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THE POLITICS OF LGBT RIGHTS: A COMPARISON BETWEEN THE UNITED NATIONS, THE OSCE AND THE COUNCIL OF EUROPE

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Table of Contents

Abstract3

Introduction4

1. Literature Review5

2. Theoretical Framework8

3. Research Design14

4. LGBT Rights at the United Nations16

5. LGBT Rights at the OSCE32

6. LGBT Rights at the Council of Europe46

7. Analysis69

8. Conclusion73

Literature74

Abstract

This thesis examines the possibility of international organisations exhibiting a degree of autonomous behaviour in the area of LGBT rights. It looks at three international organisations: the United Nations, the OSCE and the Council of Europe and how they respond to their given mandate and pressure from Member States in implementing their LGBT policies. It finds that, sometimes despite a lack of consensus, they have adopted LGBT policies. People in leadership positions within the organisations in particular have played an important advocacy role, thereby demonstrating a degree of autonomous behaviour.

Introduction

After the World Health Organisation in 1990 removed homosexuality from the International Classification of Diseases (ICD), issues related to sexual orientation and gender identity did not disappear from the international agenda. On the contrary, the fight for equality and human rights protection for gay people by governments and advocacy networks intensified. International organisations became the forum where fierce battles were fought, milestones reached and set-backs deplored.

But what role do these international organisations themselves play in the advancement of rights for Lesbian, Gay, Bisexual and Transgender (LGBT) people? Are they the mere mouthpiece of the Member States that have created these institutions in the first place? How do they deal with the limitations and possibilities of their official mandate in this particular area? And what are the implications for their legitimacy? These questions will be at the heart of this thesis. A comparison between the United Nations, the OSCE and the Council of Europe, the three most relevant international organisations in this regard, will show that despite the political sensitivity of LGBT issues these international organisations have taken a clear stance, both through their leadership and their bureaucratic structures.

First of all, a short overview of the existing academic literature on international organisations will show that most theories look at how these organisations come into being, and much less at how they evolve and behave afterwards. A more appealing theoretical framework is offered by Barnett and Finnemore, focusing on the extent to which international organisations can display autonomous behaviour. This will then be applied to the case of the endorsement of LGBT rights by the three mentioned international organisations: the United Nations, the OSCE and the Council of Europe. In the analysis, the findings and their implications for the legitimacy of these organisations will be discussed. In my conclusion, I will address the implications and limitations of my research.

1. Literature Review

In political science, the topic of international organisations has received much attention. Many books have been written on them and countless theories have been designed and tested. But surprisingly little research has actually been done on what happens inside an international organisation once it has been created. The focus is usually on state power or state preferences leading to their specific mandates, or on how voting procedures or membership might influence the institutional dynamics (e.g. the Security Council). In this literature review I will give an overview of the main schools of thought and synthesise the main arguments they provide in trying to explain the role of international organisations.

NEO-REALISM

The basic assumptions of neo-realism, exemplified in Kenneth Waltz's *Theory of International Politics*, are highly state-centred. They flow from classic realist notions of power, anarchy and conflict and have major implications for the study of international organisations. In the absence of a central authority, states compete for influence in the international realm, and are driven by self-interest. For power and influence they rely on structural and material sources like economic and military weight. International co-operation certainly exists, but their *raison d'être* is based on coinciding self-interest among states. Waltz indeed sees "international politics as a competitive realm" (1979: 126). The international distribution of power is characterised by a hierarchy of states, in which the most powerful ones are able to define the parameters of international politics and use institutions as instruments for the pursuit of self-interest. The United States for example sought Security Council approval for their military operation in Kuwait in 1991 to lend it a stamp of moral approval. When they failed to do so in 2003 for their invasion in Iraq, they went ahead nonetheless.

Neo-realism's focus on power, conflict and war makes it essentially a theory of states. International organisations are treated as mere byproducts of states and are, by consequence, not the object of extensive analysis. Mearsheimer for example sees them as "intervening variables" that do not affect state behaviour independently. Because of what he calls the "False Promise of International Institutions", he denounces a

“misplaced reliance on institutional solutions” as they have not been able to prevent conflict and war (1994: 49).

As neorealist theories mainly focus on why institutions come into being and how they mirror the balance of power between states, they tend to ignore what happens to them once they are established. Also, their focus on organisations in the realm of (inter)national security like NATO or the OSCE leads to a bias in their final predicament, purposefully overlooking organisations like the United Nations High Commissioner for Refugees or the Office of the High Commissioner for Human Rights. They may not be a decisive factor in matters of peace and war, but definitely shape and influence the security environment in which states operate.

NEOLIBERAL INSTITUTIONALISM

Both neorealists and neoliberal institutionalists would agree that international organisations are based on intergovernmental dynamics: states co-operate because of self-interest. However, where realists argue that they are mainly the result of the interests of the powerful, neoliberal institutionalists see institutions as a way to resolve collective action problems. They are not just instruments in the hands of dominant powers, but acquire a certain degree of independence in fulfilling their state-mandated tasks.

If every state autonomously pursues its own narrowly defined self-interest, problems can arise. Creating an international organisation is therefore a way to achieve a “superior type of rationality” (Goldstein, 2003: 119). That doesn’t mean of course that neoliberals are never critical of international organisations. As Keohane and Nye already wrote in 1974, “international organisations are rarely optimally efficient, and they are frequently quite unsatisfactory” (1974: 62). The reason is that they still see them as intergovernmental in nature, meaning that decision-making is usually unanimous and dependent on agreement between still powerful states. A strong international organisation therefore is not so much the result of a coherent internal bureaucracy, acquired expertise or its stature, but agreement between rational states that act through them.

ENGLISH SCHOOL

A final school of thought that deserves mention here is the so-called English School, particularly relevant when discussing the current international human rights regime. Its basic argument rests on the assumption that “just as human beings as individuals live in societies which they both shape and are shaped by, so also states live in an international society which they shape and are shaped by” (Buzan, 2004: 8). The extent to which this international society departs from a traditional conception of state sovereignty and forms its own institutions and norms is subject to debate. Solidarists are optimistic and see much room for shared norms and its collective enforcement. Pluralists on the other hand would argue that there are only minimal rules that states can agree to.

What is important though is that the English School stresses the role of values and soft power much more than neorealism and neoliberal institutionalism. Institutions that promote essentially cosmopolitan and liberal values, like the OHCHR or the International Criminal Court, are proof that a “cosmopolitan culture of late modernity is shaping a new institutional arrangement in world society” (Dunne: 278, in: Reus-Smit and Snidal, 2008).

The three theories discussed above all have different ideas about the *raison d'être* of international organisations. What they have in common however is their assumption that their importance and influence is determined by state power, state preference or promotion of shared values. The international organization itself is not so much an independent actor but rather an instrument, expression or reflection of state action.

2. Theoretical Framework and Hypotheses

By focussing only on why international organisations come into being and how states act through them, scholars risk to overlook the ontologically independent power and autonomy that institutions can acquire. To start, Barnett and Finnemore (2004) offer a theory that aims to better understand why international organisations behave as they do.

BUREAUCRACY AND AUTHORITY

Crucially, the starting point in their reasoning is the assertion that international organisations essentially function as domestic bureaucracies. Bureaucracies are usually characterised by a hierarchical structure, continuity, impersonality and expertise, and these elements can equally be seen within international organisations. In turn, this bureaucratic nature can provide them both with a degree of authority and autonomy beyond their prescribed mandate. The assumption that they possess authority derived from their own bureaucratic nature is crucial: it means that they are not just “servants to whom states delegate” (Barnett and Finnemore, 2004: 5), but become an independent actor in the international arena.

Barnett and Finnemore distinguish four categories of authority: rational-legal authority, delegated authority, moral authority and expert authority. Rational-legal authority is made up of legalities, procedures and rules and is therefore highly impersonal and abstract. Delegated authority concerns the mandate that states confer on an international organization. This doesn't mean that there is no room for manoeuvre: mandates often require interpretation, and the way the organisation fulfils a certain task is highly coloured by experience, training, values or even external influence by NGO's. Moral authority goes one step further: it relies on a claim of doing something inherently good and just. The OHCHR for example argues to be a neutral and impartial defender of human rights worldwide, serving universal and not state interests. But as we will see in the case of LGBT rights, moral authority sometimes involves taking a clear political stance. The last category of authority is expert authority, derived from the fact that staff members are usually experts and therefore have authority though the specialised knowledge they have.

BUREAUCRATIC AUTONOMY

If international organisation can indeed acquire authority of their own apart from the Member States that mandated them, the question then must be to what extent they do so. Barnett and Finnemore come up with five (increasing) degrees of autonomy:

- International organisations may exercise autonomy to further state interests;
- They may act where states are indifferent;
- They may fail to act and therefore fail to carry out state demands;
- They may act in ways that run against state interests;
- They may change the broader normative environment and states' perceptions of their own preferences, so that they are consistent with the organisation's preferences.

ORGANISATIONAL CHANGE

One of the most interesting implications of Barnett and Finnemore's theory of organisational change manifests itself when it comes to change in international organisation. The important assumption is that they evolve in ways not intended by their creators. Both realists and neoliberal institutionalists would assume that change is driven by states themselves, either through demands of the great powers or through co-operation. Barnett and Finnemore's theory doesn't exclude that possibility, but they point to the internal bureaucratic culture as a possible driver for change. Firstly, organisational change is usually path dependent: "existing rules and culture inside an organisation strongly shape decisions about the future, foreclosing some options and biasing outcomes toward others" (43). Secondly, bureaucracies by nature tend to expand in both size and scope of tasks. Indeed, "left to their own devices, bureaucracies are likely to craft policies that promote rational (in the Weberian sense), impersonal rule-governed and technocratic approaches to social tasks" (43).

PATH DEPENDENCY

Paul Pierson's work on path dependency also has relevance to the study of autonomy of international organisations. He makes several assumptions about the nature of political processes: specific patterns of timing and sequence matter; starting from similar conditions, several social outcomes may be possible; large consequences

may result from relatively “small” events; and particular courses of action, once introduced, can be virtually impossible to reverse (Pierson, 2002: 251). This is captured by the concept of ‘increasing returns’: the probability of further steps along the same path increases with each move down that path. It follows from his theory that international organisations, once they adopt a certain policy or stance, tend to stick to that policy. So once for example the OSCE adopts guidelines on non-discrimination, it might lead to the inclusion of LGBT discrimination as well through this path dependent mechanism, thus creating a kind of autonomous policy process separate from Member States.

PRINCIPAL-AGENT THEORY

Mark Pollack’s principal-agent approach also offers valuable insights to the autonomy of international organisations. In his well-known study about the European Community he tried to uncover the extent to which the European institutions “will enjoy autonomy from and exert influence on the member governments of the Community” (Pollack, 1997: 101). The member governments are the “principals” who, as the *maîtres des traités*, willingly and consciously delegate authority to the organisation they found, called the “agent”. The extent to which the agent then is able to exert independent autonomy depends on the efficacy and credibility of control mechanisms that are established by member state principals. Pollack further identifies four factors that determine supranational autonomy: the distribution of preferences among member state principals and supranational agents (which the latter can exploit creatively to their benefit); the institutional decision rules for applying sanctions, overruling legislation, and changing agents’ mandates; the role of incomplete information and uncertainty in principal-agent relationships with autonomy greater where the created institution has more information about itself than do others (particularly important when it comes to agenda setting); and the presence or absence of transnational constituencies of subnational institutions, interest groups or individuals within the member states, which can act to bypass the member governments and/or place pressure directly on them (the international human rights community is a case in point).

Agenda setting is a crucial characteristic of agency and autonomy. Pollack distinguishes two types: formal and informal. Formal agenda setting relies on formal rules that establish an explicit agenda setting role for the organisation at hand. The

European Commission is a clear example: the founding treaties have given it the explicit power of initiative, a powerful tool in setting the policy agenda in the European Union. Informal agenda setting is more complicated to measure, but can be equally influential. Pollack defines it as “the ability of a ‘policy entrepreneur’ to set the *substantive* agenda of an organisation, not through its formal powers but through its ability to define issues and present proposals that can rally consensus among the final decision makers” (1997: 121).

It has to be noted here that Pollack’s approach has its roots in rational choice theory, and therefore departs from Barnett and Finnemore’s constructivist approach in which the bureaucratic nature of organisations is constitutive of the social context in which they operate. Pollack therefore is sceptical of two types of authority, rational-legal and moral, which he sees as “difficult to reconcile” with the core (rational) assumptions of principal-agent analysis (2007: 20). In the context of human rights however, there is reason to assume that moral authority is an important factor, as is rational-legal authority (by relying on codified human rights standards).

INTERNATIONAL AGENCY AND AUTONOMY: A SYNTHESIZED APPROACH

Path dependency, bureaucratic autonomy and principal-agent analysis stress the autonomy of international institutions, albeit through varying mechanisms and to differing degrees. They are not necessarily contradictory. Synthesising these approaches, one could hypothesise that an international organisation adopts or advocates certain LGBT policies because it takes advantage of the existing disagreement between states (Pollack), at the same time basing itself on its moral and expert authority (Barnett and Finnemore) while these dynamics all result from a path dependent process in which the adoption of anti-discriminatory policies more or less automatically leads to the inclusion of sexual minorities in those policies. All three theories provide a piece of the puzzle

WHY LGBT RIGHTS?

Focusing on LGBT rights might be a surprising choice in the context of the study of international politics. Some might argue that it should be left to international lawyers, or that it has limited relevance to politics in general. I disagree with these objections as human rights and politics have always been closely related. Indeed, international human

rights law is in many cases “the product of political, pragmatic agreement and a limited moral consensus” (Freeman, 2002: 60). This is *a fortiori* the case for LGBT rights. As we will see, laws criminalising same sex activities amongst consenting adults are still in place in 78 countries of the world (ILGA: 2013: 5), making up 40 % of all UN Member States.

But LGBT rights in particular could prove to be a crucial case for testing theories of autonomous behaviour of international organisations. LGBT rights, or even the recognition of sexual minorities, let alone same-sex marriage, are still very controversial in most parts of the world. It’s not included in any human rights treaty or any international organisation’s mandate. Still, LGBT policies have found their way (to different degrees) into three organisations: the Office of the High Commissioner for Human Rights (OHCHR), the Council of Europe and the Organisation for Security and Co-operation in Europe (OSCE). The interesting and crucial question that I will attempt to answer is whether organisational autonomy also has played a role in this.

Much research has already been published on LGBT rights in the context of international human rights law and its jurisprudence. To date, no comprehensive study exists on how international organisations advance and advocate LGBT rights. This thesis therefore also will (partly) address this lacuna.

The three chosen institutions all have human rights in their core mandate or later adopted policies. They differ however in structure, membership and scope. Within the United Nations, the General Assembly and the Human Rights Council are the two intergovernmental bodies dealing with human rights issues, both deciding by majority voting. The Office of the High Commissioner for Human Rights is the UN agency responsible for human rights, led by the High Commissioner who is appointed by the General Assembly. The Council of Europe is a highly intergovernmental organisation, but also has a clear supranational branch through the European Court of Human Rights. Its 47 members are all European, although their membership is much broader than that of the European Union. In addition, it has a considerable bureaucracy with a high number of staff. The Council of Ministers and its sub bodies determine the policies by unanimity. The OSCE has a much looser and more flexible organisational structure as its founding charter has no constitutive character (it was a signed declaration and not a treaty that was subsequently ratified). Decision-making among the 58 Member States is by

consensus, meaning that a single State can block the adoption of resolutions and declarations. Membership is much more diverse as that of the Council of Europe, but its core focus is on European security.

HYPOTHESES

The hypotheses following from the theoretical framework that I will test are:

HYPOTHESIS 1

The promotion of LGBT rights as part of an international organisation's policies is partly the result of the organisation's autonomous behaviour.

HYPOTHESIS 2

The extent of the international organisation's autonomous behaviour in the promotion of LGBT rights is greater when decision-making is done by majority voting instead of by consensus.

3. Research Design

CASE SELECTION

In this thesis the focus will be on three international organisations: the United Nations, the OSCE and the Council of Europe. All three have a clear human rights mandate and have integrated LGBT policies in some way into their policies. The European Union also does, but it is not included in this analysis as the EU aims to be much more than an intergovernmental organisations co-operating in certain areas. The human rights branches of other international organisations like the Organisation of American States, the African Union or the Arab League are much less developed and usually only consist of a semi-judicial body without a big Secretariat. In addition, to date only the UN, OSCE and Council of Europe pay attention to LGBT policies one way or another.

DATA

I have relied mainly on existing articles, news sources, official documents, statements and speeches. In addition, I have talked with numerous insiders: staff members within the organisation, experts and NGO representatives. The interviews I had with staff members and insiders (NGO's, experts) were all on the condition of anonymity, except for the interviews with the former Commissioner of Human Rights Mr Hammarberg (Council of Europe), the former Director of the OSCE Office for Democratic Institutions and Human Rights ODIHR Christian Strohal and the current LGBT Rapporteur of the Parliamentary Assembly of the Council of Europe.

OPERATIONALISATION

As Barnett and Finnemore rightly argue, "autonomy is not simply present or absent in IO behaviour" (2004:11). It is not easy to determine the extent to which they exhibit a certain degree of autonomy. I employ five indicators to try to uncover this. The first two measure the intergovernmental side of the coin: are LGBT issues covered by the official mandate given to the organisation by the Member States, and is there consensus among them whether they should be included or not? Two others are indicators that measure the opposite, namely how the organisations themselves deal with LGBT issues: first of all the attitude of people in leadership positions within the

organisation, and secondly how the bureaucratic structures under them deal with it. In addition, I will also look at the opportunity of influence by NGO's. However, their influence goes both ways: they not only provide input to the international organisation, but also the national delegations of Member States. But in the case of LGBT rights, NGO's have played a crucial role in making an invisible minority visible and can therefore not be left out of the analysis.

DEFINITIONS

In 2006, a group of international human rights experts met in Indonesia to define how human rights standards are applied to issues of sexual orientation and gender identity. The so-called Yogyakarta principles that they elaborated have become an authoritative guide used by international organisations, governments and NGO's around the world. This thesis will employ the definitions as stated in the preamble to the Yogyakarta Principles. *Sexual orientation* is understood to refer to 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. *Gender identity* is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.¹

IMPLICATIONS

The assertion that international organisations exert a degree of power separate from the states that created and mandated them has important repercussions on that organisation's legitimacy. As Barnett and Finnemore argue, "international organisations often use undemocratic procedures in the pursuit of liberal values, thus creating "undemocratic liberalism" in global governance". If power and influence of international organisations is partly derived from its own bureaucratic authority and autonomy, then the view that international bureaucrats are selfless and powerless agents of states is maybe out-dated. In the final analysis, this question will be addressed in greater detail.

