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## Do Ask, Do Tell: Where is the Protection Against Sexual Discrimination in International Human Rights Law?

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# DO ASK, DO TELL: WHERE IS THE PROTECTION AGAINST SEXUAL ORIENTATION DISCRIMINATION IN INTERNATIONAL HUMAN RIGHTS LAW?\*

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\* In response to the question asked by Debra L. DeLaet in her paper on sexual orientation discrimination, Debra DeLaet, *Don't Ask, Don't Tell: Where Is the Protection Against Sexual Orientation Discrimination in International Human Rights Law?*, 7 L. & SEXUALITY 31 (1997).

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## I. INTRODUCTION

Since the development of the international human rights regime in the aftermath of World War II, no treaties or other instruments adopted by the United Nations General Assembly explicitly reference sexual orientation. While Article 2 of the Universal Declaration of Human Rights (“Universal Declaration”) asserts that all human beings are entitled to the rights enunciated in the document and explicitly states that this entitlement shall apply “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,”<sup>1</sup> no reference is made to sexual orientation. The International Covenant on Civil and Political Rights (“ICCPR”)<sup>2</sup> and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),<sup>3</sup> which together with the Universal Declaration are often referred to as the International Bill of Human Rights,<sup>4</sup> also do not reference sexual orientation. Studies have shown that Lesbian, Gay, Bisexual, and Transgendered (“LGBT”) people experience discrimination in countries around the globe.<sup>5</sup> For example, in over seventy-eight countries, homosexual acts

1. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter U.N. Declaration of Human Rights].

2. See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess, Supp No. 16, U.N. Doc A/6316 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (listing race, colour, sex, language, religion, political or other opinion, national or social origin, property, and birth or other status, as categories that are protected from discrimination).

3. See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp No. 16, U.N. Doc A/6316 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

4. See generally THE INTERNATIONAL BILL OF HUMAN RIGHTS (Paul Williams et al. eds., 2d ed. 1999).

5. See Lucas Paoli Itaborahy, State-Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Sexual Acts Between Consenting Adults (2012), [http://www.aidsfreeworld.org/PlanetAIDS/~/\\_media/796515F2D74A4158AC599504E042F4A8.pdf](http://www.aidsfreeworld.org/PlanetAIDS/~/_media/796515F2D74A4158AC599504E042F4A8.pdf) (noting that forty percent of U.N. Member States still criminalize same-sex sexual acts between consenting adults); cf. Harvey Makadon et al., Fenway Guide To Lesbian, Gay, Bisexual, and Transgender Health 15–16 (2008) (defining the terms “Gay,” “Lesbian,” and “Bisexual” as “people who have an orientation toward people of the same gender in sexual behavior, attraction or affection, where

are illegal and parts of seven countries still retain the death penalty for homosexual acts.<sup>6</sup> In states where homosexual acts are not penalized, LGBT people frequently experience more subtle discrimination through national laws, for example, in the area of employment and family life.<sup>7</sup> Even in states with legislation that specifically protects LGBT people, violent crimes against LGBT people occur with increasing frequency.<sup>8</sup>

Despite the publicly displayed discrimination around the globe, and the knowledge thereof, the United Nations and international human rights law remain silent on rights for sexual minorities and shy away from protecting them.<sup>9</sup> A number of Member States interpret this silence to mean that international human rights law does not protect against discrimination on the basis of sexual orientation or even prohibits this protection.<sup>10</sup>

Beginning with the 1969 Stonewall Tavern riots against police harassment in New York,<sup>11</sup> the modern LGBT people's rights

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the term 'transgendered' includes anyone who does not conform to traditional gender norms for men and women; for example, people who do not identify as either male or female or people that choose to express their gender identity as opposite to their (birth) sex"). See generally The Greenwood Encyclopedia of LGBT Issues Worldwide (Chuck Stewart ed., 2010).

6. See Itaborahy, *supra* note 5, at 12–13 (listing Iran, Mauritania, Saudi Arabia, Sudan, Yemen, and Nigeria as some countries that, as of 2012, provided the death penalty for these acts).

7. See Pratima Narayan, *Somewhere over the Rainbow . . . International Human Rights Protections for Sexual Minorities in the New Millennium*, 24 B.U. INT'L L.J. 313, 314 (2006) (noting the types of punishment LGBT people suffer other than criminal penalties).

8. Emma Mittelstaedt, *Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations*, 9 CHI. J. INT'L L. 353, 354 (2008).

9. See Debra DeLaet, *Don't Ask, Don't Tell: Where Is the Protection Against Sexual Orientation Discrimination in International Human Rights Law?*, 7 L. & SEXUALITY 31, 33 (1997) (indicating that international human rights law neither sets guidelines for providing protections to LGBT people nor prohibits discrimination against them).

10. Sharon Yecies, Comment, *Sexual Orientation, Discrimination, and the Universal Declaration of Human Rights*, 11 CHI. J. INT'L L. 789, 792 (2011) (discussing a statement by Syria on the matter regarding the interpretation of U.N. treaties' applicability to LGBT people as up to individual states).

11. See Janice Wood Wetzel, *Human Rights in the 20th Century: Weren't Gays and Lesbians Human?*, 13 J. GAY & LESBIAN SOC. SERVICES 15, 18 (2001) (pointing to what is credited as the beginning of the gay rights movement).

movement grew stronger by the decade. As the movement progressed, many began to call for action on the international level to promote the treatment of LGBT people in accordance with their human rights.<sup>12</sup> In 1997, DeLaet's provocatively titled paper, "Don't Ask, Don't Tell: Where Is the Protection Against Sexual Orientation Discrimination in International Human Rights Law?"<sup>13</sup> stated that, "to date, an imbalance has characterized international human rights law because sexual orientation discrimination is not explicitly prohibited."<sup>14</sup> DeLaet requested that "the non-discrimination clauses in major human rights documents . . . be expanded to include protection for gay, lesbian, and bisexual persons as an important step in the struggle to minimize all forms of discrimination in practice" and to "end [the] relative silence . . . to promote norms consistent with the noble ideal of human rights."<sup>15</sup> DeLaet argued that the expansion of non-discrimination clauses could be done through the adoption of an "aspirational statement" on the international level.<sup>16</sup> Since DeLaet's request in 1997, many have acted on the international level to promote LGBT rights, which is evidenced in international jurisprudence, authoritative commentary, resolutions, and other statements affirming that international human rights law is applicable to LGBT people.<sup>17</sup>

The aim of this article is to critically assess the question of whether a statement on the international level is still necessary and beneficial to clarify that LGBT people are protected under international human rights law in light of the growing authoritative commentary and jurisprudence on the international level. This article also contemplates the risks and benefits associated with the adoption of such a statement, and whether an alternative approach, such as a dialogic approach, may be better suited on the international level to improve the treatment of LGBT people in Member States.

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12. See, e.g., ERIC HEINZE, SEXUAL ORIENTATION: A HUMAN RIGHT, 291–303 (1995) [hereinafter HEINZE, SEXUAL ORIENTATION: A HUMAN RIGHT] (recognizing that "persecution on the basis of sexual orientation constitutes a vast chapter of the chronicle of human rights violations throughout the world" and agreeing to basic principles of change).

13. DeLaet, *supra* note 9.

14. *Id.* at 52.

15. *Id.* at 52–53.

16. DeLaet, *supra* note 9; see also discussion *infra* Part II.A (crafting a definition of aspirational statement).

17. See discussion *infra* Part II.

Following this introduction, Part II contemplates the question of whether the adoption of an aspirational statement, as requested by DeLaet, should be pursued to improve the human rights situation of LGBT people in the future. Part II first defines the aspirational statement and subsequently contemplates if such a statement is still necessary by analyzing the protection offered through the evolving jurisprudence, authoritative commentary, and statements of U.N. bodies on the applicability of international human rights law to LGBT people. Part II concludes that while a general statement reaffirming the applicability of international human rights law to LGBT people seems unnecessary in light of international jurisprudence and authoritative commentary, a legally binding document like a convention with clear obligations could be beneficial to improve the human rights situation of LGBT people in Member States.

Part III analyzes the risks and benefits associated with such a convention and argues that, due to a lack of consensus on the international level, the adoption of a legally binding convention should not be pursued at the current time in order to prevent the escalation and polarization of the debate. Based on these findings, Part IV analyzes whether a different, less risk-intensive approach in the human rights framework could be employed to improve the treatment of LGBT people in Member States. This article considers using a dialogic approach as an alternative to adopting a legally binding convention and concludes that, although a dialogic approach may be a much slower process, it has the potential to influence Member States' attitudes and change the long-term treatment of LGBT people.

