



MEMORANDUM

To: Nancy Nicol, Principle Investigator, York University, Envisioning Global LGBT Human Rights (funded by the Social Science and Humanities Research Council of Canada)*
From: Atrisha Lewis (3L) & Zahra Ahmed (LL.M.), International Human Rights Clinic
Date: January 13th, 2012
Re: **India's Interactions with the UN System on the Issue of LGBT Rights**

This document was prepared by law students and highlights publicly-accessible information available at the time it was prepared. It is not exhaustive, nor is it updated on a regular basis. The information provided here is not a substitute for legal advice or legal assistance, and the International Human Rights program at the University of Toronto, Faculty of Law cannot provide such advice or assistance.

Overview of the UN System

There are two major human rights systems at the United Nations (the "UN"): the Treaty based system and the Charter based system.

The treaty-based human rights system consists of nine treaty bodies that monitor state compliance with the obligations under their respective conventions. Each treaty body is comprised of a committee of independent experts that interpret and apply the convention in reviewing and commenting on periodic state reports and individual complaints. The treaty bodies are not judicial institutions and there is debate as to the nature of the body of law that the treaty bodies produce.¹ Regardless of whether these normative findings are actually law, they have legal significance as they are referenced in international and domestic decisions.²

The Charter based human rights system derives its authority from the UN Charter itself. The UN Human Rights Council, the successor to the Human Rights Commission, is the main organ in this Charter based system. The mandate of the Human Rights Council is to make recommendations on situations of human rights violation, while being guided by principles of "universality, impartiality, objectivity, and non-selectivity."³ This intergovernmental body, which meets in Geneva 10 weeks a year, is composed of 47 elected United Nations Member States who serve for an initial period of 3 years, and cannot be elected for more than two consecutive terms. The Human Rights Council oversees the Universal Periodic Review (UPR), which is a process that involves a review of the human rights records of all 193 UN Member States once every four years.

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¹ Burgenthal, *The Evolving International Human Rights System* 100 A.J.I.L. 788, 787-791

² *Ibid*

³ G.A. Res. 60/251 (March 15, 2006)



While not a human rights system, the General Assembly also deals with human rights issues through its broad mandate. Established in 1945 under the Charter of the United Nations, the General Assembly is the chief deliberative, policymaking and representative organ of the United Nations. Comprising all 193 Members of the United Nations, it provides a unique forum for multilateral discussion of the full spectrum of international issues covered by the Charter.

INDIA

1. Summary

This is a summary of India’s interaction with UN mechanisms on Sexual Orientation and Gender Identity (“SOGI”) issues.

- India’s constitution does not include any reference to sexual orientation.
- India has signed and ratified key human rights treaties that are germane to SOGI issues. However, India has not accepted the jurisdiction of any of the Committees to hear individual complaints. See chart below re Treaty Status.
- While India has submitted reports to the treaty-based bodies, India has been late in reporting and there are currently a number of reports that are overdue.
- In recent years, India has voted in favour of SOGI issues at the United Nations but its record is not consistent. India has not been vocal at the meetings in supporting SOGI issues.
- In 2008, the *Universal Periodic Review Committee* expressed concerns about the status of LGBTI people in India, in particular the criminalization of homosexuality.
- The other UN committees have not address SOGI issues in India.

2. Treaty/ Convention Status

International Conventions are subject to ratification, acceptance or accession by States. They define rules with which the States undertake to comply.

The following chart highlights the international conventions that protect sexual orientation and gender identity rights through affirming international human rights principles such as the right to equality.

India has ratified all relevant treaties. The chart highlights when India has ratified these conventions.

Convention	Date of Signature	Date of Accession(a), Succession(s), Ratification
International Convention on the Elimination of all forms of Racial Discrimination (“CERD”)	2 March 1967	3 Dec. 1968



Article 14 of CERD		--
International Covenant on Civil and Political Rights ("ICCPR")		10 April 1979 (a)
First Optional Protocol to the ICCPR ⁴		--
International Covenant on Economic, Social and Cultural Rights ("ICESCR")		10 April 1979 (a)
Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW")	30 July 1980	9 July 1993
Optional Protocol to CEDAW ⁵		--
Convention against Torture ("CAT")	14 Oct 1997	--
Article 22 of CAT		--
Convention on the Rights of the Child ("CRC")		11 Dec 1992 (a)

In accordance with the various treaties, India has an obligation to report its compliance with the treaties. The tables below set out the status of India's reporting.