¹ Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, March 2007 (http://www.yogyakartaprinciples.org/principles_en.pdf)

4. The United Nations

1. Introduction

While the OSCE and Council of Europe are regional organisations, the United Nations encompasses all the countries of the globe. It started off with 51 Member States, and now comprises 193 States. Founded in 1945, it is also the oldest of the three. Its mandate is broad, and there is hardly a topic that is not somehow covered by a United Nations body or treaty. The Security Council, dealing with matters relating to peace and security, is probably its most well-known body, but the organisation deals with much more. Issues range from sustainable development, environment protection and disaster relief to counter terrorism, non-proliferation and the promotion of democracy, human rights and gender equality.

2. Mandate

The 1945 Charter of the United Nations solemnly declares the determination “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”. One of those wars brought particular sorrow to homosexuals, who were actively persecuted by Nazi Germany. The 1939 *Law about Aliens to the Community* provided the sterilisation of “asocial persons, vagrants, and homosexuals”, leading to the extermination of tens of thousands of homosexuals in concentration camps (ICJ, 2009: 10).

Despite the outspoken suffering brought upon homosexuals during the Second World War, no specific mention is made of them in the 1945 Charter or the 1948 Universal Declaration of Human Rights (UDHR) adopted by the UN General Assembly. The latter does proclaim that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”² As the addition of ‘other status’ shows, the list of prohibited grounds of discrimination is not exhaustive. Although the Universal Declaration is not legally binding (as it is not an international treaty but a resolution adopted by the General Assembly), many of its provisions are now binding through customary law (Armstrong

² UDHR, Article 2

et al., 2007: 156). The 1966 International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) however do have binding legal force for all its signatories, and translate the UDHR's principles into concrete legal provisions. They both contain a similar non-discrimination article, but, more importantly, both treaties also have so-called treaty bodies that oversee the implementation of the treaties. Contrary to the European Convention on Human Rights however, not all UN Member States are signatories to the Covenants. The ICCPR currently has 167 signatories, and the ICESCR 160.

The Human Rights Committee, belonging to the ICCPR, is the most important in this regard. Nationals of states that have signed the optional protocol can also bring individual petitions to the Committee. In 1994, it decided that a law in Tasmania criminalising consensual sexual contact between men violated the right to privacy (Article 17, ICCPR), and also that the reference to "sex" in the non-discrimination articles 2 and 26 of the ICCPR is to be taken as including sexual orientation.³ Other bodies with the UN human rights machinery have followed the Human Rights Committee's approach. The UN Working Group on Arbitrary Detention for example referred to the famous 1994 Toonen case when it addressed the issue of homosexuals detained in prison because of their sexual orientation (ICJ, 2009: 35).

Until recently, no intergovernmental body of the United Nations had pronounced itself on LGBT issues. This changed in 2011 with a landmark resolution adopted by the Human Rights Council at the initiative of South Africa. It expressed "grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity", and requested the High Commissioner to Request the United Nations High Commissioner for Human Rights to prepare a study "documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world."⁴ Of the 47 Member States of the Human Rights Council 23 voted in favour, 19 against with 3 abstentions.⁵ Although the resolution is not legally binding, it is

³ Communication No. 488/1992, case of Nicholas Toonen v. Australia, 31 March 1994

⁴ Human Rights Council Resolution 17/19, 14 July 2011, (A/HRC/RES/17/19)

⁵ *In favour*: Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Guatemala, Hungary, Japan, Mauritius, Mexico, Norway, Poland, Republic of Korea, Slovakia, Spain, Switzerland, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay; *against*: Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan,

the first-ever resolution adopted by a UN body which recognises the existence of sexual orientation and gender identity under international human rights law. Since June 2011, LGBT issues are therefore no longer restricted to the 'expert' part of the UN system.

It is questionable whether a "hard" mandate through an international treaty (for example an additional protocol to the ICCPR prohibiting discrimination on the grounds of sexual orientation and gender identity) will make it easier for the UN when it comes to LGBT policies. As a UN staff member remarked⁶, states who don't ratify will then say: I didn't sign up for it, so I'm not beholden to uphold those standards. With the current broader mandate, there is more flexibility and room for interpretation, as the rulings of the UN Human Rights Committee have shown.

3. Membership attitudes

Among the 193 UN Member States, attitudes towards LGBT rights vary highly. In 2012, there were still 76 countries with laws criminalising homosexual acts between consenting adults, making up approximately 40 % of the United States membership. Five countries⁷ still retain the death penalty for these 'crimes' (ILGA, 2013: 5). These penalties unfortunately are not a dead letter. In May 2013 two Zambian men were charged with homosexual acts, facing up to 14 years in prison.⁸ In 2011, three men were hanged in Iran after being found guilty of same-sex conduct.⁹ The UN's newest Member State, South Sudan, equally retained its criminal provisions regarding homosexuality. President Salva Kiir said in a radio interview in 2010 that homosexuality "is not there and if anybody wants to import or to export it to Sudan, I will not get the support and it will always be condemned by everybody."¹⁰ Interestingly, many laws criminalising homosexuality are a relic from colonial times. 16 of the 19 African Commonwealth

Qatar, Republic of Moldova, Russian Federation, Saudi Arabia, Senegal and Uganda; *abstaining*: Burkina Faso, China and Zambia.

⁶ Interview by the author with UN staff member, 16 May 2013.

⁷ Iran, Mauritania, Sudan as well as 12 northern states in Nigeria, the southern parts of Somalia, Saudi Arabia and Yemen.

⁸ "Zambian men charged over gay sex", BBC News, 8 May 2013 (<http://www.bbc.co.uk/news/world-africa-22451632>)

⁹ "Iran executes three men on homosexuality charges", The Guardian, 7 September 2011 (<http://www.guardian.co.uk/world/2011/sep/07/iran-executes-men-homosexuality-charges>)

¹⁰ "Referendum on South Sudan's secession will be held", Radio Netherlands Worldwide, 8 June 2010 (<http://www.rnw.nl/africa/article/referendum-south-sudans-secession-will-be-held>)

countries for example retain anti-sodomy laws dating back to British rule.¹¹ There is also a group of countries where same-sex acts are legal, but where homosexuality is still far from accepted and discriminatory practices are common. Examples include Russia, Turkey, Indonesia¹², South Korea and Jordan.

On the other hand, there are currently 14 countries¹³ in the world that have legalised same-sex marriage. The first country in the world to do so was the Netherlands in 2001, hailed by gay advocates as the “the jewel in the crown of the gay rights movement.”¹⁴ Although Belgium (2003) and Spain (2005) followed soon afterwards, gay marriage is no longer confined to the European continent. In 2005 Canada introduced same-sex marriage, followed by South Africa (2006), Argentina (2010) and New Zealand (2013), thus covering almost all corners of the globe.

Taking into account these highly diverging views on homosexuality, it is perhaps not surprising that LGBT issues are a veritable bone of contention at the United Nations. At regular intervals, the inclusion of sexual orientation and gender identity in officially adopted documents is a hotly debated topic. At the 2001 United Nations Global Conference on AIDS, Catholic and Islamic countries for example objected successfully to the inclusion of gays and prostitutes as groups vulnerable to HIV. A Pakistani delegate declared that “these kinds of things are not prevalent in Muslim countries.”¹⁵

The two main theatres where the intergovernmental battles take place are the General Assembly in New York and the Human Rights Council in Geneva. In Geneva the intergovernmental confrontation started in 2003, when Brazil rather unexpectedly presented a draft resolution entitled ““Human rights and sexual orientation” to the Commission on Human Rights (the Human Rights Council’s predecessor). It met with fierce opposition within the Commission. The OIC countries, led by Pakistan, as well as others like Zimbabwe, argued that the topic did not even belong on the agenda of the

¹¹ “Colonial Sodomy: Homophobic threat within common law”, Frederick Cowell, Discussion Paper for Consultancy Africa Intelligence (CAI), 14 July 2010 (http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=472:colonial-sodomy-homophobic-threat-within-common-law&catid=91:rights-in-focus&Itemid=296)

¹² South Sumatra and Aceh Province still criminalise homosexuality through Sharia law (ILGA, 2013: 22).

¹³ Argentina, Belgium, Canada, Denmark, France, Iceland, Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, Uruguay and several sub-national jurisdictions (parts of Mexico and the United States).

¹⁴ “Pragmatism for Dutch on Gay Marriage”, New York Times, 7 December 2012 (http://www.nytimes.com/2012/12/08/world/europe/08iht-letter08.html?_r=0)

¹⁵ “Homophobia Still Hinders AIDS Fight”, Los Angeles Times, 8 July 2001 (<http://articles.latimes.com/2001/jul/08/opinion/op-19774>)

Commission and tried to remove the resolution from the agenda altogether. Their attempt failed, but when it became clear that the resolution did not have enough votes, deliberations were postponed to the next session, and then taken off the agenda in 2005.

It would take until 2011 until a resolution was agreed at the Human Rights Council, condemning violence and discrimination of LGBT people. 23 of the 47 Member States voted in favour of the resolution initiated by South Africa. The resolution also called for a panel to be convened in 2012 and a study to be prepared by the Office of the High Commissioner for Human Rights. With the benefit of hindsight, it now seems that part of the reason the resolution was able to pass were the internal divisions among the OIC countries due to the events of the Arab Spring that were taking place.¹⁶ A month before the panel would take place, Pakistan on behalf of the OIC wrote a letter to the President of the Council, explaining concern that “the panel will discuss issues that relate to personal behaviour and preferences, and have nothing to do with fundamental human rights.”¹⁷ When the panel took place in March 2012, almost all OIC countries and some African countries ostentatiously walked out of the room after having made known their opposition. Pakistan, on behalf of the OIC, argued that “licentious behaviour promoted under the concept of sexual orientation was against the fundamental teachings of various religions including Islam”. Mauritania, speaking on behalf of the Arab Group, said that “attempts to impose the controversial topic of sexual orientation were aimed at creating new rights for specific cultural values which would have negative effects on social structures”, while Senegal, on behalf of the majority of the African Group, rejected “any attempt to impose concepts or notions on certain behaviours which did not fall into the internationally agreed set of human rights.”¹⁸

In New York, the first-ever UN General Assembly statement on LGBT issues adopted in 2008 again revealed the existing divide. There, the format of a statement was

¹⁶ According to Dr. Rosa Freedman (Birmingham Law School) in a blog entitled “The United Nations Human Rights Council’s Backwards Step on LGBT Rights”, 7 June 2013 (<http://ilg2.org/2013/06/07/the-united-nations-human-rights-councils-backwards-step-on-lgbt-rights/>)

¹⁷ The letter was posted by UN Watch on their online blog (<http://blog.unwatch.org/index.php/2012/02/17/letter-from-uns-islamic-group-to-unhrc-president-opposing-panel-on-violence-against-gays/>)

¹⁸ “Human Rights Council holds panel discussion on discrimination and violence based on sexual orientation and gender identity”, OHCHR Report, 7 March 2012 (<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11920&LangID=E>)

used because there was not enough support for an official resolution.¹⁹ Co-sponsored by France and the Netherlands, 66 nations supported the declaration condemning discrimination and violence based on sexual orientation and gender identity.²⁰ Initially, the United States refused to sign the declaration, together with China, Russia and the countries of the Organisation of the Islamic Conference. After the election of President Obama, the American Administration announced it would reverse President Bush' decision, bringing the total number of signatories to 67.²¹ However, Syria, on behalf of a group of 57 countries, read out a counter statement, stating its opposition to the concepts of sexual orientation and gender identity in international law. It argued that the introduction of the concept of 'orientation' could usher in "the social normalization and possibly the legitimization of many deplorable acts including pedophilia." It noted "with concern the attempts to create "new rights" or "new standards" by misinterpreting the Universal Declaration and international treaties to include such notions that were never articulated nor agreed by the general membership."²² Clearly, consensus at the UN on LGBT rights is still far away.

4. Leadership

Secretary General

The UN Charter only provides a rather vague description of the role the Secretary General plays within the organisation, calling him the UN's "chief administrative officer."²³ Over time, the function UN Secretary General has expanded beyond being a mere civil servant. Indeed, the United Nations itself now describes his role as "equal parts diplomat and advocate, civil servant and CEO".²⁴ In that role of global advocate

Kofi Annan was the first Secretary General to address gay rights, albeit cautiously and hesitantly. The first occasion when he did so was at an event organized by the UN Gay, Lesbian or Bisexual Employees Organisation (GLOBE) in 2003 at the UN's

¹⁹ "In a First, Gay Rights Are Pressed at the UN", New York Times, 18 December 2008 (<http://www.nytimes.com/2008/12/19/world/19nations.html>)

²⁰ United Nations General Assembly, 22 December 2008 (A/63/635)

²¹ Press Statement "UN Statement on "Human Rights, Sexual Orientation, and Gender Identity", US State Department, 18 March 2009 (<http://www.state.gov/r/pa/prs/ps/2009/03/120509.htm>)

²² Response to SOGI Human Rights Statement, read by Syria, 18 December 2008

²³ UN Charter, Article 97

²⁴ "The Role of the Secretary-General", UN website (http://www.un.org/sg/sg_role.shtml)

Headquarters in New York.²⁵ Speaking about protecting the rights of lesbians and gays around the world, he emphasised that “the United Nations cannot condone any persecution of, or discrimination against, people on any grounds, and recalls article 2 of the Universal Declaration of Human Rights, which says that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind.”²⁶ He added that “we should be much more tolerant and compassionate” and “stress those positive aspects in our society, the things that bring us together, and move away from discrimination and persecution”.²⁷ At the same event, Annan announced that he would treat married gay and lesbian staff members according to the staff member's nationality. In January 2004, the decision was formally announced that “marriage recognized as valid under the law of the country of a staff member’s nationality will qualify that staff member to receive the entitlements provided for eligible family members.”²⁸ Although seemingly a rather insignificant move, and fully according to UN practice, it was immediately noticed by the Organisation of the Islamic Conference (OIC), a group consisting of 57 Muslim States. Its Iranian representative Alireza Tootoonchian, told a UN General Assembly committee that “there is no justification for Annan's move”, accusing him of exceeding his authority. An Indonesian delegate expressed concern that a new concept of “family” had been created without proper deliberation in UN bodies. The Vatican aligned itself with the OIC, stressing that same-sex unions are contrary to Catholic teaching.²⁹ Interestingly however, Turkey, also part of the OIC, defended the Secretary General, saying he had respected the legislative authority of member states.³⁰ The fact that the UN also recognized polygamous marriages of its staff members, even

²⁵ That he chose this occasion might have to do with the fact that he was the first UN Secretary General to come from the ranks of the UN staff itself.

²⁶ Statement attributable to the Spokesman for the Secretary-General on the rights of gays and lesbians New York, 5 August 2003 (<http://www.un.org/sg/statements/?nid=441>)

²⁷ “After gay rights event, Annan calls for tolerance, laments bias 'on any grounds”, 5 August 2003 (<http://www.un.org/apps/news/story.asp?NewsID=7917&Cr=gay&Cr1=rights>)

²⁸ Statement by the Secretary-General’s Spokesman at noon briefing, 29 January 2004 (http://www.unspecial.org/UNS627/UNS627_T03.html)

²⁹ “Vatican joins Muslims to fight homosexual partnerships”, The Telegraph, 21 March 2004 (<http://www.telegraph.co.uk/news/worldnews/europe/italy/1457417/Vatican-joins-Muslims-to-fight-homosexual-partnerships.html>)

³⁰ “UN: Islamic States Protest Annan Edict On Same-Sex Unions”, Radio Free Europe Radio Liberty, 5 June 2013 (<http://www.rferl.org/content/article/1051910.html>)

allowing them to divide their benefits among their wives,³¹ was apparently of no relevance to the OIC.

