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**Committee on the Elimination of
Discrimination against Women****Twenty-ninth session**

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**Working paper for the Committee on the Elimination
of Discrimination against Women on how the other treaty
bodies have dealt with sexual orientation as it relates
to discrimination and the enjoyment of human rights****I. Introduction**

1. At its twenty-eighth session, in January 2003, the Committee requested the Division for the Advancement of Women to submit to it at its twenty-ninth session a paper with information on the jurisprudence, if any, in other treaty bodies concerning the aspect of sexual orientation as it relates to discrimination and the enjoyment of human rights.¹ The present paper, submitted in response to that request, compiles information from relevant case law, concluding observations, general comments and other work of the Committee on Economic, Social and Cultural Rights, the Committee against Torture, the Committee on the Rights of the Child and the Human Rights Committee. The Committee on the Elimination of Racial Discrimination has not addressed the issue in its case law, general comments or concluding observations.

**II. Work of the Committee on Economic, Social and
Cultural Rights****A. General comments**

2. At its twenty-second session, in April and May 2000, and its twenty-ninth session, in November 2002, the Committee on Economic, Social and Cultural Rights adopted General Comments Nos. 14 and 15, respectively, which include sexual orientation as a prohibited ground for discrimination.

3. General Comment No. 14 (2000) on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural

Rights) states that “By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health ...”²

4. General Comment No. 15 (2002) on the right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), states that “The obligation of States parties to guarantee that the right to water is enjoyed without discrimination (art. 2, para. 2), and equally between men and women (art. 3), pervades all of the Covenant obligations. The Covenant thus proscribes any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water.”³

B. Concluding observations

5. In the “positive aspects” section of its concluding observations, the Committee on Economic, Social and Cultural Rights has referred to national mechanisms that cover discrimination on grounds of sexual orientation. It welcomed the establishment in Sweden of the office of an Ombudsperson against Discrimination on Grounds of Sexual Orientation,⁴ as well as the Government Plenipotentiary for Equal Gender Status in Poland, whose responsibilities were expanded to include combating discrimination based on race, ethnic origin, religion and belief, age and sexual orientation.⁵

6. The Committee welcomed the repeal of legislation criminalizing homosexual acts in Cyprus,⁶ while expressing concern at the classification of lesbianism as a sexual offence in the Penal Code in Kyrgyzstan.⁷ In the latter instance, it recommended that the State party proceed to remove lesbianism from the Penal Code, as had been indicated by the delegation.⁸

7. In the area of employment, the Committee welcomed the adoption of laws in Ireland “which aim at removing several aspects of discrimination relating to, inter alia, gender, marital status, family status, sexual orientation, religion, age, disability, race, colour, nationality, national or ethnic origin and membership of the traveller community...”⁹ With respect to Trinidad and Tobago, the Committee was concerned that the Equal Opportunity Act 2000 did not afford protection to individuals on the grounds of sexual orientation, age and HIV/AIDS status, among others, and encouraged the State party to undertake proactive policies to promote the rights of individuals, especially with regard to their sexual orientation and HIV/AIDS status.¹⁰ In 1996, it expressed concern that the Sex Discrimination Ordinance in Hong Kong (United Kingdom of Great Britain and Northern Ireland) did not protect those individuals whose right to work was violated by inappropriate account being taken of their private sex lives and urged the State party to amend that Ordinance.¹¹ In 2001, the Committee expressed concern over the failure of Hong Kong Special

Administrative Region (China) to prohibit discrimination on the basis of sexual orientation and age and urged the Hong Kong Special Administrative Region to do so.¹²

C. List of issues to be taken up in connection with the consideration of a report of a State party

8. The Committee on Economic, Social and Cultural Rights requested detailed information in relation to article 2 (2) of the Covenant (non-discrimination) on studies and consultations conducted in the Special Administrative Region of Hong Kong in relation to legislation against discrimination on the grounds of race and sexual orientation as had been mentioned in the initial report of the State party.¹³

III. Work of the Committee against Torture

A. Conclusions and recommendations

9. In its conclusions and recommendations on the initial report of Brazil, the Committee against Torture expressed particular concern about allegations of ill treatment and discriminatory treatment of certain groups of prisoners with regard to access to the already limited essential services, “notably on the basis of social origin or sexual orientation”. It recommended, among other things, that urgent measures be taken to improve conditions of detention and efforts made to establish a systematic and independent system to monitor the treatment in practice of persons arrested, detained or imprisoned.¹⁴

B. Contribution to the preparatory process for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance

10. The Committee against Torture indicated in its contribution to the preparatory process for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance that it has received information and raised questions about allegations of many related forms of discrimination, xenophobia and related intolerance based on racial, religious, linguistic, minority or ethnic status, or based upon sex, age, disability, sexual orientation, citizenship or other status.¹⁵