Reporting to Human Rights Council under Universal Periodic Review

	Date of Report	Next reporting date
Universal Periodic Review ⁶	2008	2012

Reporting to Treaty-based bodies

Treaty-based bodies	Date of Review	Comments
Human Rights Committee (CCPR)	1997	Fourth report overdue since 2001
Committee on the Elimination of Racial Discrimination ("CERD")	2007	Twentieth and twenty-first report overdue since 2010
Committee on Economic, Social and Cultural Rights ("ICESCR")	2008	
Committee on the Elimination of all forms of	2010 ⁷ , 2007, 2000	

⁴ Authorizes the Human Rights Committee to hear complaints by private persons alleging violations of their rights under the ICCPR

⁵ Authorizes the CEDAW Committee to receive complaints from individuals alleging violations of their rights under CEDAW

⁶ Info re Universal Periodic Review, including calendar.
<http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>

⁷ The Committee considered the exceptional report of India (CEDAW/C/IND/SP.1) at its 960th meeting, on 15 October 2010 (see CEDAW/C/SR.960).



Discrimination Against Women ("CEDAW")		
Committee against Torture ("CAT")	--	India has not ratified CAT.
Committee on the Rights of the Child ("CRC")	2000, 2004	Third and fourth reports overdue since 2008.

3. All Official State Positions on LGBT Rights as Reflected in Voting Patterns

Human Rights Council

The Human Rights Council is an inter-governmental body within the UN system made up of 47 States responsible for strengthening the promotion and protection of human rights around the globe. The Council was created by the UN General Assembly on 15 March 2006 with the main purpose of addressing situations of human rights violations and make recommendations on them.

Year	Resolution	Vote
2011	<p>Resolution 17/19 Human rights, sexual orientation and gender identity⁸</p> <p>The resolution requested that the UN High Commissioner on Human Rights conduct a study on SOGI Human Rights violations in all regions of the world, convene a panel to discuss the results, and remain seized of the issue.</p> <p>Resolution adopted 23 to 19 with 3 abstentions, at the Human Rights Council on June 17, 2011</p>	<p>India was not a member at the time of the vote.</p> <p>India will be a member in 2014.</p>

Prior to the June 2011 resolution, in 2003, Brazil put forward a resolution pertaining to human rights and sexual orientation at the Human Rights Committee. There was no vote on the actual resolution instead the debate was postponed. In 2008, the debate respecting the resolution was further postponed.

General Assembly Resolutions

The votes on the draft resolutions relating to the *Special Rapporteur on Extra-judicial executions* are tracked in the following chart. The resolution relates to whether the scope of investigation should specifically include investigating extra-judicial killings on the basis of sexual

⁸ A/HRC/RES/17/19



orientation. The chart tracks draft resolutions because this is where the clear statements and votes relating to include or remove the explicit reference to “sexual orientation” actually occur. The final resolutions are typically passed without any discussion relating to the inclusion or removal of the words “sexual orientation.”

Final Resolution	Draft Resolution	Vote
57/214	2002 Draft Resolution ⁹ at Third Committee	
	New reference to "sexual orientation"	Abstain
59/197	2004 Draft resolution ¹⁰	
	Retain words "sexual orientation"	In Favour
63/182	2009 Amendment ¹¹ to Draft Resolution ¹² at Third Committee	
	Remove words "sexual orientation"	Against
	Vote to Adopt Draft Resolution with sexual orientation in it.	In Favour
65/208	2010 Amendment ¹³ to Draft Resolution ¹⁴ at Third Committee	
	Remove words "sexual orientation"	Against
	2010 Amendment ¹⁵ to Draft Resolution ¹⁶ at Plenary	
	Re-include "sexual orientation"	In Favour

The Economic and Social Council (ECOSOC)

The Economic and Social Council (ECOSOC) is a Charter based UN organ that serves as the central forum for discussing international economic and social issues. States are elected to serve three year terms on the ECOSOC. Seats on the Council are allotted based on geographical representation. There are 54 member Governments at any time. In 2006, ECOSOC granted consultative status to the first LGBT NGO. The following chart outlines the voting patterns of India with respect to granting consultative status. India was a member from 2005 – 2007 and is currently a member of ECOSOC serving a term from 2009 to 2011. India will continue for a second term from

⁹ A/C.3/57/L.56/Rev.1

¹⁰ A/C.3/59/L.57/Rev.1

¹¹ A/C.3/63/L.75

¹² A/C.3/63/L.35/Rev.1

¹³ A/C.3/65/L.65

¹⁴ A/C.3/L.29/Rev.1

¹⁵ A/65/L.53

¹⁶ A/C.3/L.29/Rev.1



2012 to 2015. India also served on the NGO Committee and has consistently abstained during votes involving an NGO working SOGI issues. The NGO Committee makes recommendations to ECOSOC.