Annan's reluctance to speak out in favour of gay rights is rather surprising taken into account the fact that he called the fight against HIV/AIDS his "personal priority".³² When asked at a press conference whether "cultural sensitivities naming vulnerable groups" like gay people should be respected, Annan answered that "regardless of their religious beliefs, regardless of their orientation, they are human beings with human rights which ought to be respected."³³

Ban Ki-moon, who succeeded Annan in 2007, initially started off as cautiously as Mr Annan. His first public mentioning of gay rights was rather unexpected and impromptu. During a speech at the 2007 World Affairs Council in San Francisco, protesters interrupted Mr Ban while raising a banner and yelling "Gay Rights are Human Rights". Mr Ban's dryly replied that "I recognize that gay rights is a very sensitive issue."³⁴ Still, Mr Ban would become the first sitting Secretary-General who exclusively addressed the issue of LGBT rights at a debate at the United Nations. In 2010, on the occasion of International Human Rights Day, Mr Ban spoke at an event co-sponsored by Argentina, Belgium, Brazil, Croatia, Gabon, the Netherlands, New Zealand, Norway, the United States and the European Union calling for an end to violence and discrimination against LGBT persons.. Although he conceded that gay rights were a controversial issue, he affirmed that "where there is tension between cultural attitudes and universal human rights, universal human rights must carry the day."³⁵

Mr Ban's support of gay rights were not just words. In 2010, Mr Ban travelled to Malawi, where his personal efforts secured the release of a gay couple who had been

³¹ "UN spousal benefits for gays in dispute", Washington Post, 16 March 2004

(http://www.boston.com/news/world/articles/2004/03/16/un_spousal_benefits_for_gays_in_dispute/)

³² Remarks at the Inauguration of the new UNAIDS/WHO building in Geneva, 20 November 2006

(http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/speech/2006/20061120_sg_inauguration_speech.pdf)

³³ Transcript of press conference by Secretary-General Kofi Annan at the UN Headquarters, 27 June 2001

(<http://www.un.org/News/Press/docs/2001/sgsm7865.doc.htm>)

³⁴ Address to the World Affairs Council of San Francisco by Secretary-General Ban Ki-moon, San Francisco (USA), 26 July 2007

(http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=103#Ua8tJ0B7KSo)

³⁵ UN Secretary-General Ban Ki-moon's remarks at the event on "Ending Violence and Criminal Sanctions Based on Sexual Orientation and Gender Identity", New York today, 10 December 2010

(<http://www.un.org/News/Press/docs/2010/sgsm13311.doc.htm>)

sentenced to 14 years in prison. Malawi President Bingu wa Mutharika pardoned the two men, although he maintained that they had “committed a crime against our culture, our religion and our laws” and that the release was purely on humanitarian grounds.³⁶ Mr Ban regularly urges African leaders to repeal laws criminalising homosexuality. At the 2012 African Union Summit in Ethiopia he called on African nations to stop treating gays as “second-class citizens, or even criminals”.³⁷ However, his outspoken gay rights advocacy as UN Secretary General on a still deeply homophobic continent makes him vulnerable for criticism. A Zimbabwean diplomat recently accused Mr Ban of championing Western causes, adding that his “crusade to promote gay rights is dismal diplomacy.”³⁸

Since the 2010 speech exclusively devoted to LGBT rights, Mr Ban Ki-moon has clearly stepped up his engagement by using increasingly strong language. His remarks to the Human Rights Council panel in March 2012 showed a strong personal commitment to the cause. “To those who are lesbian, gay, bisexual or transgender, let me say: You are not alone. Your struggle for an end to violence and discrimination is a shared struggle. Any attack on you is an attack on the universal values the United Nations and I have sworn to defend and uphold.”³⁹ In January 2013 he confessed that that LGBT issues had also been a sensitive topic for himself. “I did not grow up in a culture or at a time when we talked about these issues. But, as Secretary-General, I learned to speak out for one essential reason: lives and fundamental values are at stake.”⁴⁰ But his strongest-worded remarks till date were as recent as April 2013 in a video message to the Oslo Conference on Human Rights, Sexual Orientation and Gender Identity. Calling LGBT discrimination

³⁶ “Malawi frees jailed gay couple”, The Guardian, 29 May 2010

(<http://www.guardian.co.uk/world/2010/may/29/malawi-frees-jailed-gay-couple>)

³⁷ “Ban Ki-Moon: Africa Leaders Should Respect Gay Rights”, Huffington Post, 29 January 2012

(http://www.huffingtonpost.com/2012/01/29/ban-ki-moon-africa-gay-rights_n_1240124.html)

³⁸ “Ban Ki-Moon’s gay crusade”, The Southern Times, 6 March 2012

(http://www.southerntimesafrica.com/news_article.php?id=6806&title=Ban%20Ki-moon%E2%80%99s%20gay%20crusade&type=83)

³⁹ Message to Human Rights Council meeting on Violence and Discrimination based on Sexual Orientation or Gender Identity by Secretary-General Ban Ki-moon, Geneva, 7 March 2012

(http://www.un.org/apps/news/infocus/speeches/statments_full.asp?statID=1475#.Ua8vpUB7KSo)

⁴⁰ Remarks at Stanford University by Secretary-General Ban Ki-moon, Palo Alto, California, 17 January 2013

(http://www.un.org/apps/news/infocus/speeches/statments_full.asp?statID=1748#.Ua8xDk87KSo)

“one of the great, neglected human rights challenges of our time”, Mr Ban pledged to lead a global campaign against homophobic violence and discrimination.⁴¹

The High Commissioner for Human Rights

When the UN General Assembly created the post of High Commissioner for Human Rights in 1993, it also tried to clearly circumscribe its mandate to ensure an “impartial, objective, non-selective and effective performance.”⁴² The High Commissioner had to be guided “by the recognition that all human rights - civil, cultural, economic, political and social - are universal, indivisible, interdependent and interrelated and that, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”⁴³ This built-in ambiguity – respecting cultures and religions while at the same time defending the universality of human rights – meant that the fulfillment of his mandate was almost bound to meet with controversy and criticism.

More than just a civil servant overseeing the United Nations human rights machinery, it is the (supposed) moral leadership of the High Commissioner that gives it weight and influence on the international stage. It allows him to speak out on causes that the Commissioner thinks are overlooked or need to be addressed. But moral issues are inevitably also political issues (Ramcharan, 2009: 202), and the High Commissioner is not an activist but a diplomat. This balancing act is all the more obvious when it comes to LGBT rights advocacy.

The first High Commissioner, José Ayala-Lasso, did not speak out for LGBT rights during his mandate. Overall, he was seen as a rather weak and cautious Commissioner (Mertus, 2005: 38). When he was asked about his position on female genital mutilation (sometimes defended as cultural practice), his answer was that “first there is the idea that human rights are universal and must be respected. And second, we must not forget regional and national particularities of a cultural religious and traditional nature. So

⁴¹ Video and transcript to be found at the website of the Office of the High Commissioner for Human Rights (<http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTVideos2013.aspx>)

⁴² Resolution UN General Assembly A/RES/48/141, 85th plenary meeting, 20 December 1993, par. 2(a)

⁴³ Resolution UN General Assembly A/RES/48/141, 85th plenary meeting, 20 December 1993, par. 3(b)

there is a mutual interdependence between these concepts and I will follow the guidelines that the General Assembly has decided to establish as my mandate.”⁴⁴

Mr Ayala-Lasso resigned mid-way through a four-year term, making way in 1997 for Mary Robinson, then President of Ireland. Human rights groups had urged Secretary-General Annan to come up with a more outspoken candidate⁴⁵. In many regards, Mary Robinson was the opposite of José Ayala-Lasso. She promised to “stand up to bullies”, angered the United States with her stance on Afghanistan and was not afraid to speak out on issues she felt strongly about. But more interestingly, she was the first UN High Commissioner to consistently speak out in favour of gay rights. Her track record in that area was more that of an activist than a diplomat. As early as 1969 she spoke out against the criminalisation of homosexuality in Ireland⁴⁶, thereby upsetting both the political establishment and the Catholic Church. For many years Robinson also worked as legal advisor for the Campaign for Homosexual Law Reform, an organisation set up to organisation set up to campaign for the decriminalisation of homosexuality in Ireland. When they took the case (successfully) to the European Court in Strasbourg, Mary Robinson, at the time Senator, was part of the legal team.⁴⁷ Coincidentally, as President of Ireland she became the one to sign the bill into law which decriminalised homosexuality in Ireland in 1993. One year after her appointment as High Commissioner in 1997 an historical meeting took place between her and the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) in Geneva.⁴⁸ According to ILGA, Robinson promised to introduce the right of non-discrimination based on sexual orientation in all seminars and debates promoted by her, and intended to establish a permanent liaison between her Office and ILGA. She also asked ILGA to provide information for training UN staff, treaty bodies and rapporteurs.⁴⁹ In 2005 Mary Robinson received the OUTSPOKEN Award by the International Gay and Lesbian Human Rights Commission (IGLHRC) for her leadership in the advancement of LGBT rights. Reflecting back on the criticism she received after speaking out on homosexuality,

⁴⁴ “In conversation with Jose Ayala Lasso”, *Freedom Review*, April 1994, Vol. 25 Issue 2, p. 32

⁴⁵ “Irish President Favored for UN Rights Post”, *New York Times*, 19 May 1997

⁴⁶ In her acceptance speech to become Ireland’s youngest professor of law at Trinity College in 1969. (Source: interview with *Vanity Fair* in March 2013, <http://www.vanityfair.com/online/daily/2013/03/mary-robinson-pope-francis-reform>)

⁴⁷ Case of *Norris v. Ireland*, no .10581/83, Judgment of 26 October 1983.

⁴⁸ http://www.ilga-europe.org/home/about_us/what_is_ilga_europe/our_history/1998

⁴⁹ ILGA Annual Report 1999 (<http://www.cogailles.org/ilga/repilga99e.html>)

Robinson later said that “I had focused solely on the legal issue, not appreciating the political realities.”⁵⁰

When her mandate was not prolonged in 2002, the Brazilian UN official Vieira de Mello took over. He left the post however after eight months to become the UN Iraq Envoy. Louise Arbour, former Justice at the Canadian Supreme Court, succeeded him in 2003 and would remain High Commissioner until 2008. In 2005 her Office’s website for the first time included a reference to “sexual orientation” as part of a section on “cross-cutting issues.”⁵¹ But where Mary Robinson was the first High Commissioner to meet with gay NGO’s, Louise Arbour was the first to openly speak out in a strong-worded statement at the International Conference on LGBT Human Rights held in Montreal in July 2006 as part of the first World Outgames. “Neither the existence of national laws, nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killings that gay, lesbian, bisexual, and transgender persons are subjected to because of who they are or are perceived to be. Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights.”⁵²

Her successor, current High Commissioner Navi Pillay (South-Africa) is equally outspoken. Three months after the start of her tenure in 2008, she likened laws that criminalise same-sex consensual sex with the laws under the Apartheid regime, adding that they are “inconsistent both with international law and with traditional values of dignity, inclusion and respect for all.”⁵³ At the 2012 Human Rights Council panel on violence against LGT persons, where most of the OIC delegates walked out the room, she acknowledged that for some, “homosexuality and expressions of transgender identity conflict with local cultural or traditional values, or with religious teachings, or that they run counter to public opinion.” She added however that “the balance between tradition

⁵⁰ Ibidem.

⁵¹ “Out at the UN”, Douglas Sanders in: WORLD, 1 February 2010

⁵² Keynote Address by Madam Louise Arbour, United Nations High Commissioner for Human Rights at the International Conference on LGBT Human Rights, Montréal, 26 July 2006 (http://montreal2006.info/en_louise_arbour.html)

⁵³ “Gays, lesbians must be treated as equal members of human family – UN rights chief”, UN News Centre, 18 December 2008 (<http://www.un.org/apps/news/story.asp?NewsID=29364&Cr=pillay&Cr1#.Ubl8UB7KSo>)

and culture, on the one hand, and universal human rights, on the other, must be struck in favour of rights.”⁵⁴ The tension between the two became very apparent during her 2012 visit to Zimbabwe, where she called for the inclusion where Pillay spoke out in favour of gay rights. After her visit, the state-controlled Zimbabwe Broadcasting Corporation called it “stupid”, adding that “Zimbabwe is a morally-conscious nation whose traditions, customs and beliefs are against homosexuality.”⁵⁵

5. NGO Participation

Within the United Nations machinery, it is the United Nations Economic and Social Council (ECOSOC) that can grant NGO’s consultative status. Obtaining this status is important because it gives access not only to ECOSOC, but also to its many subsidiary bodies, to the various human rights mechanisms of the United Nations (most importantly the Human Right Council), ad-hoc processes on small arms, as well as special events organized by the President of the General Assembly.⁵⁶ Currently 3,735 NGO’s enjoy consultative status, and among them are several NGO’s that champion the cause of LGBT rights, either worldwide or nationally.

In July 1993, the International Lesbian and Gay Association (ILGA) obtained the much-coveted status. However, this happened more by accident, as the major battle within the Economic and Social Council was about the admission of Human Rights Watch. Also, for the first time the decision was taken by majority vote in the Economic and Social Council, and several delegates from developing countries were absent during crucial stages in the process.⁵⁷

ILGA’s accreditation met with fierce resistance, in particular among conservative American groups. When it became known in 1994 that one of ILGA’s 350 member organisations supported paedophilia⁵⁸, American Senator Jesse Helms began a campaign to have ILGA’s consultative status suspended. In September 1994 ECOSOC indeed

⁵⁴ Statement by UN High Commissioner for Human Rights Navi Pillay to the Panel on ending violence and discrimination against individuals on the basis of their sexual orientation and gender identity at the Human Rights Council 19th Session, Geneva, 7 March 2012

(<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11917&LangID=E>)

⁵⁵ “Pillay: gay rights advocate?”, ZBC, 28 May 2012 (<http://www.zbc.co.zw/news-categories/blogs-a-features/19933-mspillays-visit-controversial.html>)

⁵⁶ “Basic Facts about ECOSOC Status”, United Nations website (<http://csonet.org/index.php?menu=17>)

⁵⁷ “Out at the UN”, Douglas Sanders in: WORLD, 1 February 2010

⁵⁸ The North American Man Boy Love Association (NAMBLA) turned out to be a member of ILGA (source: ILGA: 1978 - 2007. A Chronology, in : World, 27 October 2010, <http://ilga.org/ilga/en/article/mG6UVpR17x>)

suspended ILGA from the list of accredited NGO's. It would take until 2006 until the first NGO's solely dedicated to the cause of LGBT rights would receive consultative status: the Danish National Association for Gay and Lesbians, the European branch of ILGA, and the Lesbian and Gay Federation in Germany.⁵⁹In July 2011 ECOSOC finally granted consultative status to ILGA, healing a 17-year-old wound according to its Secretary-General.⁶⁰

How effective has LGBT advocacy been at the UN? According to Swiebel (2009), the record thus far is mixed. Although they have contributed to putting the issue on the agenda, the unwillingness or outright hostility of many Member States to recognise concepts like sexual orientation and gender identity have severely hindered their effectiveness. Most of their success occurred in what Swiebel calls the 'niches' of the UN human rights machinery, in particular the treaty bodies and Special Rapporteurs. However, when it comes to binding decision-making at the intergovernmental level, progress depends on the (changing) attitudes of the Member States. The 2011 Human Rights Council resolution was groundbreaking in that regard, but as a non-binding resolution of a UN body composed of only 47 Member States, it remains to be seen what its impact will be.

Obviously not all accredited NGO's that speak about LGBT rights do so in a supportive way. Particularly in the last years, conservative organisations have gained ground within the United Nations. According to Clifford Bob, author of *The Global Right Wing and the Clash of World Politics* (2012), a rather unusual, transnational coalition has emerged uniting conservative Catholics, Protestants, Orthodox Jews and Muslims in their fight for traditional values. They seem to have overcome their aversion to international institutions and are becoming more and more professional in their international advocacy. The Catholic Family & Human Rights Institute is a case in point. For them, the whole terminology of sexual orientation and gender identity threaten "the national structure of the family", and must therefore be "discredited" (Bob, 2012: 43). According to United Families International, also accredited at ECOSOC, "tolerance

⁵⁹ ILGA: 1978 - 2007. A Chronology, in : World, 27 October 2010 (<http://ilga.org/ilga/en/article/mG6UVpR17x>)

⁶⁰ "ECOSOC: LGBT voices at the United Nations / ECOSOC Council vote grants consultative status to ILGA", in WORLD, 25 July 2011 (<http://ilga.org/ilga/en/article/n5GebHB1PY>)

toward sexual orientation requires the elevation of dangerous sexual practices to a place equal to traditional monogamous heterosexual norms.”⁶¹

6. Bureaucratic Structures

Within the United Nations structures, there is no special unit or department dealing with LGBT issues. Only the OHCHR structurally deal with LGBT issues, in particular since the 2011 resolution adopted by the Human Rights Council. Of course other UN organs, bodies and officials sometimes address LGBT issues, but not in a structural, consistent manner. In September 2010, High Commissioner for Human Rights Pillay appointed a Senior Advisor on Sexual Orientation and Gender Identity, a part-time position to co-ordinate LGBT-related work of the Commissioner, but working from the UN Headquarters in New York. In 2013, a full-time Human Rights Officer will be appointed to the OHCHR in Geneva with specific responsibility to “support the development and implementation of an OHCHR-wide strategy to strengthen protection of the human rights of lesbian, gay, bisexual and transgender (LGBT) persons.”⁶²

In 2011, the Office published a study, requested by Human Rights Council resolution 17/19, on discriminatory laws and discriminatory practices related to sexual orientation and gender identity. At her own initiative, the High Commissioner also published a booklet in 2012 called “Born Free and Equal” setting out the legal obligations that States have towards LGBT people. In addition to these publications, the OHCHR various field offices also pay attention to LGBT issues. According to the OHCHR 2010 Report, many of them are located in countries where discrimination against LGBT persons is systematic. In the OHCHR Management Plan for 2012-2013, the Office announced that it would focus its work on “fighting discrimination based on sex, race, colour, descent, national, ethnic or indigenous origin, religion or belief, language, disability, age, sexual orientation and gender identity.”⁶³

Funding of the OHCHR is not without problems. A third of the budget comes from the United Nations regular budget, while two thirds come from voluntary contributions

⁶¹ “Guide to Family Issues – Sexual Orientation”, United Families International, 2004, p. 5 (<http://unitedfamilies.org/downloads/Sex.pdf>)

⁶² See for the posted vacancy: <http://unjjobs.org/vacancies/1365585684913>

⁶³ OHCHR Management Plan 2012-2013, p. 32 (http://www2.ohchr.org/english/ohchrreport2011/web_version/media/pdf/0_OMP_2012-13_whole_Report.pdf)

by Member States and other donors. The overwhelming majority of these donations come from Western countries. In 2012, the top-five contributors were the United States, the Netherlands, Sweden, Norway and the European Commission.⁶⁴ 47 percent of these contributions were earmarked, meaning that money is donated for specific purposes. The Office's work on sexual orientation and gender identity issues in 2012 was largely funded by earmarked contributions from Norway.⁶⁵ OHCHR itself has acknowledged that a high level of earmarked funding could diminish its independence.⁶⁶ A conservative blog for instance recently accused Norway of "outsourcing – or laundering – their promotion of homosexuality through a UN agency."⁶⁷

In addition to earmarked funding, the imbalance in the geographical distribution of the OHCHR staff is seen as problematic, with more than half of the staff coming from European countries.⁶⁸ In 2007, the United Nations Joint Inspection Unit concluded that this could "result in diminishing the effectiveness and credibility of the work of OHCHR if it is perceived to be culturally biased and unrepresentative of the United Nations as a whole."⁶⁹

⁶⁴ OHCHR Report 2012, p. 117

(http://www2.ohchr.org/english/ohchrreport2012/web_en/allegati/downloads/1_Whole_OHCHR_Report_2012.pdf)

⁶⁵ OHCHR Report 2012, p. 138-139

(http://www2.ohchr.org/english/ohchrreport2012/web_en/allegati/downloads/1_Whole_OHCHR_Report_2012.pdf)

⁶⁶ The OHCHR Management Plan 2012-2013, p. 96, states that "a high level of unearmarked funding also reinforces OHCHR's independence"

(http://www2.ohchr.org/english/ohchrreport2011/web_version/media/pdf/0_OMP_2012-13_whole_Report.pdf)

⁶⁷ "Nordics launder LGBT advocacy through UN Human Rights Office", Wendy Wright, Blog 'Turtle Bay and Beyond', 9 May 2013. The blog is funded by the US-based Catholic Family & Human Rights Institute (<http://www.turtlebayandbeyond.org/2013/abortion/nordics-laundry-lgbt-advocacy-through-un-human-rights-office/>).