IV. Work of the Committee on the Rights of the Child

A. General thematic discussions

11. On the basis of its day of general discussion on 5 October 1998 on “Children living in a world with HIV/AIDS”, the Committee on the Rights of the Child formulated a number of recommendations, including that particular attention be given to discrimination based on sexual orientation, “as homosexual boys and girls often face acute discrimination while being a particularly vulnerable group in the context of HIV/AIDS”.¹⁶

B. Concluding observations

12. The Committee welcomed the Decree of March 2000 in Belgium which expanded the mandate of the Centre for Equal Opportunities and Opposition to Racism to include all forms of discrimination, including grounds of gender, sexual orientation, birth, civil status, ill health, age and disability.¹⁷

13. The concluding observations on the initial report of the Overseas Territories (United Kingdom) addressed non-discrimination, inter alia, by expressing concern that in some of the Overseas Territories, insufficient efforts had been made to ensure the full implementation of article 2 of the Convention and that discrimination based on gender, sexual orientation and birth status remained apparent. The disparity between the ages for sexual consent to heterosexual and homosexual relations, in some of the Overseas Territories was also noted.¹⁸ The concluding observations on the initial report of the Isle of Man (United Kingdom) were similar.¹⁹

14. In its concluding observations on the second periodic report of the United Kingdom, the Committee expressed concern in the section “basic health and welfare” that homosexual and transsexual young people did not have access to the appropriate information, support and necessary protection “to enable them to live their sexual orientation”. It recommended that the State party provide adequate information and support to homosexual and transsexual young people.²⁰

V. Work of the Human Rights Committee

15. In its views and/or concluding observations, the Human Rights Committee has devoted attention to aspects of sexual orientation in relation to a number of articles of the Covenant, including the right to freedom of expression (article 19), the right to privacy (article 17), the prohibition of discrimination (articles 2 (1) and 26), the right to life (article 6) and the prohibition of torture and cruel treatment or punishment (article 7).

A. Views

16. In case No. 61/1979 (Leo Hertzberg et al v. Finland), the authors claimed that the Finnish authorities, including organs of the State-controlled Finnish Broadcasting Company, had interfered with their right to freedom of expression and information (article 19 of the Covenant) by imposing sanctions against participants in, or censoring, radio and television programmes dealing with homosexuality. The Committee adopted its views on 2 April 1982, finding no violation under article 19, paragraph 2, of the Covenant in respect of one of the authors because the programme in which he had taken part had actually been broadcast and no sanctions had been imposed against him. Furthermore, he had not claimed that the programme restrictions would in any way personally affect him. With regard to the other alleged victims, the Committee found that it could not question the decision of the responsible organs of the Finnish Broadcasting Company that radio and television were not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour. It also found as follows:

“According to article 19 (3), the exercise of the rights provided for in article 19 (2) carries with it special duties and responsibilities for those organs. As far as radio and television programmes are concerned, the audience cannot be controlled, In particular, harmful effects on minors cannot be excluded.

Accordingly, the Human Rights Committee is of the view that there has been no violation of the rights of the authors of the communication under article 19 (2) of the Covenant.”

An individual opinion to the decision to which two members associated themselves stated:

“This conclusion prejudices neither the right to be different and live accordingly, protected by article 17 of the Covenant, nor the right to have general freedom of expression in this respect, protected by article 19. Under article 19 (2) and subject to article 19 (3), everyone must in principle have the right to impart information and ideas — positive or negative — about homosexuality and discuss any problem relating to it freely, through any media of his choice and on his own responsibility.”²¹

17. In case No. 488/1992 (Nicholas Toonen v. Australia), the Committee was called upon to determine whether the author, a gay activist in Tasmania who challenged two provisions of the Tasmanian criminal code that prohibited private homosexual behaviour, had been a victim of unlawful or arbitrary interference with his privacy, and whether he had been discriminated against in his right to equal protection of the law. The Committee adopted its views on 31 March 1994. It held that (a) adult consensual sexual activity in private was covered by the concept of “privacy” in article 17 of the Covenant; (b) the author was actually and currently affected by the continued existence of the two provisions of the Tasmanian criminal code, even if they had not been enforced for a decade, as there was no guarantee that no action would be brought against homosexuals in the future; (c) the impugned provisions, which could not be justified on grounds of public health or morality, arbitrarily interfered with the author’s right under article 17, paragraph 1; and (d) the reference to “sex” in article 2, paragraph 1, and article 26 was taken as including sexual orientation. The Committee was of the view that the facts of the case revealed a violation of article 17, paragraph 1, *juncto* 2, paragraph 1, of the Covenant, and that an effective remedy would be the repeal of the two impugned provisions. An individual opinion was appended to the decision.²²

