



Evaluating The Human Rights Committee's Advancement of Norms to Protect Individuals of Diverse Sexual Orientation, Gender Identity and Expression and Sex Characteristics

by

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I dedicate this dissertation to all the people born into this world who are victims of human rights abuses on the grounds of their sexual orientation, gender identity and expression or sex characteristics. I dream of the day where everyone is assured the freedom to be who they are.

Abstract

Throughout the world human rights abuses are committed against individuals on the grounds of their sexual orientation, gender identity and expression or sex characteristics (SOGIESC). The Human Rights Committee (HRC), which is the monitoring body of the International Covenant on Civil and Political Rights (ICCPR), can play a role in ensuring that human rights violations targeting SOGIESC diverse groups end. This can be done through the advancement of SOGIESC norms. By advancing SOGIESC norms the HRC would affirm that the rights in the ICCPR extend to SOGIESC diverse groups, thus promoting protection of SOGIESC diverse groups' civil and political rights.

This dissertation examines the *extent* to which the HRC advances SOGIESC norms. This is realized through a combination of quantitative and qualitative analysis of how the HRC has engaged with SOGIESC under the auspice of its three monitoring functions – Views in individual communications, Concluding Observations and General Comments. The findings are explored within the theoretical framework of norm formation and theories about intrinsic qualities of successful norms.

The analysis reveals that the HRC's advancement of SOGIESC norms is characterized by uneven progress. On one hand, the analysis demonstrates that the HRC has progressed significantly in its advancement of SOGIESC norms during the last 25 years. The HRC has increasingly advanced norms to affirm that numerous rights enshrined in the ICCPR extend to SOGIESC diverse groups. On the other hand, the analysis shows that progression on advancement of SOGIESC norms by the HRC is qualified. The HRC has not advanced the distinct SOGIESC norms equally, nor do the SOGIESC norms advanced by the HRC apply equally to individuals of diverse sexual orientation *and* gender identity and expression *and* sex characteristics. It is concluded that there is still scope for the HRC to improve advancement of SOGIESC norms. The dissertation offers three recommendations as to how the HRC can improve advancement of SOGIESC norms to achieve more comprehensive protection of SOGIESC diverse groups' human rights.

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List of Abbreviations

CSSSA	Consensual Same Sex Sexual Activity
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
IHRL	International Human Rights Law
ILGA	International Lesbian and Gay Association
INDA	International Norm Dynamics Approach
LGBTQIA	Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual
NGO	Non-governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
OP1	First Optional Protocol to the International Covenant on Civil and Political Rights
SOGIESC	Sexual Orientation, Gender Identity and Expression, and Sex Characteristics
UN	United Nations
UNGA	United Nations General Assembly
UNTB	United Nations Treaty Body
YP	The Yogyakarta Principles on the Application of International Human Rights Law in Relations to Sexual Orientation and Gender Identity
YP+10	Yogyakarta Plus 10, Additional Principles and States Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to compliment the Yogyakarta Principles

Chapter 1.

Introduction

1.1 Research Context

As of today, there is no United Nations (UN) treaty that explicitly refers to sexual orientation, gender identity and expression or sex characteristics (SOGIESC). This has enabled states to claim that SOGIESC diverse groups are not protected by the human rights enshrined in the treaties.¹ One way to address the exclusion of SOGIESC in the UN treaties is through the advancement of norms by UN Treaty Bodies (UNTBs). Norms can be understood as ‘standards of appropriate behaviour for actors with a given identity’.² While norms are not legal obligations, normative standards act as leverage to regularize states’ behaviour and impact regional human rights courts and domestic courts.³ Advancing norms that relate to SOGIESC would entail affirming that the human rights enshrined in UN treaties apply equally to SOGIESC diverse groups and affirm the universality of human rights. This is important because egregious human rights abuses are committed against individuals on the grounds of their SOGIESC. These violations range from discrimination, stigma, harassment, abuses in detention and medical settings, criminalization, arbitrary detention and imprisonment, violence and even killings.⁴ In light of these flagrant human rights abuses against SOGIESC diverse groups, the UNTBs, whose mission it is to strengthen the protection of human rights, should endeavour to ensure that human rights violations targeting SOGIESC diverse groups end through the advancement of SOGIESC norms.

One of the UNTBs whose normative standards are of particular relevance for SOGIESC diverse groups is the Human Rights Committee’s (HRC). The HRC is the monitoring body to the International Covenant on Civil and Political Rights (ICCPR).⁵ The ICCPR covers civil and political rights such as the right to life,⁶ prohibition of discrimination,⁷ the right to privacy,⁸ and

¹ See Rasha Younes, ‘Egypt’s Denial of Sexual Orientation and Gender Identity’ (*Human Rights Watch*, 20 March 2020) <<https://www.hrw.org/news/2020/03/20/egypts-denial-sexual-orientation-and-gender-identity>> (accessed 5 September 2020); Robert Horvath, ‘The Reinvention of “Traditional Values”: Nataliya Narochnitskaya and Russia’s Assault on Universal Human Rights’ (2016) 68(5) *Europe-Asia Studies* 868.

² Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52(4) *International Organization* 887, 891.

³ *Ibid* 894.

⁴ United Nations Office of the High Commissioner for Human Rights (OHCHR), ‘Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law’ (2019) vii.

⁵ (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁶ *Ibid* article 6.

⁷ *Ibid* article 14.

⁸ *Ibid* article 17.

the right to freedom of expression.⁹ As with all UN treaties, the ICCPR does not include reference to SOGIESC. By formulating SOGIESC norms the HRC would affirm that the rights in the ICCPR apply equally to SOGIESC diverse groups. Consequently, through formulating SOGIESC norms the HRC has the capacity to assist in ensuring that the future of SOGIESC diverse groups is one in which their human rights are protected, respected and fulfilled.

1.2 Research Questions

This dissertation will explore how the HRC protects and enhances respect for the rights of SOGIESC diverse groups through norm formation. The question this dissertation will address is:

To what extent does the Human Rights Committee advance SOGIESC norms in the international human rights framework?

To answer the research question I will address five sub-questions.

First, what is the role of the HRC in norm formation? To answer this, I discuss the HRC's work under the auspices of its three monitoring functions – Concluding Observations, General Comments, and Views in individual communications brought under the first Optional Protocol (OP1) to the ICCPR. I demonstrate that the HRC can be understood as a venue for norm formation due to the fact that the HRC does not adopt legally binding documents, but rather interprets and adds detail to the rights and obligations enshrined in the ICCPR. The interpretation and pronouncements adopted by the HRC under the auspice of its three monitoring functions elucidate and reformulate what 'standards of appropriate behaviour' look like for States Parties to the ICCPR. This question is answered in Chapter 2 and sets the foundation for understanding the way in which the HRC works.

Second, how do norms emerge and why is norm formation significant? To answer this, I discuss Finnemore and Sikkink's "international norm dynamics approach" model (INDA Model),¹⁰ and theories about intrinsic qualities of successful norms and norm contestation. The INDA is a model used to identify the process by which new norms are adopted in international law through three stages: (1) norm emergence, (2) norm cascade, and (3) norm internalization. The final stage, norm internalization, is characterized by a majority of States abiding by the norm in question, which confirms the value of successful norm formation. This question is also answered

⁹ ICCPR (n 5) article 19.

¹⁰ Finnemore and Sikkink (n 3).

in Chapter 2 and exhibits why it is valuable to evaluate how the HRC has advanced SOGIESC norms under the auspice of its three monitoring functions.

Third, which SOGIESC norms have the HRC advanced? To answer this, I quantitatively analyse SOGIESC-inclusion within the HRC's three monitoring functions – Views in individual communications, Concluding Observations, and General Comments, and identify which provisions of the ICCPR the HRC has confirmed apply equally to SOGIESC diverse groups. This question is answered in Chapter 3 and is premised on an understanding of the HRC's monitoring functions introduced in Chapter 2.

Fourth, are there shortcomings in regard to how the HRC has dealt with SOGIESC under the auspice of its three monitoring functions? This question is answered through an evaluation of SOGIESC-inclusion and SOGIESC-exclusion in Concluding Observations, General Comments and Views in individual communications. This question is answered in Chapter 4 and builds on the analysis of SOGIESC-inclusion in Chapter 3.

Fifth, what characterizes SOGIESC norm advancement by the HRC overall? This question is answered by looking at whether the identified SOGIESC norms are characterized by intrinsic qualities of successful norms, whether the HRC has adapted to norm contestation, and whether the SOGIESC norms advanced apply equally to individuals of diverse sexual orientation, gender identity and expression and sex characteristics. This question is answered in Chapter 5 and is premised on the discussion in Chapter 2 in which the INDA model and intrinsic qualities of successful norms were introduced, on the findings in Chapter 3 and the discussion in Chapter 4.

The aim of this dissertation is to identify SOGIESC norms advanced by the HRC and demonstrate the progress made and the challenges that remain in respect of SOGIESC norm advancement by the HRC.

1.3 Terminology

Some of the terminology used in this dissertation may not be familiar to all or may be used by different people in different ways. It is therefore necessary to clarify matters pertaining to the terminology used in this work. Throughout this dissertation a conscious choice has been made to refer to the acronym "SOGIESC". The acronym stands for sexual orientation,¹¹ gender identity,¹²

¹¹ 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.

¹² 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 (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means).

gender expression,¹³ and sex characteristics,¹⁴ and is increasingly used in international human rights discourse. The SOGIESC categories have emerged as pivotal contestations of concepts such as ‘homosexual’ and the acronyms ‘LGBT’¹⁵ and ‘LGBTQIA’.¹⁶ SOGIESC is viewed as more culturally neutral than the categories represented by LGBTQIA, and as an effective ‘attempt to overcome binary representations of gender (male/ female) and sexuality (heterosexual/ homosexual)’.¹⁷

SOGIESC is understood as more culturally neutral because labels and perceptions of sexuality, gender, and sex characteristics vary greatly from culture to culture. This fact is palpably evident by the plethora of descriptions used to describe sexual orientations, gender identities and expressions and sex characteristics beyond Western discourse. These descriptions include, but are not limited to, hijra, meti, lala, skesana, motsoalle, mithli, kuchu, kawein, travesti, muxé, fa’afafine, fakaleiti and hamjensgara.¹⁸ Consequently, as Katyal notes, efforts to globalize the language of ‘gay rights’ as human rights may be seriously counter-productive - ‘gay’ being linked to Western perceptions of sexual identity.¹⁹ Similarly, Petchesky remarks that ‘homosexual’, ‘gay’, ‘lesbian’ and ‘LGBTQI’ are derivative of the Western language, most evident by the fact that LGBTQI is a formula based on a Latinized alphabet, and the fact that the term ‘queer’ ‘has no equivalent translation in practically any language besides English’.²⁰ This study endorses the acronym SOGIESC because it enables formulating claims to human rights in a language that recognizes the plurality and cross-cultural understanding of sexuality, gender, and sex characteristics. Embedded in SOGIESC are people who identify with the labels “lesbian”, “gay”, “bisexual”, “transgender”, “intersex” or “queer”, but it is not limited to this.

The foregoing does not mean that SOGIESC is the only term used in this thesis. “LGBT”, “LGBTI”, “gay”, “lesbian”, “transgender”, “intersex”, and “homosexual”, as well as the curtailed version of SOGIESC, “SOGI”, all appear herein. This is because the choice has been made to replicate the terminology used by the HRC, other international human rights bodies and scholars, to avoid obfuscation of meaning and intent on the part of the authors.

¹³ Each person’s presentation of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioral patterns, names and personal references, and noting further that gender expression may or may not conform to a person’s gender identity.

¹⁴ Each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.

¹⁵ Acronym for lesbian, gay, bisexual and transgender.

¹⁶ Acronym for lesbian, gay, bisexual, transgender, queer, intersex and asexual.

¹⁷ Vanja Hamzic, ‘The Case of “Queer Muslims”’: Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos’ (2011) 11(2) Human Rights Law Review 237, 240.

¹⁸ OHCHR (n 4) 1.

¹⁹ Sonia Katyal, ‘Exporting Identity’ (2002) 14 Yale Journal of Law & Feminism 97.

²⁰ Rosalind P Petchesky, ‘The language of “sexual minorities” and the politics of identity: a position paper’ (2009) 17(33) Reproductive Health Matter 105, 108.

1.4 Approach

The research in this dissertation is based on qualitative and quantitative analysis. The qualitative research utilizes primary and secondary sources, and a variety of legal and non-legal sources. The primary sources used are principally the provisions of the ICCPR which form a central part of the research. Secondary sources include the HRC's Concluding Observations, General Comments and Views in individual communications, as well as legal and social science academic writing on SOGIESC rights in international human rights law and norm formation.

The quantitative research in this work has been prepared by collecting and analysing the HRC's Views in individual communications, Concluding Observations and General Comments, and numerically displaying the HRC's engagement with SOGIESC. The quantitative research exhibits frequency of SOGIESC references and subject matters referenced in SOGIESC-inclusive Views, Concluding Observations and General Comments.²¹ The quantitative analysis provides an overview of the extent to which the HRC addresses SOGIESC.

1.5 Structure

The remainder of this dissertation is set out as follows. Chapter 2 provides an overview of the composition and monitoring functions of the HRC and explains the concept of norm formation in international law. Chapter 3 displays the quantitative findings of SOGIESC-inclusion in the HRC's Views in individual communications, Concluding Observations and General Comments. Chapter 4 explores the limitations that characterize the Committees' approach to SOGIESC under the auspice of its three monitoring functions. In Chapter 5 the findings from Chapter 3 and discussion from Chapter 4 are used to ascertain the overall advancement of SOGIESC norms by the HRC. Chapter 6 contains recommendations for how the HRC can improve advancement of SOGIESC norms. Finally, Chapter 7 draws the research together and provides concluding remarks.

²¹ Subject matters refer to issues such as: discrimination, harassment, violence.

Chapter 2.

The Human Rights Committee and Norm Formation

2.1 Introduction

In this chapter I answer the first and second sub-question listed in Chapter 1. I discuss the role of the Human Rights Committee (HRC) in norm formation, theoretical frameworks that explain how norms emerge and become part and parcel of international law, and why norm formation is of significance. I start by introducing the HRC's three monitoring functions – Concluding Observations, General Comments, and Views in individual communications brought under the first Optional Protocol (OP1) to the International Covenant on Civil and Political Rights (ICCPR). I demonstrate that the HRC can be understood as a venue for norm formation due to the fact that the HRC does not adopt legally binding documents, but rather interprets and adds detail to the rights and obligations contained in the ICCPR. Thereafter I discuss the 'international norm dynamics approach' model (INDA Model) and theories about intrinsic qualities of successful norms and norm contestation, which elucidates how norms emerge and become internalized. I demonstrate that successfully formulating SOGIESC norms is important because this can alter State behaviour and have ontological consequences for SOGIESC diverse groups' lives. In this chapter I set the foundation for answering the question which this dissertation seeks to address, the extent to which the HRC advances SOGIESC norms in the international human rights framework, by explaining how the HRC is part of norm formation and how norm formation occurs in international law.

2.2 The Human Rights Committee's Monitoring Mechanisms

The HRC is the treaty body affiliated with the ICCPR,¹ brief introduction of the ICCPR first is therefore necessary. The ICCPR is one of the foundational treaties in the United Nations (UN), and has at the time of writing been ratified by 173 states. It was adopted on 16 December 1966 and entered into force 23 March 1976. As a treaty in force the ICCPR is legally binding on all

¹ (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

States which are party to the treaty, as established in article 18 of the Vienna Convention on the Law of Treaties, which is the principal international authority for the treaty obligations of states.² The ICCPR contains fifty-three articles, and covers civil and political rights such as the right to life,³ prohibition of discrimination,⁴ the right to privacy,⁵ the right to freedom of expression,⁶ and the right to marry and found a family.⁷ Joseph and Castan argue that the ICCPR is probably one of the most important human rights treaties in the world, given its universal coverage (unlike regional conventions such as the European Convention on Human Rights), it encompasses a large number of rights (unlike single-issue treaties such as the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment), and it purports to apply to all classes of person (unlike for example the Convention on the Rights of the Child).⁸

Article 28 of the ICCPR establishes the HRC as the institution responsible for supervising States Parties' compliance with the obligations under the Covenant, and for interpreting the provisions of the Covenant.⁹ The HRC consists of 18 expert members from States Parties to the ICCPR who must be 'persons of high moral character and recognized competence in the field of human rights'.¹⁰ Committee members are nominated by the State Party of which they are nationals,¹¹ and are elected by a ballot of all 173 States Parties to the ICCPR. The Committee members hold four-year terms, and are to serve in their personal capacity, declaring upon taking office that they will fulfil their functions impartially.¹²

It is essential to note that because the Committee members are nominated and elected by states, who also determine whether they will be renominated, tension between Committee members' declaration of impartiality and actual levels of impartiality might arise. Notwithstanding this, an empirical analysis on independence in UN Treaty Bodies (UNTBs) by Carraro exhibited that, overall, the independence of committees is considered satisfactory and their judgments deemed to be impartial.¹³ Similarly, Shikhelman demonstrated that Committee members tend to

² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention) article 18.

³ ICCPR (n 1) article 6.

⁴ Ibid article 14.

⁵ Ibid article 17.

⁶ Ibid article 19.

⁷ Ibid article 23.

⁸ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Comments* (3rd edn, OUP 2013) 3-4.

⁹ ICCPR (n 1) article 28.

¹⁰ Ibid article 28(2).

¹¹ Ibid article 29.

¹² Ibid article 28(3).

¹³ Valentina Carraro, 'Electing the experts: Expertise and independence in the UN Human rights treaty bodies' (2019) 25(3) *European Journal of International Relations* 826, 828.

‘act in their personal capacity most of the time’.¹⁴ Consequently, while the election process may be deemed politicized, evidence suggests that the committee members of the HRC are chiefly independent and impartial in their workings.

With regard to monitoring mechanisms, the HRC has three supervisory functions to assist with monitoring and interpreting the ICCPR.¹⁵ Firstly, the Committee receives and considers periodic reports from States Parties and drafts Concluding Observations directed at the specific State Party whose report they consider. The authority for this function is article 40(1) of the ICCPR. Article 40(1) establishes that State Parties to the ICCPR accept the obligation ‘to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights’.¹⁶ Article 40(4) of the ICCPR prescribes that the task of the HRC upon receipt of the State report is to study the State Parties’ report and ‘transmit its reports’.¹⁷ Since 1992 the HRC has construed the duty to ‘transmit its reports’ as the adoption of Concluding Observations. Concluding Observations commonly include a section on ‘positive aspects’ and a section listing ‘principal subjects of concern and recommendations’. There are no legal obligations on States Parties to implement Concluding Observations. The principal objective of the Concluding Observations is to foster constructive dialogue with the Member States and improve implementation of the rights enshrined in the ICCPR.

Secondly, the Committee formulates General Comments where its understanding of rights in the ICCPR is conveyed to *all* State Parties. The HRC’s authority to transmit General Comments is established in Article 40(4), prescribing that the Committee shall transmit ‘such general comments as it may consider appropriate, to the States Parties’.¹⁸ General Comments add to international human rights practice and interpretation of the Covenant. Many provisions in the ICCPR can be perceived as vague and indeterminate,¹⁹ the General Comments are therefore a valuable tool for the HRC to define the scope of the rights in the Covenant. General Comments are important and expert pronouncements on Covenant issues, but are not legally binding.

Thirdly, the Committee can receive communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant if a state has ratified the First Optional Protocol to the ICCPR (OP1).²⁰ The OP1 is an additional protocol to the ICCPR and

¹⁴ Vera Shikhelman, ‘Geography, Politics and Culture in the United Nations Human Rights Committee’ (2017) 28(3) *The European Journal of International Law* 845, 869.

¹⁵ There is also an inter-state procedure but this has never been used.

¹⁶ ICCPR (n 1) article 40 (1) .

¹⁷ *Ibid*, article 40 (4).

¹⁸ *Ibid*.