⁶⁸ In 2012, 53,3 % came from European countries, 16, 7 % from Africa, 15,7 % from Asia and 13,3 % from Latin America and Caribbean countries. Source: "Composition of the staff of the Office of the United Nations High Commissioner for Human Rights", Report of the United Nations High Commissioner for Human Rights, 25 January 2013, p. 4 (http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-69_en.pdf)

⁶⁹ "Funding and Staffing of the Office of the United Nations High Commissioner for Human Rights", United Nations Joint Inspection Unit, Geneva 2007, p. IV (https://www.unjiu.org/en/reports-notes/archive/JIU_REP_2007_8_English.pdf)

5. The Organisation of Security and Co-operation in Europe (OSCE)

1. Introduction

The Organisation of Security and Co-operation (OSCE) prides itself on being the world's largest security organisation, ranging from Vancouver to Vladivostok and spanning three continents. But it is not only its large and diverse membership that sets it apart. Contrary to the Council of Europe and the United Nations, the OSCE does not have Member States, but "mere" Participating States. Although this may seem a trivial detail in the greater picture, it is a reflection of the much looser and more flexible structure of the organisation. Indeed, born out of the desire to bring East and West together in the middle of the Cold War, its foundation was not a formal treaty or charter, but an intergovernmental conference that resulted in a solemn declaration. This "Conference on Security and Co-operation in Europe" was held from July 1973 till 1 August 1975 and resulted in the Helsinki Final Act.⁷⁰ Signed by 35 countries from the Warsaw Pact, NATO and neutral countries like Switzerland, Finland and Ireland⁷¹, it reflected the careful optimism during the so-called *Détente* of the Cold War. It is important to note that the Final Act is not a formal international treaty or agreement, and therefore the nature of its provisions is mainly declaratory and political. Contrary to the Council of Europe Statute or the UN Charter, the Participating States of the OSCE have not legally bound themselves, nor does the organisation they created enforce the commitments that they have voluntarily subscribed to.

The Final Act itself was based on the innovative concept of "comprehensive security": security was not just defined in traditional politico-military terms, but also included economic, environmental and humanitarian aspects. They would later become known as the three "baskets" of the OSCE: the politico-military dimension, the economic-

⁷⁰ According to the official text, the Final Act "is not eligible for registration under Article 102 of the Charter of the United Nations" (Helsinki Final Act, page 59). Article 102 of the UN Charter provides that "every treaty and every international agreement" concluded between any UN Member States be registered with the UN Secretariat and published by it, and that only those treaties and agreements that are registered may be invoked before any organ of the United Nations.

⁷¹ The complete list of the original signatories to the Helsinki Final Act is as follows: Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Soviet Union, the United Kingdom, the USA and Yugoslavia.

environmental dimension and the human dimension (Gheciu, 2008: 118). These three areas of co-operation were preceded by a Declaration of Principles that were to guide the Participating States in their mutual relations.⁷² The first six principles resembled much of the UN Charter provisions: the inviolability of frontiers, sovereign equality of States and the non-intervention in internal affairs all reflect classical notions of the Westphalian system. The seventh principle however went further, as the Participating States promised to

“respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion. They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.”⁷³

The Soviet delegation was particularly hesitant about accepting the human rights principle, but as often happens at the conclusion of treaties the end result was a bargain between two opposite blocks. The Soviets would accept the inclusion of human rights, whereas the West would accept the territorial status quo (Galbreath, 2007: 34).

With the end of the Cold War in the early 1990's, the CSCE gradually transformed from a small Secretariat to a fully-fledged international organisation. In 1992 a Parliamentary Assembly was created and the Office for Free Elections was renamed the Office for Democratic Institutions and Human Rights (ODIHR), taking on more tasks in the area of human rights and democratic institution-building. In 1994 the Conference of Security and Co-operation in Europe turned into a fully-fledged international organisation: the Organisation for Security and Co-operation in Europe (OSCE).⁷⁴

2. Mandate

As the core body within the OSCE that deals with human rights, ODIHR's mandate is weak compared to that of the OHCHR or the Council of Europe's Commissioner for

⁷² Contrary to the Statute of the Council of Europe (1948) for example, these principles and obligations are only incumbent on the Participating States, and are not phrased as the aim or purpose of the CSCE itself.

⁷³ Helsinki Final Act (1975), Declaration on Principles Guiding Relations between Participating States, Principle VII

⁷⁴ This decision was formally taken at the fourth Heads of State Summit in Budapest, 5-6 December 1994.

Human Rights. One of its main tasks is to “organize a short CSCE meeting at the seat of the Office for Democratic Institutions and Human Rights to address implementation of CSCE human dimension commitments every year in which a follow-up meeting does not take place”.⁷⁵ Clearly, ODIHR’s room for manoeuvre is extremely limited in an organisation that is based on consensus and unanimous decision-making. As a result, the human dimension commitments are leading in the implementation of its mandate. The core question therefore must be: do any of these commitments somehow address LGBT rights?

LGBT rights are not explicitly mentioned in any of the OSCE commitments or Ministerial Council Decisions adopted at the numerous summits and councils held since 1975. Neither is any reference made to homophobia or sexual orientation. This sets the OSCE apart from both the Council of Europe and the United Nations, that both have acknowledged LGBT rights in officially adopted documents at the highest political level. As the next section will show, the Holy See is one of the few Participating States that blocks any reference to sexual orientation or gender identity in the official Commitments or Ministerial Council Decisions.

Despite the fact that there is no explicit OSCE mandate in the field of LGBT rights, there are numerous adopted documents that endow the organisation with an important role in monitoring and combating intolerance and discrimination. One of the 1989 Vienna Document Principles is to “ensure human rights and fundamental freedoms to everyone within their territory and subject to their jurisdiction, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁷⁶ The 2003 Maastricht Ministerial Council, under Dutch Chairmanship, again reaffirmed the “commitment to promote tolerance and combat discrimination, and its concern about all manifestations of aggressive nationalism, racism, chauvinism, xenophobia, anti-Semitism and violent extremism in all participating States, as well as discrimination based, inter alia, on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, property, birth or other status”.⁷⁷ Although in the long list of prohibited grounds

⁷⁵ Prague Document on Further Development of CSCE Institutions and Structures (1992), Chapter III “Human Dimension”, par. 10

⁷⁶ Vienna 1989 Document, Questions Relating to Security in Europe: Principles (13.7)

⁷⁷ Decision No. 4/03 on Tolerance and Non-discrimination, Maastricht Ministerial Council 2003

of discrimination sexual orientation and gender identity is (purposefully) omitted, the addition of “or other status” and “inter alia” could theoretically cover these as well. However, there is no consensus among the Participating States whether that is the case.⁷⁸

When it comes to the mandate, interesting parallels can be drawn between LGBT rights and another politically sensitive topic: the death penalty. None of the OSCE commitments call for the abolition of the death penalty, although 51 OSCE States indeed have abolished it.⁷⁹ However, despite the lack of consensus and the sensitive nature of the debate surrounding the death penalty, commitments have been agreed in the area of exchange of information, making information public about the use of the death penalty and compliance with international standards.⁸⁰ In addition, ODIHR has published annual reports on the use of the death penalty since 1999.

In conclusion, it is important to note that the tension between mandate and practice does not limit itself to LGBT rights. Russia is increasingly critical of the OSCE’s work in the field of human rights and democracy, in particular its election monitoring. In 2005, it denounced the “blatant asymmetries that have taken root within the Organisation” and criticised the “double standards, politically motivated and biased assessments and (...) the use of human –rights issues for exerting political pressure”.⁸¹ The fact that the OSCE Secretariat has to operate in a highly politicised environment in which every move is carefully observed by the Participating States clearly limits its room for manoeuvre.

3. Membership attitudes

OSCE membership (although legally the term “participation” would be more adequate) is diverse and broad, both in terms of geography and culture. That in itself is not unusual for an international organisation, the United Nations being the obvious

⁷⁸ One could of course also turn the argument around: the Organisation has never explicitly said that sexual orientation or gender identity are *not* covered by this mandate.

⁷⁹ Only Belarus and the United States continue to impose the death penalty, whereas Kazakhstan, Russia and Tajikistan retain the death penalty in law but have in place moratoriums on executions.

⁸⁰ “The Death Penalty in the OSCE Area”, Background Paper 2012, OSCE/ODIHR (<http://www.osce.org/odihr/94219>)

⁸¹ Russia Statement in response to the Statement by the OSCE Chairman-in-Office and Minister for Foreign Affairs of Slovenia, Mr. Dimitrij Rupel to the Permanent Council, Vienna, 13 January 2005 (<http://www.osce.org/pc/39864>)

example. Several factors however give the OSCE its distinctive character. First of all, decision-making is based on consensus. If one state, even the smallest, does not agree with a certain paragraph or a particular phrasing in any of the Commitments or Ministerial Council Decisions, it will be modified until consensus is reached, or withdrawn by the Chairmanship-in-Office. Secondly, the OSCE includes even the smallest states, both in terms of territory and population. San Marino, Liechtenstein and Andorra are all full Participating States and are therefore legally on an equal footing with States like Canada and the United States. This inclusivity, coupled with the consensus principle, makes the OSCE the “only Organisation which gives equal voice to superpowers like the US and Russia, medium states like the UK, France, and Germany, and microstates such as Liechtenstein and San Marino” (Mosser, 2001: 67). Finally, there are no formal membership criteria: a State can join the OSCE by submitting a letter of accession in which it formally accepts the OSCE commitments and responsibilities.

When it comes to LGBT rights, roughly three groups of countries can be distinguished. First of all, there is a large group of countries that advocates an active role for the OSCE when it comes to LGBT rights. In their view, the mandate of the OSCE, in particular in the domain of tolerance and non-discrimination, is broad enough as to encompass also discrimination based on sexual orientation and gender identity. The European Union, as observer entitled to speak in the Permanent Council, usually represents this majority of states.⁸² In its view, “the commitments assumed by the participating States with regard to non-discrimination and fundamental freedoms should apply to all, including lesbian, gay, bisexual and transgender (LGBT) persons”. In addition, it condemns “manifestations of intolerance and the discrimination affecting LGBT persons in many OSCE participating States”.⁸³ Norway, as non-EU Member State, also regularly makes statements advocating for LGBT rights to be included in the OSCE agenda, recognising the “sensitivity of the LGBT issue in many countries throughout the

⁸² According to the EU Strategic Framework and Action Plan on Human Rights and Democracy adopted by the Council of Ministers in Jun 2012, “promoting adoption of commitments in the area of human rights of LGBT within the OSCE” is one of the priorities (Action point 22 of the EU Action Plan on Human Rights and Democracy, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf)

⁸³ Statement by the European union at the 925th meeting of the OSCE Permanent Council, Vienna, 15 October 2012 (OSCE Doc. PC.DEL/909/12)

OSCE area”, but at the same time denouncing the intolerance and legislation curbing the right of expression and assembly⁸⁴.

Noteworthy is also the increasingly active role of the United States in this dossier. Although officials during the Bush Administration remained silent at the OSCE about LGBT rights, that has changed with the Obama Presidency. In 2009 it urged “redoubled efforts to combat discrimination based on religion, race, gender, national origin, sexual orientation, gender identity, or disability”⁸⁵, and in January 2013 it stated to be “deeply concerned about proposed national legislation in Russia that would reportedly restrict freedoms of expression and assembly for lesbian, gay, bisexual, and transgender (LGBT) individuals, and indeed all Russians”, calling on Russia to “fulfill its OSCE commitments”.⁸⁶

Then there is a small group of States that keep silent about LGBT rights: they neither sign statements in favour, nor do they explicitly speak out against them. Turkey⁸⁷ and most of the former Soviet Republics in Asia are a case in point here. Most interestingly, the two remaining OSCE States that still criminalise homosexuality – Uzbekistan and Turkmenistan – also belong to this “quiet” group.⁸⁸ Many people in these predominantly Islamic societies still regard homosexuality as undesirable and objectionable. As recently as 2012, the leader of the People’s Movement of Uzbekistan, Muhammad Salih, spoke out in favour of a “civilised way of isolating gays and other sick members of society so that they could not infect healthy people with their disease”.⁸⁹

⁸⁴ Norway Statement on LGBT by Ambassador Robert Kvile to the Permanent Council, Vienna, 19 July 2012 (<http://www.norway-osce.org/PageFiles/586429/Norway%20on%20LGBT.pdf>)

⁸⁵ U.S. Statement on Tolerance and Non-Discrimination by Chargé d’Affaires Fuller to the Permanent Council, Vienna, 5 November 2009 (<http://iipdigital.usembassy.gov/st/english/texttrans/2009/11/20091105120521eaifas0.9869043.html#axzz2TqQwIxZa>)

⁸⁶ U.S. Statement on LGBT Rights in the Russian Federation by Ambassador Ian Kelly to the Permanent Council, Vienna, 31 January, 2013 (<http://iipdigital.usembassy.gov/st/english/texttrans/2013/02/20130205142083.html#axzz2TqQwIxZa>)

⁸⁷ Turkey decriminalized homosexuality as early as 1858 (source: ILGA, 2013: 21). In addition, Turkey was the first Muslim country in which a gay pride march was held. However, only 11,2 % of the Turkish population think homosexuality should not be a criminal act (Göksel, 2013: 2). The fact that Turkey is a candidate country to join the European Union probably plays a role in Turkey’s reluctance to clearly position itself in this regard.

⁸⁸ As is most often the case, the Criminal Codes of both countries only talk about men having sexual intercourse with men. In Turkmenistan the maximum prison sentence is two years, and in Uzbekistan three years. (Source: ILGA, 2013: 73, 75)

⁸⁹ “Muhammed Salih vows to isolate homosexuals”, UZNews.net, 30 April 2012 (https://uznews.net/news_single.php?lng=en&sub=&cid=30&nid=19667)

The third group of countries is even smaller, but increasingly vocal in their opposition to LGBT rights being included in the OSCE agenda in any fashion. The opposition is led by the Holy See, which is in a unique position in this regard.⁹⁰ Contrary to the Council of Europe or the United Nations – and indeed many other international organisations – it is a full OSCE member.⁹¹ This allows it to not only participate in all meetings at the highest level, but also to block any proposal that it disagrees with. It has regularly expressed the view that “so called “sexual orientation” or LGBT issues do not belong to the area of competence of the OSCE agenda. There is no consensus among participating States on these topics and no commitments in this regard, even if some are repeatedly trying to force our Organisation to deal with it. Hence, the Holy See will not accept to discuss these issues.⁹² A former OSCE staff member confirms the stubborn rejection by the Holy See of any document mentioning sexual orientation, with the acquiescence of some other countries. Their diplomats are usually extremely well prepared, know how to present their view well, and impress other Participating States with their rhetorically compelling contributions.⁹³

The fact that a State as small as the Holy See is able to block inclusion of sexual orientation or gender identity in the OSCE commitments due to the consensus principle causes a lot of frustration, not only with other Participating States but also staff members themselves.⁹⁴ As the OSCE Secretary-General Mr Lamberto Zannier recently remarked, the consensus principle “strengthens in a way those countries that don’t have any other way of putting their agenda on the table and making sure that everybody listens to them. I find that healthy and so I like it”. However he went on to say that “sometimes we have the feeling that out of frustration there is too much hijacking the agenda, including by some of the small players, creating frustrations for everybody”.⁹⁵

⁹⁰ See for more on the Holy See’s diplomacy: “Papal Diplomacy: God’s Ambassadors”, The Economist, 19 July 2007 (<http://www.economist.com/node/9516461>)

⁹¹ The Organisation for the Prohibition of Chemical Weapons (OPCW) and the International Atomic Energy Agency (IAEA)

⁹² Holy See Statement on Review of Current Issues by Monseigneur Marinko Antolović to the Permanent Council, Vienna, 19 July 2012 (<http://www.osce.org/pc/92448>)

⁹³ Interview in Vienna, 23 April 2013

⁹⁴ This frustration was prevalent in all the interviews I had, both with UN, Council of Europe and OSCE (former) staff members.

⁹⁵ “Lamberto Zannier: OSCE has to address new challenges”, Radio The Voice of Russia, 24 October 2012 (http://english.ruvr.ru/2012_10_24/Lamberto-Zannier-OSCE-has-to-address-new-challenges/)

Although the Holy See has been the most vocal in its opposition, Russia increasingly aligns itself with it. When other States recently criticised a proposed bill that would prohibit the “promotion” of homosexuality among minors, the Russian delegation responded by pointing out that “there is no mention of the concepts of “sexual orientation” or “gender identity” in universal international agreements or in the OSCE commitments. The calls on Russia to implement certain commitments in this area are therefore unfounded”. In addition, it stressed that it “shall continue to rely on traditional and moral values, which prevail not only in Russian society but also in the societies of other OSCE Participating States”.⁹⁶ Moldova has expressed the same view, stating that “we consider that this topic does not belong to the OSCE agenda and it could be discussed in the framework of other international fora”.⁹⁷

4. Leadership

While the intergovernmental side of the OSCE is reflected in both the official mandate and the positions taken by the Participating States within the Ministerial and Permanent Councils, the bureaucratic side of the Organisation equally deserves attention. Although the consensus principle is the OSCE’s corner stone, some parts of the organisation display a relative degree of autonomy. As Bloed argues, the Chairman-in-Office, the ODIHR, the High Commissioner on National Minorities, the Representative on Freedom of the Media and long-duration field presences are not “(fully) subject to the consensus principle” (2009: 553). How does that play out when it comes to the issue of LGBT rights within the Organisation? First we will look at the role of people in leadership positions within the Organisation, before we turn to the bureaucratic structures themselves.

OSCE Secretary-General

Unlike the Secretary-Generals of the Council of Europe or the United Nations, the successive Secretary-Generals of the OSCE to date have never spoken out publicly in favour of LGBT rights. His role however is more restricted than that of his counterparts. When the post was created, it was established that the Secretary-General “will derive

⁹⁶ Russian Federation Statement on the draft law on amendments to the Code of Administrative Offences of the Russian Federation by Mr Andrey Kelin to the Permanent Council, Vienna, 31 January 2013 (<http://www.osce.org/pc/99151>)

⁹⁷ Moldova Statement by Mr Valeriu Chiveri to the Permanent Council, Vienna, 22 March 2012 (<http://www.osce.org/pc/89252>)

his/her authority from the collective decisions of the participating States and will act under the guidance of the Chairman-in-Office”.⁹⁸ This of course does not prevent him from raising LGBT issues in private conversations with government officials or NGO representatives, but as the representative of the Chairperson-in-Office and the OSCE’s Chief Administrative Officer his public advocacy role is very limited. A more flexible, broader interpretation of his mandate could meet with the resistance of the Participating States.