18. One of the issues raised by the author in case No. 480/1991 (José Luis García Fuenzalida v. Ecuador), was unequal treatment on grounds of homosexuality. The author claimed to be a victim of a violation of article 3 in conjunction with article 26, owing to the difficulties he encountered in retaining a lawyer, allegedly because of his homosexuality. The Committee decided that this part of the communication was inadmissible for lack of substantiation (adopted on 12 July 1996).²³

19. Case No. 902/1999 (Joslin v. New Zealand),²⁴ concerned the issue of same sex marriage. The authors (two lesbian couples) brought the case before the Committee because they had been denied the right to legally marry in New Zealand. The Committee adopted its views on 17 July 2002, finding that there had been no violation of any provisions of the Covenant. It held:

“The authors’ essential claim is that the Covenant obligates States parties to confer upon homosexual couples the capacity to marry and that by denying the

authors this capacity the State party violates their rights under articles 16, 17, 23, paragraphs 1 and 2, and 26 of the Covenant. The Committee notes that article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry. Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term ‘men and women’, rather than ‘every human being’, ‘everyone’ and ‘all persons’. Use of the term ‘men and women’, rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognise as marriage only the union between a man and a woman wishing to marry each other”.²⁵

“In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant”.²⁶

20. Two Committee members appended an individual opinion (concurring), in which they observed that the Committee’s conclusion in this case in relation to article 26 of the Covenant “should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would never amount to a violation of article 26. On the contrary, the Committee’s jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination.”²⁷

B. Concluding observations

21. The Human Rights Committee welcomed information that the Ecuadorian Constitutional Court declared unconstitutional the criminalization of private homosexual relations between consenting adults.²⁸

22. The Committee was concerned over the criminalization of a sexual relationship between consenting adult partners of the same sex in Lesotho,²⁹ and discriminatory legal provisions that penalized homosexual acts in Cyprus.³⁰

23. The Committee considered legislation that criminalized homosexual relations between consenting adults in Chile to “involve[s] violation of the right to privacy ... and [might] reinforce attitudes of discrimination between persons on the basis of sexual orientation. Therefore: The law should be amended so as to abolish the crime of sodomy between adults”.³¹ The Committee was concerned at the serious infringement of private life in some states in the United States of America that classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without discrimination.³² It also expressed concern at restrictions on the right to privacy, in particular with regard to homosexual relations between consenting adults, in Romania.³³

24. The Committee expressed regret that a reference to sexual orientation had been removed from the non-discrimination clause of the draft constitution in Poland, which “could lead to violations of articles 17 and 26” of the Covenant,³⁴ and was concerned that, in Austria, legislation on the minimum age of consent for sexual relations in respect of male homosexuals was discriminatory on the grounds of sex and sexual orientation.³⁵ The Committee recommended that measures be taken in Jersey (United Kingdom Crown Dependencies) to remove and prohibit any discrimination on grounds of sexual orientation³⁶ and recommended that Trinidad and Tobago amend the Equal Opportunities Act 2000 to cover persons who suffer discrimination on grounds of age, sexual orientation, pregnancy or infection with HIV/AIDS.³⁷

25. In 1995, the Human Rights Committee expressed concern that the Sexual Discrimination Ordinance in Hong Kong (then United Kingdom) was limited in its application to discrimination based on gender and marriage and did not prohibit discrimination on grounds of age, family responsibility or sexual preference.³⁸ In 1999, the Committee stated that it remained concerned that no legislative remedies were available to individuals in respect of discrimination on the grounds of race or sexual orientation in the Hong Kong Special Administrative Region.³⁹

26. The Committee noted with concern that homosexuals were subjected to discrimination by the Zimbabwean authorities; for example, aliens deemed to be homosexuals may be defined as “prohibited persons” for immigration purposes and subject to deportation.⁴⁰ It condemned the continuation of so-called “social cleansing” operations in Colombia, targeting street children, homosexuals, prostitutes and petty delinquents, and urged the authorities to take stringent measures to ensure full protection of the rights of the victims, particularly under articles 6 and 7 of the Covenant.⁴¹

27. The Committee considered that the imposition of the death penalty in the Sudan for offences which could not be characterized as the most serious, including apostasy, committing a third homosexual act, illicit sex, embezzlement by officials, and theft by force, was incompatible with article 6 of the Covenant and recommended that the death penalty be repealed for all but the most serious crimes.⁴²

C. List of issues to be taken up in connection with the consideration of periodic reports of State parties

28. The Human Rights Committee requested Guyana⁴³ to provide information on what legislation prohibited discrimination on the grounds of sexual orientation, disability, age and other grounds stated in article 26 of the Covenant. It asked the United Kingdom (Crown Dependencies)⁴⁴ to comment on any differences in Jersey between the regulation of heterosexual and homosexual activity with regard to age-limits, and how those differences were justified. Venezuela⁴⁵ was asked to describe the legislation applicable to sexual relationships conducted in private between consenting adults of the same sex and to provide information as to existing measures to prohibit discrimination against individuals on grounds of their sexual orientation. Egypt⁴⁶ was requested to provide information on the existence, in law and in fact, of discrimination based on sexual orientation, and to explain in the light of articles 17

and 26 of the Covenant the justification for criminalizing certain acts described as “debauchery” and “attacks on religion” on the basis of sexual orientation.