¹⁹ Steven Wheatley, ‘On the legitimate authority of International Human Rights Bodies’, in Andrea Føllesdal et al. (eds.) *The legitimacy of international human rights regimes: Legal, political and philosophical perspectives* (Series: Studies on human rights conventions) (Cambridge University Press 2014) 85.

²⁰ (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 (OP1).

has to date been ratified by 116 States. The Committee addresses individual communications in two stages. First, the Committee determines whether the communication is admissible.²¹ Secondly, if the communication is admissible the Committee issues its Views wherein it determines whether the State Party has violated one or more rights protected by the Covenant. Views adopted by the HRC have direct consequences in the State Party involved in the process. Where a State Party is found to have been in breach of its obligations under the Covenant the State is normally required to take remedial action, such as modifying domestic legislation and offering reparations to victims.²²

To summarize, the HRC is an important institution within the UN through its affiliation with the ICCPR, which is a significant treaty due to wide ratification, universal coverage, comprehensiveness and broad application. The HRC operates through three monitoring functions. Firstly, article 40(1) of the ICCPR mandates the HRC to adopt Concluding Observations directed at *individual* States Parties. Secondly, article 40(4) authorizes the Committee to provide guidance on provisions in the ICCPR by adopting General Comments that apply to *all* States Parties. In addition to these two monitoring functions the HRC can also consider individual complaints and adopt Views if a State has ratified the OP1.

2.3 Limits and Significance of the Human Rights Committee's Work

Under the auspice of its three monitoring functions the HRC creates non-binding norms. These non-binding norms interpret and add detail to the rights and obligations contained in the ICCPR.²³ By formulating and reformulating norms the HRC elucidates what 'standards of appropriate behaviour' look like for States Parties to the ICCPR. By creating non-binding norms there are some limits to the impact of the HRC's work, but this does not mean that Concluding Observations, General Comments and Views in individual communications lack significance. The following discussion expounds on both the limits and significance of the HRC's work.

The norms created by the HRC can be contrasted with hard law, which are legal obligations found in treaties like the ICCPR, that are binding in and of themselves. Thus, there are some inherent limitations to the Committees' influence. For instance, some States Parties have critically contended that General Comments are an 'unacceptable attempt to attribute to treaty provisions

²¹ See OP1 (n 20) article 2, article 3 and article 5 for admissibility criteria.

²² Alex Conte and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2nd ed, Ashgate 2009) 12.

²³ Helen Keller and Leena Grover, 'General comments of the Human Rights Committee and their legitimacy' in Leena Grover, Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 129.

a meaning which they do not have',²⁴ and refused to acknowledge the HRC's interpretation of Covenant provisions in General Comments. Furthermore, the HRC cannot force States Parties to comply with the recommendations outlined in Concluding Observations. Thus, if a State Party is unwilling to improve their performance, there is nothing the HRC can do. Additionally, the HRC is 'neither a court nor a body with a quasi-judicial mandate',²⁵ consequently it does not have any powers to enforce State compliance with Views it adopts in individual communications.

While there are thus certain limits to the impact of the HRC's work, by virtue of the fact that the Committee does not adopt legally binding documents nor have powers of enforcement, the Committees' work is not without significance. Firstly, although there are no legal obligations to implement Concluding Observations, Kälin claims that recommendations in the Concluding Observations have considerable authority.²⁶ Kälin argues that 'recommendations must be implemented insofar as a state violating treaty obligations has – by virtue of treaty law – a duty to stop violations as soon as its authorities become aware of them'.²⁷ Furthermore, Carraro has documented that there have been instances where 'policy change happened as a direct consequence of treaty body recommendations'.²⁸ The prospect of a State Party complying fully with the Committees' recommendations depends on a number of factors, but Kretzmer argues that States *generally* 'seem to care about what is said about them, especially by international bodies',²⁹ such as the HRC.

The HRC's authoritative interpretation of the rights in the ICCPR in General Comments are also important. General Comments add to international human rights practice and provide valuable interpretation of the ICCPR. The General Comments are significant because many of the provisions in the ICCPR can be interpreted as vague, therefore detailed guidance from a body of experts chosen to interpret the Covenant is valuable. The HRC's pronouncement in General Comments have been relied on by domestic courts,³⁰ and academics, not as binding documents, but as documents providing guidance about human rights norms.

²⁴ Keller and Grover (n 23) 129.

²⁵ *Selected decisions of the Human Rights Committee under the Optional Protocol Volume 2* UN Doc CCPR/C/OP/2 (1990).

²⁶ Walter Kälin, 'Examination of state reports' in Leena Grover, Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 32.

²⁷ *Ibid.*

²⁸ Valentina Carraro, 'Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies' (2019) 63 *International Studies Quarterly* 1079, 1089.

²⁹ David Kretzmer, 'The UN Human Rights Committee and International Human Rights Monitoring' (2010) Straus Institute Working Paper 12/10, 51.

³⁰ Machiko Kanetake, 'UN Human Rights Treaty Monitoring Bodies Before Domestic Courts' (2018) 67 *International and Comparative Law Quarterly* 201.

Finally, it has been claimed that Views adopted by the HRC in individual communications are comparable to judicial decisions, despite not being binding formally.³¹ Scheining justifies this position as follows:

it would be wrong to categorize the Committee's views as mere "recommendations". They are the end result of a quasi-judicial adversarial international body established and elected by the States Parties for the purpose of interpreting the provisions of the Covenant and monitoring compliance with them. It would be incompatible with these preconditions of the procedure if a state that voluntarily has subjected itself to such a procedure would, after first being one of the two parties in a case, then after receiving the Committee's views, simply replace the Committee's position with its own interpretation as to whether there has been a violation of the Covenant or not.³²

The position that Views are 'in effect' binding has broad scholarly support.³³ Furthermore, similarly to General Comments, the Views adopted by the HRC have been used as authoritative statements by domestic courts,³⁴ as well as regional courts.³⁵

The HRC's authoritative statements in Concluding Observations, Views and General Comments have the ability to affect human rights discourse worldwide. Indeed, Keller and Ulfstein note that the work of the UNTBs have 'influenced the human rights narrative in many countries around the world'.³⁶ Furthermore, a report from the International Law Association concluded that interpretations adopted by UNTBs is used as a relevant source by many domestic courts.³⁷ Additionally, in *Diallo v Congo* the International Court of Justice (ICJ) held, with regards the HRC, that although it was not obliged 'to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that

³¹ Geir Ulfstein, 'Individual Complaints' in Leena Grover, Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012), 92.

³² Raija Hanski and Martin Scheinin, *Leading Cases of the Human Rights Committee* (2nd ed, Turku: Institute for Human Rights, Åbo Akademi University, 2007) 23.

³³ See Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights Law, Politics, Morals* (3rd ed, OUP 2008) 915; Ulfstein (n 31) 93.

³⁴ Kanetake (n 30) 208.

³⁵ Claire Callejon, Kamelia Kamileva and Felix Kirchmeier, *Treaty Bodies' Individual Communication Procedures: Providing Redress and Reparation to Victims of Human Rights Violations* (Geneva Academy, 2019) 21.

³⁶ Helen Keller and Geir Ulfstein, 'Introduction' in Leena Grover, Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012).

³⁷ International Law Association (ILA) Committee on International Human Rights Law and Practice, 'Final Report on the Impact of the Findings of the United Nations Human Rights Treaty Bodies' (2004).

treaty'.³⁸ Finally, non-governmental organizations (NGOs) have also utilized the HRC's work to exert pressure on local governments to further their aims and respect of human rights in general.³⁹

In summary, the fact that the work of the Committee is not legally binding does not mean that its work lacks importance. The norms advanced by the HRC under the auspice of its three monitoring functions can have significant impact through influencing international and national courts and by clarifying what 'standards of appropriate behaviour' look like for States Parties to the ICCPR.

2.4 The International Norm Dynamics Approach and Successful Norms

The international human rights frameworks can be understood as a site for continuous formulation and reformulation of norms due to the actors' decision to view the UN treaties as 'living instruments' that must reflect present-day conditions.⁴⁰ This means that the content of States obligations under international human rights law is constantly reassessed through norm formation, such as the work done by the HRC under the auspice of its three monitoring functions.

In relation to the UN treaties norms can emerge through the work of UNTBs. Sometimes these norms are not explicitly covered by the UN treaties themselves. The development of SOGIESC norms is a pertinent example of this. None of the UN treaties explicitly reference SOGIESC. Consequently, the inclusion of SOGIESC would be a direct outcome of the flexibility that comes from norm formation. The HRC, as a prominent international human rights body, has a crucial part to play in formulating SOGIESC norms that affirm that SOGIESC diverse groups are equally entitled to the human rights in the ICCPR. Through its work under the auspice of its three monitoring functions the HRC can incrementally and continuously formulate and reformulate SOGIESC norms.

Importantly, not all norms that emerge will affect state behaviour. Indeed, some norms may emerge and disappear again. To understand how norms emerge, and how some norms become part and parcel of international frameworks, Finnemore and Sikkink constructed 'the

³⁸ *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits and judgment) General List No 103 (2010) ICJ 639, 664.

³⁹ Transgender Equality Network Ireland, 'Gender Recognition' <<https://www.teni.ie/gender-recognition/>> (accessed 5 September 2020).

⁴⁰ See Amrite Mukherjee, 'The ICCPR as a "Living Instrument": The Death Penalty as Cruel, Inhuman and Degrading Treatment' (2004) 68 *The Journal of Criminal Law* 6; George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds) in *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge Press 2013) 106-141.

international norm dynamics approach' model (INDA Model).⁴¹ According to the INDA Model, norms follow a "life cycle" consisting of three stages: (1) norm emergence, (2) norm cascade, and (3) norm internalization.⁴² The first two stages are divided by a threshold or "tipping point", at which a 'critical mass' of relevant state actors adopt the norm.⁴³ The three stages identify the process by which an emerging candidate norm is adopted as an 'international norm', understood as a 'standard of appropriate behaviour for actors with a given identity'.⁴⁴

During the first stage, *norm emergence*, norm entrepreneurs try to persuade a "critical mass" of states to accept a new norm and become norm leaders who promote international acceptance of the candidate norm. In the field of human rights, norm entrepreneurs include UNTBs, non-governmental organizations (NGOs), grassroots organizations, legal experts, UN representatives, academics and other non-state actors. These actors exchange information and pressure other actors to change their behaviour.⁴⁵

If the emergent norm manages to surpass the "tipping point", meaning a 'critical mass' of relevant state actors adopt the norm, it will move on to the *norm cascade* stage. The second stage is characterized by norm leaders attempting to socialize other states to become norm followers. During a norm cascade a substantial number of states continue to be critical to the adoption of the particular norm. Essentially, these states must exert such power that without their support 'the achievement of the substantive norm goal is compromised'.⁴⁶ "Institutionalization" contributes to a norm cascade by clarifying what the content of the norm is and what constitutes a violation of the norm.⁴⁷

Finally, *norm internalization* occurs when a norm achieves a "taken-for-granted" quality that makes conformance with the norm almost automatic'.⁴⁸ However, even at the norm internalization stage, criticism may persist. This is evident by the right to life norm which is interpreted differently in countries that oppose and accept the death penalty. Significantly, completion of the norm "life cycle" is not guaranteed, and many emerging norms fail to pass the "tipping point".⁴⁹

Essentially, the aim when formulating SOGIESC norms is for these norms to be internalized. According to the INDA model as defined by Finnemore and Sikkink, the question of

⁴¹ Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887.

⁴² Finnemore and Sikkink (n 41) 895.

⁴³ Jonathan Symons and Dennis Altman, 'International norm polarization: sexuality as a subject of human rights protection' (2015) 7(1) *International Theory* 61, 62; Symons and Altman argue that where one-third of actors agree this will commonly suffice to constitute a "critical mass".

⁴⁴ Finnemore and Sikkink (n 41) 891.

⁴⁵ *Ibid* 900.

⁴⁶ *Ibid* 901.

⁴⁷ *Ibid* 900.

⁴⁸ *Ibid* 904.

⁴⁹ Symons and Altman (n 43) 62.

whether a novel norm is accepted by a broad range of actors, and thus surpasses the tipping point, cascades, and is internalized is argued to depend on intrinsic qualities of the norm.⁵⁰ In norm research scholars claim that ‘the formulation of the norm, its clarity and specificity, the substance of the norm and the issues it addresses’,⁵¹ are imperative. Keck and Sikkink have formulated more specific claims regarding the intrinsic qualities of successful norms. They argue that ‘norms involving (1) bodily integrity and prevention of bodily harm for vulnerable or ‘innocent’ groups, especially when a short causal chain exists between cause and effect, and (2) legal equality of opportunity, are particularly effective transnationally and cross-culturally’.⁵² Furthermore, Finnemore and Sikkink assert that adjacency claims, where the relationship of new normative claims to existing norms is strong, influence the likeliness of a norms’ success.⁵³ In international human rights law ‘adjacency claims’ are particularly prevalent as ‘the power of persuasiveness of a normative claim in law is explicitly tied to the ‘fit’ of that claim within existing normative frameworks’.⁵⁴ I will return to the concepts about intrinsic qualities of successful norms in Chapter 5 to analyse the SOGIESC norms that have then been identified as advanced by the HRC. I will do that to assess whether the HRC is relying on the factors identified as characterizing successful norms in their formulation of SOGIESC norms, as this can impact the success of the SOGIESC norms.

In addition to the traditional concepts concerning norm formation, scholars have expanded norm formation theory in recent years by shifting the focus from ‘norm advancement’ to ‘norm contestation’. Norm contestation, according to Antje Wiener, entails objection to specific issues, where actors ‘discursively express disapproval of norms’.⁵⁵ Norm contestation emphasizes that norm diffusion, namely the process of norm cascading and internalizing, does not always proceed smoothly.⁵⁶ This is an appropriate description of the current environment in which SOGIESC norms are being promoted. SOGIESC norms are being contested in a multitude of ways. These contestations range from framing norms that seek to protect SOGIESC diverse

⁵⁰ Finnemore and Sikkink (n 41) 906.

⁵¹ Elizabeth Baisley, ‘Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity’ (2016) 38 *Human Rights Quarterly* 134, 138.

⁵² Finnemore and Sikkink (n 41) 907.

⁵³ *Ibid* 908.

⁵⁴ *Ibid*.

⁵⁵ Antje Wiener, *A Theory of Contestation* (Springer, 2014) 1.

⁵⁶ Rebecca Sanders, ‘Norm Proxy War and Resistance Through Outsourcing: The Dynamics of Transnational Human Rights Contestation’ (2016) 17 *Hum Rights Rev* 165, 169.

groups as incompatible with culture,⁵⁷ being constructed as a moral wrong,⁵⁸ a detriment to traditional values,⁵⁹ and as incompatible with religion.⁶⁰ Thus, while some states affirm that SOGIESC diverse groups are entitled to certain rights,⁶¹ opposition persists. Symons and Altman argue that the present situation for SOGIESC norms

has most characteristics of the 'tipping point' stage of Margaret Keck and Kathryn Sikkink's 'norm life cycle' model (1998), which anticipates that after such a tipping point is reached a candidate norm will cascade through international society. However, this has not yet occurred. Instead, several decades of debate over sexuality have produced international *polarization* in which two groups of states have adopted conflicting norms and have clashed repeatedly over them.⁶²

International polarization, or norm contestation, require that the SOGIESC norms are pursued with even more vigour.⁶³ This can be effectuated by putting further impetus on persuasion and framing of SOGIESC norms. In light of this it is essential to assess whether one can identify that the HRC has improved its advancement of SOGIESC norms to adapt to the environment of contestation. I will return to evaluate whether the HRC has adapted to norm contestation in relation to the SOGIESC norms the Committee advances in Chapter 5.

The importance of having strong intrinsic qualities to the norms that are advanced, working to adapt to norm contestation, and eventually reaching the stage of norm internalization is substantial. As Douzinas explains, 'human rights struggles are symbolic and political',⁶⁴ this means that their immediate battleground is discourse. If a norm is understood as a human right, then violations of the norm would be a violation of an internationally recognized human right. This puts pressure on States to comply with the norm in question and enhances likelihood of norm conforming behaviour. Furthermore, human rights norms are often used as part of a litigation strategies and as tools to advance political goals. Consequently, the outcome of the HRC successfully framing SOGIESC norms as part and parcel of the human rights discourse enshrined

⁵⁷ See Joel Voss, 'Contesting Sexual Orientation and Gender Identity at the UN Human Rights Council' (2017) 19 Human Rights Review 1, 11; Scott Long 'Anatomy of a Backlash: Sexuality and the 'Cultural' War on Human Rights' (*Human Rights Watch*, 5 January 2005) <<https://www.hrw.org/legacy/wr2k5/anatomy/1.htm>> (accessed 15 June 2020).

⁵⁸ Nick J Mulé, Cameron McKenzie and Maryam Khan, 'Recognition and Legitimation of Sexual Orientation and Gender Identity (SOGI) at the UN: A Critical Systemic Analysis' (2016) 46 British Journal of Social Work 2245, 2253.

⁵⁹ See Voss (n 57) 2; Long (n 57) 2.

⁶⁰ Tine Fetner, *How the Religious Right Shaped Lesbian and Gay Activism* (University of Minnesota Press, 2008).

⁶¹ See Holning Lau, 'Sexual Orientation: Testing the Universality of International Human Rights Law' (2004) 71(4) University of Chicago Law Review 1689, 1702; Symons and Altman (n 43) 62.

⁶² Symons and Altman (n 43) 62.

⁶³ Voss (n 57) 20.

⁶⁴ Costas Douzinas, 'Critique and Comment: The End(s) Of Human Rights' (2002) 26 Melbourne UL Rev 445, 457.

in the ICCPR is that this can have ontological consequences and positively change SOGIESC diverse groups' lives.

2.5 Conclusion

In this chapter I have demonstrated how the HRC, through its three monitoring functions Concluding Observations, General Comments and Views in individual communications, is part and parcel of the continuous formulation and reformulation of norms. The HRC is a venue for norm formation due to the fact that it does not adopt legally binding documents, but rather interpret and expound on the rights enshrined in the ICCPR. I furthermore introduced the INDA model and theories about intrinsic qualities of successful norms and norm contestation. These frameworks elucidate how norms emerge and how some norms become internalized. The frameworks are beneficial to understand the value of assessing how the HRC formulates SOGIESC norms, as successful norm formation can inform human rights discourse and guide States as to the 'standard of appropriate behaviour'. Successful SOGIESC norm formation by the HRC could assist in ensuring that SOGIESC diverse groups are protected by the rights enshrined in the ICCPR and could thus positively affect SOGIESC diverse groups' lives.

Chapter 3.

SOGIESC Norms Advanced by the Human Rights Committee

3.1 Introduction

In this chapter I answer the third sub-question outlined in Chapter 1 – which SOGIESC norms are advanced by the HRC? The way in which I identify SOGIESC norms is through a quantitative analysis of “SOGIESC-inclusion” in the HRC’s three monitoring mechanisms, which were introduced in the previous chapter: Views in individual communications, Concluding Observations and General Comments. “SOGIESC-inclusive” denotes that the HRC has referenced sexual orientation and/or gender identity and expression and/or sex characteristics. The use of the term “SOGIESC-inclusive” treats SOGIESC as one category. However, I want to emphasize that SOGIESC are not a homogenous group. Sexual orientation, gender identity and expression and sex characteristics are each distinct categories. They are grouped together in the quantitative analysis as a practical exercise and because, while they are a diverse group, they nevertheless face some common challenges. I engage with the limits to treating SOGIESC as a homogenous group in the next chapter.

To identify the SOGIESC norms I ascertain which provisions of the International Covenant on Civil and Political Rights (ICCPR),¹ the HRC has referenced most frequently first in SOGIESC-inclusive Views, thereafter, Concluding Observations and finally General Comments. I evaluate SOGIESC-inclusion in each monitoring mechanism individually because, as was discussed in Chapter 2, the three monitoring mechanisms operate differently. I claim that the SOGIESC norms advanced by the HRC are those which reappear in *each* monitoring mechanism.