Date	Organization	Vote at NGO Committee	Vote at ECOSOC
25-Jul-11	ILGA	India voted against a no-action motion ¹⁷	
19-Jul-10	International Gay and Lesbian Human Rights Commission	No vote was taken rather a no action motion was taken which was viewed by some countries as a way to indefinitely delay consideration of the Application.	Abstain ¹⁸
27-Jul-09	Associação Brasileira de Gays, Lésbicas e Transgêneros	Abstain ¹⁹	Abstain ²⁰
21-Jul-08	1. COC Netherlands; 2. Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales	1. Abstain ²¹ 2. Abstain ²²	
23-Jul-07	1. Coalition gaie et lesbienne du Québec 2. Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights	1. Abstain ²³ 2. Abstain ²⁴	
24-Jul-06	1. The Danish National Association for Gays and Lesbians; 2. ILGA-Europe; 3. The Lesbian and Gay Federation in Germany	1. Abstain ²⁵ 2. Abstain ²⁶ 3. Abstain ²⁷	

¹⁷ E/2011/32 (Part I)

¹⁸ E/2010/SR.39

¹⁹ E/2009/32 (Part I)

²⁰ E/2009/SR.37

²¹ E/2008/32 (Part II)

²² E/2008/32 (Part I)

²³ E/2007/32/Corr.1 (part I)

²⁴ E/2007/32 (Part II)

²⁵ E/2006/32 (Part I)

²⁶ E/2006/32 (Part II)

²⁷ E/2006/32 (Part I)



Other Statements

Over the years, countries have made joint statements at the Commission on Human Rights (predecessor of the Human Rights Council), the Human Rights Council and the UN General Assembly on sexual orientation and human rights seeking recognition of sexual orientation as a fundamental aspect of an individual and as recognition of discrimination on the basis of sexual orientation.

JOINT STATEMENTS RE SEXUAL ORIENTATION AND HUMAN RIGHTS	
	India
<p>March 2011 Joint Statement at Human Rights Council by 85 countries²⁸ which stated:</p> <p>We call on States to take steps to end acts of violence, criminal sanctions and related human rights violations committed against individuals because of their sexual orientation or gender identity, encourage Special Procedures, treaty bodies and other stakeholders to continue to integrate these issues within their relevant mandates, and urge the Council to address these important human rights issues.</p>	Did not support
<p>Dec 2008 Joint Statement at UN General Assembly by 66 countries²⁹ in which the States called upon States and international human rights mechanisms to “commit to promote and protect human rights of all persons, regardless of sexual orientation and gender identity”.</p>	Did not support
<p>Dec 2006 Joint Statement at Human Rights Council by 54 countries³⁰ in which the countries stated:</p> <p>We express deep concern at these ongoing human rights violations. The principles of universality and non-discrimination require that these issues be addressed. We therefore urge the Human Rights Council to pay due attention to human rights violations based on sexual orientation and gender identity, and request the President of the Council to provide an opportunity, at an appropriate future session of the Council, for a discussion of these important human rights issues.</p>	Did not support

²⁸ For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/human-rights-council/hrc16/joint-statement>

²⁹ For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/sogi-statements/2008-joint-statement>

³⁰ For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement>



<p>March 2005 Joint Statement at Commission on Human Rights by 32 countries³¹ calling for the recognition of “Sexual orientation is a fundamental aspect of every individual’s identity and an immutable part of self.”</p>	<p>Did not support</p>
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4. All UN Statements on the situation of LGBT rights in India

Universal Periodic Review

The Universal Periodic Review (UPR) is a unique state-driven process conducted under the auspices of the Human Rights Council, which involves a review of the human rights records of all 192 UN Member States once every four years. The Universal Periodic Review process began in 2006 and the first round will be completed by 2011. The documents on which the reviews are based are: 1) information provided by the State under review, which can take the form of a “national report”; 2) information contained in the reports of independent human rights experts and groups, known as the Special Procedures, human rights treaty bodies, and other UN entities; 3) information from other stakeholders including non-governmental organizations and national human rights institutions. Following the State review, a report referred to as the “outcome report” is produced. This report consists of the questions, comments and recommendations made by States to the country under review, as well as the responses by the reviewed State.