Chairmanship-in-Office

Since 1991, the rotating Chairmanship-in-Office is assumed by a Participating State who then chairs the Permanent and Ministerial Councils. In that capacity it can influence the agenda and set priorities, but in the end a lot depends on whether consensus can be reached. In addition, as the OSCE is first and foremost a security organisation, most Chairmanships will focus on security-related activities. Even during the Chairmanship of the Netherlands in 2003, which two years earlier had been the first country in the world to introduce same-sex marriage, LGBT issues did not figure among the priorities and were not mentioned in the final report.⁹⁹ New challenges have also appeared on the agenda recently, like human trafficking, terrorism and internet freedom.

As the 2012 Irish Chairmanship-in-Office experienced, progress in the so-called Human Dimension is particularly challenging. At the end of the Dublin Ministerial Council, where no agreement could be reached to strengthen the Human Dimension¹⁰⁰, the Irish Minister for Foreign Affairs and Trade Eamon Gilmore concluded that the “failure to agree any decisions in the human dimension is a matter of regret to me and reconfirms a worrying trend of recent Ministerial Councils”, adding that “respect for basic human rights and fundamental freedoms is currently under great threat in many parts of the OSCE region”. He went then on to assure his counterparts that he would

⁹⁸ Decision taken at the Third Ministerial Council Meeting, Stockholm, 14-15 December 1992 (<http://www.osce.org/mc/40342>)

⁹⁹ Report of the Chairman-in-Office, OSCE 2003 (<http://www.osce.org/secretariat/13587>)

¹⁰⁰ According to the Irish Times, just over 50 States supported the Irish proposals (“OSCE summit ends with few strides in “human dimension”, Irish Times, 8 December 2012)

“work tirelessly to (...) combat discrimination of all kinds, including discrimination against our LGBT fellow citizens”.¹⁰¹

There is another way however in which the Chairmanship can exert some influence: the appointment of Personal Representatives. In their report to the Permanent Council they enjoy a relative freedom. The Irish Chairmanship for example appointed Judge Catherine McGuinness as the Personal Representative on Combating Racism, Xenophobia and Discrimination, also focusing on Intolerance and Discrimination against Christians and Members of Other Religions¹⁰², who from the outset was clear that she was “committed to combating all forms of racism, xenophobia, and discrimination, including (...) bias against LGBT persons”. She implicitly criticised Ukraine and Russia for promulgating legislation which “risks criminalising legitimate speech and has the effect of legalising discrimination against LGBT persons”.¹⁰³ It remains to be seen whether the new Personal Representative appointed by the current Ukrainian Chairmanship will include LGBT discrimination in her report.

Director of ODIHR

Although the highest official at the OSCE in charge of Human Rights, the position of Director of the Office for Democratic Institutions and Human Rights is much different than that of the Commissioner for Human Rights of the Council of Europe or the UN High Commissioner for Human Rights. Its leadership and advocacy role is much more limited due to the consensus principle and the circumscribed mandate of ODIHR itself. Still, the first ODIHR Director, Luchino Cortese, already mentioned the importance of combating discrimination based on sexual orientation as part of democratic institution building as early as 1994.¹⁰⁴ Christian Strohal¹⁰⁵, who served as ODIHR Director from March 2003

¹⁰¹ Closing Statement by Chairperson-in-Office of the OSCE, Eamon Gilmore TD, Minister for Foreign Affairs and Trade of Ireland, 19th OSCE Ministerial Council, Dublin, 7 December 2012

¹⁰² The long title is in itself a compromise, reflecting

¹⁰³ Judge Catherine McGuinness, Personal Representative of the OSCE Chair-in-Office on Combating Racism, Xenophobia and Discrimination, also focusing on Intolerance and Discrimination against Christians and Members of Other Religions, Report to the OSCE Permanent Council, Vienna, 15 November 2012 (<http://www.osce.org/pc/97507>)

¹⁰⁴ Report of Ambassador Luchino Cortese to the 25th CSCE Committee of Senior Officials on the First Three Years' Activity of the Office for Democratic Institutions and Human Rights, CSCE ODIHR BULLETIN Vol. 2, No. 2, p. 31

¹⁰⁵ Previously the Austrian diplomat worked as representative to the UN Commission on Human Rights, as a delegate to the UN General Assembly, and as a representative to the EU Working Group on Human Rights. From 1994 to 2000, he was Director for Human Rights, International Humanitarian Law, and Minority and Gender Issues at the Austrian Ministry of Foreign Affairs.

to June 2008, also deserves special mention here. Under his leadership, a fully-fledged Human Right Department was created, as well as the Tolerance and Non-discrimination Department. Mr Strohal, who in his farewell speech called the function of ODIHR Director “the most exciting function in the world of human rights”¹⁰⁶, alluded regularly to sexual orientation in his speeches. At the OSCE Conference on Anti-Semitism and on Other Forms of Intolerance at Cordoba in 2005 he stressed that “the OSCE recognizes that intolerance and exclusion are not the sole burden of ethnic minorities. Intolerance (...) affects individuals on the grounds of their religion or belief, their background or status, their sexual orientation or their particular abilities”.¹⁰⁷ He further illustrated his remarks by describing an incident of “gay-bashing” where someone was severely beaten while walking hand-in-hand with his boyfriend.

5. NGO Participation

NGO participation within the OSCE is very limited, particularly when compared with the Council of Europe or the United Nations. The only meeting where they are entitled to contribute to the discussion is the annual Human Dimension Implementation Meeting in Vienna, a forum where OSCE participating States discuss the implementation of human dimension commitments that were adopted by consensus at prior OSCE Summits or Ministerial Meetings. The European branch of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), but also national organisations like COC Netherlands, usually make a number of interventions during the meeting’s relevant sessions, focusing for example on Gay Prides as part of freedom of assembly and expression, or the fact that Turkmenistan and Uzbekistan still criminalise homosexuality. Increasingly, NGO’s that are critical of LGBT rights also express their negative stance. In 2010, the American evangelical organisation Redeemed Lives organised a side-event to the Human Dimension Implementation Meeting in which it advocated that the rights of people with unwanted same-sex attractions to receive treatment from therapists who hold to their same convictions were in danger.¹⁰⁸ In 2012

¹⁰⁶ Address by Ambassador Christian Strohal, Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) at the 716th Meeting of the Permanent Council Vienna, 12 June 2008 (<http://www.osce.org/odihr/32363>)

¹⁰⁷ Introductory Statement by Ambassador Christian Strohal, Director of ODIHR, Cordoba, 9 June 2005, p. 2 (<http://www.osce.org/odihr/15551>)

¹⁰⁸ Understanding Diversity of Definitions for Gender for the Public Debate, Side Event OSCE - Warsaw, 6 October 2010 (<http://www.redeemedlives.org/pdf/ART92.PDF>)

the International Federation for Therapeutic Choice (IFTC) recommended Participating States to “condemn intolerance and discrimination against sexual minorities who freely choose help in order to overcome or diminish their unwanted sexual attractions, orientation, behaviors, and/or identity”.¹⁰⁹

6. Bureaucratic Structures

ODIHR

Despite the politicised debate around the reach of the mandate, the opposition by some States and the consensus principle, ODIHR tried to push LGBT issues forward in two regards¹¹⁰. The first was the creation of a Tolerance and Non-Discrimination Department, which subsequently included discrimination based on sexual orientation in its working definition of “hate crime”. Officially mandated to “follow closely (...) incidents motivated by racism, xenophobia, or related intolerance, including against Muslims, and anti-Semitism in the OSCE area making use of all reliable information available”¹¹¹, the office decided to also include incidents based on homophobia. It judged that discrimination based on sexual orientation was a fundamental element of hate crime, and could not be left out¹¹², also because some Participating States reported specifically on this category of hate crime.

Secondly, homophobia was included as a “key issue” within the newly created Tolerance and Non-Discrimination Information System (TANDIS).¹¹³ It provides an overview of international standards and commitments, documents and publications, practices and initiatives, and links to relevant websites focusing on homophobia. Its main focus is hate motivated violence against LGBT persons, but the section also includes educational resources, tools and manuals to help counter general intolerance

¹⁰⁹ IFTC Intervention at the 2012 ODIHR Human Dimension Implementation Meeting, Warsaw, 1 October 2012 (<http://www.osce.org/odihr/94505>)

¹¹⁰ Interview with Christian Strohal, former ODIHR Director, Vienna, 23 May 2013

¹¹¹ OSCE Decision no. 621 on Tolerance and the fight against racism, xenophobia and discrimination, 2004

¹¹² The full working definition was formulated as follows: “Part A) Any criminal offence, including offences against persons or property, where the victim, premises or target of the offence are selected because of their real or perceived connection, attachment, affiliation, support or membership with a group as defined in part B. Part B) A group may be based upon their real or perceived race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or other similar factor.” According to the first 2005 Hate Crime Report, this working definition “takes national differences into account, such as differences in approach, resources, legislation and needs, and allows each state to amend the definition as it sees fit”.

(<http://www.osce.org/odihr/15249>)

¹¹³ TANDIS has developed into a publicly accessible online database (<http://tandis.odihr.pl>).

against LGBTs. The Holy See objected to the inclusion of homophobia in the TANDIS system, but they acquiesced when ODIHR staff members showed that “Intolerance against Christians” was also included as a key issue.¹¹⁴ In 2011 and 2012, the German evangelical organisation Wuestenstrom called for a specific category to be added in TANDIS on discrimination of “Christians who seek help with unwanted same-sex attraction”.¹¹⁵

Field Missions

Interestingly, field missions enjoy a considerable degree of freedom, mainly due to their small and ad-hoc structure, limited visibility and their geographical distance from the Vienna headquarters. In some of the field offices, the protection of LGBT rights is mainstreamed within its activities.¹¹⁶ When the second ever Gay Pride was planned in October 2010 in Belgrade, the Head of the OSCE’s field office Daiana Serafina called it a test of Serbia’s maturity as a democracy.¹¹⁷ Sometimes the OSCE mission is the only international office where LGBT activists can find a place of safety, especially in the former Soviet Republics. On occasion, OSCE missions serve as venue for roundtables or meetings related to for example the International Day against Homophobia (IDAHO).¹¹⁸

Parliamentary Assembly of the OSCE

Although the Parliamentary Assembly, located in Copenhagen, is a somewhat separate body within the general structure of the OSCE and has a strictly advisory role¹¹⁹, its resolutions can serve as pressure on both the Participating States and the Secretariat. To date, it has spoken out twice about LGBT rights. In 1995 it called on the Participating States to ensure that there “be no subordination, explicit or implied, on the basis of ethnicity, race, colour, language, religion, sex, sexual orientation, national or social origin or belonging to a minority”.¹²⁰ In 2010, it condemned “any incitement to hatred and any discriminatory or abusive statement against LGBT persons or groups”

¹¹⁴ Interview with former OSCE staff member, Vienna, 23 April 2013

¹¹⁵ Compilation of Written Recommendations, Human Dimension Implementation Meeting, 4 October 2011 (<http://www.osce.org/odihr/83744>), and the Statement at the 2012 Human Dimension Implementation Meeting, 24 September 2012 (<http://www.osce.org/odihr/94712>)

¹¹⁶ Interview with Mr Christian Strohal, Vienna, 23 May 2013

¹¹⁷ “Gay Parade is Serb Democracy Test”, AFP, 7 October 2010

¹¹⁸ Interview former OSCE staff member, Vienna, 23 April 2013

¹¹⁹ For example, unlike to the Parliamentary Assembly of the Council of Europe it cannot pose official questions to the Permanent or Ministerial Council.

¹²⁰ Ottawa Declaration of the OSCE Parliamentary Assembly, 8 July 1995, Chapter III, par. 29

and called on States to “adopt legislation banning any form of discrimination on grounds of sexual orientation or gender identity”.¹²¹ In addition, in 2012 President of the Assembly Petros Efthymiou called on the OSCE participating States to “recommit themselves to the constant fight against discrimination and all acts of hate, whether they target one for their ethnicity, religion, race or sexual orientation”¹²² during a wreath laying ceremony at Yad Vashem.

¹²¹ Resolution on the Prohibition of Discrimination on Grounds of Sexual Orientation or Gender Identity, adopted at the 19th Annual Session, Oslo, 6-10 July 2010

¹²² Statement of the President upon laying a wreath at the Hall of Remembrance at Yad Vashem, OSCE PA, 13 February 2012 (<http://www.oscepa.org/news-a-media/press-releases/886-statement-of-the-president-upon-laying-a-wreath-at-the-hall-of-remembrance-at-yad-vashem>)

6. The Council of Europe

1. Introduction

In May 1949 the Treaty of London created the Council of Europe, headquartered in Strasbourg, France, with the aim to “achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.”¹²³ With ensuring respect for fundamental freedoms, democracy and human rights as its core principle, it gradually expanded in scope, membership and importance. Originally signed by only ten States, its current 47 Member States cover all of Europe except Belarus.

Unlike the OSCE, its human rights machinery is highly developed and forms the core of the organisation. In particular the European Court of Human Rights, tasked with interpreting and ensuring the observance of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, has been influential through its judgements that are binding upon all Member States. In addition, the Council of Europe has drafted numerous standards laid down in more than 200 Conventions, although they only bind the Member States who ratified them.

2. Mandate

As a strictly intergovernmental organisation, the Council’s principal mandate comes from both its Statute and the Committee of Ministers as its principal decision-making body. The European Convention for Human Rights and the Court’s interpretation can be seen as the legal underpinning of the organisation, as all 47 Member States are bound by the Convention and the Court’s rulings. Technically however the Convention is separate from the Council and its Secretariat.

When it comes to the 1949 Statute of the Council, it does not mention any specific human rights categories. According to Article 15, it is up to the Committee of Ministers to “consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters.” It will therefore be of most interest

¹²³ Statute of the Council of Europe, Article 1(a)

for the purpose of this thesis to focus on the Convention for Human Rights and the Committee of Ministers.

The Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

Although it is not legally required, it has become customary to require the acceptance of the European Convention on Human Rights and Fundamental Freedoms (1950) by any country who wants to join the Council of Europe.¹²⁴ In that sense, one could perhaps consider the European Convention a de facto constitutional document laying down the human rights principles that the organisation seeks to uphold. The contentious issue of how subsequently to interpret the scope and reach of the human rights provisions has been solved within the Council of Europe by the creation of the European Court of Human Rights. It is the Court which interprets and applies the Convention, and the Member States “undertake to abide by the final judgment.» The Committee of Ministers’ role in turn is to “supervise its execution” (Article 46). By conferring the task of interpreting the reach and scope of the European human rights provisions, the Member States have avoided the politicised discussions that take place at the OSCE or the United Nations. In that sense, the Court rulings become part of the human rights *acquis* in all the Member States, and indirectly also the Council of Europe itself.

The rulings of the European Court of Human Rights are legally separate from the Council of Europe’s mandate, and are only binding upon the individual signatories to the Convention. The fact that the Court in 1981 ruled in the famous *Dudgeon v. United Kingdom* case that the criminalisation of homosexuality in Northern Ireland¹²⁵ infringes upon the right to privacy (Article 8 of the Convention) in principle meant that all other Member States with a similar provision in their Criminal Code also had to change their legislation. With this landmark case, the Court was the first international body to rule that laws criminalising same-sex conduct between consenting adults violate human rights. In subsequent rulings, the Court elaborated and developed its reasoning. In *Salgueiro da Silva Mouta v. Portugal* for example, it explicitly affirmed sexual orientation as a prohibited ground of discrimination within the meaning of Article 14 of the

¹²⁴According to the Parliamentary Assembly website (http://assembly.coe.int/Main.asp?link=/AboutUs/APCE_structures.htm). The Assembly gives an official Opinion on the accession of candidate countries to the Committee of Ministers, which decides in the end.

¹²⁵ *Dudgeon v. the United Kingdom* (no.7525/76), 22 October 1981

Convention. Article 14 states that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” According to the Court, “the list set out in that provision is illustrative and not exhaustive, as is shown by the words ‘any ground such as’ (in French ‘notamment’)” (ICJ, 2009: 37).

Although the Court’s rulings are in essence a judicial mechanism, the fact that the Committee of Ministers has to ensure its rulings are effectively carried out within the national jurisdictions of the Member States gives it a clear intergovernmental character as well. An example is the case of *Alekseyev v. Russia* in 2010 – the first LGBT case against Russia – in which the Court found that it had violated *inter alia* the freedom of association and the prohibition of discrimination by refusing Mr Alekseyev to hold gay-pride marches in Moscow in 2006, 2007 and 2008.¹²⁶ The execution of the judgment was placed by the Committee of Ministers under “enhanced supervision” and as a consequence the subject of close scrutiny. Clothed in diplomatic language, it noted that “the domestic remedy referred to by the authorities might not provide adequate redress in all circumstances” and expressed “concerns as regards the use of regional laws prohibiting propaganda of homosexuality among minors.”¹²⁷ In March 2013 it conveyed its serious concerns regarding the pending bill regarding prohibition of the “promotion of homosexuality” at federal level, adding that the “adoption of such a law could raise serious questions as to the compliance by the Russian Federation with its obligations under Article 46 of the Convention.”¹²⁸

It should be noted that there is not explicit anti-discrimination provision when it comes to sexual orientation or gender identity in the Convention¹²⁹. In 2000, an additional Protocol was adopted with a more general prohibition of discrimination, but again without explicit reference to LGBT rights. ILGA-Europe, who argued that “their

¹²⁶ *Alekseyev v. Russia*, European Court of Human Rights, no. 4916/07, 25924/08 and 14599/09, 21 October 2010

¹²⁷ Supervision of the execution of judgments of the European Court of Human Rights, 6th Annual Report of the Committee of Ministers 2012, p. 132

¹²⁸ 1164th meeting, Committee of Ministers, 7 March 2013 (<https://wcd.coe.int/ViewDoc.jsp?id=2039741&Site=CM>). Article 46 states that “the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.»