This chapter helps to answer the main question of the dissertation, ‘to what extent does the HRC advance SOGIESC norms in the international human rights framework’ by (1) demonstrating *which* SOGIESC norms are advanced by the HRC under the auspice of its three monitoring functions, and (2) commencing the discussion on *extent* through identifying how many SOGIESC norms are advanced.

¹ (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

3.2 Views in Individual Communications

The first time the HRC addressed how the ICCPR applies to SOGIESC was in an individual communication relating to sexual orientation brought under the OP1 in 1982.² Since then the HRC has adopted several Views in individual in communications brought by claimants of both diverse sexual orientation and gender identity. No individual communication has, to date, been brought relating to sex characteristics.

The Views adopted by the HRC in the individual communications that relate to either sexual orientation or gender identity can be understood as incremental formation of SOGIESC norms. In the following quantitative analysis, I identify SOGIESC-inclusive Views and distinguish which SOGIESC norms are advanced by the HRC under the auspice of this monitoring function.

3.2.1 Overview of SOGIESC-inclusion in Views

The identification of SOGIESC-inclusive Views in individual communications was prepared by searching for the keywords “gay”, “homosexual”, “lesbian”, “bisexual”, “transgender”, “intersex”, “same sex”, “sexual orientation”, “gender identity”, “gender expression” and “sex characteristics”, in Views adopted by the HRC in response to individual communications brought under the OP1. The documents were accessed on the ‘UN Treaty Body Database: Sessions for CCPR’ website.³

The first SOGIESC-inclusive View was adopted by the HRC in 1982. Between 1982 and 2019 the HRC has adopted a total of 18 Views identified as SOGIESC-inclusive. 16 Views relate to the application of the ICCPR in relation to sexual orientation and 2 Views relate to the application of the ICCPR in relation to gender identity. Table 1 on the next page compiles the 18 individual communications that concern either sexual orientation or gender identity. Table 1 includes the parties to the communication, the substantive issue in the communications, whether the communication concern sexual orientation or gender identity, and the final decision adopted by the HRC.

² *Hertzberg et al. v Finland* (2 April 1982) Communication No. R.14/61.

³ United Nations Office of the High Commissioner for Human Rights, ‘Sessions for CCPR – International Covenant on Civil and Political Rights’ (UN Treaty Body Database) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/SessionsList.aspx?Treaty=CCPR> accessed 14 May 2020.

Table 1: SOGIESC-inclusive Views adopted in individual communications by the HRC.

Title	Substantive issues	Category	Decision
<i>Hertzberg v Finland (1982)</i>	Challenged censorship on TV and radio on shows dealing with sexual orientation.	Sexual Orientation	No violation.
<i>Toonen v Australia (1994)</i>	Challenged criminalization of same-sex sexual relations.	Sexual Orientation	Violation articles 17 and 2(1).
<i>Joslin v New Zealand (2002)</i>	Challenged refusal to let same-sex couple marry.	Sexual Orientation	No violation.
<i>Young v Australia (2003)</i>	Same-sex couple denied pension transfer.	Sexual Orientation	Violation article 26.
<i>X v Colombia (2007)</i>	Same-sex couple denied pension transfer.	Sexual Orientation	Violation article 26.
<i>X v Sweden (2011)</i>	Deportation of a bisexual man to Afghanistan.	Sexual Orientation	Violation articles 6 and 7.
<i>Fedotova v Russia (2012)</i>	Applicant challenged fine for ‘propaganda of homosexuality among minors’.	Sexual Orientation	Violation articles 19 and 26.
<i>M.I. v Sweden (2013)</i>	Deportation of a lesbian woman to Bangladesh.	Sexual Orientation	Violation article 7.
<i>Alekseev v Russia (2013)</i>	Challenged fine after picket to express ‘concern for execution of homosexuals in Iran’.	Sexual Orientation	Violation article 21.
<i>Praded v Belarus (2014)</i>	Participated in ‘demonstration to end execution of homosexuals in Iran’, challenged the ensuing fine.	Sexual Orientation	Violation articles 19(2) and 21.
<i>Ernazarov v Kyrgyzstan (2015)</i>	Death of a man convicted of “forced sodomy” in a police station as a result of inter-prisoner violence against gay men.	Sexual Orientation	Violation articles 2(3), 6 and 7.
<i>M.K.H. v Denmark (2016)</i>	Deportation of a gay man to Bangladesh.	Sexual Orientation	Violation article 7.
<i>Androsenko v Belarus (2016)</i>	Petitioned to end ‘punishment of homosexuals in Iran’, challenged the ensuing fine.	Sexual Orientation	Violation articles 19(2) and 21.

<i>M.Z.B.M v Denmark (2017)</i>	Deportation of a transgender woman to Malaysia.	Gender Identity	No violation.
<i>C v Australia (2017)</i>	Challenged prohibition of access to divorce proceedings for same-sex couples.	Sexual Orientation	Violation article 26.
<i>G v Australia (2017)</i>	Challenged refusal to allow sex change on birth certificate for transgender woman.	Gender Identity	Violation articles 17 and 26.
<i>Nepomnyaschiy v Russia (2018)</i>	Challenged fine for 'propaganda of homosexuality among minors'.	Sexual Orientation	Violation articles 19 and 26
<i>Z.B. v Hungary (2018)</i>	Deportation of a woman who allegedly suffered from violence based on her sister's sexual orientation.	Sexual Orientation	Inadmissible.

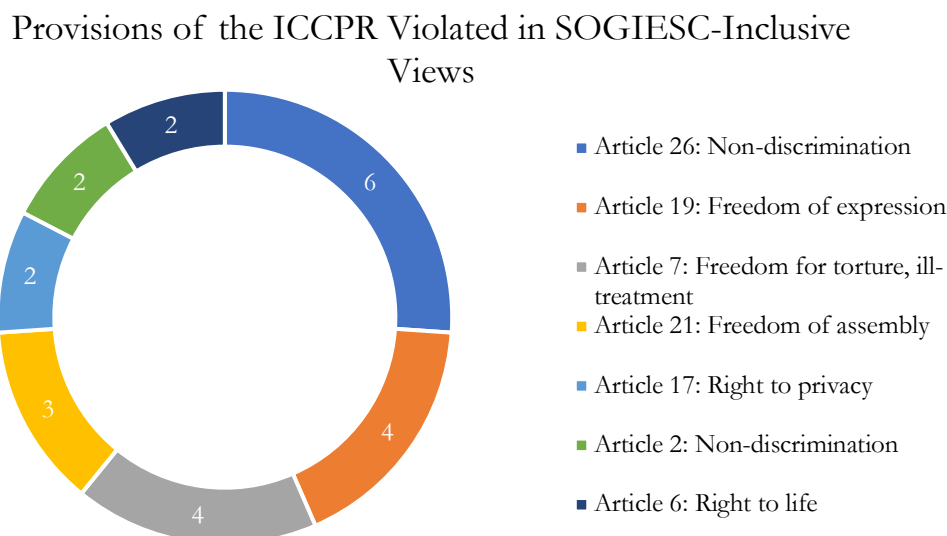
Source: Views adopted by the Human Rights Committee accessed on UN Treaty Body Database (2020).

Table 1 exhibits that until 2017 all SOGIESC-inclusive Views relate to claims regarding the applicability of the Covenant in relation to sexual orientation. The two Views adopted by the HRC concerning the applicability of the Covenant in relation to gender identity were both adopted in 2017. Table 1 further exhibits that the Committee found violations of the Covenant in 14 SOGIESC-inclusive Views (77 per cent), no violation in three (16 per cent), and deemed one inadmissible (7 per cent). This division indicates that the HRC has extended the scope of the Covenant to cover rights violations in the context of sexual orientation, and more recently, gender identity.

3.2.2 SOGIESC Norms Advanced in Views

To identify the SOGIESC norms advanced by the HRC in Views in individual communications it is necessary to look at the provisions of the ICCPR the HRC has affirmed to be violated in SOGIESC-inclusive Views and the substantive issues in the SOGIESC-inclusive Views. In regard provisions of the ICCPR violated in SOGIESC-inclusive Views, this is compiled in Figure 1 on the next page.

Figure 1: Provisions of ICCPR violated in SOGIESC-Inclusive Views.



Source: Adapted from findings in Table 1 on SOGIESC-inclusive individual communications.

Figure 1 displays which provisions of the ICCPR have been established as applying equally to individuals of diverse sexual orientation and/or gender identity and the number of times this has been established. The provisions which the HRC has established as violated in SOGIESC-inclusive Views and the number of times give an indication of which SOGIESC norms the Committee is pursuing under this monitoring mechanism. To extrapolate more in depth how these norms are advanced it is necessary to consider the substantive issues in these SOGIESC-inclusive Views and to which identity category (sexual orientation or gender identity) it applies.

Two of the SOGIESC norms advanced by the HRC in Views is that the provisions on prohibition of discrimination and on the right to privacy in the ICCPR extend to individuals of diverse sexual orientation and gender identity. Figure 1 shows that the HRC has established a violation of article 26 six times in SOGIESC-inclusive Views. Article 26 entitles all persons to equality before the law, equal protection of the law, prohibits any discrimination under the law and guarantees ‘to all persons equal and effective protection against discrimination’.⁴ In addition, the Committee has established a violation of article 2(1) in two SOGIESC-inclusive Views. Article 2(1) stipulate that the rights in the ICCPR must be guaranteed without discrimination. The Committee has also established a violation of article 17, which guarantees individuals the right to privacy, in two SOGIESC-inclusive Views. These Views combined advance norms to affirm that article 26, article 2(1) and article 17 extends to individuals of diverse sexual orientation *and* gender

⁴ ICCPR (n 1) article 26.

identity. To understand how these SOGIESC norms are being advanced it is necessary to consider the substantive issues in the Views where the Committee has established a violation of articles 26, 2(1) and 17.

Firstly, in *Toonen v Australia* from 1994,⁵ the Committee found that the provisions in the Tasmanian Criminal Code prohibiting consensual same-sex activity (CSSSA) violated article 17, the right to privacy, and article 2(1) prohibition of discrimination. *Toonen* was a ground-breaking decision due to the fact that this was the first time the Committee affirmed that the Covenant extended to sexual orientation and the first time the Committee said that criminalizing CSSSA violated the Covenant.

Secondly, in *Young v Australia*,⁶ and *X v Colombia*,⁷ the Committee decided that the refusal by the respective States to grant pension to the same-sex partner of a deceased violated article 26 of the ICCPR. The Committee concluded that the Australian and Columbian States failed to provide convincing arguments for how the ‘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’.⁸ In these two communications the Committee established that article 26 extends to sexual orientation.

Thirdly, in *C v Australia*,⁹ the author claimed that Australian legislation which prevented her from divorcing her wife, whom she had married in Canada, violated articles 14(1), 2(1) and 26. Part of the authors’ claim in *C* was premised on the fact that parties in other opposite-sex marriages which were not allowed to take place in Australia (polygamous marriages and marriages between a man and woman over 16 but under Australian marriageable age of 18), could obtain a divorce. The Committee decided that C had been subjected to differential treatment on the grounds of her sexual orientation in violation of article 26 because same-sex marriages were treated differently than the two other categories of opposite-sex marriages.

Finally, in *G v Australia*,¹⁰ the author was a male to female transgender persons who claimed that Australian legislation which prevented her from registering a change of sex on her birth certificate without first divorcing her wife violated articles 2(1), 2(3), 17 and 26. The HRC held that Australia had violated articles 17 and 26. Importantly, the Committee stated explicitly that the

⁵ (31 March 1994) Communication No. 488/1992.

⁶ (6 August 2003) Communication No. 941/2000.

⁷ (30 March 2007) Communication No. 1361/2005.

⁸ *Young v Australia* (n 6) para 10.4.

⁹ (1 November 2017) Communication No. 2216/2012.

¹⁰ (15 June 2017) Communication No. 2172/2012.

right to privacy in article 17, and the prohibition against discrimination in article 26, encompassed gender identity.¹¹

The Views adopted by the HRC in the individual communications discussed above denote that the HRC is advancing norms to affirm that the principles of non-discrimination and equality in article 26 and 2(1) apply to sexual orientation and gender identity. Furthermore, through *Toonen* and *G* the Committee is advancing the norm that article 17, the right to privacy, extends to sexual orientation and gender identity.

Figure 1 also exhibit that the second most referenced provisions in SOGIESC-inclusive Views is article 19, the right to freedom of expression. The first time article 19 was found violated in a SOGIESC-inclusive View was in *Fedotova v Russian Federation*.¹² Fedotova had been subjected to administrative fines for displaying posters ‘encouraging tolerance towards homosexuality’ near a school. The Russian state attempted to justify the restrictions on freedom of expression on the necessity to protect children’s physical and mental health. However, the HRC did not find the argument convincing. The Committee held that ‘the State Party has not shown that a restriction on the right to freedom of expression in relation to “propaganda of homosexuality” – as opposed to heterosexuality or sexuality in general ... is based on reasonable and objective criteria’.¹³ Thus, the Committee affirmed that article 19 protects individuals of diverse sexual orientation.

In *Nepomnyaschiy v Russian Federation*,¹⁴ a communication with analogous facts to *Fedotova*, the Committee explained that article 19 also extends to gender identity. Specifically, the Committee argued that banning “propaganda of non-traditional sexual relationships among minors” exacerbated negative stereotypes against individuals on the grounds of both sexual orientation *and* gender identity.¹⁵ The Views adopted in *Fedotova* and *Nepomnyaschiy* indicate that the HRC is advancing the norm that individuals of diverse sexual orientation *and* gender identity are protected by article 19. Furthermore, in *Nepomnyaschiy* the Committee affirmed its previous statement from *G* that article 26 extends to gender identity. The decision in *Nepomnyaschiy*, together with *G*, indicate consistency in the Committees’ interpretation that the Covenant also protects individuals whose rights are violated on the grounds of gender identity.

The Committee has also affirmed that article 7, which guarantees freedom from torture and ill-treatment, and article 6, which guarantees the right to life, extends to sexual orientation. Firstly, with regard to article 7, this has been affirmed in three communications brought by applicants who if deported from their country of refuge to their home country could have been

¹¹ *G v Australia* (n 9) para 7.12.

¹² (31 October 2012) Communication No. 1932/2010.

¹³ *Ibid* para 10.6.

¹⁴ (17 July 2018) Communication No. 2318/2013.

¹⁵ *Ibid*.

subjected to torture on the grounds of their sexual orientation.¹⁶ Additionally, in *Ernazarov v. Kyrgyzstan*,¹⁷ the Committee found a violation of both article 7 and article 6. The communication was brought by the brother of a man who had been convicted of “forced sodomy”, and whose subsequent death in detainment was allegedly the result of inter-prisoner violence against gay men. The Committee established that the State had violated the rights of the deceased. These communications indicate that the HRC is advancing SOGIESC norms pertaining to the fact that article 6, the right to life, and article 7, the right to freedom from torture, extend to sexual orientation.

Finally, article 21, which guarantees the right to freedom of assembly, has been found violated in three of the SOGIESC-inclusive Views, namely *Alekseev v Russia*,¹⁸ *Praded v Belarus*,¹⁹ and *Androsenko v Belarus*.²⁰ These three communications have analogous facts, each concerning individuals who were fined after participating in demonstrations to end punishment of homosexuals in Iran. The Committee held in each of the communications that the State Party had unjustly restricted the applicants’ right under article 21. In these three communications the HRC advanced the SOGIESC norm that the right to freedom assembly applies to individuals of diverse sexual orientation.

In summary, the HRC has advanced four SOGIESC norms in Views. The HRC has advanced norms to affirm that (1) criminalization of CSSSA violates the right to privacy, (2) individuals of diverse sexual orientation *and* gender identity are protected by the rights to non-discrimination and the right to freedom of expression, (3) individuals of diverse sexual orientation are protected by the right to life and the right to be free from torture and ill-treatment, and (4) individuals of diverse sexual orientation have the right to freedom of assembly.

3.3 Concluding Observations

In this section I discuss SOGIESC-inclusion in Concluding Observations. I demonstrate that through SOGIESC-inclusion in Concluding Observations the HRC has affirmed a number of the SOGIESC-norms already identified as being advanced in Views.

¹⁶ See *X v Sweden* (4 November 2011) Communication No. 1833/2008; *M.I v Sweden* (25 July 2013) Communication No. 2149/2012; *M.K.H v Denmark* (17 November 2016) Communication No. 2462/2014.

¹⁷ (25 March 2015) Communication No. 2054/2011.

¹⁸ (2 December 2013) Communication No. 1873/2009.

¹⁹ (25 November 2014) Communication No. 2029/2011.

²⁰ (11 May 2016) Communication No. 2029/2011.

3.3.1 Overview of SOGIESC-inclusion in Concluding Observations

SOGIESC-inclusive Concluding Observations were identified by searching for the following keywords in the Concluding Observations transmitted by the HRC: “gay”, “homosexual”, “lesbian”, “bisexual”, “transgender”, “intersex”, “same sex”, “sexual orientation”, “gender identity”, “gender expression” and “sex characteristics”. The Concluding Observations were retrieved from the Committees’ Session Page. Prior to 1995 there were no SOGIESC-inclusive Concluding Observations, the following quantitative analysis is therefore delimited to Concluding Observations adopted between 1995 and 2019.

Table 2 below exhibits the total number of Concluding Observations prepared in each review period by the HRC between 1995 and 2019, the amount of Concluding Observations that were SOGIESC-inclusive, and the percentage of SOGIESC-inclusive Concluding Observations each review period.

Table 2: SOGIESC-inclusive Concluding Observations by year.

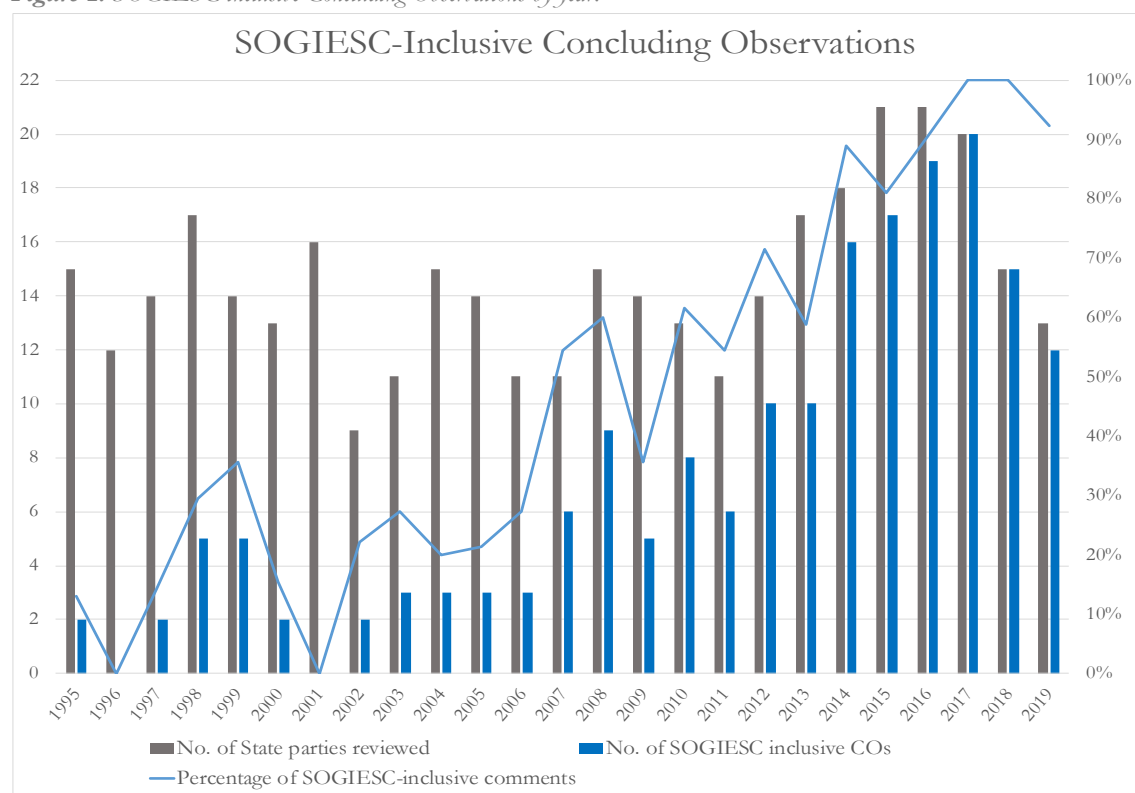
Year	No. of State Parties reviewed	No. of SOGIESC-inclusive	Percentage of SOGIESC-inclusive
1995	15	2	13
1996	13	0	0
1997	14	2	14
1998	17	5	29
1999	14	5	36
2000	13	2	15
2001	16	0	0
2002	9	2	22
2003	11	3	27
2004	15	3	20
2005	14	3	21
2006	11	3	27
2007	11	6	55
2008	15	9	60
2009	14	5	36
2010	13	8	62
2011	11	6	55

2012	14	10	71
2013	17	10	59
2014	18	17	94
2015	21	17	81
2016	21	19	90
2017	19	19	100
2018	16	16	100
2019	13	12	92
Total	364	183	50

Source: Own evaluation based on findings of SOGIESC-inclusive Concluding Observations.