Part V concludes with the author's view that the protection of LGBT people in Member States does not necessarily depend on whether an additional international human rights instrument is created but on reaching a consensus on these matters between Member States. The promotion of the existing international human rights framework, jurisprudence, and authoritative commentary in a dialogue with Member States, has the potential, as stated by the High Commissioner for Human Rights, Navanethem Pillay, to "move beyond a debate on whether all human beings have rights—for such questions were long ago laid to rest by the Universal Declaration—and instead . . . secure the climate for implementation."<sup>18</sup>

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18. Daniel Ottoson, *State-Sponsored Homophobia*, INT'L LESBIAN, GAY,

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## II. ASPIRATIONAL STATEMENT ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW TO LGBT PEOPLE

### A. DEFINING ASPIRATIONAL STATEMENT

Before beginning a discussion of whether an aspirational statement could improve LGBT people's rights in Member States, one must determine what DeLaet envisioned when she requested an aspirational statement that clarified the protection against sexual orientation discrimination in international human rights law.

In her article, DeLaet noted that, in 1997, international human rights law failed to set promotional standards and guidelines for the prohibition of discrimination on the basis of sexual orientation.<sup>19</sup> DeLaet contended that the silence on LGBT people's human rights in the international community reflected a widespread consensus that discriminatory treatment of LGBT people was a "form of clearly acceptable discrimination."<sup>20</sup> DeLaet argued that international human rights law could increase awareness and knowledge of human rights, as well as provide human rights advocates with an international principle to which they could refer in their efforts to broaden support for human rights.<sup>21</sup> In DeLaet's opinion the lack of explicit reference to LGBT people in existing human rights treaties contributed to the general lack of attention to this issue. The lack of explicit mentioning did not provide advocates with a minimal promotional guideline they can refer to when attempting to broaden support for LGBT people's human rights and therefore supply them with an important political symbol.<sup>22</sup> DeLaet elaborated that an aspirational statement clarifying the applicability of international human rights laws to LGBT people could take the form of a separate protocol to existing treaties or the form of an entirely new convention to specifically prohibit sexual

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BISEXUAL, TRANS & INTERSEX ASSOC'N 9 (May 2009), [http://ilga.org/historic/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2009.pdf](http://ilga.org/historic/Statehomophobia/ILGA_State_Sponsored_Homophobia_2009.pdf) (providing a text of the statement given by the U.N. High Commissioner for Human Rights Navanethem Pillay in New York on December 18, 2008).

19. DeLaet, *supra* note 9, at 33.

20. *Id.*

21. *Id.*

22. *Id.* at 53.

orientation discrimination.<sup>23</sup>

The lack of authoritative commentary and jurisprudence on the international level in the 1990s likely caused DeLaet to request a statement explicitly affirming the applicability of international human rights law to LGBT people in order to provide human rights advocates with a tool to promote these rights. An aspirational statement intended to promote LGBT people's human rights may, however, be superfluous if, since the 1990s, U.N. bodies and agencies have interpreted the language of existing human rights treaties in a way that provides sufficient protection for LGBT people. In that case, the United Nations would have ended the "relative silence" in international human rights law on the treatment of LGBT people that DeLaet had identified as a major hurdle to improving the treatment of LGBT people in Member States.

#### B. IS AN ASPIRATIONAL STATEMENT SUPERFLUOUS?

This section first considers the rights of LGBT people according to the International Bill of Human Rights and subsequently analyzes how treaty bodies have interpreted these treaties in jurisprudence and authoritative commentary, which Member States are generally required to follow once they have signed and ratified the treaty. Subsequently, this section will consider the applicability of international human rights law to LGBT people as set out in draft resolutions, declarations, and other international statements.

##### 1. *Human Rights Treaties and International Jurisprudence*

During World War II, severe violations of human rights occurred.<sup>24</sup> Shortly after the war, the United Nations adopted the Universal Declaration in 1948 in part to condemn the violations that had occurred during the past years and those expected to occur in the future. In addition, in 1966, the ICCPR and the ICESCR were adopted, entering into force in 1976, and with the Universal Declaration, created the International Bill of Human Rights. The Universal

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23. *Id.* at 35 (providing that an aspirational statement would need reinforcement beyond its initial drafting).

24. See Philipp Tahmindjis, *Sexuality and International Human Rights*, 48 J. HOMOSEXUALITY 9, 11 (2005) (pointing to "the atrocities of the Nazis" as examples of violations of human rights generally and against LGBT people).



Declaration's Preamble states that the United Nations proclaim the Declaration as a common standard of achievement for all peoples and all nations.<sup>25</sup>

As noted above, the International Bill of Human Rights does not specifically mention sexual orientation. In relation to non-discrimination, Article 1 of the Universal Declaration states that all human beings are born free and equal in dignity and rights, while Article 2 specifies that "everyone is entitled to all the rights and freedoms set forth in this Declaration 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."<sup>26</sup> Article 7 reaffirms that, "all are equal before the law and are entitled without any discrimination to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."<sup>27</sup> Article 26 of the ICCPR, which states 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 . . . on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status<sup>28</sup>

reinforces these principles, while similar protections exist under the ICESCR.<sup>29</sup>

No affirmative answer has been offered as to why an explicit reference to sexual orientation or gender identity is missing in the International Bill of Human Rights.<sup>30</sup> Instead, the existing literature is

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25. See U.N. Declaration of Human Rights, *supra* note 1 (recognizing "the inherent dignity and . . . the equal and inalienable rights of all members of the human family").

26. *Id.* art. 1.

27. *Id.* art. 7.

28. ICCPR, *supra* note 2, art. 26.

29. See, e.g., ICESCR, *supra* note 3, art. 2.2 (guaranteeing the rights in the present Covenant without discrimination of any kind of status).

30. "Sexual orientation" is used in this article in accordance with the Preamble of the Yogyakarta Principles as "each person's capacity for profound emotional, affectional and sexual attraction, to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender." THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY (2007), available at <http://www.yogyakartaprinciples.org/>

largely characterized by an overall lack of discussion on this matter. As one of the few authors addressing the question, Phillip Tahmindjis suggests that the absence of any reference to sexual orientation is related to the political and social undercurrents of the time of the instruments' drafting.<sup>31</sup> However, the lack of specific reference to sexual orientation is particularly surprising when considering that the Universal Declaration was drafted shortly after World War II, when human rights violations were likely still on the drafters' minds. Despite the fact that an estimated 700 homosexual inmates died in the Sachsenhausen concentration camp at the hands of the Hitler regime, the Universal Declaration condemning the violations of human rights that occurred during the war remained silent in relation to sexual orientation discrimination.<sup>32</sup>

The fact that the International Bill of Human Rights does not reference sexual orientation or gender identity as a specific category protected against discrimination does not necessarily mean that LGBT people are not protected from discrimination through international human rights law or that no freestanding rights to equality exist in addition to the explicitly listed.<sup>33</sup> Whether the jurisprudence of the United Nations Human Rights Committee ("HR Committee"), responsible for monitoring compliance with the ICCPR, has established sufficient protections for LGBT people under international human rights law by the interpretation of existing treaties is analyzed

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principles\_en.pdf [hereinafter THE YOGYAKARTA PRINCIPLES]. "Gender identity" refers to "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body and other expressions of gender, including dress, speech and mannerisms." *Id.*

31. Tahmindjis, *supra* note 24, at 11.

32. See THE ROUTLEDGE HISTORY OF THE HOLOCAUST, 393 (Jonathan C. Friedman ed., 2011); Tahmindjis, *supra* at note 24, at 11 (describing the atrocities committed against LGBT people); Sam Garkawe, *International Human Rights Law and the Law Regarding Sexual Orientation: Two Book Reviews and More*, 7 AUSTRALASIAN GAY & LESBIAN L.J. 69, 69–70 (1997) (explaining that individuals who suffered discrimination during World War II based on sexual orientation did not receive compensation until 1988).