¹²⁹ Article 14 prohibits “discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.»

explicit mention in the list of grounds would constitute a symbolic declaration of the greatest importance”¹³⁰, lobbied unsuccessfully to have them included. The Explanatory Report argued that inclusion was not necessary since the list of non-discrimination ground is not exhaustive, and the inclusion of any particular additional ground “might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included.” In addition, it pointed to the fact that the Court had already applied Article 14 to cases of discrimination based on sexual orientation or gender identity.¹³¹ The additional protocol is ratified by only 18 countries, less than half of the Member States. Among the countries that have not ratified are the United Kingdom, Sweden, Turkey and Russia.

Committee of Ministers

The Committee decides – in principle by unanimity¹³² – on the budget and the policies that are carried out by the Secretariat, and has therefore a pivotal role. The Committee of Ministers was more or less forced to debate the discrimination of homosexuals for the first time in 1981 when it had to formulate a reaction to Recommendation 924 and Resolution 756 on this topic adopted by the Parliamentary Assembly, *inter alia* calling for the decriminalisation of homosexuality in all Member States. Perhaps not surprisingly, no unanimity could not be reached, as at that moment, Ireland and Cyprus still had laws that criminalised same-sex intercourse by consenting adults. In the end, the decision was taken that “without wishing to comment on their content” the recommendation and resolution would be transmitted to the governments of member States.¹³³

¹³⁰ Background Information Protocol 12, by Nigel Warner and Robert Wintemute, ILGA-Europe (http://www.ilga-europe.org/home/how_we_work/previous_projects/council_of_europe_additional_protocol_12/background_information)

¹³¹ Explanatory Report of Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, par. 20

¹³² In 1994 the Ministers' Deputies decided to make their voting procedure more flexible and made a "Gentleman's agreement" not to apply the unanimity rule to recommendations. (http://www.coe.int/t/cm/adoptedtextsinfo_EN.asp)

¹³³ Conclusion of the Meeting of the Deputies, Doc. CM/Del/Concl(82)343, item no. 15. (<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1793314&SecMode=1&DocId=674726&Usage=2>). The minutes of the meetings of the Committee of Ministers are declassified after 30 years, unless they are classified as ‘secret’.

It would be in their reply to the 1989 Assembly recommendation on “The conditions of transsexuals” that the Committee of Ministers was able to reach a conclusion that was more than just procedural, although it took them several years to come up with the reply. It expressed “its awareness of the serious problems faced by transsexuals, who are often victims of discrimination.”¹³⁴ In 2000, it reacted on a more general Recommendation by the Assembly on “the situation of gays and lesbians in the Council of Europe Member States.» The Ministers acknowledged the problem, but rejected all the concrete proposals by the Assembly, which proposed *inter alia* to create a fulltime position within the Office of the Commissioner for Human Rights with special responsibility for LGBT discrimination and extend the terms of reference of the European Commission against Racism and Intolerance (ECRI).

In addition to the Assembly’s recommendations, LGBT issues were increasingly raised in written questions to the Committee on individual governments’ conduct. When local authorities in the Moldovan capital Chisinau banned the so-called “Pride Festival” in 2007, Swedish MP Acketoft asked the Committee whether it agreed that the decision made by the local authorities in Chisinau infringed Article 11 of the Convention on Human Rights.¹³⁵ The Committee responded by stressing that “the Council of Europe’s message of tolerance and non-discrimination is meant to materialise in all European societies, and discrimination on grounds of sexual orientation is not compatible with the value of tolerance and the principle of equality, to which all the member states are bound.”¹³⁶

An historic step was the Recommendation¹³⁷ that was adopted on 31 March 2010 by the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity. Under Swedish Chairmanship, the Steering Committee for Human Rights (CDDH)¹³⁸ was charged with drafting a “recommendation on measures to combat discrimination based on sexual orientation or gender

¹³⁴ Committee of Ministers’ reply to Recommendation 1117 (1989) adopted on 17 February 1994 at the 508th meeting of the Ministers’ Deputies.

¹³⁵ Written Question No. 524 to the Committee of Ministers by Mrs Acketoft, 14 May 2007 ([https://wcd.coe.int/ViewDoc.jsp?Ref=CM/AS\(2007\)Quest524&Language=lanEnglish&Ver=final](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/AS(2007)Quest524&Language=lanEnglish&Ver=final))

¹³⁶ Reply to Written Question No. 524, CM Documents (CM/AS(2007)Quest524 final 9 November 2007)

¹³⁷ Article 15.b of the Statute provides for the Committee of Ministers to make recommendations to member states on matters for which the Committee has agreed “a common policy.»

¹³⁸ The Steering Committee’s role, under the auspices of the Committee of Ministers, is to set up standards commonly accepted by the 47 member states with the aim of developing and promoting human rights in

identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them.”¹³⁹ The CDDH in turn tasked a committee of experts to come up with a first draft. In the expert committee several NGO’s (e.g. Amnesty International, ILGA-Europe) were also allowed to participate as observer. Conservative NGO’s also noted these new developments. The Christian Telegraph for example wrote that the Council was to “debate forced acceptance of homosexual ideology.”¹⁴⁰

Hailed as the world’s first comprehensive intergovernmental agreement on LGBT rights, it is the Committee’s strongest and clearest stance on LGBT rights to date in the Council’s history. It addresses LGBT discrimination in *inter alia* employment, education, housing, health and asylum, and encourages States to adopt national legislation to combat hate speech and guarantee freedom of association and expression. Legal provisions that try to restrict these rights on the grounds of public health, public morality or public order should be prevented.¹⁴¹ The recommendation can be seen as a soft law instrument, meaning that it is not legally binding and that its implementation cannot be enforced. Still, it carries considerable political and moral weight, as all Member States theoretically have agreed with its content.

Although adopted by the Committee as a whole, and therefore by all 47 Member States, Russia’s internal opposition and their efforts to water down the final text are mentioned by several insiders. It argued that the final text subverted the European Court judgments and that it encouraged discrimination against the traditional family.¹⁴² Some interviewees have mentioned the fact that Russia has made an internal reservation to the text, although it did not want to block the adoption of the recommendation as a whole. As the minutes of the Committee of Ministers meetings will only be made public thirty years from now, it is impossible to ascertain whether that is true. It is possible that they invoked the informal Gentleman’s Agreement from 1994 in

Europe and improving the effectiveness of the control mechanism established by the European Convention on Human Rights (<http://www.coe.int/t/dghl/standardsetting/cddh/>).

¹³⁹ Meeting of the Minister’s Deputies 1031st meeting, 2 July 2008, Decision No. CM/876/02072008, “Ad hoc terms of reference for the Steering Committee for Human Rights (CDDH)”

¹⁴⁰ “Europe to debate forced acceptance of homosexual ideology”, Christian Telegraph, 20 November 2009 (<http://www.christiantelegraph.com/issue7696.html>)

¹⁴¹ Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity.

¹⁴² Interview NGO representative, 17 May 2013

which the Committee decided not to apply the strict unanimity rule to recommendations. It is however an informal agreement, meaning that formally the unanimity rule applies and thus can be invoked.¹⁴³

In order to ensure the implementation of the recommendation, the Committee of Ministers instructed the CDDH in September 2012 to examine the implementation in all Member States. The way in which this would be done met however with opposition, in particular from Russia who managed to exclude NGO contributions from the assessment report. The subsequent attempt by Russia and Bulgaria to block the approval of the questionnaire failed, and the questionnaire was therefore sent out to all 47 Member States. On 13 March a draft report was published which concluded that twenty states judged their implementation as “adequate”. Six states answered “fully satisfactory”, six other states described it as “insufficient”¹⁴⁴ and one state as “absent”.¹⁴⁵ Russia, Bulgaria, Ukraine, Azerbaijan, Iceland, Luxembourg, Monaco and San Marino did not reply to the questionnaire. The report did indeed exclude contributions from NGO’s, but mentioned as a compromise that “spontaneous contributions submitted by Amnesty International, ILGA Europe and the European Union Agency for Fundamental Rights (...) are accessible online” at the Council of Europe’s website.¹⁴⁶ With the financial support of the Dutch Government’s Department for Gender & LGBT Emancipation of the Ministry of Education, Culture and Science, ILGA-Europe published its own report, in which it concluded that in general there had been little progress. Indeed, “in some of the countries reviewed steps are being taken which directly contravene its provisions”, citing Russia and Ukraine as the prime examples.¹⁴⁷

Aware of the political sensitivity, the CHHD draft report cautiously concludes that the Committee of Ministers “could take action in order to mainstream LGBT issues in all the areas of activity of the Council of Europe, possibly by setting up a long-term action

¹⁴³ According to Article 20 of the Statute of the Council of Europe (1949)

¹⁴⁴ Bosnia and Herzegovina, Estonia, Greece, Serbia, Slovakia and Turkey

¹⁴⁵ Slovenia

¹⁴⁶ Draft report on the implementation of the Committee of Ministers’ Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, Steering Committee for Human Rights, 13 March 2013, p.2 ([http://www.coe.int/t/dghl/StandardSetting/CDDH/CDDH-DOCUMENTS/CDDH\(2013\)007_en.pdf](http://www.coe.int/t/dghl/StandardSetting/CDDH/CDDH-DOCUMENTS/CDDH(2013)007_en.pdf))

¹⁴⁷ “The Council of Europe Recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5). A survey of progress towards implementation in 16 member states”, ILGA-Europe, January 2013, p. 9

plan.”¹⁴⁸ It remains to be seen whether all Member States will agree to that later this year. Recent developments however are not encouraging. In the past years, the laws introduced in Ukraine and Russia to curb so-called propaganda of homosexuality among minors have caused unease with other Member States and within the Council itself. When the current LGBT rapporteur Haugli asked questions in 2012 about regional laws introduced within Russia that prohibited “propaganda of sodomy, lesbianism, bisexuality, transgenderism amongst minors”¹⁴⁹, the Committee of Ministers replied that “owing to a lack of consensus it has not been possible to adopt a reply.”¹⁵⁰ According to Mr Haugli, “there are a few countries that decline to support any resolutions mentioning (in a positive way) LGBTs. Since the Committee of Ministers can only reach decisions when unanimous, one country alone can block resolutions that all others support.”¹⁵¹ This is a clear indication that LGBT issues are still surrounded with political sensitivity and that its full inclusion in the human rights *acquis* of the Council of Europe is far from achieved.

3. Membership attitudes

As the Committee of Ministers’ minutes are not public, it is not always easy to ascertain the exact stance that countries take when it comes to LGBT rights within the Council of Europe. Still, several observations can be made.

First of all, none of the Member States criminalise homosexuality, setting it apart from both the United Nations and the OSCE. The Parliamentary Assembly, which is consulted by the Committee of Ministers before new members are admitted, for example required states like Romania, Armenia and Azerbaijan to change their Criminal Codes and decriminalise homosexuality. This didn’t always happen immediately. Romania for example joined the Council in 1993, but only decriminalised homosexuality three years later (ILGA, 2013: 21). For a long time however, several Member States had criminal laws which made homosexual acts illegal. Northern Ireland for example had maintained

¹⁴⁸ Draft report on the implementation of the Committee of Ministers’ Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, Steering Committee for Human Rights, 13 March 2013, p.2 ([http://www.coe.int/t/dghl/StandardSetting/CDDH/CDDH-DOCUMENTS/CDDH\(2013\)007_en.pdf](http://www.coe.int/t/dghl/StandardSetting/CDDH/CDDH-DOCUMENTS/CDDH(2013)007_en.pdf)), p. 22

¹⁴⁹ Written question No. 614 to the Committee of Ministers by Mr Håkon Haugli, 24 April 2012

¹⁵⁰ Meeting of the Ministers’ Deputies 1155th meeting, 21 November 2012 (<https://wcd.coe.int/ViewDoc.jsp?id=2005747&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>)

¹⁵¹ Interview by the author with Mr Haugli, 10 May 2013

a law – already abolished in England and Wales – which criminalized same-sex activities. In 1981, the European Court struck down this law, with the result that in 1982 homosexuality was decriminalized in all of the United Kingdom.¹⁵² Ireland, also a founding member of the Council, only decriminalized homosexuality in 1993, after the European Court of Human Rights had ruled that penal sanctions were not justified when consenting adults were involved.¹⁵³ Cyprus, admitted as member in 1961, had a similar provision in its criminal code until 1998.¹⁵⁴

Although none of the Member States has national legislation criminalizing homosexuality, there remains one small jurisdiction within the Council of Europe's territory which still does: Northern Cyprus. Since the Turkish invasion in 1974, an old law dating back to British colonial times is still in place, although since a European Court ruling in 1993 the same law has been repealed in the rest of Cyprus. Article 171 of the Northern Cyprus Criminal Code penalises "carnal knowledge of any person against the order of nature" with up to three years imprisonment. In October 2011 Parliamentary Assembly member Haugli (who would later be appointed LGBT rapporteur) raised the issue with the Committee of Ministers, asking whether the Committee would request "Turkey, as the Council of Europe member state responsible for the Northern part of Cyprus, to ensure the early repeal of Article 171 of the Criminal Code in that territory."¹⁵⁵ In June 2012 the Ministers replied that "owing to a lack of consensus it has not been possible to adopt a reply."¹⁵⁶ Currently a case is pending before the Court against Turkey to have this legal provision declared as violating the European Convention.¹⁵⁷

The second observation is that 27 (and soon 28) Member States of the Council of Europe are also Member States of the European Union. Several others are candidate countries and are therefore in the process of adapting and reviewing their legislation to bring it in line with European rules and legislation. As discrimination based on sexual

¹⁵² Dudgeon v. the United Kingdom (no. 7525/76), 22 October 1981.

¹⁵³ Norris v. Ireland (no. 8225/78), 26 October 1988. Mary Robinson, who later would become the United Nations High Commissioner for Human Rights, was Mr Norris' Senior Counsel, as she was member of the Homosexual Law Reform Campaign.

¹⁵⁴ In *Modinos v. Cyprus* (no. 15070/89), 22 April 1993, the Court ruled that the legislation in place did not meet a pressing social need, and therefore violated the Convention.

¹⁵⁵ Written question No. 608 to the Committee of Ministers by Mr Haugli, 28 October 2011

¹⁵⁶ Reply to Written question No. 608, CM Document CM/Del/Dec(2012)1145, 15 June 2012

¹⁵⁷ European Court of Human Rights, Application no. 6428/12 H.Ç. against Turkey lodged on 30 January 2012 ([http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117167#{"itemid":\["001-117167"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117167#{))

orientation or gender identity is expressly prohibited by the Charter of Fundamental Rights of the EU¹⁵⁸, most of the (aspiring) EU Member States actively promote that LGBT rights be an integral part of the Council of Europe's focus.

The third observation is that the Holy See is "just" an Observer State at the Council of Europe. Contrary to the OSCE therefore it is not able to block recommendations or decisions that include references to sexual orientation or gender identity. This doesn't mean that it cannot exert influence behind the scenes, in particular by lobbying other delegations. In several Member States the Catholic Church still has a powerful presence and is therefore listened to, in particular when family-related issues are discussed. A 1996 report noted that maintaining the traditional family structure and fighting "homosexual unions" is a high priority for the Vatican in Europe, and claimed that "while supporters of the Vatican line on family and gender often are thwarted in the European Parliament, Rome has had considerably more success in the Parliamentary Assembly of the Council of Europe."¹⁵⁹ The Holy See was entitled to participate in the Expert Committee which prepared the draft recommendation adopted in 2010. An NGO participant recalls that instead of sending one of its regular diplomatic staff members, the Holy See appointed a member of European Center for Law and Justice¹⁶⁰, a conservative American organisation as its delegate.¹⁶¹

Finally, although inclusion of sexual orientation and gender identity in the Council's policies has proven to be less controversial than at the OSCE, there is still a small group of countries that is either reluctant or hostile towards it. According to former and current Council of Europe staff members, Russia, and to a lesser extent Bulgaria, are most vocal about their resistance to including sexual orientation and gender identity into the Council of Europe's human rights standards.¹⁶²

Although Russia decriminalised homosexuality in 1993, prejudice and intolerance towards LGBT persons still runs deep in Russian society. In 2013, a poll by

¹⁵⁸ According to Article 21, discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

¹⁵⁹ "The Vatican and Family Politics", Gordon Urquhart, 1997

(<http://www.catholicsforchoice.org/topics/other/documents/vaticanandfamilypolitics.pdf.pdf>)

¹⁶⁰ The American spelling of the word "Center" made clear to the other participants that it was a USA-based organization.

¹⁶¹ Interview NGO representative, 17 May 2013

¹⁶² Interview, Vienna, 23 April 2013

the Levada Center showed that only 12 percent of Russians consider homosexuality as normal sexual behaviour fully equal to heterosexual relations.¹⁶³ The crucial role played by the Russian Orthodox Church should not be underestimated. In a speech in 2007 before the Parliamentary Assembly Patriarch Alexy called homosexuality a sin and a “distortion of the human personality like kleptomania.” Secretary General Davis later called it an “unfortunate analogy”, although the President of the Assembly, René van de Linden, praised his commitment to peace and mutual respect.¹⁶⁴ At a meeting in May 2013, Patriarch Kirill told Secretary-General Jagland that same-sex marriage is sinful, adding that ““if people choose such lifestyle, this is their right but the Church's responsibility is to say that this is a sin in the face of God.”¹⁶⁵

In 2012 Russia blocked the adoption of the final declaration at the 9th Council of Europe Conference of Ministers responsible for youth in held in St. Petersburg. According to the Russian deputy Minister of Education and Science, other countries’ representatives unexpectedly amended the document by adding an item referring to the requirement to combat discrimination and violation of rights of LGBT youth.¹⁶⁶ In addition, she argued that LGBT people “are not discriminated against and have all the rights as other citizens, and inclusion of such a special item in the resolution would in effect constitute propaganda of homosexuality, bisexuality and transgenerness.”¹⁶⁷

Similar attitudes can also be found in other Member States. In 2012, Father Evgeni Yanakiev of the Bulgarian Orthodox Church called to oppose a Gay Pride planned in Sofia, arguing that “throwing stones at gays is an appropriate way.”¹⁶⁸ The importance of personal attitudes within the diplomatic corps should not be underestimated either. Several interviewees mentioned the homophobic views of the Bulgarian Permanent Representative in Strasbourg. In 2010, two Azerbaijani MP’s refused to take part in a debate at the Parliamentary Assembly about LGBT discrimination. Mr Hajiyevev stated that “I am not going to take part in these discussions and I think it wrong to raise this

¹⁶³ “Most Russians against Promotion of Homosexuality – Survey”, RIA Novosti, 17 May 2013 (<http://en.ria.ru/russia/20130517/181208925/Most-Russians-Against-Promotion-of-Homosexuality---Survey.html>)

¹⁶⁴ “Patriarch Alexy of Russia assails gays in speech at Council of Europe”, New York Times, 2 October 2007

¹⁶⁵ “Patriarch Kirill tells CoE's secretary general same-sex marriage sinful”, Interfax, 21 May 2013 (<http://www.interfax-religion.com/?act=news&div=10476>)

¹⁶⁶ “Russia blocks CE's youth resolution over disagreements on LGBT policy”, RT.com, 26 September 2012.

