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2015

Levels of Generality and the Protection of LGBT Rights Before the United Nations General Assembly

Anthony S. Winer

Mitchell Hamline School of Law, anthony.winer@mitchellhamline.edu

Publication Information

41 William Mitchell Law Review 80 (2015)

Repository Citation

Winer, Anthony S., "Levels of Generality and the Protection of LGBT Rights Before the United Nations General Assembly" (2015).
Faculty Scholarship. Paper 265.

<http://open.mitchellhamline.edu/facsch/265>

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Levels of Generality and the Protection of LGBT Rights Before the United Nations General Assembly

Abstract

Various countries around the world have been according greater protection to the rights of lesbian, gay, bisexual, and transgender (LGBT) people in recent years. At the same time, in other countries, the rights of LGBT people are becoming more threatened.

Against this backdrop, it is worth noting that the United Nations (U.N.) General Assembly has never issued a resolution specifically protecting or advancing the rights of LGBT people. This is remarkable given the significant role the General Assembly has had in promulgating international human rights. From the standpoint of advocates for LGBT rights, it would be desirable for the General Assembly to issue such a resolution. This article suggests part of a strategy to be implemented in pursuing that goal. Attention is drawn to the importance of levels of generality that are used to describe human rights. Several major United States Supreme Court cases regarding constitutional rights illustrate this importance. Overall, the deployment of higher levels of generality in discourse concerning LGBT rights can be more successful in securing results favorable to those rights.

Although the General Assembly has not issued any resolutions protecting or advancing LGBT rights, other international actors have. Certain international tribunals have issued decisions, certain international organizations have issued resolutions and reports, and certain non-governmental organizations (NGOs) have issued principles and policies, all aimed at protecting or advancing LGBT rights. A recent and commendable example is a resolution from the American Bar Association (ABA), adopted on August 11, 2014, that (among other effects) condemns all laws that discriminate against LGBT people.

Upon review, it is observed that the language used in these actions reflects varying points on a spectrum, running from a broad (or higher) level of generality to a specific (or lower) level of generality. Historically, most General Assembly resolutions protecting or advancing human rights have adopted specific levels of generality. An earlier effort to advance LGBT rights before the General Assembly, adopting only a moderately specific level of generality, was unsuccessful.

This article asserts that, in designing the General Assembly's first LGBT rights resolution, it will be safer and more effective to follow the examples indicating higher levels of generality rather than those indicating lower levels of generality. Given the record of the international authorities and precedents reviewed in this article, and given the earlier unsuccessful attempt in the General Assembly, the first General Assembly resolution on LGBT rights should adopt a very high level of generality.

Keywords

Human Rights, LGBT, International Human Rights, levels of generality

**LEVELS OF GENERALITY AND THE PROTECTION OF
LGBT RIGHTS BEFORE THE UNITED NATIONS
GENERAL ASSEMBLY**

Anthony S. Winer[†]

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[†] Professor of Law, William Mitchell College of Law, St. Paul, Minnesota.

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I. INTRODUCTION

Various countries around the world have been according greater protection to the rights of lesbian, gay, bisexual, and transgender (LGBT) people in recent years.¹ At the same time, in other countries, the rights of LGBT people are becoming more threatened.²

Against this backdrop, it is worth noting that the United Nations (U.N.) General Assembly has never issued a resolution specifically protecting or advancing the rights of LGBT people. This is remarkable given the significant role the General Assembly has had in promulgating international human rights.³ From the standpoint of advocates for LGBT rights, it would be desirable for the General Assembly to issue such a resolution. This article suggests part of a strategy to be implemented in pursuing that goal.

Attention is drawn to the importance of levels of generality that are used to describe human rights. Several major United States Supreme Court cases regarding constitutional rights illustrate this importance.⁴ Overall, the deployment of higher levels of generality

1. See generally Emine Saner, *Gay Rights Around the World: The Best and Worst Countries for Equality*, GUARDIAN, July 30, 2013, at 6, available at LEXIS.

2. See *infra* Part IV.A.

3. See *infra* Part II.

4. See *infra* Part III.B.

in discourse concerning LGBT rights can be more successful in securing results favorable to those rights.

Although the General Assembly has not issued any resolutions protecting or advancing LGBT rights, other international actors have. Certain international tribunals have issued decisions, certain international organizations have issued resolutions and reports, and certain non-governmental organizations (NGOs) have issued principles and policies, all aimed at protecting or advancing LGBT rights.⁵ A recent and commendable example is a resolution from the American Bar Association (ABA), adopted on August 11, 2014, that (among other effects) condemns all laws that discriminate against LGBT people.⁶

Upon review, it is observed that the language used in these actions reflects varying points on a spectrum, running from a broad (or higher) level of generality to a specific (or lower) level of generality. Historically, most General Assembly resolutions protecting or advancing human rights have adopted specific levels of generality.⁷ An earlier effort to advance LGBT rights before the General Assembly, adopting only a moderately specific level of generality,⁸ was unsuccessful.