As shown in Table 2, the HRC prepared a total of 364 Concluding Observations between 1995 and 2019, out of which 183 are SOGIESC-inclusive. The fact that such a high number are SOGIESC-inclusive is largely attributable to the significant increase in SOGIESC references since 2007. Figure 2 below illustrates this sharp increase in SOGIESC-inclusive Concluding Observations from 2007.

Figure 2: SOGIESC-inclusive Concluding Observations by year.



Source: Own evaluation based on findings of SOGIESC-inclusive Concluding Observations.

Several factors can have influenced the sharp increase in SOGIESC-inclusive Concluding Observations since 2007. For instance, in 2006 Norway delivered a joint statement on behalf of 54 states in the Human Rights Council on the need to end discrimination and violence against people on the grounds of sexual orientation and gender identity.²¹ Furthermore, in 2007 a group of international human rights experts published the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (YP),²² which provided guidance on the applicability of human rights law to sexual orientation and gender identity. In addition, in 2011,²³ 2014,²⁴ and 2016,²⁵ the Human Rights Council adopted resolutions on the indivisibility of human rights, sexual orientation and gender identity. These developments can have impacted the resolve of the HRC to address SOGIESC in Concluding Observations subsequent to 2007.

Irrespective of which factors have impacted the HRC's resolve to address SOGIESC in Concluding Observations, the increase is significant. As the findings exhibit, from 2007, with the exception of 2009, 50 per cent or more of the Concluding Observations are SOGIESC-inclusive. Furthermore, from 2014 more than 80 per cent were SOGIESC-inclusive. In both 2017 and 2018 all reporting states received a Concluding Observation that was SOGIESC-inclusive. This simplified picture indicates increased commitment to, and engagement with, SOGIESC on the part of the Committee.

3.3.2 SOGIESC Norms Advanced in Concluding Observations

To identify the SOGIESC norms advanced by the HRC within Concluding Observations I will discuss the subject matters referenced most frequently by the Committee in SOGIESC-inclusive Concluding Observations. Subject matters are discussed rather than provisions of the ICCPR due to the fact that the Committee did not start referencing provisions in Concluding Observations until 1999. Furthermore, the Committee is not consistent in which provisions it refers to even when discussing the same subject matter. This is likely due to the fact that different Committee

²¹ Norwegian joint statement on human rights violations based on sexual orientation and gender identity, Human Rights Council, 3rd session, Geneva, 1 December 2006, available at <<https://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement/>> (accessed 2 December 2020).

²² Yogyakarta Principles on the Application of International Human Rights Law in Relations to Sexual Orientation and Gender Identity (YP) (2007) available at <<https://yogyakartaprinciples.org>>.

²³ United Nations Human Rights Council, 'Human Rights, Sexual Orientation and Gender Identity' (14 July 2011) UN Doc A/HRC/RES/17/19.

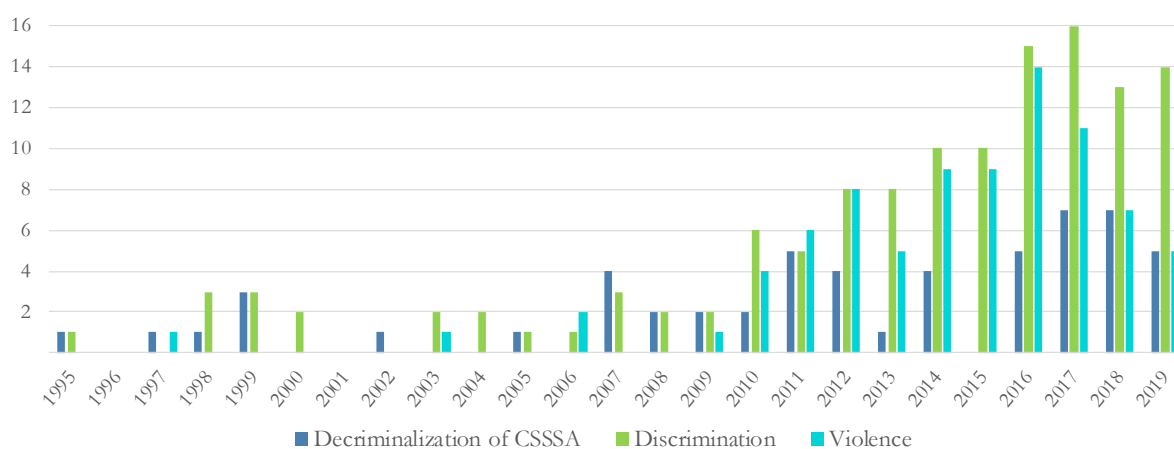
²⁴ United Nations Human Rights Council, 'Human Rights, Sexual Orientation and Gender Identity' (2 October 2014) UN Doc A/HRC/RES/27/32.

²⁵ United Nations Human Rights Council, 'Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity' (15 July 2016) UN Doc A/HRC/RES/32/2.

members are involved in drafting the Concluding Observations. Looking at subject matters therefore provides a more adequate identification of SOGIESC norms advanced by the HRC in Concluding Observations.

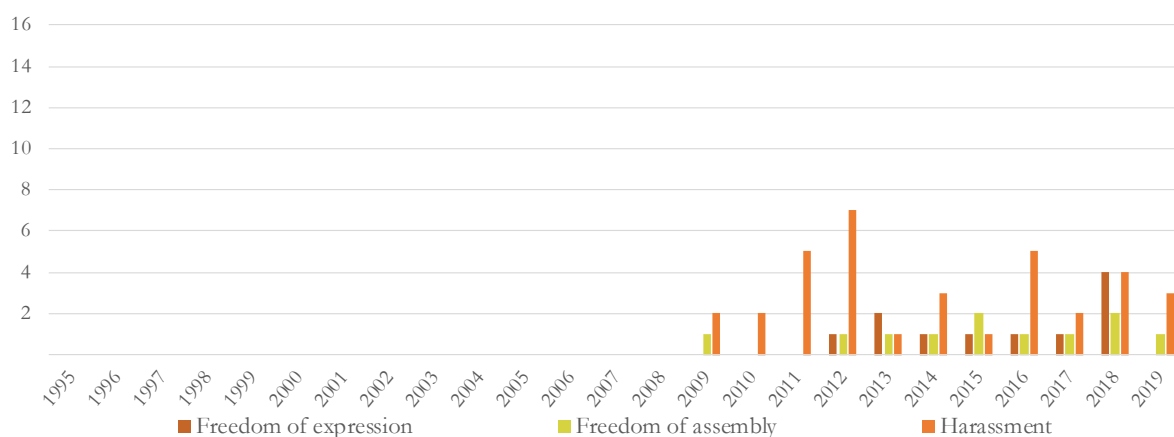
When I refer to ‘subject matter’ I refer to issues the Committee has raised concern about in SOGIESC-inclusive Concluding Observations, and where the Committee has recommended that the State Party receiving the Concluding Observation address the subject matter. Figure 3 and Figure 4 below compiles the six subject matters raised most frequently in SOGIESC-inclusive Concluding Observations from 1995 to 2019.

Figure 3: Subject matters referenced in SOGIESC-inclusive Concluding Observations.



Source: Own elaboration based on findings in Concluding Observations between 1995 and 2019.

Figure 4: Subject matters referenced in SOGIESC-inclusive Concluding Observations.



Source: Own elaboration based on findings in Concluding Observations between 1995 and 2019.

Together Figure 3 and Figure 4 demonstrate that the subject matters referenced most frequently in SOGIESC-inclusive Concluding Observations, in order, are: discrimination, violence,

decriminalization of CSSSA, harassment, freedom of expression and freedom of assembly. Discrimination against, and harassment of, SOGIESC diverse groups correlate to the rights to non-discrimination in article 26 and 2(1). Violence against SOGIESC diverse groups correlate to article 7, the right to be free from torture and ill-treatment, and article 6, the right to life. Decriminalization of CSSSA correlate to article 17, the right to privacy, as well as article 26 and 2(1). The right to freedom of expression and the right to freedom of assembly, correlate to article 19 and article 21 respectively.

With regards to the HRC raising concern about criminalization of CSSSA, which is the third most referenced subject matter, it is significant to note that this has improved drastically. It is relevant to look at the improvement on this issue because criminalization of CSSSA violates rights to privacy and to freedom from discrimination and may also lead to violations of the right to freedom from arbitrary arrest and detention. Furthermore, criminalization legitimizes prejudice and fuels discrimination. Thus, as the treaty body tasked with ensuring that everyone in State Parties to the ICCPR can enjoy the rights set out in the treaty, this is a subject matter which the HRC should raise concern about.

Table 3 on the next page provides an overview of the 44 States Parties to the ICCPR that still criminalize CSSSA and have received Concluding Observations by the HRC. Where a square is black this means the State Party has received a Concluding Observation from the HRC but that no concern regarding criminalization of CSSSA was raised. Where a square is green this means the State Party has received a Concluding Observation where the HRC raised concern about the criminalization of CSSSA. Countries in the left column that have a dark grey background are countries who criminalize CSSSA where the HRC has never indicated in a Concluding Observation to the State Party that the criminalization of CSSSA violates the Covenant.

Table 3: Concern raised regarding C.S.S.S.A in States Parties that criminalize C.S.S.S.A in Concluding Observations between 1995 and 2019. (Black = Received Concluding Observations and no concern raised. Green = Received Concluding Observation and concern raised).

Year Country	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	
Algeria				Black									Green												Green	
Botswana														Green												
Burundi																				Green						
Cameroon					Black											Green								Green		
Ethiopia																	Green									
Ghana																						Green				
Guinea																									Green	
Kenya											Green								Green							
Libera																										Green
Libya				Black									Black													
Malawi																						Green				
Mauritania																			Green						Green	
Mauritius		Black									Black													Green		
Morocoo					Black																		Green			
Namibia										Green													Green			
Nigeria		Black																								
Senegal			Black																							Green
Sierra Leone																										
Sudan			Black										Green								Black				Green	
Tanzania				Black												Green										
Togo								Black										Green								
Tunisia														Black												
Uganda										Black																
Zambia		Black												Green												
Zimbabwe				Green										Green												
Barbados														Green												
Dominica																										
Grenada															Green											
Guyana						Black																				
Jamaica			Black																				Green			
St Vincent														Green												
Bangladesh																								Green		
Iran																										
Kuwait																							Green			
Lebanon			Black																						Green	
Maldives																			Green							
Pakistan																								Green		
Sri Lanka	Black								Black												Green					
Syria							Black				Black															
Turkmenistan																								Green		
Uzbekistan							Black									Green						Green				
Yemen	Black							Black			Black															

Source: Own findings based on review of the Human Rights Committees' Concluding Observations.

Table 3 shows that six countries, Libya, Nigeria, Tunisia, Uganda, Guyana and Syria have not received Concluding Observations where the HRC raised concern about criminalization of CSSSA. This means that 38 States Parties (86 per cent) who criminalize CSSSA have received Concluding Observations where the HRC recommends that the State Party repeal the legislation which criminalizes CSSSA. Furthermore, in the six countries where the HRC has not raised concern about criminalization of CSSSA the countries received their Concluding Observations between 1995 and 2008. After 2008 the Committee has raised concern about criminalization of CSSSA in each Concluding Observation to relevant States Parties. Table 3 gives a visual representation of the decisive change in the Committees' approach following 2007. Concern being raised regarding criminalization of CSSSA clearly changes from being an exception to becoming the norm.

In summary, the HRC has advanced four SOGIESC norms in Concluding Observations. The SOGIESC norms advanced within Concluding Observations correlate almost exactly with those advanced by the Committee in Views. Namely, (1) that criminalization of CSSSA violate the Covenant, (2) that discrimination against and harassment of SOGIESC diverse groups violate the Covenant, (3) that violence against SOGIESC diverse groups violate the Covenant, and (4) That SOGIESC diverse groups should be assured the right to freedom of expression and the right to freedom of assembly.

3.4 General Comments

In this final section I discuss SOGIESC-inclusion in General Comments. In line with the development seen in both Views and Concluding Observations, the HRC has also advanced SOGIESC norms in General Comments. These norms largely replicate the SOGIESC norms advanced in Views and Concluding Observations, but add a level of assertion due to the fact that General Comments apply to all 173 States Parties to the ICCPR, not just 116 States as with Views in individual communications, or individual States Parties as with Concluding Observations.

3.4.1 Overview of SOGIESC-inclusion in General Comments

The evaluation of SOGIESC-inclusive General Comments was prepared by searching for the keywords “gay”, “homosexual”, “lesbian”, “bisexual”, “transgender”, “intersex”, “same sex”, “sexual orientation”, “gender identity”, “gender expression” and “sex characteristics” in the General Comments adopted by the HRC. The HRC has adopted 37 General Comments in total. Out of these 37 General Comments, three are SOGIESC-inclusive. This means that 8 per cent of

the HRC's General Comments are SOGIESC-inclusive. Table 4 below compiles the 3 SOGIESC-inclusive General Comments adopted by the HRC. Table 4 lists the number of the General Comment, subject matter addressed in the General Comment, the date it was adopted and whether it included reference to sexual orientation and/or gender identity and/or gender expression and/or sex characteristics.

Table 4: SOGIESC-inclusive general comments.

No.	Subject Matter	Date adopted	SO/GI/GE/SC
General Comment No. 35	Article 9 (Liberty and security of person)	23 October 2014	Sexual Orientation and Gender Identity
General Comment No. 36	Article 6 (Right to life)	2 November 2018	Sexual Orientation, Gender Identity and Sex Characteristics
General Comment No. 37	Article 21 (Right of peaceful assembly)	23 July 2020	Sexual Orientation and Gender Identity

Source: Own evaluation based on findings of SOGIESC-inclusive general comments.

As shown in Table 4 the three SOGIESC-inclusive General Comments were adopted between 2014 and 2020. Furthermore, Table 4 demonstrates that General Comment 35 and General Comment 37 include reference to sexual orientation and gender identity, whereas General Comment 36 includes reference to sexual orientation, gender identity *and* sex characteristics.

3.4.2 SOGIESC Norms advanced in General Comments

To identify the SOGIESC norms advanced by the HRC within General Comments I will discuss each of the three SOGIESC-inclusive General Comments and the references made by the HRC to sexual orientation and/or gender identity and/or sex characteristics.

General Comment 35 on article 9, the right to liberty and security of person,²⁶ was the first SOGIESC-inclusive General Comments adopted by the HRC. It was adopted in 2014 and includes two explicit references to sexual orientation and gender identity. First, in paragraph 3 the Committee confirms that article 9 guarantees the rights to liberty and security of persons to

²⁶ UN Human Rights Committee, 'General Comment No. 35' (2014) UN Doc CCPR/C/GC/35.

everyone, and that “everyone” includes, among others, ‘lesbian, gay, bisexual and transgender persons’.²⁷

The second reference to sexual orientation and gender identity in General Comment 35 is in paragraph 9 where the Committee affirms that ‘States parties must respond appropriately to patterns of violence against categories of victims such as ... violence against persons on the basis of their sexual orientation or gender identity’.²⁸ The reference to “sexual orientation or gender identity” in paragraph 9 is ensued by a footnote referring to the Concluding Observation made to El Salvador in 2003, in which the Committee condemned violence against individuals on the grounds of sexual orientation. Wheatley argues that the practice in General Comments of referring to own Concluding Observations and Views to provide verification is a process whereby UNTB’s become ‘operationally closed through self-reference to its own normative statements’.²⁹ Wheatley claims that through this process UNTB’s assert that their understanding of rights in the Covenant will prevail over other interpretations. Consequently, the ensuing footnote to “sexual orientation or gender identity” can be interpreted as an unequivocal declaration by the HRC affirming the practice from Views and Concluding Observations that sexual orientation and gender identity is covered by the Covenant.

In addition to the two explicit references to “lesbian, gay, bisexual and transgender persons” and “sexual orientation or gender identity”, paragraph 17 in General Comment 35 affirms that that ‘arrest or detention on discriminatory grounds in violation of article 2, paragraph 1, article 3 or article 26 is also in principle arbitrary’.³⁰ In the footnote to this statement the Committee refers to its Concluding Observations to Honduras in 2006 (detention on the basis of sexual orientation)³¹ and Cameroon in 2010 (imprisonment for CSSSA).³² The Committee is thus equating detention on the basis of sexual orientation and criminalization of CSSSA as arbitrary violations of article 9.

In General Comment 35 the Committee is advancing distinct but interrelated SOGIESC norms which confirm the SOGIESC norms advanced in Views and Concluding Observations: that sexual orientation and gender identity are covered by the Covenant, that violence against persons of diverse sexual orientation and gender identity violates the Covenant, and that criminalization of CSSSA violates the Covenant.

²⁷ GC 35 (20) para. 3.

²⁸ Ibid para. 9.

²⁹ Steven Wheatley, ‘On the legitimate authority of International Human Rights Bodies’, in Andrea Føllesdal et al. (eds.) *The legitimacy of international human rights regimes: Legal, political and philosophical perspectives* (Cambridge: Cambridge University Press, 2014) 105.

³⁰ GC 35 (n 20) para. 17.

³¹ *Concluding Observations: Honduras* CCPR/C/HND/CO/1, 27 October 2006, para. 13.

³² *Concluding Observations: Cameroon* CCPR/C/CMR/CO/4, 4 August 2010, para. 12.

The next SOGIESC-inclusive General Comment is General Comment 36 which was adopted in 2016.³³ General Comment 36 explains the scope of article 6, the right to life. The Committee references SOGIESC three times in General Comment 36. First, in paragraph 23 the Committee affirms that the duty to protect the right to life imposes a special duty on States with regards protection of persons in vulnerable situations, and that such persons include ‘lesbian, gay, bisexual, transgender and intersex persons’.³⁴ Secondly, in Paragraph 36 the HRC affirms that ‘under no circumstance should the death penalty ever be applied as a sanction against conduct the very criminalization of which violates the Covenant, including ... homosexuality’.³⁵ It is notable that the Committee here affirms that even the criminalization of homosexuality violates the Covenant. This reflects the Committees’ own practice from Concluding Observations and Views where the Committee has reiterated that criminalization of CSSSA violates the Covenant. Finally, in paragraph 61 the Committee states that ‘the right to life must be respected and ensured without distinction of any kind, such as ... sexual orientation or gender identity’.³⁶ This again reflects the practice from Concluding Observations and Views by confirming that sexual orientation and gender identity are protected grounds under the ICCPR.

In General Comment 36 the Committee affirms the SOGIESC norms that article 6, the right to life, extends to SOGIESC diverse groups and that criminalization of CSSSA violates the Covenant.