33. See Sophie Clavier, *Objection Overruled: The Binding Nature of the International Norm Prohibiting Discrimination Against Homosexual and Transgendered Individuals*, 35 FORDHAM INT'L L.J. 385, 390–94 (2011) (providing a detailed analysis of the inclusion of freestanding rights to equality beyond the explicitly listed international and regional human rights instruments).

below.<sup>34</sup>

In the 1982 case of *Hertzberg v. Finland*,<sup>35</sup> the HR Committee considered a communication dealing with the Finnish government's censorship of a broadcasting program addressing homosexuality.<sup>36</sup> The claimant argued that the censorship violated his rights to freedom of expression and information as expressed in the ICCPR.<sup>37</sup> The HR Committee, however, held that the right to freedom of expression could be subjected to restrictions to protect, for example, public health, order, or morals; because states' morals differed broadly, a margin of discretion had to be accorded to national authorities.<sup>38</sup> On this basis, the HR Committee dismissed the claim and upheld Finland's censorship of the program.<sup>39</sup>

Conversely, in 1994, the HR Committee dissented from its previous opinion in *Toonen v. Australia*<sup>40</sup> and established that the jurisdiction concerning matters of sexual orientation and gender identity did not lie exclusively in Member States.<sup>41</sup> In *Toonen*, the complainant argued that Tasmanian law criminalizing consensual sexual conduct between adults breached the ICCPR in relation to articles relating to anti-discrimination and privacy.<sup>42</sup> The HR Committee ultimately held that the law breached Toonen's right to privacy under Article 17.<sup>43</sup> Although the HR Committee did not have to consider other possible violations, in an additional statement the HR Committee commented that "sex" in Article 2(1) of the ICCPR must be read as including

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34. See also Lucy Morgan, *Sexual and Gender Rights and the United Nations Human Rights Framework: Towards a Resolution of the Debate 6–10* (Aug. 3, 2009) (M.A. dissertation, The University of Sydney), available at [http://ses.library.usyd.edu.au/bitstream/2123/5323/1/DISSERTATION\\_LMorgan.pdf](http://ses.library.usyd.edu.au/bitstream/2123/5323/1/DISSERTATION_LMorgan.pdf) (providing an additional in-depth analysis of cases relating to sexual rights issues).

35. Human Rights Committee Commc'n 61/1979, *Hertzberg et al. v. Finland*, 15th Sess., U.N. Doc. CCPR/C/OP/1 (April 2, 1982).

36. *Id.* at 2.

37. *Id.* at 3.

38. *Id.* at 5–6.

39. *Id.* at 6.

40. H.R. Comm. Commc'n 488/1992, *Toonen v. Australia*, 50th Sess., U.N. Doc. CCPR/C/50D/488 (Dec. 25, 1992).

41. *Id.*

42. *Id.* at 11.

43. *Id.* at 3.

sexual orientation.<sup>44</sup> Additionally, the HR Committee went further by stating that sexual orientation is neither a reasonable nor objective criterion for an exception to the prohibition of discrimination.<sup>45</sup>

Despite the importance of the *Toonen* decision affirming, for the first time, the protections under international human rights law for LGBT people, the decision had limitations on the overall application of human rights' protections to LGBT people. The decision, as stated previously, focused on the violation of the right to privacy and therefore only provided limited guidance on the interpretation of the protections of LGBT people's rights exercised in the public sphere, such as equality, family life, and marriage.<sup>46</sup> The HR Committee revisited and addressed these limitations to a greater extent a decade later in the 2003 case of *Young v. Australia*.<sup>47</sup>

In *Young*, the HR Committee held that not granting a same sex partner the deceased partner's veteran's pension constituted discrimination on the basis of sexual orientation and explicitly stated that sexual orientation is protected under the "other status" category in Article 26 of the ICCPR. *X v. Colombia*,<sup>48</sup> another case dealing with the denial of pension transfer on the basis of sexual orientation, affirmed this interpretation of Article 26.<sup>49</sup> Authors such as Ignacio Saiz have commented that the evolving jurisprudence around the matter of LGBT people and international human rights law indicates that the principles of non-discrimination have moved from the private sphere to certain issues in the public sphere.<sup>50</sup> However, the 1999 case

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44. See Tahmindjis, *supra* note 24 at 13–14 (noting that, despite this verdict, Tasmania upheld its criminal law and the Tasmanian government promised to increase the penalty if the party won the next election).

45. See H.R. Comm. Commc'n 488/1992, *supra* note 41, at 10 (rejecting the claim that criminalization of homosexuality was necessary to prevent the spread of HIV/AIDS because criminalization was not reasonable and proportionate).

46. See Graham Willet, *Liberalism and Its Limits*, in *LIVING OUT LOUD: A HISTORY OF GAY AND LESBIAN ACTIVISM IN AUSTRALIA* 19, 20 (2000) (explaining the limitations of the decision); Morgan, *supra* note 34, at 8 (recognizing the *Toonen* case as a key moment in recognizing gay rights).

47. H.R. Comm. Commc'n 941/2000, *Young v. Australia*, 78th Sess., July 14–Aug. 8, 2003, U.N. Doc. CCPR/C/78/D/94/2000, at 10.2–13 (Sept. 18, 2003).

48. H.R. Comm. Commc'n 1361/2005, *X v. Colombia*, 89th Sess., March 12–30, 2007, U.N. Doc. CCPR/C/89/D/1361/2005 (2007).

49. *Id.* at 10.

50. Ignacio Saiz, *Bracketing Sexuality: Human Rights and Sexual Orientation—A Decade of Development and Denial at the UN 9* (Sexuality Policy

of *Joslin v. New Zealand*<sup>51</sup> demonstrates that the interpretation of the applicability of international human rights law to LGBT people is still evolving.<sup>52</sup> In *Joslin*, the HR Committee held that the right to marriage as stated in Article 23 of the ICCPR was commonly understood as only marriages between men and women and that the refusal to provide marriages between same sex couples in Member States did not result in a violation of their human rights.<sup>53</sup>

The aforementioned cases illustrate that the jurisprudence of the HR Committee has progressed regarding the protection of LGBT people since the 1980s. Jurisprudence has evolved from initially stating that Member States had exclusive jurisdiction on LGBT matters to ruling that international human rights law offered protection for LGBT people in the private sphere to finally ruling that international human rights law offered protection for LGBT people in some areas of the public sphere. Even though the HR Committee has gradually expanded its interpretation of protections offered to LGBT people under international human rights law over the past thirty years, the specific protections, as Lucy Morgan points out and as the *Joslin* decision shows, still remain subject to interpretation by Committee members.<sup>54</sup> Furthermore, gaps in the interpretation of international human rights law exist.<sup>55</sup> Thus far, the HR Committee has not decided on LGBT people's rights to adoption or on matters related to gender identity.<sup>56</sup>

The jurisprudence of the HR Committee suggests that although the international community has affirmed the general applicability of international human rights law, clear and specific protections for rights

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Watch, Working Paper No. 2, 2005).

51. H.R. Comm. Commc'n 902/1999, *Joslin v. New Zealand*, 75th Sess., July 8–26, 2002, U.N. Doc. CCPR/C/75/D/902/1999, at 8.2–8.3 (July 30, 2002).

52. *Id.* at 11; *see also* Morgan, *supra* note 34, at 10 (explaining that the lack of reference to sexual rights limits the advancement of these rights).

53. H.R. Comm. Commc'n 902/1999, *supra* note 48, at 11.

54. *See* Morgan, *supra* note 34, at 6 (“The UNHRC may ‘receive and consider . . . communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.’”) (citation omitted); H.R. Comm. Commc'n 902/1999, *supra* note 51, at 10 (finding that the facts before the HRC do not disclose any violations of the International Covenant on Civil and Political Rights).

55. Morgan, *supra* note 34, at 10 (commenting on how the claims of sexual minorities remain subject to HRC interpretation).

56. *Id.*

of LGBT people have not yet been established. A protocol amending existing international human rights treaties and affirming the applicability to LGBT people, as suggested as one possible approach by DeLaet, does not seem particularly beneficial in light of the already existing jurisprudence reaffirming the applicability. However, an international convention, as suggested by DeLaet as another possible approach, with clear obligations setting out specific rights and obligations regarding the treatment of LGBT people, may clarify the situation of LGBT people's rights and protections under international human rights law. A convention, however, could be superfluous if other U.N. bodies have already established specific rights and obligations regarding the treatment of LGBT people, which will be discussed in the following section.

## 2. Human Rights Treaties and Authoritative Commentary

After the *Toonen* decision, U.N. institutions began to recognize that not only sexual acts are protected under human rights law, but that the identity of LGBT people is also protected under the term "other status."<sup>57</sup> For example, the Committee on Economic, Social and Cultural Rights, monitoring compliance with and interpreting the ICESCR, has clarified in General Comment 14 of 2000 (the right to health), 15 of 2002 (the right to water) and 18 of 2005 (the right to work) that the ICESCR prohibits discrimination on the basis of sex or sexual orientation.<sup>58</sup> In addition, the High Commissioner for Refugees has found homosexuals to be members of a "particular social group" in relation to the 1951 Convention and 1967 Protocol Relating to the Status of Refugees.<sup>59</sup>

These evolving international instruments demonstrate a growing

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57. See generally Clavier, *supra* note 33 (describing the vagueness which qualifies as "other status").

58. Comm. Econ., Soc., & Cult. Rts. General Cmt. No. 14, The Right to the Highest Attainable Standard of Health, 22d Sess., U.N. Doc. E/C.12/2000/4 (Apr. 25–May 12, 2000); Comm. Econ., Soc., & Cult. Rts. General Cmt. No. 15, The Right to Water, 29th Sess., U.N. Doc. E/C.12/2002/11 (Nov. 11–29, 2002); Comm. Econ., Soc., & Cult. Rts. General Cmt. No. 18, The Right to Work, 35th Sess., U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006).

59. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; *Protecting Refugees: Questions & Answers*, U.N. REFUGEE AGENCY (Feb. 1, 2002), <http://www.unhcr.org/3b779dfe2.html>.

trend by U.N. bodies in interpreting international human rights law to protect LGBT people. However, the interpretation of these U.N. bodies does not establish clear definitions of the protections and the rights of LGBT people.

### 3. *Draft Resolutions, Principles, and Declarations*

When analyzing the protections of LGBT people under U.N. resolutions, statements, and declarations, this part of the article considers the developments in the area in the 2003 draft Resolution on Human Rights and Sexual Orientation, the 2007 Yogyakarta Principles, the 2008 U.N. Declaration on Sexual Orientation and Gender Identity, and the 2011 Human Rights Council Resolution on Human Rights, Sexual Orientation and Gender Identity.

In 2003, the first attempt to formalize the debate on the applicability of international human rights law to protect LGBT people at the U.N. level was the introduction of a draft Resolution on Human Rights and Sexual Orientation (“Brazilian Resolution”).<sup>60</sup> The introduction of such a resolution caught many delegates by surprise due to the lack of debate on this issue within U.N. bodies.<sup>61</sup> The Brazilian Resolution’s content was not revolutionary, as it did not expand the rights of LGBT people, but merely reaffirmed, that the International Bill of Human Rights applied regardless of sexual orientation.<sup>62</sup>

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60. H.R. Comm., 59th Sess., Promotion and Protection of Human Rights, Austria, Belgium, Brazil, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden and United Kingdom of Great Britain and Northern Ireland: Draft Resolution, U.N. Doc. E/CN.4/2003/L.92 (Apr. 17, 2003).

61. See Paula L. Ettelbrick & Alia Trabucco Zerán, *The Impact of the Yogyakarta Principles on International Human Rights Law Development, A Study of November 2007–June 2010*, YP IN ACTION 3 (2010), [http://www.ypinaction.org/files/02/57/Yogyakarta\\_Principles\\_Impact\\_Tracking\\_Report.pdf](http://www.ypinaction.org/files/02/57/Yogyakarta_Principles_Impact_Tracking_Report.pdf) (last visited July 24, 2013) (explaining how the Brazil Resolution surprised the Human Rights Council).

62. See Arvind Narrain, *Brazil Resolution on Sexual Orientation: Challenges in Articulating a Sexual Rights Framework from the Viewpoint of the Global South 1* (Paper presented at the Sexualities, Genders and Rights in Asia: 1st International Conference of Asian Queer Studies, Bangkok, Thailand, July 2005), available at [https://digitalcollections.anu.edu.au/bitstream/1885/8680/1/Narrain\\_Brazilresolutiononsexualorientation2005.pdf](https://digitalcollections.anu.edu.au/bitstream/1885/8680/1/Narrain_Brazilresolutiononsexualorientation2005.pdf) (describing how the Brazilian Resolution did not advance LGBT rights and merely restated previous HR Committee jurisprudence).

The Brazilian Resolution attracted fierce protest, particularly from Sub-Saharan states and members of the Organization of the Islamic Conference, including Egypt, Libya, Malaysia, and Saudi Arabia.<sup>63</sup> All opposing states threatened to paralyze discussion by bringing hundreds of amendments to the text.<sup>64</sup> Discussions about the Brazilian Resolution were postponed in 2004 and dropped in 2005 without being put to vote.<sup>65</sup> Michael O’Flaherty and John Fisher note that, the failure of the Brazilian Resolution actually raised awareness for the issues of LGBT human rights and mobilized NGOs from all regions to engage in U.N. processes.<sup>66</sup> The increased awareness of the matter contributed to the launch of the Yogyakarta Principles in 2007.<sup>67</sup>

A group of twenty-nine international human rights experts from twenty-five countries across the world drafted the Yogyakarta Principles between 2006 and 2007.<sup>68</sup> The Preamble of the Yogyakarta Principles offers a definition of “sexual orientation” and “gender identity” to identify the social group and to whom the law applies.<sup>69</sup> While the Yogyakarta Principles themselves are not legally binding on Member States, the principles as stated in the document’s Preamble aim to affirm legally binding human rights standards with which states

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63. *Id.*

64. See Catherine Wolfe, *The United Nations Declaration on Sexual Orientation and Gender Identity 2008: Tracing the Evolution of LGBT Minority Rights Within the UN*, 22 SOC. & POL. REV. 49, 51 (2012) (detailing the delay of the resolution until 2004); Douglas Sanders, *The Role of the Yogyakarta Principles*, YP IN ACTION 3 (2009), [http://ypinaction.org/files/70/Background\\_on\\_the\\_Principles\\_\\_Sanders\\_\\_Douglas\\_\\_The\\_Role\\_of\\_the\\_Yogyakarta\\_Principles.pdf](http://ypinaction.org/files/70/Background_on_the_Principles__Sanders__Douglas__The_Role_of_the_Yogyakarta_Principles.pdf) (describing the opposition to the resolution).

65. See Sanders, *supra* note 64, at 3 (noting that once Brazil tabled this resolution, it met significant opposition from Sub-Saharan countries and members of the Organization of the Islamic Conference).

66. Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles* 8 HUM. RTS. L. REV. 207, 230 (2008).

67. See THE YOGYAKARTA PRINCIPLES, *supra* note 30, at 7 (explaining how the Yogyakarta Principles came into existence).

68. *Id.* at 7.

69. *Id.* at pmb1. (defining sexual orientation as the “person’s capacity for profound emotional affectional and sexual attraction to individuals of a different gender or the same gender or more than one gender,” and gender identity as the person’s “internal and individual experience of gender . . . including personal sense of the body . . . and other expressions of gender, including dress, speech and mannerisms”).



must comply.<sup>70</sup>

The Yogyakarta Principles are a statement concerning the “application of international human rights law in relation to sexual orientation and gender identity.”<sup>71</sup> As Douglas Sanders puts it, the drafters of the Yogyakarta Principles did not want to create a lecture on “where we should be going.”<sup>72</sup> Instead, the drafters created a statement about what existing human rights law says on LGBT rights and how human rights principles should be applied to the situation of LGBT people.<sup>73</sup> The document contains twenty-nine principles that each contemplates a statement of international human rights law and the application to the situation of LGBT people.<sup>74</sup>

Due to limitations of space, the aim of this paper is not to analyze the accuracy of the Yogyakarta Principles as a restatement of existing international law since this has been undertaken by others in great detail elsewhere. The Yogyakarta Principles go further than merely affirming that international human rights law applies to LGBT people to identifying explicit protections and rights including, for example, the right to found a family through the possibility of adoption and the right to enter into a marriage or other legalized partnership.<sup>75</sup> However, no U.N. body has adopted these positive rights and some Member States have rejected the Yogyakarta Principles’ interpretation of international law in the past because of this lack of support from the United Nations. Malta, for example, rejected the Yogyakarta Principles on the basis that “these principles were discussed and adopted by a number of experts acting on their own behalf.”<sup>76</sup> Whether

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70. *See id.* (recognizing that the Principles rely on the current state of international human rights law).

71. *Id.* at 7.

72. Sanders, *supra* note 64, at 6.

73. *See* Ettlbrick & Zerán, *supra* note 61, at 2 (describing the Yogyakarta Principles as “a statement of the status of the current international human rights law as it applies to sexual orientation and gender identity,” noting that the document also includes recommendations and obligations of states to “adopt measures in accordance with their legal responsibilities under these treaties”).

74. *See* O’Flaherty & Fisher, *supra* note 66, at 234–37 (elaborating on the applicability of international human rights law in areas such as fundamental rights of life, privacy, and the obligation to protect human rights defenders and hold accountable the human rights violators).

75. THE YOGYAKARTA PRINCIPLES, *supra* note 30, at 27.

76. Ettlbrick & Zerán, *supra* note 61, at 21 (noting other Member States that have rejected the recommendations made by the Principles, including Qatar,

a statement reaffirming the content of the Yogyakarta Principles has been adopted by the United Nations subsequently is analyzed below.

Through a joint initiative in December 2008, France and The Netherlands brought the U.N. Declaration on Sexual Orientation and Gender Identity (“Declaration on Sexual Orientation”) before the 63rd session of the U.N. General Assembly.<sup>77</sup> The initiative was originally signed by sixty-six states and has since, in an updated statement in March 2011, found support by eighty-five states.<sup>78</sup> The non-binding Declaration on Sexual Orientation reaffirms that the principle of non-discrimination applies to all human beings regardless of sexual orientation or gender identity.<sup>79</sup> Furthermore, it condemns human rights violations against LGBT people and calls upon all states to take all the necessary measures to ensure that gender identity is under no circumstances the basis for criminal penalties in particular executions, arrests, or detention.<sup>80</sup> The aim of the Declaration on Sexual Orientation was therefore, at least partly, to specifically address the absence of formal acknowledgments of LGBT people from international human rights law.<sup>81</sup>

The Declaration on Sexual Orientation, although of symbolic value as the first attempt to bring the issue of LGBT human rights before the U.N. General Assembly, had many drawbacks as an instrument to advance LGBT issues under international human rights law. For example, the Declaration is not legally binding on Member States and fails to affirm LGBT people’s positive rights as set out by the Yogyakarta Principles despite stating that LGBT people should not be discriminated against.<sup>82</sup> Not all of these drawbacks have been resolved

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Ukraine, and San Marino).