Year	Questions during the review process	India’s comments during review process
2008	<p>During the review process, criminalization of homosexuality in India was raised by Sweden.³²</p> <p>67. Sweden raised two questions, which it stated could also be seen as recommendations. India has ratified or acceded to several instruments of international law relating to human rights but there are also a number of instruments to which it is not a party, notably the Convention against Torture, the refugee convention and ILO Conventions Nos.138</p>	<p>In response to the issues raised respecting homosexuality, India responded as follows:³³</p> <p>84. Regarding Sweden’s comments on homosexual conduct, India noted that under Section 377 of the 1860 Indian Penal Code, the concept of sexual offences “against the order of nature” was introduced. This was essentially a Western concept, which has remained over the years. The concept of homosexuality itself does not find a mention in the Indian Penal Code and it can be a matter of debate whether it is “against the</p>

³¹ For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/sogi-statements/2005-joint-statement>

³² Report of the Working Group for the Universal Periodic Review. UN Doc. A/HRC/8/26

³³ Report of the Working Group for the Universal Periodic Review. UN Doc. A/HRC/8/26



<p>and 182 relating to child labour. Sweden noted with interest India’s intention to ratify the Convention against Torture and encouraged the Government to do so. It requested the Indian Government to elaborate on its efforts to ratify other instruments of international law relating to human rights, in particular ILO Conventions Nos. 138 and 182 relating to child labour. Secondly, it stated that homosexual conduct is prohibited by the Indian Penal Code and that civil society organizations have reported discrimination of homosexual, lesbian, bisexual, transgender and transsexual persons both by agents of the State and on a general societal level. Sweden asked the Indian Government about the measures it is taking to ensure full equality before the law regardless of a person’s sexual orientation.</p>	<p>order of nature”. An NGO had filed a petition before the Delhi High Court for declaring Section 377 of the Indian Penal Code as unconstitutional. The High Court’s judgment turning down the petition was challenged in the Supreme Court which has returned it to the High Court for reconsideration. The matter was referred to the Law Commission of India, which took the view that Indian society does not currently accept homosexuality as an acceptable form of behaviour. However, the matter is under the consideration of the courts in India.</p>
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Human Rights Committee

The Human Rights Committee, composed of 18 independent experts, monitors state compliance with the International Covenant on Civil, and Political Rights.

India has not submitted a report for a review since 1997.

Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women, composed of 23 independent experts, monitors the Convention on the Elimination of All Forms of Discrimination Against Women.

In 2010, the Committee considered the exceptional report of India (CEDAW/C/IND/SP.1) at its 960th meeting, on 15 October 2010 (see CEDAW/C/SR.960). The exception report related to specific events that occurred in Gujarat. The review was not a review on all issues.

In 2007, the Committee considered India’s report but did not make any concluding observations respecting the treatment of LGBTI persons.



Report of UN High Commissioner on Human Rights

In December 2011, the UN High Commission on Human Rights submitted a report to the Human Rights Council pursuant to its resolution 17/19, in which the Council requested the United Nations High Commissioner for Human Rights to commission a study documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity.

The report stated that:

- India is one of the countries where since 2000 laws criminalize homosexual consensual sex have been repealed.³⁴
- Indian Courts have interpreted general language on non-discrimination as providing equivalent protection.³⁵
- India is one of the few countries that have made it easier for transgender and intersex persons to obtain legal recognition of a change of gender or to indicate a gender other than male or female.³⁶

5. Individual Complaints

The Human Rights Committee and five of the human rights treaty bodies (CCPR, CERD, CAT, CEDAW, and CRPD) may, if a State accepts the Committees jurisdiction, consider individual complaints or communications from individuals.

India has not accepted the competence of any treaty-based bodies to consider individual complaints.

Communications and urgent appeals can be sent to Special Rapporteurs and other experts established by the Human Rights Committee. There have been no references made by the Special Rapporteurs of LGBT persons in India.

6. Domestic Court Decisions

In the matter of *Naz Foundation v. Government of NCT of Delhi and Others*, the High Court of Delhi cited the case of *Toonen* and considered the reasoning of the South African Constitutional Court in finding section 377 of the Indian Penal Code unconstitutional.

³⁴ A/HRC/19/41 at para. 43

³⁵ A/HRC/19/41 at para. 49

³⁶ A/HRC/19/41 at para. 79



This section of the code criminalized, “carnal intercourse against the order of nature with any man, woman or animal” – wording from colonial rule that is still in use in more than half of the jurisdictions criminalizing sodomy worldwide.

The Naz Foundation submitted that by criminalizing private, consensual same-sex conduct, section 377 perpetuated negative and discriminatory beliefs towards same-sex conduct, driving activities underground and crippling HIV/AIDS prevention efforts.

The High Court of Delhi held that treating consensual homosexual sex between adults as a crime was a violation of the fundamental rights protected by India’s Constitution and on that basis Section 377 was in violation of the Indian Constitution.

The Government is not appealing to the Supreme Court of India however, other interested parties have filed an appeal.