¹⁶⁷ “Conference of Youth Ministers end in scandal over sexual orientation”,

¹⁶⁸ “Bulgaria: “Chilling” calls for stoning LGBT citizens in Bulgaria”, Boris Dittrich, Public Service Europe, 28 June 2012 (<http://www.publicserviceeurope.com/article/2147/chilling-calls-for-stoning-of-lgbt-citizens-in-bulgaria>)

issue in PACE.”¹⁶⁹ In 2012, the Albanian Deputy Defense Minister was asked his opinion about a Gay Pride to be held in the capital Tirana. In his opinion, “what remains to be done is to beat them up with a stick. If you don’t understand this, I can explain it: to beat them with a rubber stick.”¹⁷⁰ Interestingly, Albania is one of the partner states in the current Council of Europe LGBT Project. The current Prime Minister seems to be co-operative with the project and even has said he would be in favour of a Gay Pride being held in the Albanian capital.¹⁷¹

Turkey equally is dismissive when it comes to LGBT rights. In 2008, Turkey’s leading gay organization Lambda Istanbul was banned by Istanbul’s Governor, because it allegedly violated Turkey’s “law and morals.”¹⁷² The ban led to sharp criticism from the President of the Council’s Parliamentary Assembly. In February 2013 the Turkish army announced that any soldier who would come out as gay would be expelled from the army, thereby wilfully ignoring objections expressed by both the European Commission and the Parliamentary Assembly.¹⁷³ Prime Minister Erdogan in March 2013 said that homosexuality conflicted with the “culture of Islam”.¹⁷⁴

Interestingly, Turkish diplomats keep a low profile when it comes to LGBT issues at the Council of Europe. From time to time they will indicate their opposition, but it doesn’t translate into an outright diplomatic offensive. Most of the Turkish diplomats are raised in the secular Kemalist tradition in which politics and religion are strictly separated. Still, in 2010 a Turkish minister objected to an article in a Council of Europe declaration on children’s rights alluding to gay marriage, arguing that “we do not accept gay marriages and also we do not accept the institution of homosexual family parenting.”¹⁷⁵ The article was subsequently adapted to accommodate the Turkish objections.

¹⁶⁹ “Azerbaijani MPs not to attend European debates on same-sex marriage”, News.az, 22 January 2010 (<http://www.news.az/articles/7279>)

¹⁷⁰ “Albania: Reprimand Official for Anti-Gay Remarks”, Human Rights Watch, 26 March 2012 (<http://www.hrw.org/news/2012/03/26/albania-reprimand-official-anti-gay-remarks>)

¹⁷¹ Interview by the author with Council of Europe staff member, 22 May 2013

¹⁷² “Council of Europe expresses concern over gay rights in Turkey”, PinkNews, 30 May 2008

¹⁷³ “Turkey to expel out gay soldiers”, Turkishnews.com, 10 February 2013

¹⁷⁴ “Erdogan: homosexuality ‘contrary to Islam’”, Jerusalem Post, 26 March 2013

¹⁷⁵ “Turkey objects to gay marriage allusion in council document”, Hürriyet, 23 February 2010

4. Leadership

Although the first judgment of the European Court of Human Rights condemning the criminalisation of homosexuality dates back to 1981¹⁷⁶, it took a long time before people in leadership positions within the Council of Europe started speaking out in favour of LGBT rights.

Secretary-General

Apart from leading the Secretariat and submitting the annual budget for adoption to the Committee of Ministers¹⁷⁷, the Secretary General's role is not clearly defined. Before the post of Commissioner for Human Rights was created in 1999, one could say that he was Europe's top human rights official. Although the candidates are put forward by the Committee of Ministers, the Parliamentary Assembly in the end appoints the Secretary –General. The appointment process is usually opaque and part of a broader political deal in which political affiliation, national background and professional qualification are all part of the equation. In 1999, the leading candidate for the position Walter Schwimmer, an Austrian MP, caused controversy with his conservative stance on homosexuality. Several NGO's pointed to the fact that his voting record in the area of LGBT rights was questionable¹⁷⁸, and started a nine month campaign to lobby national governments and Parliamentary Assembly members to vote against this "homophobe".¹⁷⁹ Secretary-general of Austria's national lesbian and gay organisation Kurt Krickler commented that "the Austrian government, which put forward Walter Schwimmer as candidate, has been acutely embarrassed. Never again, we believe, will a European government propose a candidate for such a position in the belief that lesbian and gay rights can safely be ignored."¹⁸⁰ In the end, Schwimmer was elected on 23 June by a very narrow margin of two votes over United Kingdom candidate Terry Davis, who would become his successor in 2004.

¹⁷⁶ Dudgeon v. the United Kingdom (no.7525/76), 22 October 1981

¹⁷⁷ Article 36, Statute of the Council of Europe

¹⁷⁸ For example, he had voted against repeal of Penal Code Articles 220 and 221 which prohibit gay organisations and positive information about homosexuality. In 1996 and 1998 he also had voted against repeal of the discriminatory age of consent for gay men (Article 209). He had also voted against granting the right of compensation to the lesbian and gay victims of the Nazis.

¹⁷⁹ The Homosexual Initiative Vienna, in: ScotsGay, Issue 28, June 1999

(<http://www.scotsgay.co.uk/text/sg28.txt>)

¹⁸⁰ "Lesbian, gay and bisexual rights take centre stage in election of new Secretary-General for the Council of Europe", Nigel Warner, in: ILGA-Europe Euroletter no. 71, June 1999, p.2

Terry Davis on the contrary was more vocal in his support for gay rights in all the Council's Member States. In a speech before the Council's Congress of Local and Regional Authorities he denounced the refusal by some local authorities to authorise public gatherings of gay and lesbian people, arguing that sometimes "the motive for the refusal is prejudice and the decision is discriminatory".¹⁸¹ On the occasion of the 2007 International Day Against Homophobia, he published an opinion article in which he strongly spoke out against the increasing homophobia in Europe, calling to "end the hypocrisy of silence and stop treating homophobic attitudes as a cultural eccentricity. It is time to apologise for the past and act for the future. It is time for Europe to say clearly and with force – no longer and never again!"¹⁸²

Current Secretary-General Thorbjørn Jagland has equally assumed a leadership role in advocating LGBT rights, sometimes explicitly targeting specific Member States. In a statement marking International Human Rights Day in 2011, he condemned "discriminatory laws" adopted in Lithuania, Ukraine and Russia, deploring the fact that "prejudice and hypocrisy still exist towards LGBT persons in Europe."¹⁸³ During a visit to Moscow he called on the authorities to allow gay prides so that "LGBT people can express their views and (hold) demonstrations."¹⁸⁴

Commissioner for Human Rights

The post of Commissioner for Human Rights was created in 1999 as the Council of Europe's "non-judicial institution to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe."¹⁸⁵ His main role is to create awareness of human rights (violations) within Member States through statements, country visits and reports. Under the Convention, States are also allowed to bring cases against other States, but this provision is seldom used, mainly because of the politically sensitive nature that these cases would have. In that sense, as an independent person of "high moral character having recognised

¹⁸¹ Speech of Secretary-General Terry Davis before the Congress of Local and Regional Authorities, 31 May 2006 (http://www.ilga-europe.org/home/news/latest/terry_davis_secretary_general_of_the_council_of_europe_speaks_of_lgbt_rights)

¹⁸² "Hate, hypocrites and human rights", New Europe – The European Weekly, Issue 729, 12 May 2007

¹⁸³ "Secretary General condemns persistent discrimination against LGBT", Council of Europe, 10 December 2011 (<http://hub.coe.int/2011-human-rights-day>)

¹⁸⁴ "Council of Europe head says Russia must protect LGBT rights", Reuters, 22 May 2013

¹⁸⁵ Resolution 99 (50) of the Committee of Ministers, Article 1

expertise in the field of human rights, a public record of attachment to the values of the Council of Europe and the personal authority necessary to discharge the mission of the Commissioner effectively”¹⁸⁶, the Commissioner fulfils a deficit in the Convention’s human rights system (Schlüter, 2006: 53). However, he should not duplicate the activities of the Council and the Court and he is not allowed to take up individual complaints. These limitations led the first Commissioner Alvaro Gil-Robles to wonder “what the strict application of these criteria would actually have left.» In his opinion, it reveals “all the distrust of the established towards the unknown and the desire to orient the Commissioner towards a promotional role.”¹⁸⁷

During his mandate from 1999 – 2006, Mr Gil-Robles occasionally paid attention to LGBT rights, in particular during his country visits. On his visit to Slovenia in 2003 for example, he expressed his concern to learn that “to learn that homophobic statements were frequently published in the media.”¹⁸⁸ The attention paid to LGBT issues in his Annual Reports however is not systematic. Only his second (2001), third (2002) and final (2006) report mention them. It was under his successor, the Swede Thomas Hammarberg, that LGBT rights became one of nine thematic priorities.¹⁸⁹ Where Commissioner Gil-Robles spoke of the homosexual community, Hammarberg from the outset used the more encompassing term of LGBT rights. In 2007, it was announced that the Office was able to strengthen its capacity to monitor the human rights situation of LGBT persons with the help of a voluntary contribution from the government of the Netherlands.¹⁹⁰ In 2008 he delivered the key note address at a conference of the International Lesbian and Gay Association (ILGA) and published a special Viewpoint in which he denounced the existing prejudices, adding that “advocacy against homophobia is clearly not opportune in a number of countries.”¹⁹¹ In 2009 Mr Hammarberg issued an Issue Paper on gender identity and human rights, and in 2011 a comprehensive report on “Discrimination on grounds of sexual orientation and gender identity in Europe” was launched. Mr Hammarberg’s outspoken commitment to LGBT rights was largely the

¹⁸⁶ Resolution 99 (50) of the Committee of Ministers, Article 10

¹⁸⁷ Final Report of Mr Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights (October 1999 – March 2006), CommDH(2006)17 REV, p.7

¹⁸⁸ Report by Mr Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, on his visit to Slovenia, 11- 14 May 2003, CommDH(2003)11

¹⁸⁹ Annual Activity Report 2006, CommDH(2007)3

¹⁹⁰ Annual Activity Report 2007, CommDH(2008)10REV

¹⁹¹ “Time to recognize that human rights principles apply also to sexual orientation and gender identity”, Viewpoint 14 May 2008

result of his country visits, during which he “found that the discrimination of LGBT persons was very, very widespread and deep. People were scared and open discussion was a taboo. (...) In other words, we had here a serious human rights problem”.¹⁹²

Under the current Commissioner Nils Muižnieks (Latvia) who took office in April 2012, LGBT rights are no longer mentioned as a priority, but still feature as a “central theme”.¹⁹³ In October 2012 he published a web-item “How long must LGBTI persons still wait to live free from prejudice?” in which he targeted *inter alia* the legislation criminalising the “promotion of homosexuality” in some Member States.¹⁹⁴

Chairmanship

The rotating Chairmanship of the Committee of Ministers offers the opportunity to set the agenda for 6 months. It was no coincidence that under Swedish leadership in 2008 the Steering Committee for Human Rights – a sort of working group of the Committee of Ministers – was charged with drafting the 2010 Recommendation on sexual orientation and gender identity.¹⁹⁵ In its priorities for the Chairmanship, Sweden had already announced that it would “seek to encourage further action by the Council of Europe against discrimination on grounds of sexual orientation. Close contacts with all parts of the Council of Europe, including the Commissioner for Human Rights, should be maintained on this issue”. The United Kingdom equally included LGBT rights in the priorities for its Chairmanship from November 2011 – May 2012. It pledged to “work to maintain the momentum generated by the Council of Europe recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity”.¹⁹⁶ In March 2012, the UK organized a conference entitled “Combating discrimination on the grounds of sexual orientation or gender identity across Europe: sharing knowledge and moving forward”, the first time in the history of the Council of Europe that the Chairmanship had organized a special event on LGBT issues.¹⁹⁷ The

¹⁹² Interview with Mr Hammarberg, 27 May 2013

¹⁹³ The two priorities he identified were the impact of the economic crisis on human rights and Internet freedom (see: Annual Activity Report 2012, CommDH(2013)5)

¹⁹⁴ http://www.coe.int/t/commissioner/News/2012/121017Lgbti_en.asp

¹⁹⁵ Priorities of the Swedish Chairmanship of the Committee of Ministers of the Council of Europe May – November 2008, CM/Inf(2008)17, 5 May 2008.

¹⁹⁶ Priorities of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe November 2011 – May 2012, CM/Inf(2011)41, 27 October 2011.

¹⁹⁷ “Council of Europe conference on combating sexual orientation and gender identity discrimination”, ILGA Euroletter March 2012

Chairmanship's room for manoeuvre however is dependent upon the political will of other Member States.

5. NGO Participation

NGO's play a much more important role at the Council of Europe than at the OSCE. Already in 1952 the organisation introduced the possibility for NGO's to obtain so-called consultative status, and in 2005 they together form the Conference of INGO's of the Council of Europe. In practice, this means that NGO's may contribute to the work of intergovernmental committees, prepare memoranda for the Secretary General, make oral or written statements to the committees of the Parliamentary Assembly and the Congress of Local and Regional Authorities and address seminars and other meetings organised by the Council of Europe.¹⁹⁸

The activity of NGO's advocating gay rights has played a pivotal role in putting LGBT rights on the Council of Europe's agenda. ILGA-Europe (the European branch of the International Lesbian, Gay, Bisexual, Trans and Intersex Association) deserves special mention here. At first its consultative status was rejected because their activities were not "directly related to the present work programme of the Council of Europe"¹⁹⁹. This changed in 1998, when Secretary-General Tarschys judged that "the organisation has a specific contribution to make to any discussion on discrimination generally as well as on more specific issues such as discrimination against people with HIV and AIDS."²⁰⁰

ILGA-Europe made use of various channels within the Council structures. Several ILGA members supported test cases to the European Court and the organisation influenced the admission policy for new members so that their entry into the Council would be made conditional upon the decriminalisation of homosexuality. But the Parliamentary Assembly has proven to be the most accessible forum for ILGA-Europe to exert influence. Questions asked by Assembly members to the Committee of Ministers are sometimes the result of successful lobbying by ILGA-representatives. Their expertise and their extended network make them a valuable source of information and analysis when it comes to the situation of LGBT persons in all 47 Member States. According to

¹⁹⁸ Participatory Status, information on the Council of Europe website (http://www.coe.int/t/ngo/particip_status_intro_en.asp)

¹⁹⁹ ILGA Euroletter 57, February 1998 (<http://www.france.qrd.org/assoc/ilga/euroletter/57.html>)

²⁰⁰ Ibidem.

former Commissioner for Human Rights Hammarberg, it is thanks to “the enormous and skilful work of ILGA-Europe” that the situation of LGBT persons in Europe has improved in the last years.²⁰¹

However, conservative NGO’s, sometimes linked to the Vatican or evangelical groups in the United States, try to raise their voice as well. It is hard to measure their influence and success, but the fact that they rely more on principled statements and oppose most of the Court’s rulings on LGBT equality gives them a more marginalised position than for example ILGA-Europe. Whereas ILGA has regular meetings with the Commissioner for Human Rights and participated in the drafting process of the 2010 Recommendation, more conservative or outright homophobic NGO’s have to rely on oppositional tactics to make their voice heard within the Council’s complex institutional architecture.

As mentioned before, the European Centre for Law and Justice is one of the conservative NGO’s trying to defend traditional family values. In their comments on the report by Assembly rapporteur Gross they argued that LGBT people do not have any special or specific fundamental rights. In their view, “it appears more and more clearly that the concepts of “hate speech” and “homophobia” are modern tools for censorship and, at least, for the imposition of a compulsory morality.”²⁰²

In March 2013 two Russian NGO’s (the ‘Family and Demography Foundation’ and the ‘Interregional Public Organisation “For Family Rights”’) argued in a written communication to the Committee of Ministers that Russian laws prohibiting propaganda of homosexuality to minors do not contradict the Court’s judgement on *Alekseyev v. Russia* (2010). “Homosexual lifestyle” would be linked to increased health risks, propaganda of homosexuality would contradict Russia’s concept of morals and that the Court in its rulings has overstepped its mandate.²⁰³

²⁰¹ Interview by the author with Mr Hammarberg, 27 May 2013

²⁰² Comments on the draft Resolution and Report on Discrimination on the basis of sexual orientation and gender identity by Rapporteur Andreas Gross, European Centre for Law and Justice, 8 December 2009

²⁰³ Communication to the Committee of Ministers of the Council of Europe concerning *Alekseyev v. Russia* (application no. 4916/07) by the Family and Demography Foundation, 25 March 2013 (<http://www.familypolicy.ru/rep/int-13-049en.pdf>)

6. Bureaucratic Structures

European Commission against Racism and Intolerance (ECRI)

The European Commission against Racism and Intolerance (ECRI) was created in 1993 by the first Summit of Heads of State and Government of the Council of Europe with as main task the combating of racism, racial discrimination, xenophobia, anti-Semitism and intolerance in Europe. Its 47 experts from all Member States review national legislation and subsequently formulate general policy recommendations.²⁰⁴ The Commission is independent, but answerable to the Committee of Ministers which – crucially – determines the scope of its mandate.