The last SOGIESC-inclusive General Comment is General Comment 37 which was adopted in 2020.³⁷ General Comment 37 concerns article 21, the right to peaceful assembly. Two references are made to sexual orientation and gender identity in General Comment 37. First, in paragraph 25 the Committee explains that States have an obligation not to deal with assemblies in a discriminatory manner on the basis of sexual orientation and gender identity.³⁸ Second, in paragraph 46 the Committee emphasize that ‘restrictions on peaceful assemblies should only exceptionally be imposed for the protection of “morals”...restrictions based on this ground may not, for instance, be imposed because of opposition to expressions of sexual orientation or gender identity’.³⁹ General Comment 37 substantiates the SOGIESC norm developed in both SOGIESC-inclusive Views and Concluding Observations, that the right to peaceful assembly must be ensured without discriminating against people on the basis of their sexual orientation and gender identity.

³³ UN Human Rights Committee, ‘General Comment No. 36’ (2014) UN Doc CCPR/C/GC/36.

³⁴ *Ibid* para. 23.

³⁵ *Ibid* para. 36.

³⁶ *Ibid* para. 61.

³⁷ UN Human Rights Committee, ‘General Comment No. 37’ (2020) UN Doc CCPR/C/GC/37.

³⁸ *Ibid* para. 25.

³⁹ *Ibid* para. 46.

In summary, the Committee has corroborated the following SOGIESC-norms in the three General Comments discussed: (1) that criminalization of CSSSA violates the Covenant, (2) that violence against persons of diverse sexual orientation and gender identity violates the Covenant, (3) that article 6, the right to life, extends to SOGIESC diverse groups, and (4) that the right to peaceful assembly must be ensured without discriminating against people of diverse sexual orientation and gender identity. In the SOGIESC-inclusive General Comments the Committee moreover affirm that SOGIESC diverse groups are equally covered by the Covenant and can thus not be discriminated against.

3.5 Conclusion

In this chapter I have analysed SOGIESC-inclusion in the HRC's Views in individual communications, Concluding Observations and General Comments. Based on the findings in this chapter I assert that four categories of SOGIESC norms are advanced by the HRC: (1) the prohibition of criminalization of CSSSA, (2) human rights principles of non-discrimination and equality apply to SOGIESC, (3) violence against individuals on the grounds of SOGIESC is prohibited, and (4) rights to freedom of expression and peaceful assembly apply to individuals of diverse sexual orientation and gender identity. These four categories of SOGIESC norms have received most extensive coverage across the three monitoring functions. Consequently, in this chapter I have identified *which* SOGIESC norms are advanced by the HRC and identified *extent* by demonstrating that there are four SOGIESC norms advanced across the three monitoring functions.

Chapter 4.

Shortcomings and Challenges for SOGIESC Norm Advancement

4.1 Introduction

In this chapter I address the fourth sub-question listed in Chapter 1 – are there shortcomings in regard to how the HRC has dealt with SOGIESC under the auspice of its three monitoring functions? In this chapter I demonstrate that there are challenges to how the Committee approaches SOGIESC. I discuss shortcomings in Views in individual communications first, thereafter in Concluding Observations and finally in General Comments. I argue that the Committee at times lack a progressive approach to protecting SOGIESC diverse groups’ comprehensively due to the fact that the HRC does not advance SOGIESC norms that protect individuals of diverse sexual orientation *and* gender identity and expression *and* sex characteristics equally. In the final section I discuss why the marginalization of gender identity and expression and sex characteristics in the HRC’s work is problematic.

In this chapter I discuss both shortcomings in regard to what the Committee has done and what the Committee ought to have done to protect the human rights of SOGIESC diverse groups in a comprehensive manner in line with their mission to strengthen the protection of human rights. When I use the words “progressive” or “cautious” in this chapter I take the viewpoint of SOGIESC diverse groups founded on the premise that the human rights enshrined in the International Covenant on Civil and Political Rights (ICCPR) are universal. Discussing shortcomings and challenges in how the Committee has addressed SOGIESC under the auspice of its three monitoring functions is essential to understand the *extent* to which the Committee advances SOGIESC norms in the international human rights framework.

4.2 Views in Individual Communications

The previous chapter demonstrated that the Committee has progressed significantly in relation to SOGIESC-inclusion and advancement of SOGIESC norms in Views in individual communications. There are nevertheless a number of issues with how the HRC has approached SOGIESC under the auspice of this monitoring function. The subsequent discussion identifies

three main challenges in regard to how the Committee has approached SOGIESC in Views in individual communications. The Views which will be discussed below are all listed in Table 4 in Chapter 3.

Firstly, Table 4 in Chapter 3 exhibited that the Committee has to date only adopted Views in individual communications pertaining to how the Covenant applies to individuals of diverse gender identity and expression twice, and has not adopted any Views pertaining to how the Covenant applies to individuals of diverse sex characteristics. This stands in stark contrast to the 16 Views adopted in individual communications concerning sexual orientation. It is important to note that the Committee does not itself elect which individual communications are brought before it. Consequently, the lack of Views adopted in relation to individuals of diverse gender identity and expression and sex characteristics is not the Committees' choice. However, the lack of Views adopted by the Committee in relation to gender identity and expression and sex characteristics entails that the SOGIESC norms promoted by the Committee under the auspice of this monitoring function are of limited value to individuals of diverse gender identity and expression and no value in relation to individuals of diverse sex characteristics.

Secondly, in some Views adopted in individual communications on subject matters pertaining to sexual orientation the Committee has deferred to 'general consensus' which can be detrimental to SOGIESC diverse groups. This was the case in for example *Hertzberg v Finland*.¹ *Hertzberg* was the first ever individual communication brought before the Committee in which an applicant sought to establish that the Covenant applied to persons of diverse sexual orientation. The authors in *Hertzberg* claimed that Finnish authorities interfered with their right to freedom of expression by censoring radio and TV programs that portrayed homosexuality. In *Hertzberg* the HRC found no violation of the Covenant. The Committee reasoned that the prohibition on radio and shows portraying homosexuality reflected prevailing moral conceptions in Finland, and that 'as far as radio and TV programmes are concerned, the audience cannot be controlled. In particular, harmful effects on minors cannot be excluded'.² In *Hertzberg* the Committee deferred to public morality without engaging with whether the 'public moral' in question was discriminatory and thereby a violation of the Covenant. Furthermore, the comment regarding harmful effects on minors was a rather explicit declaration of the Committees' view on homosexuality. It is likely that *Hertzberg* would have been decided differently today, considering progress that has been made for sexual orientation rights since the Views in *Hertzberg* were adopted in 1982. Nevertheless, the decision gives an indication regarding the approach of the Committee in adhering to, rather than

¹ (2 April 1982) Communication No. R14/61.

² Ibid para 10.4.

opposing, general consensus. This is problematic as the HRC is supposed to ensure the universality of human rights, not hinge protection of human rights on whether there is general consensus on the matter.

Another individual communication in which the Committee deferred to ‘general consensus’ was *Toonen*.³ Toonen challenged provisions in the Tasmanian Criminal Code prohibiting consensual same-sex sexual activity (CSSSA) between adult men in private. The Committee found that the provisions in the Tasmanian Criminal Code violated articles 17 and 2(1). While *Toonen* was significant by virtue of this being the first time the Committee accepted that sexual orientation was a protected characteristic under the ICCPR, parts of the Committee’s reasoning in the communication are cautious. The Committee concluded that criminalization of CSSSA could not be deemed essential to protect morals, as the State Party argued, for two reasons: (1) criminalization of homosexuality was repealed throughout the rest of Australia, (2) there was no consensus in Tasmania on whether the provisions in question should be repealed.⁴ This argument enabled the Committee to conclude that the provisions in question violated Toonen’s rights under the Covenant. However, by hinging the decision on whether there is consensus or disagreement on the matter in the State Party, the Committee adopted a cautious approach. This could limit the extent to which SOGIESC diverse groups are awarded protection because a State Party who violates the human rights of SOGIESC diverse groups could try to justify it by demonstrating that there is consensus on the matter.

Thirdly, the Committee has in two recently adopted Views maintained a cautious approach to how the Covenant applies to sexual orientation. First, in *Joslin v New Zealand* from 2002.⁵ The complaint was brought by four women who claimed that the failure of the Marriage Act to provide for homosexual marriage violated articles 16, 17, 23 and 26.⁶ The Committee found no violation. The Committee held that article 23 had been ‘consistently and uniformly understood’ as recognizing marriage as ‘a union between a man and a woman’.⁷ Langford notes that ‘the Committee provides no reference for this statement despite peppering the rest of the decision with footnotes’.⁸ Langford argues that the cautious approach in *Joslin* is a reflection of the Committee’s ‘modest compliance record with its decisions, exits by two states in protest at some decisions, and non-ratification of the OP1 by a third of state parties at the time the complaint was reviewed’.⁹

³ (31 March 1994) Communication No. 488/1992.

⁴ *Ibid* para 8.6.

⁵ (17 July 2002) Communication No. 902/1999.

⁶ *Ibid* para 3.1.

⁷ *Ibid* para 8.2.

⁸ Malcolm Langford, ‘Revisiting *Joslin v New Zealand*: Same-Sex Marriage in Polarised Times’ (2017) University of Oslo Faculty of Law Research Paper No. 2017-12 <<https://ssrn.com/abstract=2912904>> accessed 2 June 2020, 11.

⁹ Langford (n 8) 2.

However, the decision by the Committee not to assess whether there had been a violation of articles 16, 17 and 26 as the authors claimed, indicates a lack of willingness to evaluate the content of individuals' rights under the Covenant in the context of sexual orientation. While same-sex marriage is a controversial topic, the brevity of the Committees' arguments is reflective of cautiousness.

Second, in *Ernazarov v. Kyrgyzstan* from 2015,¹⁰ the Committees' decision can also be regarded as cautious. Specifically, the Committee failed to take a firm stance on the problem of violence and hate crimes against individuals on the basis of sexual orientation. The communication was brought by the brother of a man who had been convicted of "forced sodomy", whose subsequent death in detainment was allegedly the result of inter-prisoner violence against gay men. Despite the author arguing that the deceased was 'particularly vulnerable because he was charged with sexual offence against another man',¹¹ the Committee restricted its analysis to procedural guarantees which the national authorities failed to provide. The Committee noted that the author claimed the ill-treatment his brother endured was 'because of the nature of the charges brought against him',¹² but made no further comment. Considering that Kyrgyzstan launched a series of legal reforms in 2014 directly aimed at suppressing expression of sexual orientation and gender identity, and the subsequent '300% increase in attacks against LGBT people',¹³ the lack of engagement with discrimination on the grounds of sexual orientation is difficult to reconcile with the purported inclusion of sexual orientation as a protected characteristic under the ICCPR. While the Committee established that the State had violated the rights of the deceased, the Committee failed to seize this opportunity to provide a stance against the problem of violence and hate crimes against individuals on the basis of sexual orientation.

In summary, the main challenges in regard to how the Committee has dealt with SOGIESC in Views relate to: the few Views on how the Covenant applies in relation to gender identity and expression. No Views to date on how the Covenant applies in relation sex characteristics. The Views in which the Committee adhere to rather than oppose 'general consensus' which can limit the extent to which SOGIESC diverse groups are protected. Finally, that the Committee does not always adopt a progressive approach in relation to SOGIESC. These features all impact the extent to which SOGIESC norms are advanced by the Committee.

¹⁰ (25 March 2015) Communication No. 2054/2011.

¹¹ Ibid para 2.3.

¹² Ibid para 9.4.

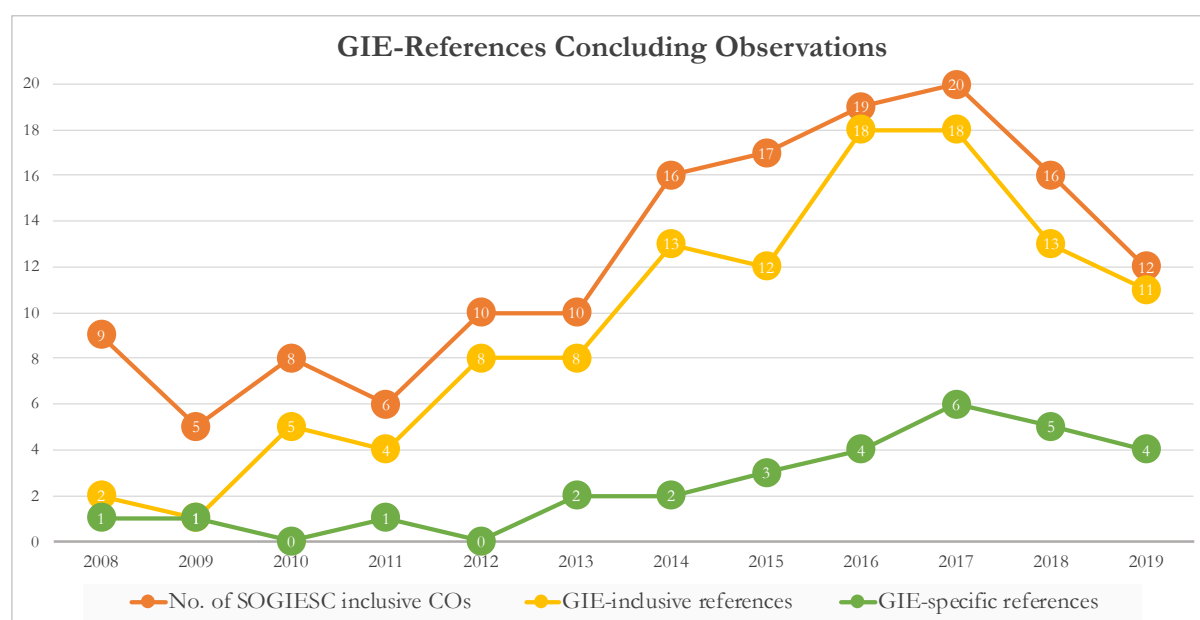
¹³ Katie Arnold, 'All of us will be victims at some point: why Bishkek's only gay club closed' (*The Guardian*, 19 October 2017) <<https://www.theguardian.com/cities/2017/oct/19/victims-closure-bishkek-only-lgbt-club-kyrgyzstan>> accessed 12 June 2020.

4.3 Concluding Observations

With regard to Concluding Observations, much has been done by the Committee to address and improve the situation of SOGIESC diverse groups in States Parties through this monitoring mechanism. However, a number of issues remain.

Firstly, there has overall been a lack of attention awarded to gender identity and expression and sex characteristics.¹⁴ With regard gender identity and expression, the HRC did not reference gender identity and expression in a Concluding Observation until 2008. Figure 5 below exhibit the number of references made to gender identity and expression in Concluding Observations since 2008.

Figure 5: References to gender identity and expression in Concluding Observations.



Source: Own findings based on review of the Human Rights Committees' Concluding Observations.

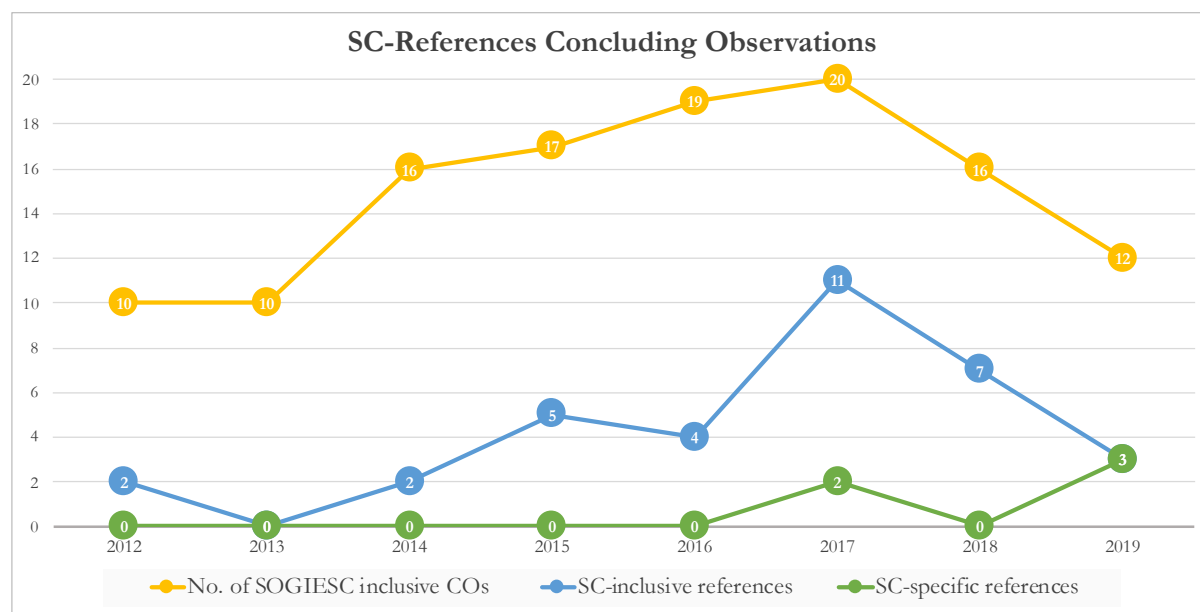
Figure 5 demonstrates that after 2008 inclusion of gender identity and expression has become more frequent. However, Figure 5 also demonstrates that few Concluding Observations have touched on issues that are specific to gender identity and expression, such as for example ensuring respect for individuals with diverse gender identity and expression through enactment of legislation on gender recognition.¹⁵

¹⁴ Before 2008 all SOGIESC-inclusive Concluding Observations concerned sexual orientation, and between 2008 and 2012 they concerned only sexual orientation and gender identity and expression.

¹⁵ Evan Vipond, 'Trans Rights Will Not Protect Us: The Limits of Equal Rights Discourse, Antidiscrimination Laws, and Hate Crime Legislation' (2015) 6 *Western Journal of Legal Studies* 1, 7.

Even fewer Concluding Observations have included reference to sex characteristics and the HRC has only addressed issues that are specific to sex characteristics a handful of times. Furthermore, the HRC did not reference sex characteristics in a Concluding Observation until 2012. Figure 6 below exhibit the number of references made to sex characteristics in Concluding Observations since 2012.

Figure 6: References to sex characteristics in Concluding Observations.



Source: Own findings based on review of the Human Rights Committees' Concluding Observations.

Figure 6 exhibits that, apart from 2017, issues concerning individuals with diverse sex characteristics have been referenced marginally and issues that are specific to individuals of diverse sex characteristics, such as medically invasive procedures, have only been referenced five times.

Another reoccurring shortcoming in the way the Committee addresses SOGIESC in Concluding Observations is the Committees' conflation of SOGIESC diverse groups. For example, in several Concluding Observations the Committee expresses concern about harassment and violence against the "LGBT" community, thereafter, proceeding to claim that the community faces discrimination on the grounds of their "sexual orientation", failing to mention "gender identity and expression".¹⁶ Similarly, the Committee has expressed concern about the situation of "LGBTI" and thereafter mentioned only that no person should be discriminated against on the basis of sexual orientation and gender identity, failing to mention sex characteristics.¹⁷ On another occasion the Committee stated that 'transsexual women have been placed in private clinics or

¹⁶ See *Concluding Observations: Russian Federation* CCPR/C/RUS/CO/6, 29 October 2009, para. 27; *Concluding Observations: Haiti* CCPR/C/HTI/CO/1, 27 October 2014, para. 9.

¹⁷ *Concluding Observations: Guatemala* CCPR/C/GTM/CO/3, 19 April 2012, para. 11.

rehabilitation centers in order to undergo so-called sexual reorientation treatments',¹⁸ which confuses sexual orientation with gender identity. These examples illustrate a lack of understanding regarding the distinction between sexual orientation, gender identity and expression and sex characteristics. The incorrect conflation of different categories can at worst reinforce the prejudices the Committee itself encourage States Parties to confront.

There is also a problem inherent in what appears to be the Committees' resolution to persistently refer to "LGBTI". The problem arises when these identity terms are used in relation to non-Western realities where their use may or may not be acknowledged. Browne and Nash argue that scholars have noted that

LGBT human rights claims and the interferences into domestic policies can be problematic. This is particularly so in locations where LGBT identities, grounded in understanding in the Global North, do not translate easily, if at all, to local understandings of gender and sexual practices, relationships, and desires.¹⁹

With the only exception of a single mention of 'hijra',²⁰ the Committee has become part and parcel of imposing Western discourse and identity terms on a global level. It is contended, as has also been noted by Gerber and Gory,²¹ that due to the controversial nature of universalist language in this area, the HRC needs to carefully examine the actual realities of SOGIESC in the State Party under review when adopting Concluding Observations and adapt the language accordingly.