77. Statement on Human Rights, Sexual Orientation and Gender Identity, U.N. GENERAL ASSEMBLY (Dec. 18, 2008), *available at* <http://www.unhcr.org/refworld/docid/49997ae312.html> [hereinafter Statement on Human Rights].

78. Joint Statement of Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation & Gender Identity, U.S. DEPT. OF STATE (March 22, 2011), <http://www.state.gov/r/pa/prs/ps/2011/03/158847.htm> (elaborating that a group of thirty countries engaged in discussions and sought signatures from other U.N. Member States).

79. Statement on Human Rights, *supra* note 77, ¶ 3.

80. *Id.* ¶¶ 6, 11–12.

81. *See generally id.* (urging Member States to commit to the protection of all individuals, regardless of sexual orientation or gender identity).

82. *See also* Morgan, *supra* note 34, at 28 (explaining that various Member States would face charges of human rights violations if the Declaration was legally

by the adoption of the 2011 Resolution of the Human Rights Council, as will be discussed below.

The first human rights body in the United Nations, the Human Rights Council (“HRC”), adopted the first resolution on Human Rights, Sexual Orientation and Gender Identity, Resolution 17/19,<sup>83</sup> by a narrow margin in 2011.<sup>84</sup> The work of the HRC has focused much attention on issues relating to sexual orientation and gender identity since the mid-2000s. In Resolution 17/19, the Council expressed “grave concern” for acts of violence and discrimination around the globe committed against individuals because of their sexual orientation and gender identity. The Council requested that the Office of the High Commissioner for Human Rights commission a study to document discriminatory laws and practices and acts of violence committed against individuals based on their sexual orientation and gender identity.<sup>85</sup> John Fisher of ARC International, a non-profit organization with the goal of advancing LGBT rights, considered Resolution 17/19 to be the resolution that “breaks the silence that has been maintained for far too long.”<sup>86</sup> Despite the positive perception of human rights activists as speaking out in this way for the protection of LGBT people under international human rights law, Resolution 17/19, like the Brazilian Resolution and the Declaration on Sexual Orientation, fails to clearly identify rights for LGBT people under international human rights law.

The aforementioned analysis of the development of the rights of LGBT people in international jurisprudence, authoritative commentary, resolutions, and other statements shows that the “relative

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binding).

83. H.R.C. Res. 17/19, Human Rights, Sexual Orientation and Gender Identity, 17th Sess., A/HRC/RES/17/19 (July 14, 2011).

84. *United Nations Human Rights Council*, OHCHR (July 24, 2013), <http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx> (“The Human Rights Council is an inter-governmental body within the United Nations system made up of 47 States responsible for the promotion and protection of all human rights around the globe.”).

85. *Id.* (requesting the study to determine how “international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity”).

86. Frank Jordans, *U.N. Gay Rights Protection Resolution Passes, Hailed as “Historic Moment,”* HUFFPOST WORLD (June 17, 2011), [http://www.huffingtonpost.com/2011/06/17/un-gay-rights-protection-resolution-passes-\\_n\\_879032.html](http://www.huffingtonpost.com/2011/06/17/un-gay-rights-protection-resolution-passes-_n_879032.html) (quoting John Fisher).

silence” by U.N. bodies found by DeLaet in the 1990s has ended. The application of international human rights law to LGBT people in general has continuously been reaffirmed on the U.N. level.<sup>87</sup> However, as shown above, protection gaps exist in international human rights law where jurisprudence, authoritative commentary, resolutions, and other statements on the international level establish no specific obligations and rights of LGBT people. As pointed out, questions concerning LGBT people’s right to family life and protections regarding gender identity have not been addressed on the international level. As “the newest kids on the block” of human rights, specific protections and rights of LGBT people remain subject to interpretation on the international but also national levels.<sup>88</sup>

These uncertainties raise the question of whether the adoption of a convention on the rights of LGBT people under international human rights law, as DeLaet suggests, should be pursued to clarify LGBT people’s human rights and potentially improve their treatment in Member States. Part III examines this issue below.

### III. BENEFITS AND RISKS REGARDING THE ADOPTION OF A CONVENTION ON SEXUAL ORIENTATION AND GENDER IDENTITY

When considering whether the international community should pursue the adoption of a convention on matters of sexual orientation and gender identity, the benefits and risks associated with such a convention should be assessed. The following part of this article will first outline the benefits of a convention on sexual orientation and gender identity based on the shortfalls of current international human rights law as identified above. It will then consider why the adoption of such a convention may be a risky and superfluous undertaking on the international level.

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87. See, e.g., *At UN Meeting, Countries Commit to Protect Gay Rights, Combat Discrimination*, U.N. NEWS CENTRE (Sept. 26, 2013), <http://www.un.org/apps/news/story.asp?NewsID=46036&Cr=lesbian&Cr1#UzAhH4VmwpU> (highlighting U.N. High Commissioner for Human Rights’ emphasis on continuing to address challenges still faced in the LGBT issue but nevertheless noting the “historic reforms” embarked by countries to combat discrimination based on sexual orientation and gender identity).

88. Richard Parker, *Sexual Rights: Concepts and Action* 2 HEALTH & HUM. RTS. 31, 33 (1997) (quoting Rosalind Petchesky).

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A. BENEFITS OF A CONVENTION ON SEXUAL ORIENTATION AND  
GENDER IDENTITY

U.N. bodies, as discussed above, have previously applied the anti-discrimination protections in international human rights law to LGBT people. The question arises as to whether the specific protections and rights of LGBT people under international human rights law should be enshrined in a legally binding instrument to close protection gaps and clarify the human rights of LGBT people. This path has been taken for other groups subject to discrimination. For example, the Convention on the Elimination Against all Forms of Racial Discrimination, adopted in 1965, followed by the Convention on the Elimination of all Forms of Discrimination Against Women in 1979, promoted the specific protection of these groups and intended to end discrimination.<sup>89</sup>

A legally binding convention on sexual orientation and gender identity could be a step on the international level towards improving the treatment of LGBT people in Member States for many reasons. Firstly, contrary to the evolving jurisprudence and authoritative commentary that Member States should follow once they ratify the treaty, the Organization of the Islamic Conference States maintain generally that international human rights law does not protect LGBT people's rights as this does not appear in any U.N. treaty.<sup>90</sup> They suggest that homosexuality is not a characteristic of human nature, but rather a product of the west.<sup>91</sup> In their opinion, sexual orientation may be a legitimate basis for discrimination in order to protect children and

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89. GA Res. 2106 (XX), U.N. Treaty Series, vol. 660, 195 (1965) (entered into force Jan. 4, 1969); GA Res. 34/180 (XXXIV), U.N. G.A.O.R., 34th Sess., Supp. No. 46, 194, U.N. Doc A/34/830 (1979) (entered into force, Sept. 3, 1981).

90. *Letter from UN's Islamic Group to UNHRC President Opposing Panel on Violence Against Gays*, U.N. WATCH (Feb. 14, 2012), available at <http://blog.unwatch.org/index.php/2012/02/17/letter-from-uns-islamic-group-to-unhrc-president-opposing-panel-on-violence-against-gays/> (expressing concern at the United Nations' attempt to introduce "concepts that have no legal foundation in any international human rights instrument," referring to notions against discrimination based on sexual orientation and gender identity as presented in Resolution 17/19).