Notes

- ¹ See A/58/38, para. 448.
- ² See *Official Records of the Economic and Social Council, 2001, Supplement No. 2 (E/2001/22)*, annex IV, para. 18.
- ³ See E/C.12/2002/11, para. 13.
- ⁴ See E/C.12/1/Add.70., para. 8.
- ⁵ See E/C.12/1/Add.82. para. 5.
- ⁶ See E/C.12/1/Add.28, para. 7.
- ⁷ See E/C.12/1/Add.49, para. 17.
- ⁸ *Ibid.*, para. 30.
- ⁹ See E/C.12/1/Add.35, para. 5.
- ¹⁰ See E/C.12/1/Add.80, paras. 14 and 37.
- ¹¹ See E/C.12/1/Add.10, paras. 15 and 36.
- ¹² See E/C.12/1/Add.58, paras. 15 (c) and 31.
- ¹³ See E/C.12/Q/HKSAR/1, para. 4.
- ¹⁴ See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 44 (A/56/44)*, para. 119 (b) and 120 (d).
- ¹⁵ See A/CONF.189/PC.2/17, second preambular paragraph.
- ¹⁶ See *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 41 (A/55/41)*, para. 1536 (l).
- ¹⁷ See CRC/C/15/Add.178, para. 18.
- ¹⁸ See CRC/C/15/Add.135, paras. 25 and 26.
- ¹⁹ See CRC/C/15/Add.134, para. 22.
- ²⁰ See CRC/C/15/Add.188, paras. 43 and 44 (d).
- ²¹ See CCPR/C/15/D/61/197.
- ²² See *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40)*, vol. II, annex EE and appendix.
- ²³ See *ibid.*, *Fifty-first Session, Supplement No. 40 (A/51/40)*, vol. II, annex VIII, sect. H.
- ²⁴ See *ibid.*, *Fifty-seventh Session, Supplement No. 40 (A/57/40)*, vol. II, annex IX, sect. Z.
- ²⁵ See *ibid.*, annex IX, sect. Z, para. 8.2.
- ²⁶ See *ibid.*, para. 8.3.
- ²⁷ See *ibid.*, annex IX, sect. Z, appendix.
- ²⁸ See *ibid.*, *Fifty-third Session, Supplement No. 40 (A/53/40)*, vol. I, para. 281.
- ²⁹ See *ibid.*, *Fifty-fourth Session, Supplement No. 40 (A/54/40)*, vol. I, para. 256.
- ³⁰ See *ibid.*, *Fifty-third Session, Supplement No. 40 (A/53/40)*, vol. I, para. 190.

- ³¹ See *ibid.*, *Fifty-fourth Session, Supplement No. 40 (A/54/40)*, vol. I, para. 216.
- ³² See *ibid.*, *Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, paras. 287 and 295.
- ³³ See *ibid.*, *Fifty-fourth Session, Supplement No. 40 (A/54/40)*, vol. I, para. 375.
- ³⁴ See *ibid.*, para. 356.
- ³⁵ See *ibid.*, para. 190.
- ³⁶ See *ibid.*, *Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. I, para. 309.
- ³⁷ See *ibid.*, *Fifty-sixth Session, Supplement No. 40 (A/56/40)*, vol. I, para. 72.
- ³⁸ See *ibid.*, *Fifty-first Session, Supplement No. 40 (A/51/40)*, vol. I, paras. 59 and 69.
- ³⁹ See *ibid.*, *Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. I, paras. 247 and 248.
- ⁴⁰ See *ibid.*, *Fifty-third Session, Supplement No. 40 (A/53/40)*, vol. I, para. 226.
- ⁴¹ See *ibid.*, *Fifty-second Session, Supplement No. 40 (A/52/40)*, vol. I, paras. 279 and 296.
- ⁴² See *ibid.*, *Fifty-third Session, Supplement No. 40 (A/53/40)*, vol. I, para. 119.
- ⁴³ See CCPR/C/68/L/GUY, question No. 20.
- ⁴⁴ See CCPR/C/68/L/UKCD, question No. 12.
- ⁴⁵ See CCPR/C/71/L/VEN, question No. 20.
- ⁴⁶ See CCPR/C/76/L/EGY, question No. 26.
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