Finally, lack of guidance from the Committee in Concluding Observations as to how States Parties should improve protection of SOGIESC diverse groups' human rights persists. For example, when the Committee recommends that the State Party "take measures"²² or "intensify its efforts"²³ to address prejudice and stigmatization against persons on the grounds of SOGIESC, without explaining what "measures" or "efforts" are, this is problematic. Or when the Committee recommends that the State should "demonstrate"²⁴ that they do not tolerate harassment or discrimination against SOGIESC diverse groups, without explaining how the state should "demonstrate" it, this is unhelpful. Similarly, when Slovakia is recommended to 'develop and implement a procedure for legal gender recognition that is compatible with the provisions of the

¹⁸ *Concluding Observations: Ecuador* CCPR/C/ECU/CO/5 4 November 2009, para. 12.

¹⁹ Katherine Browne and Catherine J Nash, 'Resisting LGBT Rights Where "We Have Won": Canada and Great Britain' (2014) 13 *Journal of Human Rights* 322, 324.

²⁰ *Concluding Observations: Bangladesh* CCPR/C/BGD/CO/1, 27 April 2017, para. 11.

²¹ Paula Gerber and Joel Gory, 'The UN Human Rights Committee and LGBT Rights: What is it Doing? What could it be doing?' (2014) 14 *Human Rights Law Review* 403, 415.

²² *Concluding Observations: Romania* CCPR/C/ROU/CO/5, 11 December 2017, para. 16.

²³ *Concluding Observations: Slovenia* CCPR/C/SVN/CO/3, 21 April 2016, para.10.

²⁴ *Concluding Observations: Cameroon* CCPR/C/CMR/CO/4, 4 August 2010, para. 12.

Covenant’,²⁵ but the Committee fails to explain what a compatible procedure is, this enhances ambiguity. Vague and generic recommendations carry the risk of arbitrary and capricious application. The Concluding Observations are above all an opportunity for constructive dialogue with the State Party. By providing vague guidance the Committee wastes an opportunity for providing constructive and actionable recommendations and advancing clear and unambiguous SOGIESC norms.

To summarize, the main challenges to the Committees’ approach to SOGIESC in Concluding Observations are: lack of attention to gender identity and expression and sex characteristics, conflation of SOGIESC diverse groups, persistent use of “LGBTI” terminology and lack of guidance for States Parties in how they should improve protection of SOGIESC diverse groups’ human rights.

4.4 General Comments

With regard to General Comments there are two types of shortcomings. Firstly, there are shortcomings in the three SOGIESC-inclusive General Comments. Secondly, there is the shortcoming that only three of the HRC’s 37 General Comments *are* SOGIESC-inclusive. I elaborate on these challenges below.

Beginning with the first SOGIESC-inclusive General Comment adopted by the Committee, General Comment 35 on Article 9 (Liberty and security of person). Firstly, while the Committee affirmed in General Comment 35 that criminalization of CSSSA violates the Covenant, it did so only implicitly. The reference to criminalization of CSSSA in General Comment 35 was only included in a footnote. By relegating this grave violation to a footnote, the Committee fails to take advantage of an opportunity to state explicitly that criminalization of CSSSA violates article 9. Furthermore, in General Comment 35 the Committee maintained its approach to “LGBT” terminology in paragraph 3. This is problematic as General Comments provide the Committees’ authoritative interpretation of the Covenant to 173 Member States with widely differing social, cultural and historical contexts. Finally, in General Comment 35 the Committee could have included reference to ‘gender identity and expression’ within its comment on the ambit of arbitrary violation of arrest or detention on discriminatory grounds as many countries have legislation which criminalizes “impersonating a different sex”. However, no such inclusion was made.

²⁵ *Concluding Observations: Slovakia* CCPR/C/SVK/CO/4, 31 October 2016, para. 15.

In the next SOGIESC-inclusive General Comment, General Comment 36 on Article 6 (Right to life), the main shortcoming concerns the discrepancy between the reference to ‘intersex’ in paragraph 23 and subsequent exclusion of sex characteristics in paragraph 61. In paragraph 23 the Committee affirmed that the duty to protect the right to life imposes a special duty on States with regards protection of persons in vulnerable situations, and that such persons include ‘lesbian, gay, bisexual, transgender and intersex persons’.²⁶ However, in in paragraph 61 of General Comment 36 the Committee states that ‘the right to life must be respected and ensured without distinction of any kind, such as ... sexual orientation or gender identity’.²⁷ Despite the Committees’ inclusion of ‘intersex’ in paragraph 23, it fails to include ‘sex characteristics’ in paragraph 61. This is either evident of an arbitrary conflation of ‘intersex’ with sexual orientation and gender identity, or an arbitrary exclusion of ‘intersex’. Either explanation is unsound. The exclusion is problematic considering that General Comment 36 was adopted as recently as 2018 and in light of the Committees’ own affirmation in paragraph 23 that States have a special duty to protect ‘intersex persons’.

Finally, in the last SOGIESC-inclusive General Comment, General Comment 37 on Article 21 (Right of peaceful assembly) there are also two notable omissions. Firstly, while the revised draft to General Comment 37 included the comment that States have a ‘duty to protect participants from homophobic, sexual or gender-based attacks’, the finalized version has removed this sentence. Instead, in paragraph 90, it states that States have an obligation to investigate unlawful use of force or other violations by law enforcement officials, including sexual or gender-based violence.²⁸ The choice to remove the inclusion of homophobic attacks is problematic considering that examples of violence against SOGIESC-diverse groups who attend assemblies are rife.²⁹ Secondly, General Comment 37 does not include reference to ‘sex characteristics’. The inclusion of ‘sex characteristics’ in General Comment 37 would have been valuable in light of the fact that Pride marches are an equally valuable advocacy tool for activism for those who face discrimination on the grounds of sex characteristics. This exclusion is a reminder that despite the progress made in General Comment 36, where the Committee included ‘intersex’, exclusion persists.

In addition to the shortcomings in those General Comments which are in fact SOGIESC-inclusive, it is also important to stress the shortcoming in relation to the fact that only three of the HRC’s 37 General Comments are SOGIESC-inclusive. It is unsurprising that the 24 general

²⁶ UN Human Rights Committee, ‘General Comment No. 35’ (2014) UN Doc CCPR/C/GC/35, para. 23.

²⁷ UN Human Rights Committee, ‘General Comment No. 36’ (2014) UN Doc CCPR/C/GC/36, para. 61.

²⁸ UN Human Rights Committee, ‘General Comment No. 37’ (2020) UN Doc CCPR/C/GC/37, para. 90.

²⁹ ILGA-Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia* (Maque Studio 2020).

comments published prior to 1994, when the Committee for the first time ever established in *Toonen* that the ICCPR protects individuals of diverse sexual orientation, are not SOGIESC-inclusive. However, it is striking that in the 13 General Comments published between 1995 and 2020, only three include reference to SOGIESC. Furthermore, the first reference to SOGIESC was not made until 2014. The incongruity is made more prominent by the fact that the Committee was explicitly referencing SOGIESC in its Concluding Observations and adopting Views protective of sexual orientation and gender identity between 1995 and 2014. There is a visible discrepancy between the inclusive and protective approach adopted in Concluding Observations and Views, compared to the exclusion in General Comments.

While not all General Comments adopted between 1995 and 2014 are relevant to SOGIESC rights,³⁰ in several General Comments adopted within this time frame reference to SOGIESC would have been valuable. For instance, Gerber and Gory argue that General Comment 28, on the equality between men and women adopted in 2002, would have been an ideal opportunity for mentioning States Parties 'responsibility to protect the rights of lesbians including preventing violence perpetrated against them under the guise of cultural, religious or traditional attitudes'.³¹ However, no such reference was made by the Committee. Furthermore, General Comment 34 on freedom of opinion and expression adopted in 2011 should have been SOGIESC-inclusive. There is an inextricable connection between freedom of expression and SOGIESC. This is exhibited by, for example, that several States interfere with SOGIESC diverse groups' freedom of expression by banning Pride marches, conferences and events.³² The adverse nature of SOGIESC-exclusion in General Comment 34 is accentuated by the fact that during the reading of a draft version of General Comment 34 the Committee discussed a proposal from several NGOs to include a reference to 'the right of expression of dress, as well as forms of expression of sexual orientation and gender identity'.³³ The reluctance by several Committee members to include such a reference meant these proposals were overturned.

The exclusion of SOGIESC in General Comments before 2014 is furthermore difficult to reconcile with the fact that other UNTBs included sexual orientation and gender identity in General Comments as early as 2006. The Committee on Economic, Social and Cultural Rights (CESCR) affirmed the principle of non-discrimination on grounds of sexual orientation for the

³⁰ See UN Human Rights Committee, 'General Comment No. 24' (1994) UN Doc CCPR/C/21/Rev.1/Add.6; UN Human Rights Committee, 'General Comment No. 30' (2002) UN Doc CCPR/C/21/Rev.2/Add.12; UN Human Rights Committee, 'General Comment No. 33' (2009) UN Doc CCPR/C/GC/33.

³¹ Gerber and Gory (n 20) 421.

³² United Nations Office of the High Commissioner for Human Rights, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' (17 November 2011) UN Doc A/HRC/19/41, 20-21.

³³ UN Human Rights Committee, Summary Record of the 2788th Meeting, 23 March 2011, CCPR/C/SR.2788.

first time in 2006 in General Comment 18,³⁴ and again in 2008 in General Comment 19.³⁵ In 2009 the CESCR clarified that both sexual orientation and gender identity were protected characteristics in General Comment 20.³⁶ Furthermore, the Committee Against Torture (CAT) affirmed that the obligation to protect all persons from torture and ill-treatment extended to sexual orientation and gender identity in 2008 in General Comment 2.³⁷ The practice of other UNTBs would imply that there was nothing exceptional in explicitly extending the ambit of the Covenant to sexual orientation and gender identity in General Comments. The exclusion by the HRC of SOGIESC in General Comments, as compared to other UNTBs, may imply that the Committee members of the HRC reluctant to include SOGIESC have been more successful, or that other UNTBs do not have Committee members who advocate for exclusion. Either possibility is hard to reconcile with the purported mission of the HRC to strengthen protection of human rights for everyone.

In summary, the main shortcomings for SOGIESC in relation to General Comments are the lack of engagement with issues pertaining to gender identity and expression and sex characteristics, the fact that the Committee conflates the SOGIESC identity categories and the Committees' failure to address certain issues of importance for SOGIESC diverse groups adequately. Furthermore, with regard to the General Comments that do not include reference to SOGIESC, this exclusion in itself is a shortcoming.

4.5 Marginalization of Gender Identity and Expression and Sex Characteristics

The discussion in the previous sections demonstrate that a re-occurring challenge throughout the three monitoring functions is the lack of engagement by the HRC as to how the ICCPR applies to individuals of diverse gender identity and expression and sex characteristics. In the following discussion I demonstrate why the marginalization of gender identity and expression and sex characteristics in the HRC's work is problematic.

With regards gender identity and expression, the Committee has increasingly included gender identity in Concluding Observations, in three General Comments, and have adopted promising Views in one communication on gender identity. However, gender identity and

³⁴ UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 18' (2006) UN Doc E/C.12/GC/18.

³⁵ UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 19' (2008) UN Doc E/C.12/GC/19.

³⁶ UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 20' (2009) UN Doc E/C.12/GC/20.

³⁷ UN Committee Against Torture, 'General Comment No.2' (2008) UN Doc CAT/C/GC/2.

expression is still treated largely subsidiary to sexual orientation by the HRC. Essentially this entails treating sexual orientation and gender identity and expression as a unified category despite them being distinct categories. McGill contends that when sexual orientation and gender identity and expression are treated as a unified category by UNTBs this ‘poses a significant risk that trans people and human rights issues related to gender identity and expression will simply disappear from human rights discourse, or be included only as an afterthought’.³⁸ McGill argues that

It is imperative that evolving international human rights norms actively engage with, and are inclusive of trans people *qua* trans people, and address the specific human rights priorities related to gender identity and expression, as distinct from sexual orientation and same-sex behaviour.³⁹

The lack of engagement with specific human rights violations related to gender identity and expression is exemplified by, for instance, the lack of engagement with condemnation of criminalization of ‘cross-dressing’ which is often used to criminalize individuals of diverse gender identity and expression.⁴⁰ Furthermore, laws that criminalize ‘unnatural offences’ as well as vagrancy laws also lead to various human rights violations of individuals of diverse gender identity and expression, including arbitrary arrests and detention.⁴¹ However, the Committee has so far not addressed these issues under the auspice of its three monitoring mechanisms.

The situation for individuals of diverse sex characteristics is even more precarious. ‘Sex characteristics’ has never featured in Views, and as discussed in section 4.3 and 4.4 sex characteristics has been conflated with sexual orientation and gender identity and expression a number of times in both Concluding Observations and General Comments.⁴² The conflation of sex characteristics with sexual orientation and gender identity and expression is problematic because sex characteristic-specific issues are left unsolved. For instance, while the Committee has noted that principles of non-discrimination apply to sex characteristics in Concluding Observations,⁴³ Garland and Travis argue that the protective function of anti-discrimination measures in the context of sex characteristics is limited on its own. This is because anti-

³⁸ Jena McGill, ‘SOGI...So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations’ (2014) 3 *Canadian Journal of Human Rights* 1, 24.

³⁹ *Ibid* 23.

⁴⁰ *Envisioning Global LGBT Human Rights: (Neo)colonialism, Neoliberalism, Resistance and Hope*, Nancy Nicol, Adrian Jjuuko, Richard Lusimbo, Nick J Mulé, Susan Ursel, Amar Wahab and Phyllis Waugh (eds) (School of Advanced Study Human Rights Consortium, 2018) 14.

⁴¹ See *Envisioning Global LGBT Human Rights* (n 34) 13-14; UN GA, ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’ (2017) UN Doc A/72/172, 11-12.

⁴² See *Concluding Observations: Guatemala* CCPR/C/GTM/CO/3, 19 April 2012, para. 11; GC 36 (n 27).

⁴³ See *Concluding Observations: Belize* CCPR/C/BLZ/CO/1/Add.1, 11 December 2018, para. 14; *Concluding Observations: Paraguay* CCPR/C/PRY/CO/4, 20 August 2019, para. 15.

discrimination measures on their own do not ‘interfere with or even recognise the medical jurisdiction over intersex bodies’.⁴⁴ Non-therapeutic medical interventions on the bodies of children with sex characteristics that do not fit the binary of ‘female’ or ‘male’, that are forced, coercive or otherwise involuntary, may amount to torture. Silence on this matter from the HRC, who oversees implementation of the ICCPR which includes the right to be free for torture, is consequently concerning. As Garland and Travis note,

legal silence effectively legitimizes the medical account of intersex as a purely material concern, permits attempts to ‘normalize’ these bodies and enables their social or cultural erasure... Law’s silence is therefore not neutral; rather it perpetuates the existence of a striking power imbalance between intersex people, their families and the medical profession.⁴⁵

Having support from an international human rights institution such as the HRC regarding non-therapeutic medical interventions would have been valuable because it could assist in challenging the authority of the biomedical narrative.

Overall, the HRC habitually treat sexual orientation, gender identity and expression and sex characteristics as unified categories and marginalizes gender identity and expression and sex characteristics. By treating SOGIESC as unified, the HRC implicitly suggest that the human rights interests, goals and priorities relevant to each distinct group are identical, or at least convergent. While SOGIESC diverse groups do face some similar challenges, SOGIESC are distinct categories, and there is an array of critical human rights issues unique to the context of gender identity and expression and sex characteristics. Furthermore, the lack of attention to gender identity and expression and sex characteristics by the HRC also indicates that the Committee is yet to adopt an approach to comprehensively protect individuals of diverse sexual orientation *and* gender identity and expression, *and* sex characteristics. By arbitrarily excluding gender identity and expression to some extent, and sex characteristics to a larger extent, the HRC is contributing to the entrenchment of a hierarchy of whom deserves to be subjects of human rights. This is in opposition with the calls for universality of human rights. In summary, it can be concluded that the promotion of norms by the HRC that sufficiently include gender identity and expression and sex characteristics is lacking.

⁴⁴ Fae Garland and Mitchell Travis, ‘Legislating Intersex Equality: Building the Resilience of Intersex People through Law’ (2018) 38(4) *Legal Studies* 587, 598.

⁴⁵ *Ibid* 590.

4.6 Conclusion

In this chapter I have discussed shortcomings and challenges that characterize the Committee's engagement with SOGIESC under the auspice of its three monitoring functions. Several shortcomings and challenges were identified, most of which were particular to the specific monitoring mechanism. However, one shortcoming which re-emerges across all three monitoring mechanisms is that the HRC has addressed issues concerning gender identity and expression and sex characteristics less frequently. The lack of attention to gender identity and expression and sex characteristics within the HRC's three monitoring functions directly influences the norms advanced by the HRC. It demonstrates that the *extent* to which SOGIESC norms are advanced by the HRC hinges on which of the three identity categories one is considering and therefore that the progress made on advancement of SOGIESC norms by the HRC is qualified.

Chapter 5.

Evaluating SOGIESC Norm Advancement by the Human Rights Committee

5.1 Introduction

In this chapter I answer the fifth sub-question listed in Chapter 1. I discuss what characterizes SOGIESC norm advancement by the HRC overall. To do this I first consider whether the four SOGIESC norms identified in Chapter 3 are characterized by intrinsic qualities of successful norms discussed in Chapter 2. The four SOGIESC norms identified in Chapter 3 were (1) the prohibition of criminalization of consensual same-sex sexual activity (CSSSA), (2) human rights principles of non-discrimination and equality apply to SOGIESC, (3) violence against individuals on the grounds of SOGIESC is prohibited, and (4) rights to freedom of expression and peaceful assembly apply to individuals of diverse sexual orientation and gender identity. I also assess whether the Committee has adapted to norm contestation based on the findings in Chapter 3.

In this chapter I argue that specific norms, for specific identity categories, are being consistently embraced and promoted. This entails that other norms, and other identity categories, lack the same coherent and expansive protection. I verify the conclusion from Chapter 4 that gender identity and expression and sex characteristics are marginalized.

In the final section I consider more broadly what the prospects are for the HRC advancing SOGIESC norms efficiently despite the fact that some SOGIESC norms for specific identity categories have thus far been advanced more consistently. Through evaluating the four SOGIESC norms and considering the prospects of the HRC advancing SOGIESC norms this chapter aids answering the main question of the dissertation, which is to what *extent* the HRC advances SOGIESC norms in the international human rights framework.

5.2 Revisiting Norm Formation and Intrinsic Qualities of Successful Norms

Chapter 2 introduced Finnemore and Sikkink's 'international norm dynamics approach' (INDA) model. According to this model the process of norm formation follows a pattern of (1) norm emergence, (2) norm cascade, and (3) norm internalization, with a 'tipping point' between norm

emergence and norm cascade. The question of whether a novel norm is internalized is argued to depend on intrinsic qualities of the norm.¹ In norm research scholars claim that the formulation of the norm, its clarity and specificity, the substance of the norm, and the issues it addresses are imperative.² Furthermore, Keck and Sikkink argue that ‘norms involving (1) bodily integrity and prevention of bodily harm for vulnerable or ‘innocent’ groups, especially when a short causal chain exists between cause and effect, and (2) legal equality of opportunity, are particularly effective transnationally and cross-culturally’.³ Finally, Finnemore and Sikkink assert that adjacency claims, where the relationship of new normative claims to existing norms is strong, influence the likeliness of a norms’ success.⁴ For present purposes it is valuable to assess whether the HRC is relying on the factors identified as characterizing successful norms in their formulation and promotion of the four SOGIESC norms, as this can impact the success of advancing the SOGIESC norms.