This article asserts that, in designing the General Assembly's first LGBT rights resolution, it will be safer and more effective to follow the examples indicating higher levels of generality rather than those indicating lower levels of generality. Given the record of the international authorities and precedents reviewed in this article, and given the earlier unsuccessful attempt in the General Assembly, the first General Assembly resolution on LGBT rights should adopt a very high level of generality.

II. THE SIGNIFICANCE OF GENERAL ASSEMBLY RESOLUTIONS FOR INTERNATIONAL HUMAN RIGHTS

For an international human rights movement that desires to make progress, a General Assembly resolution or declaration

5. See *infra* Part IV.B–G.

6. See *American Bar Association House of Delegates Adopts Resolutions on Cybersecurity, Domestic Violence*, A.B.A. NEWS (Aug. 12, 2014, 12:31 PM), http://www.americanbar.org/news/abanews/aba-news-archives/2014/08/american_bar_associa.html.

7. See *infra* Part V.A.

8. See *infra* Part V.D.

extolling the rights protected or advanced by the movement can be especially important. This special importance arises both from the position of the General Assembly in the U.N. and from the record of General Assembly resolutions in advancing human rights.

A. *The Position of the General Assembly in the United Nations*

The General Assembly is, of course, the only one of the six main bodies within the U.N. structure in which all member states of the U.N. are always represented.⁹ Accordingly, it has about 190 voting members, representing almost every country in the world.¹⁰ By comparison, the Security Council only has fifteen state members at any time,¹¹ and the membership of the Economic and Social Council (ECOSOC) is limited to fifty-four state members.¹² There are only fifteen permanent members of the International Court of Justice at any time,¹³ and the Secretariat, by its character, represents no countries per se.¹⁴ The operations of the sixth main body, the Trusteeship Council, were suspended in 1994.¹⁵

Each member state has equal voting power in the General Assembly, with each state having one vote. This contrasts with the Security Council, in which five members are permanent and have a veto power over non-procedural decisions.¹⁶ Although each

9. U.N. Charter art. 9, para. 1 (“The General Assembly shall consist of all the Members of the United Nations.”).

10. *See Member States of the United Nations*, UNITED NATIONS, <http://www.un.org/en/members/index.shtml> (last visited Dec. 2, 2014) (setting forth a chart providing the names and dates of admission of the current U.N. member states).

11. U.N. Charter art. 23, para. 1 (“The Security Council shall consist of fifteen Members of the United Nations.”).

12. *Id.* art. 61, para. 1 (“The Economic and Social Council shall consist of fifty-four Members of the United Nations elected by the General Assembly.”).

13. Statute of the International Court of Justice art. 3, para. 1, June 26, 1945, 59 Stat. 1055, 3 Bevens 1179 (“The Court shall consist of fifteen members, no two of whom may be nationals of the same state.”).

14. U.N. Charter art. 100, paras. 1–2 (providing that the Secretary-General and the Secretariat “shall not seek or receive instructions from any government . . .” and that each U.N. member state “undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities”).

15. *See Trusteeship Council*, UNITED NATIONS, <http://www.un.org/en/mainbodies/trusteeship/> (last visited Dec. 2, 2014).

16. U.N. Charter art. 23, para. 1 (declaring, in its currently operative form,

ECOSOC member, at any time, also has equal voting power,¹⁷ this is less significant. First, as noted above, only a minority of U.N. member states sit on the ECOSOC at any time, so formal equality of voting strength does not provide equal representation of all members at any one time. Secondly, the role of the ECOSOC in current affairs is probably secondary in comparison to the activities of the General Assembly and Security Council.¹⁸

Additionally, the scope of the General Assembly's deliberations can be very broad. The U.N. Charter gives the General Assembly wide discretion in the matters it may discuss.¹⁹ The U.N. Charter also specifically authorizes the General Assembly to consider issues regarding the "maintenance of international peace and security,"²⁰ "promoting co-operation in the economic, social, cultural, educational and health fields,"²¹ "promoting international co-operation in the political field . . . [and] the progressive development of international law."²² As a practical matter, the range of subjects that the General Assembly can address, as long as there is some nexus to international affairs or international life, is nearly unlimited.²³

Other prominent institutions of international governance, however, often operate within more limited fields of activity. The U.N. framework provides for a very large number of specialized

that China, France, the Russian Federation, the United Kingdom, and the United States are permanent Security Council members); *id.* art. 27, para. 3 (providing that, on all non-procedural matters, no decision of the Security Council can be made without the concurring votes of the permanent members).

17. *Id.* art. 67, para. 1 ("Each member of the Economic and Social Council shall have one vote.").

18. Frederic L. Kirgis, Jr., *United Nations Economic and Social Council*, in 4 ENCYCLOPEDIA OF INTERNATIONAL LAW 1092, 1092 (Rudolf Bernhardt ed., 2000) ("ECOSOC has never satisfied the hopes of those at the San Francisco Conference who saw it as the primary policy-making body for international economic and social cooperation.").

19. U.N. Charter art. 10 ("The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter . . .").

20. *Id.* art. 11.

21. *Id.* art. 13, para. 1(b).

22. *Id.* art. 13, para. 1(a).