91. Javaid Rehman & E. Polymenopoulou, *Is Green a Part of the Rainbow? Sharia, Homosexuality and LGBT Rights in the Muslim World*, 37 FORDHAM INT'L L.J. 1, 43 (Oct. 10, 2012) (noting that Malik Badri is one of the Islamic scholars that holds this belief and advances the claim that Western societies failed to prevent transmission of AIDS because of homosexuality).

the concept of family.<sup>92</sup> They further support their opposition with the argument that LGBT rights are not a human rights issue, but a social and cultural one which should be left to the individual state to address within their social and cultural value system.<sup>93</sup>

The Organization of the Islamic Conference's view of LGBT rights finds support in academic literature by cultural relativists who argue that an understanding of "right and wrong" varies along cultures and definitions of human rights should therefore vary correspondingly.<sup>94</sup> Sharon Yecies, for example, suggests that the Universal Declaration might allow discrimination on the basis of sexual orientation where it is necessary for the stability of non-oppressive states.<sup>95</sup> Yecies indicates that discrimination based on sexual orientation may be left to the discretion of the individual Member State and may not be prohibited by the Universal Declaration in general.<sup>96</sup> A legally binding Convention on the international level would likely clarify that LGBT people's rights have a foundation in international human rights law and could put an end to the debate of whether international human rights law is universally applicable.<sup>97</sup> Concurring, Pratima Narayan finds that expanding human rights law to formally prohibit discrimination against sexual minorities will obligate states to pass legislation that protects sexual minorities and grant states less latitude to enforce laws that target LGBT people.<sup>98</sup>

Secondly, as analyzed above, some uncertainties remain regarding the protections of LGBT people under current international human rights law, especially concerning positive rights such as the right to

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92. *See id.* at 38 (observing that opponents of LGBT human rights believe that homosexuality and the promoting of LGBT rights will encourage pedophilia and incest and weaken the institution of family).

93. *See, e.g.*, Letters from the Permanent Mission of Pakistan on behalf of the Organization of Islamic Conference (Feb. 26, 2004); Letter from the Permanent Mission of the Holy See (Mar. 1, 2004).

94. Holning Lau, *Sexual Orientation: Testing the Universality of International Human Rights Law*, 71 *CHI L. REV.* 1689, 1689 (2004).

95. Yecies, *supra* note 10, at 800–03.

96. *Id.* at 812.

97. Narayan, *supra* note 7, at 333 (arguing that the issuance of a formal prohibition of discrimination against sexual minorities by the Committee would achieve state-level legislative protection of LGBT people's rights to life and liberty, stricter enforcement of the laws that target them, and greater ability for LGBT individuals to seek relief against offenders).

98. *Id.* at 333.

enter into a legally recognized partnership or to adopt children.<sup>99</sup> A legally binding convention explicitly setting out the rights of LGBT people and the limitations of these rights under international law might contribute to overcoming these uncertainties and close currently existing protection gaps.<sup>100</sup> For the above reasons, the adoption of a legally binding convention on sexual orientation and gender identity could create, as opined by Eric Heinze, “a definitive normative framework for transforming rights of sexual minorities into reality.”<sup>101</sup>

Despite the benefits that lie in the adoption of a convention on sexual orientation and gender identity, the adoption is not without problems and risks, as will be demonstrated below.

#### B. RISKS ASSOCIATED WITH THE ADOPTION OF A CONVENTION

One of the greatest risks associated with the adoption of a convention on sexual orientation is the objection of a large number of Member States to signing and ratifying the convention, which could lead to the polarization and escalation of the debate.<sup>102</sup> Member States are free to sign a convention or abstain from doing so.<sup>103</sup> Few Member States signing and ratifying such a convention is not unlikely, particularly considering the cultural and religious differences between the Western States and Sub-Saharan and Islamic States, and the disagreements on the protection of LGBT people by human rights law that have become obvious in the past. The 2003 Brazilian Resolution reaffirming the application of international human rights law to LGBT

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99. *See id.* at 329 (highlighting that, despite the fact that almost every clause in the Universal Declaration of Human Rights begins with the word “everyone” and thereby confers positive rights on all human beings, Article 29 of the Declaration provides a loophole for states to circumvent its general non-discrimination position by predicating non-discrimination upon a “morality” requirement).

100. *Id.* at 315 (suggesting that the absence of a binding international human rights instrument explicitly outlawing discrimination on the basis of sexual orientation causes sexual minorities to continue to live with the fear of state-sanctioned persecution and to live without the most fundamental human rights).

101. HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT*, *supra* note 12, at 289.

102. *See Wolfe*, *supra* note 64, at 55 (acknowledging that any discussion to date about the explicit protection of the rights of sexual minorities in international human rights instruments has been met with consistent and unyielding opposition resulting in such polarization as the “immediate and reactionary” counter-statement to the SOGI Human Rights Statement that fifty-seven states signed).

103. Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273, 274 (2010).

people attracted fierce protest, particularly by Sub-Saharan States and members of the Organization of the Islamic Conference, which immediately threatened to paralyze discussion by bringing hundreds of amendments to the text.<sup>104</sup> Similarly, the Declaration on Sexual Orientation in 2008 was immediately and firmly opposed with a counter statement signed by fifty-seven countries, including the Vatican, and read in the General Assembly by Syria.<sup>105</sup> The Organization of the Islamic Conference criticized the Brazilian Resolution and suggested that protecting sexual orientation could lead to the “social normalization” or even legalization of acts such as pedophilia and incest.<sup>106</sup> According to Syria’s statement, the Universal Declaration’s absence of a reference to sexual minorities prohibits protection against discrimination on the basis of sexual orientation and the Declaration on Sexual Orientation have no basis in international human rights law.<sup>107</sup> To date, the Declaration on Sexual Orientation has never been adopted or been put to vote by the General Assembly.<sup>108</sup>

An apparent great divide exists between U.N. Member States that believe that promoting LGBT rights is a western notion without legal foundation in international human rights law and Member States that promote LGBT rights. Scholars have opined that the adoption of a clear instrument incorporating LGBT issues in international human rights law is unlikely to be adopted in the short or medium term.<sup>109</sup> Little suggests that Member States’ attitudes have changed and the

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104. See Wolfe, *supra* note 64, at 51; Sanders, *supra* note 64, at 3 (advancing the idea that passage of resolutions amidst protest is unlikely since consensus is highly favored in international diplomacy).

105. See Clavier, *supra* note 33, at 405; Wolfe, *supra* note 64, at 55 (highlighting the type of challenges faced by proponents of LGBT rights in the international community).

106. See *Response to SOGI Human Rights Statement, Read by Syria to the U.N. General Assembly*, INTER-AM. CT. HUM. RTS. (2008) [hereinafter *Response to SOGI Human Rights Statement*]; Clavier, *supra* note 33, at 405 (elaborating on ideological opposition to LGBT human rights).

107. *Response to SOGI Human Rights Statement*, *supra* note 106.

108. See *Fact Sheet: GA Statement on SOGI*, ARC INTERNATIONAL, <http://arc-international.net/global-advocacy/general-assembly/fact-sheet-ga-statement> (last visited Mar. 26, 2014).

109. See generally Tahmindjis, *supra* note 24 (explaining that the member nations’ opposition is sufficient to cast significant doubt on incorporating LGBT rights into international human rights law); JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 23, 238 (2003).



international community's acceptance of a convention on sexual orientation has grown since the last attempt to pass a resolution in the General Assembly in 2008.<sup>110</sup> For example, the adoption of Resolution 17/19 on Human Rights, Sexual Orientation and Gender Identity passed by only a narrow margin<sup>111</sup> and the growing number of Member States supporting the 2008 Declaration on Sexual Orientation remains fierce.<sup>112</sup> In an open letter to the President of the Human Rights Council, opposing Member States criticized the introduction of the topic of sexual orientation and gender identity as a concept that has no legal foundation in any international human rights law instruments.<sup>113</sup> The letter also critically highlighted the attempt to create new standards by misinterpreting international human rights law.<sup>114</sup>

This suggests that Member States might disagree on a Convention. Failing to reach a majority consensus on an international instrument on the treatment of LGBT people for the third time since 2004 could send a negative message to the international community and potentially worsen the treatment of LGBT people around the globe.

Opening a convention for adoption by the supporting Member States of the international community also does not offer a valuable

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110. *But see* Cees Van Beek, *The Politics of LGBT Rights: A Comparison Between the United Nations, the OSCE and the Council of Europe* 20–21 (Masters of Science Thesis, Leiden University, The Netherlands Institute of Int'l Relations, 2013), available at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/24155/Thesis%20Cees%20Van%20Beek.pdf?sequence=1> (conceding that the attempt to pass the 2008 U.N. General Assembly resolution was unsuccessful because no consensus existed, yet inferring a change in attitude since, in 2011, twenty-three out of forty-seven members at the Human Rights Council agreed to condemn violence and discrimination of LGBT people partly due to the division among the OIC countries).

111. H.R.C. Res. 17/19, *supra* note 83, at 2 (“Adopted by a recorded vote of 23 to 19, with 3 abstentions.”).

112. *See, e.g.,* Reed Karaim, *Gay Rights: Has the Movement's Success Sparked a Backlash?*, 5 GLOBAL RESEARCHER 107, 115–16 (2011), available at <http://www.cqpress.com/product/CQ-Global-Researcher-Gay-Rights-v5-5.htm> (recounting some of the violent and nonviolent backlash that LGBT activists face in countries like Honduras, Mexico, Indonesia, and Uganda where the movement for gay rights has gained momentum, and noting that backlash sometimes even comes from people who “feel their own rights are being trampled by the movement to recognize gay rights”).