In addition to the traditional concepts concerning norm formation, Chapter 2 furthermore exhibited that scholars have increasingly focused on ‘norm contestation’. Norm contestation entails objection to specific issues, where actors ‘discursively express disapproval of norms’.⁵ Norm contestation require that norms, in this instance SOGIESC norms, are pursued with even more vigour.⁶ This can be effectuated by putting further impetus on persuasion and framing of SOGIESC norms. In light of this it is essential to assess whether the HRC has improved its advancement of SOGIESC norms to adapt to the current environment of contestation.

5.3 Evaluation of the Four SOGIESC Norms

In the following sub-sections I evaluate the four SOGIESC norms in relation to intrinsic qualities of successful norms, consider whether the Committee has adapted to norm contestation and whether the SOGIESC norm applies equally to individuals of diverse sexual orientation *and* gender identity and expression *and* sex characteristics.

¹ Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52(4) *International Organization* 887, 906.

² Elizabeth Baisley, ‘Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity’ (2016) 38 *Human Rights Quarterly* 134, 138.

³ Finnemore and Sikkink (n 1) 907.

⁴ *Ibid* 908.

⁵ Antje Wiener, *A Theory of Contestation* (Springer, 2014).

⁶ Joel Voss, ‘Contesting Sexual Orientation and Gender Identity at the UN Human Rights Council’ (2017) 19 *Human Rights Review* 1, 20.

5.3.1 *Criminalization of CSSSA*

The first SOGIESC norm I asserted in Chapter 3 is advanced by the HRC is that criminalization of CSSSA violates the ICCPR. The intrinsic qualities of successful norms are clearly exemplified in the prohibition of criminalization of CSSSA. Firstly, the norm is clear and specific: criminalization of CSSSA violates the right to privacy and to protection against discrimination enshrined in the ICCPR.⁷ Furthermore, the norm is also an example of an adjacency claim as the Committee has linked the prohibition of criminalization of CSSSA to articles 2, 6, 9 and 17 of the ICCPR.⁸ This norm therefore has qualities which indicate that the likeliness of this norms success is heightened and therefore it is apt that the Committee is advancing this norm.

Chapter 3 identified *Toonen*, an individual communication from 1994 on criminalization of CSSSA, as the first time where the HRC explicitly extended the ambit of the ICCPR to sexual orientation. Chapter 3 further exhibited that criminalization of CSSSA has received extensive attention in Concluding Observations. It was illustrated in Table 2 in Chapter 3 that subsequent to 2008, Concluding Observations in which the Committee condemned criminalization of CSSSA increased significantly.⁹ Finally, in Chapter 3 I discussed General Comment 36 on article 6 (the right to life) from 2018, where the Committee explicitly affirmed the prohibition of criminalization of CSSSA.¹⁰ Consequently, the issue of criminalization of CSSSA is one that has received attention from the Committee over an extended period of time. By including the prohibition of criminalization of CSSSA in a General Comment the Committee can be argued to have strengthened the persuasiveness of the condemnation as General Comments apply to all 173 States Parties to the ICCPR. These features are indicative of the Committee adapting to ‘norm contestation’. The prohibition of criminalization of CSSSA can thus be regarded as a SOGIESC norm that the HRC is pursuing with vigour.

This SOGIESC norm only targets individuals of diverse sexual orientation. Consequently, this SOGIESC norm does not apply to the identity categories of gender identity and expression and sex characteristics.

⁷ See *Toonen v Australia* (31 March 1994) Communication No. 488/1992.

⁸ See *Toonen* (n 7); UN Human Rights Committee, ‘General Comment No. 35’ (2014) UN Doc CCPR/C/GC/35; UN Human Rights Committee, ‘General Comment No. 36’ (2014) UN Doc CCPR/C/GC/36.

⁹ Since 2008 *all* States who criminalize CSSSA and have received Concluding Observations have received recommendation to decriminalize.

¹⁰ GC 36 (n 8) para. 36.

5.3.2 *Non-Discrimination and Equality*

The second category of SOGIESC norm advanced by the HRC is that principles of non-discrimination and equality apply to SOGIESC diverse groups. Similarly to the prohibition of criminalization of CSSSA, the non-discrimination and equality SOGIESC norm is a norm with strong intrinsic qualities. Firstly, it is an adjacency claim as it links specifically to the existing principles of non-discrimination enshrined in articles 2 and 26 of the ICCPR. Secondly, it is characterized by the concept of legal equality. The rationale for pursuing this norm is therefore that the norm is founded on principles that are effective transnationally and cross-culturally.

The affirmation by the Committee that individuals of diverse sexual orientation are protected by the principles of non-discrimination and equality in the ICCPR has been given thorough attention throughout the three monitoring mechanisms over a long period of time. In relation to sexual orientation it is a norm that has been pursued by the Committee since the 1994 decision in *Toonen*, been advanced in Concluding Observations since 1995, and been affirmed in General Comment 35 adopted in 2014,¹¹ and General Comment 36 adopted in 2018.¹² Premised on the attention and focus granted this SOGIESC norm in relation to sexual orientation in each of the three monitoring mechanisms over an extended time frame it can be claimed that the HRC is adapting to norm contestation and contributing to this norm being internalized in relation to sexual orientation.

The affirmation by the Committee that individuals of diverse gender identity and expression are protected by the principles of non-discrimination and equality in the ICCPR has occurred more recently than the same affirmation in relation to sexual orientation. Nevertheless, the HRC has affirmed that gender identity and expression are protected by the principles of non-discrimination and equality in Concluding Observations, in the View *G v Australia* from 2017,¹³ as well as General Comment 35 and General Comment 36. This indicates that the prospects for the HRC adapting to norm contestation and advancing this norm successfully is improving.

Finally, with regards sex characteristics this SOGIESC norm has not been advanced as strongly. The Committee has only affirmed that the principles of non-discrimination and equality apply to individuals of diverse sex characteristics in Concluding Observations,¹⁴ never in Views nor in General Comments. Concluding Observations only target the specific country receiving the

¹¹ GC 35 (n 8).

¹² GC 36 (n 8).

¹³ (15 June 2017) Communication No. 2172/2012.

¹⁴ See *Concluding Observations: Thailand* CCPR/C/THA/CO/2, 25 April 2017, paras. 11-12; *Concluding Observations: Italy* CCPR/C/ITA/CO/6, 1 May 2017, paras. 10-11.

Concluding Observation and are therefore of limited applicability on a more widespread level. Consequently, this SOGIESC norm is not of a general applicability to all Member States of the ICCPR in relation to sex characteristics, but can nevertheless be seen as an emerging norm through the practice in Concluding Observations.

5.3.3 *Violence*

The third category of SOGIESC norm advanced by the HRC is that violence against individuals on the grounds of their sexual orientation, gender identity and expression or sex characteristics violates the ICCPR. The prohibition against violence towards SOGIESC diverse groups is a norm with strong intrinsic qualities. Firstly, it involves bodily integrity and prevention of bodily harm for vulnerable or ‘innocent’ groups. Furthermore, it is also an adjacency claim that is linked to articles 6, 7 and 9 in the ICCPR. Consequently, this SOGIESC norm is valuable to advance due to the fact that it is characterized by strong intrinsic qualities.

The Committee has affirmed that violence against individuals on the grounds of sexual orientation violates the ICCPR in three Views in individual communications,¹⁵ and in two General Comments.¹⁶ In relation to Concluding Observations the issue of violence is the second most referenced subject matter in SOGIESC-inclusive Concluding Observations, consequently, this will have been awarded much focus in relation to individuals of diverse sexual orientation. Thus, for the category of sexual orientation this SOGIESC norm is advanced strongly.

The Committee has thus far not affirmed this SOGIESC norm in relation to gender identity and expression or sex characteristics in Views. However, the Committee affirmed in General Comment 35 on Article 9 (Liberty and security of person) that ‘States parties must respond appropriately to...violence against persons on the basis of their sexual orientation or gender identity’.¹⁷ Furthermore, in General Comment 36 on Article 6 (the right to life), the Committee affirmed that the duty to protect the right to life imposes a special duty on States with regards protection of persons in vulnerable situations, and that such persons include ‘lesbian, gay, bisexual, transgender and intersex persons’.¹⁸ Consequently, the practice from these two General Comments suggest that the Committee is pursuing this SOGIESC norm for each of the three identity categories and adapting to norm contestation by spelling out the norm more specifically

¹⁵ See *X v Sweden* (4 November 2011) Communication No. 1833/2008; *M.I v Sweden* (25 July 2013) Communication No. 2149/2012; *Ernazarov v. Kyrgyzstan* (25 March 2015) Communication No. 2054/2011.

¹⁶ See GC 35 (n 8); GC 36 (n 8).

¹⁷ GC 35 (n 8) para. 9.

¹⁸ GC 36 (n 8) para. 23.

in General Comments. However, the Committee has advanced this SOGIESC norm for individuals of diverse gender identity and expression and sex characteristics more recently than for sexual orientation, and never in Views in individual communications. In relation to these identity categories it must therefore be regarded as an emerging norm.

5.3.4 Freedom of Expression and Freedom of Peaceful Assembly

The final SOGIESC norm advanced by the HRC is that the right to freedom of expression and freedom of peaceful assembly apply equally to individuals of diverse sexual orientation and gender identity. Two points should be noted with regards this specific norm. First, it can be seen as related to the non-discrimination and equality norm, as the Committee has adopted Views and General Comments where they declare that States may not deal with assemblies or interfere with expression in a discriminatory manner. Consequently, it displays the characteristic of equality. Second, it is again an adjacency claim as new rights are not being formulated. It is merely the extension of the existing provisions article 19 (freedom of expression) and article 21 (peaceful assembly) to the context of sexual orientation and gender identity.

This specific SOGIESC norm has been advanced for the identity category sexual orientation in five Views.¹⁹ With regard to gender identity this SOGIESC norm has been advanced in one View.²⁰ Together the Views affirm that the Committee is advancing this SOGIESC norm for both individuals of diverse sexual orientation *and* gender identity. In addition, the Committee affirmed in General Comment 37 on Article 21 (Right of peaceful assembly), that States have an obligation not to deal with assemblies in a discriminatory manner on the basis of sexual orientation and gender identity.²¹ The Committee has advanced this SOGIESC norm most recently and thus it can be regarded as an emerging norm.

In relation to sex characteristics the Committee has not adopted any Views or General Comments affirming that individuals of diverse sex characteristics are covered by article 19 and article 21. Consequently, this SOGIESC norm does not apply to this identity category.

¹⁹ *Alekseev v Russia* (2 December 2013) Communication No. 1873/2009; *Praded v Belarus* (25 November 2014) Communication No. 2029/2011; *Androsenko v Belarus* (11 May 2016) Communication No. 2029/2011; *Fedotova v Russian Federation* (31 October 2012) Communication No. 1932/2010; *Nepomnyaschij v Russian Federation* (17 July 2018) Communication No. 2318/2013.

²⁰ *Nepomnyaschij v Russian Federation* (n 18).

²¹ UN Human Rights Committee, 'General Comment No. 37' (2020) UN Doc CCPR/C/GC/37, para. 25.

5.3.5 *Summary*

Two points can be made about the SOGIESC norms advanced by the HRC. Firstly, the four SOGIESC norms are not advanced equally. Prohibition of criminalization of CSSSA has received most thorough attention by the Committee, thereafter the prohibition of discrimination, then prohibition of violence and finally freedom of expression and peaceful assembly. Secondly, the four categories of SOGIESC norms are advanced most extensively for individuals of diverse sexual orientation, to a lesser extent for individuals of diverse gender identity and expression, and only emerging in relation to the two SOGIESC norms on non-discrimination and equality and violence for individuals of diverse sex characteristics. Inherently the four SOGIESC norms offer least protection to individuals of diverse gender identity and expression and sex characteristics. Consequently, the extent to which the Committee advances SOGIESC norms in the international human rights framework depends both on which norm one refers to and whether the norm is advanced for individuals of diverse sexual orientation *or* gender identity and expression *or* sex characteristics.

5.4 Value of the HRC Promoting SOGIESC Norms

Every human rights project undertaken by UNTBs has its own unique set of practical and conceptual challenges, and the SOGIESC agenda is no exception. The issues outlined above in relation to the fact that the four SOGIESC norms are not advanced equally, nor advanced equally for each of the three identity categories should not automatically lead to the conclusion that the HRC must abandon its current trajectory regarding advancement of SOGIESC norms. Nor, as McGill claims ‘do they necessarily suggest some fundamental, insurmountable dissonance between the human rights frameworks’,²² and SOGIESC. Petchesky argues that the UN discourse on sexual orientation ‘may be the most ambiguous and frustrating and simultaneously the most promising’.²³ This argument is equally applicable to the SOGIESC norms promoted by the HRC. The four SOGIESC norms provide a foundation for furthering the struggle to ensure the universality of the rights in the ICCPR, and thereby ensuring that SOGIESC diverse groups’ human rights are protected.

²² Jena McGill, ‘SOGI...So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations’ (2014) 3 *Canadian Journal of Human Rights* 1, 35.

²³ Rosalind Petchesky, ‘Sexual Rights Policies across Countries and Cultures: Conceptual Frameworks and Minefields’ in Richard Parker, Rosalind Petchesky and Robert Sember (eds) *Sex Politics: Reports from the Frontlines* (Sexuality Policy Watch, 2007) <www.sxpolitics.org/frontlines/book/pdf/sxpolitics.pdf> 9 at 19.

The value of the HRC's role in promoting the four SOGIESC norms can be summarized in one way: consistency. Sanders argues that

[I]nternational relations and law scholars have increasingly recognized that norm salience requires consistent enactment in practice (Brunnée and Toope 2010). Actors may contest and even undo norms through failing to follow through on their commitments and comply with rules. As Panke and Petersohn (2011) argue, norms erode or disappear without enforcement. When norms lack defenders, norm challengers may be progressively emboldened, triggering a «non-compliance cascade.» Norms then lose their prescriptive status.²⁴

It is therefore imperative to note that the HRC, rather than abandoning the four SOGIESC norms, have incrementally improved their advancement of the four SOGIESC norms. To claim that the four SOGIESC norms for each of the three identity categories have passed the tipping point and are cascading through the international society because of this would be to ignore the endemic nature of CSSSA, discrimination, violence, and limits to freedom of expression and peaceful assembly that SOGIESC diverse groups experience.²⁵ However, there is scope to argue that the HRC has not only incidentally improved its commitment to these norms, but have pursued them with emphasis on consistency. Chapter 3 demonstrated that since 2014 the Committee has adopted an increasing number of Views in individual communications affirming that the ICCPR extends to sexual orientation and gender identity. Furthermore, the Committee has included reference to SOGIESC in far more Concluding Observations since 2014. Finally, the Committee has included reference to sexual orientation and gender identity in all three General Comments adopted after 2014, as well as sex characteristics in one of the three General Comments adopted since 2014.

Rather than abandoning the four SOGIESC norms, which are indeed subject to extensive criticism by States who view them incompatible with moral, religious, traditional or cultural convictions, the HRC has increased its advancement of these SOGIESC norms. Consequently, if the contention is that norm challengers will be emboldened if norms lack defenders, the HRC is filling the position of an active enforcer. This may serve a purpose for ensuring that the four categories of SOGIESC norms do not erode or disappear. Increased consistency is thus, in itself,

²⁴ Rebecca Sanders, 'Norm Proxy War and Resistance Through Outsourcing: The Dynamics of Transnational Human Rights Contestation' (2016) 17 Hum Rights Rev 165, 171.

²⁵ See International Lesbian, Gay, Bisexual, Trans and Intersex Association: Lucas Ramón Mendos, *State-Sponsored Homophobia* (Geneva, 2019); United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law' (2019).

a valuable contribution from the HRC in regards reaching norm internalization for the four SOGIESC norms.

Importantly, in the pursuance of protecting SOGIESC diverse groups there may be inherent valuable potential in the structure of the HRC as a UNTB as compared to other UN bodies. To illustrate this argument one can consider the fact that the UN General Assembly (UNGA), the main deliberative, policy-making, and representative organ of the UN, has never adopted a resolution on SOGIESC. Another example is the Human Rights Council, which despite its role as standard-setter at the UN, did not engage with sexual orientation and gender identity and expression issues until 2003.²⁶ This is nearly a decade after the HRC adopted its Views in *Toonen*. Furthermore, the Human Rights Council has to this date not adopted a resolution concerning the human rights of individuals with diverse sex characteristics. Voss argues that the lag effect between the HRC and the Human Rights Council is largely due to the political-diplomatic nature of the Human Rights Council, compared to the more apolitical nature of the UNTBs.²⁷ Furthermore, Voss emphasizes that ‘resolutions concerning sexual orientation and gender identity receive far fewer affirmative votes in the Council than almost any other set of resolutions’.²⁸ The practice from the UNGA and the Human Rights Council evidences the exclusion of SOGIESC in the more political forums in the UN and distinguishes the HRC as a more beneficial forum for the advancement of SOGIESC norms.

An explanation for the discrepancy between the frequency with which the HRC has come to advance SOGIESC norms, as compared to other UN bodies, lies in the structure of the HRC as a UNTB as stated above. Addo argues that the strength of UNTBs lie in their open-ended approach, coupled with a relatively structured judicial approach.²⁹ Addo remarks that this provides UNTBs with sufficient flexibility and legal certainty to ‘define a credible standard for the reconciliation of tensions between the diversity of cultural practices on the one hand and the universal respect for human rights on the other’.³⁰ Addo suggests that

²⁶ In 2003 Brazil offered a Resolution on Sexual Orientation and Human Rights. In 2004, the discussion of the resolution was postponed, then deferred and ultimately, in 2005, the Brazil Resolution was abandoned without coming to a discussion or a vote in its merits. See O’Flaherty M and Fisher J, ‘Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles’ (2008) 8(2) Human Rights Law Review 207, 230.

²⁷ Voss (n 15) 7.

²⁸ Ibid 8.

²⁹ Michael K. Addo, ‘Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights’ (2010) 32(3) Human Rights Quarterly 601, 615.

³⁰ Ibid.

the constructive dialogue between national authorities and UN treaty bodies provides a valuable opportunity for working out common legal standards... The constructive dialogue enables states to reiterate, revisit, or be challenged on the value of particular cultural norms and practices.³¹

This is essential in the context of SOGIESC rights because those who resist the inclusion of these rights frequently make their claims on the grounds of respect for cultural, religious, moral or traditional diversity. In spite of these promising features, it is apt to question whether the HRC can promote the tipping and cascading of SOGIESC norms for states that adamantly reject the rights of SOGIESC diverse groups at present. At the same time, the increased consistency with which the HRC is promoting the SOGIESC norms may have the potential to convince states who passively reject or passively accept the SOGIESC norms, to embrace and promote them.

5.5 Conclusion

In this chapter I have discussed what characterizes SOGIESC norm advancement by the HRC overall. To make the evaluation I first considered whether the four SOGIESC norms identified in Chapter 3 were characterized by intrinsic qualities of successful norms and whether the Committee had adapted to norm contestation. The assessment demonstrated that each of the four SOGIESC norms promoted by the HRC are characterized by intrinsic qualities of successful norms such as clarity and specificity, bodily integrity, legal equality of opportunity and adjacency claims. I also demonstrated that the four SOGIESC norms promoted by the HRC are not advanced equally, and are advanced most ardently for sexual orientation, to a lesser extent for gender identity and expression, and predominantly marginalize sex characteristics. Consequently, uneven progress can be said to characterize advancement of the four SOGIESC norms promoted by the Committee. In spite of this, it was argued that there is great value in the HRC promoting the SOGIESC norms due to the increased consistency with which the respective SOGIESC norms are being pursued and the unique flexibility and legal certainty which characterizes the HRC as a UNTB.

³¹ Addo (n 29) 617.

Chapter 6.