For a long term the Commission held that ‘intolerance’ as used in the terms of reference “does not encompass other forms of intolerance such as homophobia, sexism or intolerance towards disabled people, which are not part of its mandate.”²⁰⁵ In 2000, the Parliamentary Assembly recommended that the Committee of Ministers extend the terms of reference of ECRI to also cover homophobia.²⁰⁶ Turkey objected however, arguing that “intolerance, discrimination and violence directed to these groups deserve due attention. Nevertheless, we believe that this issue, though important in itself, again falls outside ECRI’s mandate.”²⁰⁷ Although the country reports did include sections like ‘vulnerable/target groups’ in which it deals with Muslim communities, gypsies, refugees and migrants, LGBT persons were indeed completely absent.

In 2010 Secretary-General Jagland invited ECRI to also consider working on LGBT issues. Although ECRI agreed in principle, the Russian delegation opposed the plans. When ECRI again indicated its willingness to work on LGBT issues in 2012, Russia again tried to block it but found itself isolated within the Committee of Ministers.²⁰⁸ In its

²⁰⁴ Appendix to Resolution (2002)8 Statute of the European Commission against Racism and Intolerance (ECRI), Article 1

²⁰⁵ “Combating Intolerance and Racism”, an Introduction to the work of the European Commission against Racism and Intolerance (ECRI), April 2009
(http://www.coe.int/t/dghl/monitoring/ecri/activities/Ecri_work_en.pdf)

²⁰⁶ Parliamentary Assembly Recommendation 1474 (2000), “Situation of gays and lesbians in Council of Europe Member States”

²⁰⁷ Ministers' Deputies Records CM/Del/Act(2001)751, 22 May 2001

²⁰⁸ Interview by the author with NGO representative, 17 may 2013

country visit in March 2013 to Germany, ECRI included “LGBT questions” for the first time in their information gathering in preparation of their monitoring report.²⁰⁹

Office of the Commissioner for Human Rights

The Office of the Commissioner for Human Rights is independent from the Secretariat and does not report to the Secretary-General.²¹⁰ The Commissioner is therefore free to organise his Office as he sees fit. Within the Office, one of his Senior Advisers is responsible for all the thematic work related to LGBT issues, although this only takes up part of his work. A major step was the launch in 2009 of the largest study ever made on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the 47 Member States. According to Commissioner Hammarberg, who took the initiative, the report was necessary “in order to have facts and a deeper analysis available for his ongoing dialogue with authorities on this topic”.²¹¹ In 2011 the report “Discrimination on grounds of sexual orientation and gender identity in Europe” was published, thanks to the financial support of Finland, Flanders, Germany, the Netherlands, Norway, Sweden and the United Kingdom.²¹²

LGBT Unit

In October 2011, Secretary-General Jagland took the initiative to create the so-called LGBT Issues Unit, falling under the Directorate of Human Rights and Anti-discrimination. Described by the Secretary-General as “the first-ever structure of its kind in an international intergovernmental institution”²¹³, its tasks are to implement Recommendation CM/Rec(2010)5, to organise and support relevant conferences and activities, document relevant developments and be the home of the Council of Europe

²⁰⁹ “Council of Europe Anti-Racism Commission to prepare report on Germany”, ECRI, 25 March 2013 (http://www.coe.int/t/dghl/monitoring/ecri/Library/PressReleases/133-25_03_2013_Germany_en.asp)

²¹⁰ This is also the case for the Registry of the European Court, the Secretariat of the Congress of Local and Regional Authorities and the Secretary-General of the Parliamentary Assembly.

²¹¹ Annual Activity Report 2009, CommDH(2010)8

²¹² Press release by Netherlands Ministry of Education, 28 June 2011 (<http://www.iamexpat.nl/read-and-discuss/expat-page/news/press-release-tackling-anti-gay-discrimination-in-europe-june-2011>)

²¹³ Speech by Thorbjørn Jagland, Secretary General of the Council of Europe at the Conference on “Combating discrimination on the grounds of sexual orientation or gender identity across Europe: Sharing knowledge and moving forward”, Strasbourg, 27 March 2012 (<http://hub.coe.int/20120327-disc-sg>)

LGBT Project.²¹⁴ This so-called LGBT Project takes up most of the Unit's time and effort. Interestingly, the project did not originate within the Council itself but with several Member States who wanted to ensure that the 2010 recommendation would not remain a dead letter. As a result, currently 6 partner Member States receive funding for efforts to develop a cross-sectoral LGBT policy, strengthen human rights for LGBT people and combat discrimination.²¹⁵ The overall and long-term goal of the project is to "contribute to the improvement of the quality of life among LGBT people in Europe".²¹⁶ The project is funded by voluntary contributions from Belgium, Finland, Germany, Netherlands, Norway, Sweden, Switzerland and the United-Kingdom and runs from September 2011 until the end of 2013. The partner countries, who voluntarily came forward to participate, are Poland, Italy, Latvia, Albania, Montenegro and Serbia – conveniently three EU and three non-EU countries.²¹⁷ The inclusion of Italy, a relatively rich Western European country, has raised some eyebrows with the donor countries, but overall the project is characterised as a success.

The LGBT Issues Unit itself describes their work and project as a "success", in particular because of the co-operation that it established between civil society, governments and the Council. But the discussion will now be whether to continue the Unit after 2013, a decision to be taken by the Secretary-General. It is hard to envisage a scenario in which the Unit would completely disappear, as there is no other bureaucratic structure within the Council which is completely devoted to LGBT issues. In addition, once bureaucratic structures are created, they tend to persist. The continuation of the (technically separate) project is up to individual Member States and the funds made available by them.

Parliamentary Assembly

Within the Council's institutional architecture, it is the Parliamentary Assembly who has the role of agenda-setter. The original Statute from 1949 called it a "Consultative Assembly", accurately reflecting its limited role of advising and recommending. The only exception is the election of the judges of the European Court of Human Rights, Commissioner for Human Rights, as well as the Secretary General of the

²¹⁴ Information on the website of the LGBT Issues Unit (http://www.coe.int/t/dg4/lgbt/Unit/Unit_EN.asp)

²¹⁵ Ibidem

²¹⁶ Ibidem

²¹⁷ Within the Unit, some eyebrows were raised

Council of Europe. As we saw earlier, Walter Schwimmer almost lost his election as Secretary General in 1999, as criticism grew about his conservative views on homosexuality.

The Assembly's advising role is manifested in three types of texts that it adopts: recommendations, resolutions and opinions. They mainly serve as guidelines for the Committee of Ministers, national governments, parliaments and political parties.²¹⁸ As regards LGBT rights, the Assembly indeed played the role of agenda-setter. As early as 1981 it adopted a recommendation, at the initiative of Dutch MP Voogd, urging Member States to abolish laws criminalising homosexuality and apply the same minimum age of consent for homosexual and heterosexual acts.²¹⁹ Although the recommendation was met with a lot of support, some delegates were outright hostile to it. Mr Margue (Luxembourg) argued that "the real reason why there is discrimination against homosexuals is that they bring it on themselves by behaving in a way which our parents, who still had some common sense, rightly said was unnatural."²²⁰ Mr Cavaliere (Italy) added that "to my mind homosexuality is deviant, beyond the bounds of normality. (...) The Council of Europe could be making a very serious mistake."²²¹

In 1989 a recommendation on the conditions of transsexuals followed, and in 2000 another recommendation was adopted on the situation of gays and lesbians in Council of Europe Member States, calling *inter alia* registered partnerships and measures to combat homophobic attitudes at school and in sport. Support for the 2000 recommendation was overwhelming, with only a few dissenting voices. Polish MP Libicki for example commented on the recommendation that it was "a step not towards equal rights for homosexuals but towards social conflict and political demands for more and more homosexual rights, which are already unacceptable enough."²²²

LGBT issues are also raised in debates or in the Assembly's Equality and Non-Discrimination Committee, which recently also conducting a hearing on the rights of

²¹⁸ Information brochure, Parliamentary Assembly of the Council of Europe (<http://assembly.coe.int/Communication/Brochure/Bro03-e.pdf>)

²¹⁹ Recommendation 924 (1981) of the Parliamentary Assembly – Discrimination against homosexuals, adopted on 1 October 1981 with 61 yes-votes, 22 no-votes and 5 abstentions.

²²⁰ Parliamentary Assembly, 33rd Ordinary Session, Official Report of the Tenth Sitting, Thursday 1 October 1981, p. 267

²²¹ Ibidem, p.263

²²² Parliamentary Assembly, 2000 Ordinary Session, Official Report, of the Twenty-fourth Sitting, Friday 30 June 2000, p. 883

LGBT people. In 2005, Swiss MP Andreas Goss was appointed rapporteur on the issue of “Legal recognition of same-sex partnerships in Europe” and in 2008 his mandate was broadened to discrimination of LGBT persons in general. In 2010 his report was presented, and the Assembly subsequently adopted Resolution 1728 in which it *inter alia* condemned homophobia transphobia and hate speech by political and religious leaders.

According to the current PACE rapporteur on the rights of LGBT people Håkon Haugli (Norway), the Parliamentary Assembly “can play a very important role – in setting standards, highlighting best-practice, challenging politicians to take active roles in their national parliaments, etc. - but it remains to be seen whether it will. When the Assembly last debated LGBT issues in 2010, none of the “homo-propaganda”-laws were on the table as the assembly only discussed the (broader) issue of discrimination.”²²³ In the end, even agenda-setting has its limits.

²²³ Interview by the author with Mr Haugli, 10 May 2013

7. Analysis

Two main conclusions can be drawn from the three case studies. The first is that on the intergovernmental side, LGBT issues to differing degrees remain a controversial and sensitive topic. The other one is that this has not prevented the international organisations from developing policies in this area. Let us take a closer look by going back to our hypotheses.

HYPOTHESIS 1

The promotion of LGBT rights as part of an international organisation's policies is partly the result of the organisation's autonomous behaviour.

HYPOTHESIS 2

The extent of the international organisation's autonomous behaviour in the promotion of LGBT rights is greater when decision-making is done by majority voting instead of by consensus.

Within the UN, one could say that the lack of a clear, unambiguous mandate to address LGBT discrimination has indeed made it one of the most neglected policy areas at the United Nations. There are conventions, committees and special rapporteurs on the rights of women, migrants, children and business and human rights, but none explicitly charged with LGBT rights. Although at the intergovernmental level there is some progress, as the increasing number of signatories to the General Assembly statement demonstrates, still more than a third of all UN Member States criminalise homosexuality, and in five homosexual acts are punishable with death penalty.

But still, despite the lack of consensus, leading figures at the United Nations have spoken out in strong terms against the discrimination of LGBT people. Secretary-General Ban Ki-moon's pledge that he would lead a global campaign against homophobic violence and discrimination is more than remarkable in this regard. But the engagement of the successive High Commissioners must also be recalled. One of them, Mary Robinson, even had been a gay rights activist in her younger years when she campaigned against the criminalisation of homosexuality in Ireland. Usually, these leading figures rely on the UN human rights jurisprudence as elaborated by the various expert and judicial bodies. However, not all Member States have accepted their

jurisdiction, and the fact that their views are now used as a tool for global advocacy in name of the United Nations might be problematic for some.

When Kofi Annan, after his retirement as Secretary-General, was asked about the advancement of gay rights at the United Nations, he remarked that “this is how the UN works. It starts at very low ebb, and it keeps going until other countries team up. And the debate, the discussion itself is educational. The further we discuss it, the more people are going home and reporting back; it prepares the ground for the next round, when one hopes you would get the majority of countries for it.”²²⁴ Giving the global movement for the advancement of LGBT rights the powerful seal of approval of the United Nations is a clear demonstration of a degree of autonomy exercised by an international organisation.

At the Council of Europe, much has happened at in the past years in the area of LGBT rights, despite reluctance from some (influential) Member States. This is quite remarkable, considering the fact that decision-making within the organisation is based on unanimity. As at the UN, both the Secretary-General and the Commissioner for Human Rights have spoken out in clear terms in favour of LGBT rights. The creation of the so-called LGBT Unit was a decision made by the Secretary-General himself, as was his invitation to the European Commission Against Racism and Intolerance (ECRI) to consider LGBT issues in their work. Commissioner for Human Rights Hammarberg was particularly vocal in its fight against discrimination against people based on their sexual orientation or gender identity.

At the OSCE, the lack of a clear mandate and the subsequent ambivalent approach towards LGBT rights is a reflection not only of the sensitive nature of the issue, but is also telling of the effectiveness of the diplomacy of the more progressive States (Swiebel and Van der Veur, 2009: 19). But the fact that the OSCE, despite the politicised nature of the LGBT debate, the consensus principle and the lack of a formal mandate, has been able to take some small steps in this area is remarkable. With two Participating States still criminalising homosexuality and several other States categorically opposed to the inclusion of sexual orientation as part of the anti-discrimination commitments, it is

²²⁴ “Conversations on Human Rights and International Justice”, 12 October 2010, Roosevelt House – Hunter College, New York City (see link on YouTube http://www.youtube.com/watch?v=E7on25_AEkw)

surprising that within the OSCE itself LGBT issues have become part of the agenda, albeit in a rather limited way. As former ODIHR Director Strohal acknowledges now, “we were probably doing better than one could have expected”.²²⁵ Under his leadership, ODIHR decided on its own to start including homophobia in its work on hate speech and in its Tolerance and Non-Discrimination Information System. In addition, Mr Strohal mentioned homophobia regularly in his speeches and meetings with national governments.

On the other hand, one could say that it is equally surprising that within an international organisation that bears “Europe” in its name, LGBT issues are much more invisible than for example at the more diverse United Nations. If the OSCE is indeed not much more than a talking shop (Van Ham, 2001: 404), it is surprising that even talking about LGBT rights seems to be a taboo. The OSCE’s allegedly “very flexible and dynamic norm-creating process in the human rights field”²²⁶ seems to be increasingly subject to a politicised debate about its scope, relevance and even *raison d’être*. If the OSCE is a community of values, why then are human rights its bone of contention? If it is an Organisation that primarily deals with European security, why then did Mongolia join the OSCE in November 2012? According to Christian Strohal, “the OSCE is a very conservative Organisation in many regards, in particular the way it is being managed from the governmental side”.²²⁷ Perhaps this reflects a more fundamental problem that “either the OSCE’s agenda has not been important enough to increase its relevance, or important issues have been taken over by other Organisations that can deal with them more effectively” (Dunay, 2005: 82).

NGO’s have obviously played their part as well. Their contributions are used in all three organisations, albeit to differing degrees. The UN High Commissioner and the Council of Europe’s Commissioner have regularly met up with LGBT advocacy groups, and they have provided input to their reports and country visits. It is too early to tell how much influence the more conservative NGO’s will be able to exert in the process, but it seems they already have lost the battle. Their oppositional tactics however will give them some influence over national delegations that also oppose the concepts of sexual orientation and gender identity.

²²⁵ Interview by the author with Mr Christian Strohal, Vienna, 23 May 2013

²²⁶ “The Human Dimension of the OSCE : An Introduction”, OSCE (<http://www.osce.org/training/31238>)

²²⁷ Interview by the author with Mr Christian Strohal, Vienna, 23 May 2013

When decision-making is done by majority voting, as is the case within the UN, then resolutions condemning LGBT discrimination are more likely to pass, giving the Secretariat “cover” to also include them in their policies. When rules of unanimity or consensus apply, agreement is harder to reach, and the Secretariat has to be more careful in its work. The OSCE is the case in point here, where ODIHR in particular had to deal very carefully with this sensitive. So indeed, majority voting seems to give more room for manoeuvre within an international organisation.

LEGITIMACY

The last question that has to be addressed is that of legitimacy. Have we seen instances of what Barnett and Finnemore call undemocratic liberalism in global governance? Two perspectives are possible. Some people would answer this question with a definite ‘yes’. International organisations clearly seem biased towards the global gay rights movement, ignoring the more conservative NGO’s and movements who do not accept the concepts of ‘sexual orientation and ‘gender identity’. Almost all people in leadership positions within the international organisations come from the West and have had their education in the West. At the Office of the UN High Commissioner for Human Rights, more than half of the staff comes from European countries, and most of their work on LGBT rights is funded by Norway. At the Council of Europe, a special LGBT project is funded by 6 western countries. By making international organisations the mouthpiece of liberal ideologies, their independence and legitimacy is undermined.

The other perspective would say that it is Member States themselves that have endowed these organisations with rather ambiguous and broad human rights mandates, purposefully leaving room for interpretation. When the rights of a vulnerable minority group are trampled upon, they have a clear responsibility to act. Human rights are universal and apply to everyone all the time, also LGBT people. In this view, it is legitimate that international organisations elaborate LGBT policies, and even necessary.

Conclusion

As Cynthia Enloe paraphrases in her book “Bananas, Beaches and Bases”, the personal is international. In September 2009, German Chancellor Angela Merkel appointed Guido Westerwelle as the world’s first openly gay foreign minister in history. Although someone’s sexual orientation would normally be a private affair, that was not entirely true for Mr Westerwelle. For example, the question arose how the 76 countries in the world where homosexuality is still illegal would deal with a visiting homosexual German foreign minister. In 2010, he announced that at least his life partner would not accompany him on visits to any of these countries.²²⁸ However, Mr Westerwelle’s sexual orientation did not prevent him from visiting Iran in 2011, a country where homosexual act are still punishable with the death penalty. But in 2012 it caused a diplomatic incident between Germany and Belarus, after the Belarusian President Lukashenko had said that it was better to be a dictator than gay, clearly referring to Mr Westerwelle and his criticism on Belarus’ human rights record.²²⁹

LGBT issues have undeniably found their way into the realm of diplomacy and international relations. With more and more States legalising gay marriage (the United Kingdom most probably being the next one) and with a possibly groundbreaking ruling by the US Supreme Court on its way, more scholarly attention to this topic is warranted. Many perspectives are possible, as this thesis has shown. A feminist approach could be useful, although numerically women make up a far greater proportion of the population (around 50 %) than LGBT people (approx. 6 %) and are therefore much more visible. In addition, in countries where homosexuality is illegal LGBT people will remain a hidden minority, giving their leaders the opportunity to claim that sexual orientation is a Western concept that doesn’t apply to their country. But as this thesis has shown, they face increasing pressure, not only from national governments and transnational advocacy networks but also the international organisations they are members of. Only time will tell whether this pressure will yield lasting results.

²²⁸ “Westerwelle won't take partner to anti-gay lands”, The Local, 11 August 2010 (<http://www.thelocal.de/politics/20100811-29089.html>)

²²⁹ “Germany rejects gay jibe from Belarus leader Lukashenko”, BBC News, 5 March 2012 (<http://www.bbc.co.uk/news/world-europe-17267426>)

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