113. *The United Nations Resolution 17/19 On LGBT Rights: An Open Letter to the Prime Minister*, PARADIGMA POLITIK BARU (March 6, 2012), <http://www.anwaraidc.com/?p=22415>.

114. *Id.*

solution to improving the treatment of LGBT people in all Member States. While international law has established that Member States are not bound by norms they have not agreed to, authors such as Jonathan Charney have suggested that under certain circumstances acceptance may only be required by the international community and not by all individual states.<sup>115</sup> This could mean that if the international community accepted the content of such a convention, the content could also be binding on individual states opposed to its content. However, creating legally binding international law regarding the treatment of LGBT people does not necessarily ensure that the laws will be implemented in Member States and that national actors will comply with these norms. The question of domestic implementation appears more complex and seems to depend on more diverse factors than the legal status of an international instrument.<sup>116</sup>

Advancing the treatment of LGBT people in Member States may depend heavily on the religious, political, and cultural beliefs of citizens, and whether those beliefs create hurdles and boundaries that halt the progress of LGBT human rights. Islamic shari'a law may create such hurdles and boundaries for the treatment of LGBT people in Member States that follow shari'a.<sup>117</sup> Two-thirds of the Member States that penalize homosexual acts apply shari'a law.<sup>118</sup> Despite the fact that sources of shari'a law acknowledge homosexuality and sexual diversity, the prevailing religious and social view seems to

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115. Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 536 (1993); see also Simmons, *supra* note 103, at 274; Clavier, *supra* note 33, at 403.

116. See, e.g., Hilary Charlesworth, *Swimming to Cambodia*, 4 AUSTRALASIAN L. TEACHERS ASS'N L. RESEARCH SERIES (2011), <http://www.austlii.edu.au/au/journals/ALRS/2011/4.html>; Hilary Charlesworth et al., *Deep Anxieties: Australia and the International Legal Order*, 25 SYDNEY L. REV. 423, 436 (2003); Hilary Charlesworth, *Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia*, in TREATY-MAKING AND AUSTRALIA: GLOBALISATION VERSUS SOVEREIGNTY? 129 (Philip Alston & Madelaine Chiam eds., 1995) (providing examples of issues that arise in the implementation of international treaties and giving insight as to the analysis on which governments and interested parties embark when implementing treaties).

117. See Mittelstaedt, *supra* note 8, at 357 (noting that aside from domestic political concerns and tensions with Western society, the religious ideals presented in shari'a law impose a barrier for countries to comply with treaty obligations).

118. See Rehman & Polymenopoulou, *supra* note 91, at 3–4 (inferring from the fact that two-thirds of the seventy-eight states that had criminal laws relating to sexual orientation, sexual behavior or gender identity have Muslim majorities).

interpret the shari'a as outlawing homosexuality.<sup>119</sup> Another hurdle could be that homosexuality is seen as contrary to Catholic religious principles possibly influencing Member States in that regard.<sup>120</sup>

The noticeable opposition of a significant number of Member States to LGBT rights indicates that even if a legally binding convention based on western values was signed, the opposition may refrain from enforcing it. The adoption of a legally binding document on this matter may therefore do very little regarding the practice of Member States. For example, an official statement of Ghana regarding the criminalization of homosexuality states that international conventions and charters that recognize LGBT people's rights do not override domestic law.<sup>121</sup> This suggests that a convention may only be a piece of paper in the application of human rights to LGBT people.

In conclusion, a convention on sexual orientation and gender identity with detailed legal obligations could clarify the rights of LGBT people under international human rights law. However, it seems that a greater consensus of Member States on the general issue of the protection of LGBT people by international human rights law would be necessary to bring about change in Member States' practice. The risks and problems associated with the adoption of a legally binding convention on sexual orientation due to the objectors, i.e. a negative message to the global community on LGBT rights due to a failed agreement and the polarization and possible escalation of the debate without likely improvement of the practical situation, may outweigh its benefits. A convention may therefore not be preferable at the current time.

The following section analyzes whether an alternative avenue exists on the international level that could be taken to improve the treatment of LGBT people in Member States while reducing the risk of polarizing and escalating the debate on the matter.

#### IV. DIALOGIC APPROACH TO CHANGE

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119. *See generally id.* (providing a detailed interpretation of the shari'a on matters of homosexuality).

120. *See generally* Narayan, *supra* note 7, at 343 n.251.

121. Ebenezer Henson, *Ghana: No Room for Gays and Lesbians*, ALL AFRICA (May 21, 2007), <http://allafrica.com/stories/200705211573.html>.

## ATTITUDES

Frederick Cowell and Angelina Milon suggest that the promotion of a dialogic approach in relation to LGBT people and international human rights law might improve the situation of LGBT people in Member States through a change of national laws and attitudes of the population without the risk of escalating the situation to the extent a legally binding norms on sexual orientation and gender identity might.<sup>122</sup> This argument seems convincing, particularly because the progress made in the area of human rights and the treatment of LGBT people may depend more on states building an international consensus and less on manifesting the consensus in a legally binding convention. Therefore, an international approach that furthers dialogue that leads to a consensus regarding the rights of LGBT people under international human rights law should be taken, rather than an approach that forces controversial human rights norms upon Member States in a convention. Eric Heinze has summarized such an approach as being a rising tide that “raises all ships.”<sup>123</sup>

### A. STRATEGIES TO FURTHER DIALOGUE ON THE MATTER OF LGBT PEOPLE’S HUMAN RIGHTS PROTECTIONS

The first question that needs to be addressed when considering a dialogic approach is how and where to expand dialogue on LGBT rights under human rights law. Advancing dialogue on the treatment of LGBT people in accordance with their human rights appears possible on two levels: between U.N. bodies and Member States’ governments and between U.N. agencies and Member States’ communities.

One may consider several areas of furthering dialogue and raising

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122. Frederick Cowell & Angelina Milon, *Decriminalization of Sexual Orientation through the Universal Periodic Review*, 12 HUM. RTS. L. REV. 341, 345–46 (2012) (advocating that the processes that use a dialogic approach, such as the Universal Periodic Review, would help avoid a potential confrontational and antagonistic process that may arise when attempting to enforce a controversial human rights norm, such as those related to decriminalization of sexual orientation).

123. Eric Heinze, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural Sensitivity*, 22 MICH. J. INT’L L. 283, 296 (2001) (“[T]he progressive recognition of ever more specialized interests must surely promote an overall climate of tolerance and broad-mindedness that will benefit sexual minorities in the long run.”).

awareness of LGBT people's rights between U.N. bodies and Member States' governments. As pointed out above, the Yogyakarta Principles formulate specific rights of LGBT people under international human rights law. Stephanie Farior opines that the Yogyakarta Principles offer opportunities for advocacy with intergovernmental organizations, local and national governments as well as with the judiciary.<sup>124</sup> To facilitate dialogue, the United Nations could monitor the human rights situation of LGBT people in Member States by using the Yogyakarta Principles as benchmarks and studying the situation of LGBT people's human rights violations in Member States.

Upon request by the HRC in Resolution 17/19, the High Commissioner for Human Rights undertook and presented such a study in November 2011 with the goal of "documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity."<sup>125</sup> The findings of this study and studies like it might allow subsequent dialogic engagement with Member States and U.N. bodies, as demonstrated by the formal intergovernmental panel discussion following the above-described report of the U.N. High Commissioner in March 2012 on violence and discrimination against LGBT people.<sup>126</sup> The aim of the debate was to discuss the findings in a "constructive, informed and transparent dialogue."<sup>127</sup> Frederick Cowell and Angelina Milon argue that the Universal Periodic Review conducted by the Office of the High Commissioner for Human Rights, NGOs, and delegates of Member States on the human rights record of Member States may offer another valuable opportunity to promote a

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124. Stephanie Farior, *Human Rights Advocacy on Gender Issues: Challenges and Opportunities*, 1 J. HUM. RTS. PRAC. 83, 88 (2009) (adding that the U.N.'s Statement on human rights, sexual orientation, and gender identity also accomplishes this).

125. H.R.C. Res. 17/19, *supra* note 83, at 1.

126. *See id.* (noting that a panel discussion was requested by HR Committee's Resolution 17/19).

127. *UN Human Rights Council: Landmark Report and Panel on Sexual Orientation and Gender Identity*, INT'L GAY & LESBIAN HUM. RTS. COMM'N (Mar. 3, 2012), available at <http://www.ighrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1494.html>.

dialogic approach.<sup>128</sup> The review process, so the researchers argue, could address controversial matters more sensitively than a treaty or convention could.<sup>129</sup> On another level, dialogue could be furthered between U.N. agencies and communities in Member States. U.N. agencies could enhance already-existing community and national activities that promote LGBT people's human rights in Member States to promote a consensus and the acceptance of the rights of LGBT people from within the State.