Recommendations

6.1 Introduction

In this chapter I offer recommendations for how the HRC can improve advancement of SOGIESC norms. The recommendations seek to address some of the limitations discussed in Chapter 4 and Chapter 5. The measures proposed are: (1) improve integration of the Yogyakarta Principles, (2) improve inclusion of gender identity and expression and sex characteristics, and (3) formulate a General Comment relating to SOGIESC. These measures seek to address the problems relating to arbitrary conflation of the different SOGIESC identity categories, the gap on specific measures addressing issues relating to gender identity and expression and sex characteristics, and unequivocal inclusion of SOGIESC as protected characteristics under the ICCPR. Importantly, these measures can act as a step towards improving advancement of SOGIESC norms by the HRC in the international human rights framework.

6.2 Improve Integration of the Yogyakarta Principles

The first suggestion as to how the HRC can improve advancement of SOGIESC norms is through formulating SOGIESC norms that reflect the distinction between the SOGIESC identity categories. A valuable tool in reaching this aim are the Yogyakarta Principles. The Yogyakarta Principles are two documents that establish states' pre-existing legal obligations enshrined in international human rights law (IHRL) in respect of SOGIESC. The two documents were created by a group of international human rights experts with the purpose of 'seeking a human rights response to stigma, violence, and discrimination against people based on their SOGIESC'.¹ The Yogyakarta Principles are not legally binding, but rather serve as an interpretive aid.

The first Yogyakarta Principles, the Yogyakarta Principles on the Application of International Human Rights Law in Relations to Sexual Orientation and Gender Identity (YP) were issued in March 2007.² The YP contains 29 principles in total. Each principle comprises a

¹ Andrew Park, 'Yogyakarta Plus 10: A Demand for Recognition of SOGIESC' (2019) 44(2) North Carolina Journal of International Law 223, 225.

² Yogyakarta Principles on the Application of International Human Rights Law in Relations to Sexual Orientation and Gender Identity (YP) (2007) available at <<https://yogyakartaprinciples.org>>.

statement of IHRL, its application to sexual orientation and gender identity, and an indication of the nature of States duty to implement the legal obligation. At the core of the YP are the values of inclusion and equality, emphasizing that sexual orientation and gender identity are no exception to the basic understanding of the universal application of human rights law.

The YP referred mainly to sexual orientation and gender identity and did not explicitly include gender expression and sex characteristics. However, in November 2017 the YP were supplemented by additional principles in the Yogyakarta Plus 10, Additional Principles and States Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to compliment the Yogyakarta Principles (YP+10).³ The YP+10 adds nine new principles to the existing 29 from the YP. The YP+10 represent a significant contribution through inclusion of gender expression and sex characteristics. Furthermore, the YP+10 encompass an understanding not only of the characteristics of SOGIESC but also the distinction and diversity of SOGIESC diverse groups.

Chapter 4 exhibited that the HRC has at times arbitrarily conflated the distinctions between the SOGIESC categories. Together the YP and YP+10 express comprehensive definitions of sexual orientation, gender identity and expression and sex characteristics, providing valuable information on the distinction between each category. While the terms SOGIESC were not created by the authors of the YP and YP+10, the two documents promote understanding of the difference between the oft-conflated concepts of SOGIESC. All committee members of the HRC should familiarize themselves extensively with the YP and the YP+10. Such familiarization can ensure that the Committee avoids arbitrarily conflating the distinct SOGIESC categories and prove valuable in instigating a more comprehensive understanding of SOGIESC.

5.3 Improve Inclusion of Gender Identity and Expression and Sex Characteristics

It was emphasized in Chapter 4 and Chapter 5 that gender identity and expression and sex characteristics have thus far been marginalized in the HRC's work. The marginalization of gender identity and expression and sex characteristics further emphasizes the existing marginalization of individuals of diverse gender identity and expression and sex characteristics. Consequently, the second recommendation is that the HRC must improve inclusion of gender identity and expression

³ Yogyakarta Plus 10, Additional Principles and States Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to compliment the Yogyakarta Principles (YP+10) (2017) available at <<https://yogyakartaprinciples.org>>.

and sex characteristics, and that such inclusion must be specific. The recommendation for inclusion of gender identity and expression and sex characteristics is targeted at Concluding Observations and General Comments, as the Committee does not decide on what grounds individual communications are brought.

The YP+10 can aid the Committee in understanding the different problems faced by SOGIESC diverse groups. As Park comments, the YP+10 encourage ‘efforts to understand the lived reality of people of diverse SOGIESC and assign equal value to the different SOGIESC’.⁴ The YP+10 could therefore be a valuable tool for the Committee members. For example, Principle 31 of the YP+10 affirm the right to legal recognition and obtaining identity documents which conform to a person’s gender identity and expression.⁵ This is of particular value for individuals who live in countries where they are not able to get identity documents that conform to their gender identity and expression. Furthermore, Principle 32 of the YP+10 affirms the right to bodily and mental integrity, specifying that

no one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.⁶

This right is of particular relevance for children who are subjected to forced, coercive, or otherwise involuntary modification of their sex characteristics.⁷ As Fae and Travis comment, ‘If bodily integrity is not prioritised, anti-discrimination law risks being symbolic and worse, potentially entrenches intersex embodied persons into systems of marginalization’.⁸ Consequently, the affirmation in Principle 32 of the right to bodily integrity should be integrated by the HRC in Concluding Observations to relevant States Parties.

Cooperation with NGOs who specifically promote SOGIESC rights would be useful to ensure that the issues the HRC draw attention to in Concluding Observations and General Comments reflect the needs of SOGIESC diverse groups. A pertinent example of the utility of cooperation is the legal reforms in Malta on the prohibition against medical procedures on children born with diverse sex characteristics.⁹ The legislation was considered successful because ‘policy

⁴ Park (n 1) 253.

⁵ YP+10 (n 3) Principle 31.

⁶ Ibid Principle 32.

⁷ Morgan Carpenter, ‘Intersex human rights, sexual orientation, gender identity, sex characteristics and the Yogyakarta Principles plus 10’ (2020) *Culture, Health & Sexuality* 1.

⁸ Fae Garland and Mitchell Travis, ‘Legislating Intersex Equality: Building the Resilience of Intersex People Through Law’ (2018) 38(4) *Legal Studies* 587, 607.

⁹ Malta, Gender Identity, Gender Expression and Sex Characteristics Act: Final Version (2015) <<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=26805&l=1>> (accessed 2 December 2020).

makers had engaged in meaningful conversations with intersex individuals and groups, and thus the legislation was driven by the community's needs and experiences'.¹⁰

For both Concluding Observations and General Comments there are ways in which national human rights institutions and civil society can engage with the HRC during the drafting of the respective documents. For Concluding Observations, NGOs and other interested stakeholders can submit shadow reports to the HRC where they highlight issues not raised by their governments in advance of Concluding Observations being drafted for their respective States Parties.¹¹ Shadow reports provide SOGIESC organizations an opportunity to present additional perspectives and issues of concern that the HRC should be made aware of. For General Comments, the Committee invites interested stakeholders to comment on the drafts to the General Comments.¹² The Committee should, where it receives shadow reports and comments from stakeholders who promote SOGIESC rights pay attention to these. These comments can be an invaluable tool in ensuring that Concluding Observations and General Comments reflect SOGIESC diverse groups experiences and needs.

5.4 General Comment on SOGIESC

The final recommendation is for the HRC to develop a General Comment dedicated to the application of the ICCPR in relation to SOGIESC diverse groups. Gerber and Gory argued in 2014 that the prospects of the HRC developing a General Comment dedicated to the application of the ICCPR in relation to SOGIESC rights could be described as 'hopelessly unattainable'.¹³ Gerber and Gory posed this critical stance when the HRC was yet to have included reference to SOGIESC within any General Comment. However, as discussed in Chapter 3, the HRC has since adopted three SOGIESC-inclusive General Comments. The advancements that have been made in regard SOGIESC-inclusion in General Comments since 2014 gives reason for optimism.

While SOGIESC is not included in the foundational text of the ICCPR, the creation of a General Comment on matters that are not explicitly, but implicitly, included in a treaty is not a novel occurrence. In the Convention Against the Elimination of Discrimination Against Women

¹⁰ See Garland and Travis (n 8) 605; Fae Garland and Mitchell Travis, 'Making the State Responsible: Intersex Embodiment, Medical Jurisdiction, and State Responsibility' (2020) 47(2) *Journal of Law and Society* 298.

¹¹ International Women's Rights Action Watch, 'Shadow Reporting to UN Treaty Bodies' available at <<http://hrlibrary.umn.edu/iwraw/reports.html>> (accessed 15 December 2020).

¹² See Human Rights Committee, 'Call for Comments on Article 6 – Right to Life' available at <<https://www.ohchr.org/en/hrbodies/ccpr/pages/gc36-article6righttolife.aspx>> (accessed 15 December 2020).

¹³ Paula Gerber and Joel Gory, 'The UN Human Rights Committee and LGBT Rights: What is it Doing? What could it be doing?' (2014) 14 *Human Rights Law Review* 403, 436.

(CEDAW) the foundational text does not include any provision dealing explicitly with violence against women (VAW). This omission was addressed by the treaty body monitoring the implementation of CEDAW through a General Recommendation.¹⁴ In General Recommendation 19 the CEDAW Committee established unequivocally that gender-based violence is a form of discrimination within the meaning of article 1 of CEDAW.¹⁵ In this way, despite the Convention having no provisions related to VAW, the Committee managed to introduce gender-based violence as an implicit part of the Convention. The success of General Recommendation 19 is aptly summarized by the CEDAW Committee itself in General Recommendation 35 which updated General Recommendation 19:

For more than 25 years, in their practice, States parties have endorsed the Committee's interpretation. The *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law. General recommendation No. 19 has been a key catalyst for that process.¹⁶

The creation and success of General Recommendation 19 lends itself to conceiving that a General Comment on the application of the rights in the ICCPR to SOGIESC could be formulated.

A constructive way in which to formulate a General Comment on the application of the ICCPR in relation to SOGIESC would be to formulate a General Comment on non-discrimination as it applies to SOGIESC. The General Comment could make an explicit announcement that the list of grounds enumerated in articles 2(1) or article 26 include SOGIESC, and that discrimination against SOGIESC diverse groups, which impair or nullifies the enjoyment by SOGIESC diverse groups of the human rights enshrined in ICCPR, is incompatible with the Convention.

The importance of formulating a General Comment which confirms the statements made by the HRC in Concluding Observations and Views, where the Committee has affirmed that the non-discrimination principles extend to SOGIESC, is due to the authoritative nature of General Comments. General Comments are an authoritative statement by the HRC to *all* States Parties regarding the Committees' interpretation of the ICCPR. As Donnelly notes 'without authoritative international standards (...) to what can states be held accountable?'.¹⁷ Consequently, while the pronouncements made by the HRC in Concluding Observations and Views are valuable, there is great progress to be made in having a consistent approach throughout the monitoring functions.

¹⁴ General Recommendations function analogously to general comments, they are not legally binding but clarify the content of CEDAW and define State Parties obligations under the convention.

¹⁵ UN CEDAW Committee, 'General Recommendation No. 19' (1992) UN Doc A/47/38.

¹⁶ UN CEDAW Committee, 'General Recommendation No. 35' (2017) UN Doc CEDAW/C/GC/35.

¹⁷ Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29(2) Human Rights Quarterly 281, 305.

As Heinze has noted, the longer it takes before SOGIESC is included explicitly, ‘the greater the suspicion that there must be some good reason’.¹⁸ MacArthur further argues that

In order to successfully create change, norms must be further spelt out into obligations and rights, with clear components in identifying their path to national implementation. This is important not only in providing political pressure for reform, but to provide a clear avenue and base from which state laws may be successfully challenged.¹⁹

Utilizing the existing pronouncements from Concluding Observations and Views in individual communications the HRC has grounds to formulate a General Comment on the applicability of the non-discrimination principle in relation to SOGIESC diverse groups in a way that both affirms and emphasize the universality of human rights in relation to SOGIESC diverse groups.

It must be restated that the HRC has an advantage over the political forums within the UN, such as the Human Right Council, when it comes to formulating norms relating to contentious issues. Aylward summarizes this advantage in the following excerpt:

A norm’s clarity, strength, and scope may undergo considerable changes depending on the breadth of state support that the decision-making process requires. As the required breadth of support decreases, so too does the scope of the norm in question, since a smaller group of states generally lack the legitimacy to claim that a norm applies to states that have not endorsed (and that may actively *oppose*) a norm. Technical/expert decision-making modes (UNTBs) stand out as an important exception to this trend; given that the legitimacy of norms emerging in such forums is derived from technical/expert analyses (Barnett and Finnemore 2004), the scope of a norm within such a forum could be quite broad/universal, even while any number of implicated states may oppose the norm in question...Since technical/expert-driven decision-making does not rely directly on state support, one can also anticipate that a norm’s clarity and strength can be maintained even if states disagree with the norm in question.²⁰

Aylward’s description of UNTBs advantages when it comes to advancing norms that lack broad/universal support is encouraging. It makes viewing the adoption of a General Comment by

¹⁸ Eric Heinze, 'Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural Sensitivity' (2001) 22 Michigan Journal of International Law 283, 297.

¹⁹ Gemma MacArthur, 'Securing Sexual Orientation and Gender Identity Rights Within the United Nations Framework and System: Past, Present and Future' (2015) 15 The Equal Rights Review 25, 37.

²⁰ Erin Aylward, 'Contested Rights: Abortion and Sexual Orientation and Gender Identity in the United Nations' (DPhil thesis, University of Toronto 2020) 19.

the HRC affirming that the rights enshrined in the ICCPR extend to individuals of diverse SOGIESC as attainable.

5.5 Conclusion

In this chapter I have proposed the following measures to improve advancement of SOGIESC norms by the HRC: (1) improve integration of the Yogyakarta Principles, (2) improve inclusion of gender identity and expression and sex characteristics, and (3) formulate a General Comment affirming that SOGIESC diverse groups are equally protected by the ICCPR. The measures proposed in this Chapter should not be viewed as a comprehensive solution to all the limitations identified in Chapter 4 and Chapter 5. However, the measures can be a step towards improving the HRC's advancement of SOGIESC norms in the international human rights framework, and improve the lives of SOGIESC diverse groups worldwide.

Chapter 7.

Conclusion

The aim of this dissertation was to explore how the Human Rights Committee (HRC) protects and enhances respect for the rights of individuals of diverse sexual orientation, gender identity and expression and sex characteristics (SOGIESC) through norm formation. The central research question posed was: ‘to what extent does the HRC advance SOGIESC norms in the international human rights framework?’ In Chapter 1 I listed five sub-questions which would be addressed in order to answer the main research question:

1. What is the role of the HRC in norm formation?
2. How do norms emerge and why is norm formation significant?
3. Which SOGIESC norms have the HRC advanced?
4. Are there shortcomings in regard to how the HRC has dealt with SOGIESC under the auspice of its three monitoring functions?
5. What characterizes SOGIESC norm advancement by the HRC overall?

In response to the first sub-question I examined how the HRC executes its work through its three monitoring functions: Concluding Observations, General Comments and Views in individual communications. I established that through its work the HRC is a venue for norm formation due to the fact that the HRC does not adopt legally binding documents, but rather interpret and expound on the rights enshrined in the International Covenant on Civil and Political Rights (ICCPR). This means that the HRC is an active participant in norm formation, as norms are not legally binding obligations but rather ‘standards of appropriate behaviour for actors with a given identity’. Through its work the HRC continuously explains what standards of appropriate behaviour looks like for States Parties to the ICCPR.

Having established that the HRC is part and parcel of norm formation I went on to answer the second sub-question. To do this I introduced theoretical frameworks that explain how new norms emerge and how some of these new norms become part and parcel of international law. I introduced Finnemore and Sikkink’s ‘International Norm Dynamics Approach’ (INDA) Model, which identifies the process by which an emerging candidate norm is internalized. When a norm is internalized this means most states act in accordance with the standards prescribed by the norm.

In this context I also introduced theories from norm research scholars pertaining to intrinsic qualities of norms that are deemed to be successful at reaching the stage of norm internalization. Finally, I discussed the concept of norm contestation which explains how some emerging norms need to be pursued with even more vigour due to the fact that opposition to the norms persist. I established that the importance of reaching the stage of norm internalization in relation to SOGIESC norms advanced by the HRC is because this would affirm that SOGIESC diverse groups are protected by the rights enshrined in the ICCPR and could thus positively affect SOGIESC diverse groups' lives.

In Chapter 3 I addressed the third sub-question, which was identifying the SOGIESC norms advanced by the HRC. I did this through a quantitative analysis of SOGIESC-inclusion in the HRC's three monitoring mechanisms. I identified the SOGIESC norms by ascertaining which provisions of the ICCPR or subject matters were referenced by the HRC in SOGIESC-inclusive Views in individual communications, Concluding Observations and General Comments. Based on the findings I established that the HRC is advancing four SOGIESC norms: (1) the prohibition of criminalization of consensual same sex activity (CSSSA), (2) human rights principles of non-discrimination and equality apply to SOGIESC, (3) violence against individuals on the grounds of SOGIESC is prohibited, and (4) rights to freedom of expression and peaceful assembly apply to individuals of diverse sexual orientation and gender identity.

The fourth sub-question, whether there are shortcomings in regard to how the HRC has dealt with SOGIESC under the auspice of its three monitoring functions, was answered in Chapter 4. Through an analysis of how the HRC has dealt with SOGIESC in Views in individual communications, Concluding Observations and General Comments I demonstrated that there are numerous shortcomings and challenges. I identified one shortcoming which re-emerged across all three monitoring mechanisms: the marginalization of gender identity and expression and sex characteristics. The lack of attention to gender identity and expression and sex characteristics within the HRC's three monitoring functions directly influences the norms advanced by the HRC. Consequently, the extent to which SOGIESC norms are advanced by the HRC hinges on which of the three identity categories one is considering.

In Chapter 5 I answered the final sub-question, what characterizes SOGIESC norm advancement by the HRC overall? To make the evaluation I considered whether the four SOGIESC norms identified in Chapter 3 were characterized by intrinsic qualities of successful norms and whether the Committee had adapted to norm contestation. The assessment demonstrated that each of the four SOGIESC norms advanced by the HRC are characterized by intrinsic qualities of successful norms. I further demonstrated that the four SOGIESC norms

advanced by the HRC are not advanced equally and are advanced most ardently for sexual orientation, to a lesser extent for gender identity and expression, and predominantly marginalize sex characteristics. Consequently, uneven progress can be said to characterize advancement of the four SOGIESC norms advanced by the Committee. However, I also emphasized that there is great value in the HRC advancing the SOGIESC norms due to the increased consistency with which the respective SOGIESC norms are being pursued.

In Chapter 6 I offered recommendations for how the HRC can improve advancement of SOGIESC norms. I made three recommendations which sought to address the limitations discussed in Chapter 4 and Chapter 5: (1) improve integration of the Yogyakarta Principles, (2) improve inclusion of gender identity and expression and sex characteristics, and (3) formulate a General Comment affirming that SOGIESC diverse groups are equally protected by the ICCPR. I demonstrated that these measures could address problems relating to arbitrary conflation of the different SOGIESC identity categories, the gap on specific measures addressing issues relating to gender identity and expression and sex characteristics, and unequivocal inclusion of SOGIESC as protected characteristics under the ICCPR.

In this dissertation I have evaluated the extent to which the HRC advances norms to protect individuals of diverse SOGIESC. The conclusion I draw based on the quantitative and qualitative analysis undertaken is that the HRC advances norms to protect the human rights of individuals of diverse sexual orientation to a great extent. With regard to individuals of diverse gender identity and expression, the HRC has advanced norms to protect their human rights to some extent. Finally, with regard to individuals of diverse sex characteristics the HRC has only advanced norms to protect their human rights to a marginal extent. The overall evaluation of the HRC's advancement of SOGIESC norms is nevertheless positive due to the increased consistency and incremental improvement with which the SOGIESC norms are being advanced. The HRC has assumed the role of an active promoter of SOGIESC norms, with tangible, meaningful progress in advancing SOGIESC norms having taken place. However, I hope that my research has helped to underline that there is still scope for improvement. Individuals of diverse sexual orientation, gender identity and expression and sex characteristics continue to experience egregious human rights violations throughout the world. Consequently, improving advancement of SOGIESC norms is not only desirable, it is imperative.

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