The dialogue on both levels could be heightened and supported by the publications of guides that outline the application of the Yogyakarta Principles and international human rights law in relation to LGBT people's rights. The promotion of LGBT people's rights in the suggested fashion is already underway. ARC International and other NGOs published the *Activist's Guide on the Yogyakarta Principles* in 2010, reaffirming the Principles and setting out their application in practice.<sup>130</sup> In 2012, the United Nations published the booklet *Born Free and Equal*, which set out the core obligations states have in the treatment of LGBT people and described how U.N. mechanisms have applied international law in this context.<sup>131</sup> Promotional activities like the above are only the beginning of the dialogic journey on which the United Nations needs to embark in order to be able to reach a long-term consensus on affording LGBT people human rights in all U.N. Member States.

#### B. CRITICISM OF THE APPROACH

A dialogic approach on the international level to improve the treatment of LGBT people on a national level may be criticized as incapable of influencing Member States' attitudes towards LGBT people and advancing the situation of LGBT people's human rights. It also may be argued that the disagreement between states on this highly

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128. See generally Cowell & Milon, *supra* note 122.

129. *Id.*

130. *An Activist's Guide to the Yogyakarta Principles*, YP IN ACTION, [http://ypinaction.org/content/activists\\_guide](http://ypinaction.org/content/activists_guide) (last visited July 24, 2013).

131. *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER 10 (2012) (analyzing the states' obligations, the relevant international human rights law, and the views of human rights treaties and special procedures).

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political and controversial matter seems so strong that it is impossible to arrive at a common consensus or even at a middle ground that allows discussion. The question arises of how a dialogic approach could be beneficial to improve the situation of LGBT people's rights in Member States, as it appears the cultural and religious beliefs deeply rooted in political and social attitudes of some Member States leave no room for discussion.

While a dialogic approach may be a slow process that could take considerable time for changes in Member States' attitudes to become visible, a slow process does not mean that it cannot have any effect on Member States. The advantage of a dialogic approach on several levels, between the United Nations and Member States' governments and between U.N. agencies and communities in Member States, is that this rounded approach can address the religious and political concerns of Member States and consider in detail solutions to Member States' objections concerning LGBT people's rights.<sup>132</sup> Overall, a dialogic approach does not guarantee that the treatment of LGBT people in Member States will improve; however, it may have the potential to change Member States' attitudes slowly and to encourage law reform without polarizing the debate.

An example of a case where a dialogic approach appears to have contributed to changing attitudes about cultural practices that violate human rights is the case of female genital mutilation/cutting ("FGM/C") in some African and Middle Eastern States. The attitudes towards this tradition, which was rooted in some Member States' cultures and considered a cultural necessity in the past, have started to change to some degree since the introduction of a joint U.N. program. In 2007 the UNFPA-UNICEF Joint Programme on FGM/C was launched to accelerate the abandonment of the practice in Member States.<sup>133</sup>

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132. See Cowell & Milon, *supra* note 122, at 352 (explaining that a dialogic approach tackles issues effectively by seeing reform from a different angle as different views are taken into consideration, which in turn prevents the recommendations from being "bifurcated into 'pro' or 'anti' camps").

133. *Joint Evaluation of the UNFPA-UNICEF: Joint Programme on Female Genital Mutilation/Cutting Accelerating Change (2008–2012)*, UNICEF & UNFPA 7 (Dec. 2012), available at [http://www.unfpa.org/webdav/site/global/shared/documents/Evaluation\\_branch/Joint%20Evaluation%20-%20Sept%202013/Final%20Inception%20Report%20Volume%20I-Dec%202020.pdf](http://www.unfpa.org/webdav/site/global/shared/documents/Evaluation_branch/Joint%20Evaluation%20-%20Sept%202013/Final%20Inception%20Report%20Volume%20I-Dec%202020.pdf) (reporting that UNFPA organized a meeting that brought together experts, practitioners, NGOs, U.N. and international development agencies,

The program mainly focuses on promoting already-existing programs in Member States.<sup>134</sup> Promotional activities include lobbying for the enactment and enforcement of laws against FGM/C and working with the media and other networks to broaden the understanding of social norms concerning the practice.<sup>135</sup> The program, which is characterized by “participation, empowerment, non-discrimination, equality, accountability and the rule of law” appears to have made much progress since its introduction: over 16,000 families in Sudan and Egypt have reportedly abandoned the practice and over 71,245 community education sessions had been conducted by 2010.<sup>136</sup> Proponents of the program believe that receiving information about the violations of human rights through dialogue has led to a major change in attitudes about the practice.<sup>137</sup>

The FGM/C example suggests that a dialogic approach on multiple levels could have the potential to bring about change of attitudes towards cultural traditions and to improve the human rights situations of particular groups in Member States. For this reason, at the current time, a dialogic approach may be best suited to promote the existing human rights protections of LGBT people in Member States and to contribute to changed attitudes of Member State nationals.

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representatives from government and academia, and that participants emphasized the importance of commitment and formulated “strategies [and] mechanisms to build capacities and consensus on how to accelerate the abandonment of FGM/C in one generation”).

134. See UNFPA/UNICEF *Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change: Annual Report 2011*, UNICEF & UNFPA (2012), available at [http://www.unfpa.org/webdav/site/global/shared/documents/publications/2012/Annual\\_report\\_on\\_FGM-C\\_2011\\_low\\_res.pdf](http://www.unfpa.org/webdav/site/global/shared/documents/publications/2012/Annual_report_on_FGM-C_2011_low_res.pdf) (last visited July 24, 2013) (emphasizing the extensive media coverage in Joint Programme countries relating to the denunciation of FGM/C, raising awareness and informing citizens of the different resources available).

135. *Id.* (affirming that the Programme is lobbying for Member States to wait “until Parliament agrees on a decree calling for the end of all forms of FGM/C”).

136. UNFPA/UNICEF *Joint Programme on Female Genital Mutilation–Cutting: Accelerating Change: Annual Report 2010*, UNICEF & UNFPA (2011), available at [http://www.unfpa.org/gender/docs/2010\\_Annual\\_Report\\_2.pdf](http://www.unfpa.org/gender/docs/2010_Annual_Report_2.pdf) (conveying figures that are not based on a uniform system).

137. *Id.* at 4 (observing that the shift in attitude has helped programs organize collective discussions and events that enable a consensus to be reached among major stakeholders).



## V. CONCLUSION

This article has contemplated whether opening a convention on sexual orientation and gender identity for signature is necessary and beneficial at the current time to clarify the situation of the rights of LGBT people under international human rights law. While Part II concluded that, although international authoritative commentary and jurisprudence have started to evolve on the matter, many issues remain open to interpretation and protection gaps continue to exist.

Based on this finding, Part III contemplated whether a legally binding convention is beneficial in closing existing protection gaps. Part III identified that adopting a legally binding convention has the potential to close these gaps and to clarify the existing protections and rights of LGBT people under international human rights law. However, due to the current divide of states supporting the human rights of LGBT people and states opposing these rights, a consensus on the adoption might not be reached and the debate could potentially escalate on the international level. Consequently, at the current time, the adoption of such a convention, as suggested by DeLaet, may best not be pursued on the international level.

As an alternative to adopting a legally binding convention to improve the treatment of LGBT people in Member States, Part IV suggested a dialogic approach on two levels: between U.N. bodies and Member States' governments as well as between U.N. agencies and communities in Member States to attempt to change attitudes towards LGBT people's human rights. Part IV argued that, despite the fact that a dialogic approach may be a slower process to bring about change, it has the potential to address reasons for resistance by Member States and propose culturally appropriate solutions, thereby advancing the situation of LGBT people's human rights.

While neither a convention nor a dialogic approach is a recipe for success without a change in people's attitudes, continued silence on the matter in international human rights law will not improve the situation.<sup>138</sup> Long term, a dialogic approach appears to have the

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138. The High Commissioner for Human Rights, Navanethem Pillay, has characterized the protection of LGBT people on the international level in the past and the way ahead when presenting the findings on the report documenting discriminatory laws and practices against individuals based on their sexual orientation and gender identity as follows:

potential to develop the climate necessary for implementing human rights frameworks for LGBT people in Member States and thus to begin a new chapter in international human rights law dedicated to ending violence and discrimination against LGBT people.

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The story of the United Nations is a story of progress in the fight against discrimination. It is a story that is incomplete, as we continue to work to make good on the promise enshrined in our Universal Declaration: a world where “all human beings are born free and equal in dignity and rights.” Today we all have an opportunity to begin together a new chapter dedicated to ending violence and discrimination against all people, irrespective of their sexual orientation and gender identity.

*UN Human Rights Council: Landmark Report and Panel on Sexual Orientation and Gender Identity*, INT’L GAY & LESBIAN HUM. RTS. COMM. (Mar. 7, 2012), available at <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1494.html> (last visited July 24, 2013).