23. See, e.g., M.J. Peterson, *General Assembly*, in THE OXFORD HANDBOOK ON THE UNITED NATIONS 97, 99 (Thomas G. Weiss & Sam Daws eds., 2007) (asserting that provisions of the U.N. Charter grant to the General Assembly "a potentially unlimited agenda").

agencies,²⁴ for example, which can be very influential. Among these are the World Trade Organization; the International Monetary Fund; the U.N. Children's Fund; the U.N. Educational, Scientific and Cultural Organization; and the World Health Organization.²⁵ As valuable as many of these and other institutions are, they each have narrowly defined fields of focus.

The General Assembly is, thus, in the particular position of affording nearly every state in the world equal voting strength on a virtually limitless array of international issues.²⁶ This position can be seen to accord to the General Assembly a kind of deliberative equality to essentially every country on earth,²⁷ which in turn provides a degree of popular legitimacy that is unique.²⁸ The General Assembly has, with justice, been called "the preeminent global deliberative body."²⁹

It is true that the General Assembly does not generally have the power to require any states, as a matter of legal obligation, to behave in any particular manner.³⁰ It is designed to serve as a deliberative body and not a legislative one.³¹ However, it is not

24. The specialized agencies are provided for and referenced in Article 57 of the U.N. Charter. *See* U.N. Charter art. 57.

25. MALCOLM N. SHAW, *INTERNATIONAL LAW* 121 (6th ed. 2008).

26. *See* Peterson, *supra* note 23, at 98–99.

27. *See id.*

28. *See id.* at 98 (noting that many U.N. member states "regard the Assembly as a forum where the masses can rally to counterbalance the aristocracy" of the permanent members of the Security Council (citation omitted) (internal quotation marks omitted)).

29. *See id.* at 103.

30. *See, e.g.,* SHAW, *supra* note 25, at 114–15 ("[R]esolutions of the Assembly are generally not legally binding and are merely recommendatory, putting forward opinions on various issues with varying degrees of majority support."). The General Assembly does have the authority to bind states on governance issues related to the management of the U.N. For example, Article 19 of the U.N. Charter deprives any member state that is "in arrears in the payment of its financial contributions to the [U.N.] . . . [of its] vote in the General Assembly" if the amount of the arrears exceeds a specified quantity. U.N. Charter art. 19.

31. *See* SHAW, *supra* note 25, at 3 (observing that "[i]nternational law has no legislature" and noting by contrast that the resolutions of the General Assembly are not legally binding); *see also* Christopher C. Joyner, *Conclusion: The United Nations as International Law-Giver*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 432, 443 (Christopher C. Joyner ed., 1997) ("The General Assembly may draft, approve, and recommend international instruments for multilateral agreement. That body can not, however, compel them as binding obligations upon member states.").

necessary that resolutions be legally binding in order for them to have substantial effects in the political world. The political impact of the General Assembly's actions can attract notice and exert effects even though the actions themselves do not have binding prescriptive power.³² Furthermore, the General Assembly's actions can indeed influence the development of international law. They can be, and have been, useful in establishing rules of customary international law and general principles of law.³³

B. The Record of General Assembly Resolutions in Advancing Human Rights

Resolutions of the General Assembly have been invaluable in advancing the cause of human rights. One of the most powerful documents in the modern history of international human rights is the Universal Declaration of Human Rights (Universal Declaration),³⁴ which the General Assembly promulgated in 1948. It has been termed "the parent document, the primary inspiration, for most rights instruments in the world today."³⁵ The Universal Declaration figures prominently in most major compendia of human rights instruments, usually appearing first, or nearly first, among the instruments included in such collections.³⁶ It has been

32. An example would be the worldwide publicity generated when the General Assembly admitted the Palestinian territories with nonmember observer state status into the U.N. *E.g.*, Press Release, Gen. Assembly, General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations, U.N. Press Release GA/11317 (Nov. 29, 2012). The reaction to the General Assembly's action was eminently newsworthy. *E.g.*, Colum Lynch, *United Nations Upgrades Palestine's Status: The U.N. General Assembly Passed a Resolution Recognizing Palestine as a "Non-Member Observer State"*, WASH. POST, Nov. 29, 2012, at world/national-security, available at 2012 WLNR 25420323.

33. *E.g.*, SHAW, *supra* note 25, at 82-83 (stating that General Assembly resolutions can be means of determining the existence of a state practice necessary to establish a rule of customary international law and adding that the International Court of Justice has noted that "evidence of the existence of rules and principles may be found in resolutions adopted by the General Assembly" as well as the Security Council); *see also* Joyner, *supra* note 31, at 440 (referencing the "quasi-legislative" capability of the General Assembly to "influence the nature and substance of contemporary international law in a number of ways").

34. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. GAOR, 3rd Sess., (Vol. 1), U.N. Doc. A/810 (Dec. 10, 1948).

35. MARY ANN GLENDON, *A WORLD MADE NEW* xvi (2001).

36. *E.g.*, BASIC DOCUMENTS ON HUMAN RIGHTS 23 (Ian Brownlie & Guy S. Goodwin-Gill eds., 5th ed. 2006) (appearing third); HUMAN RIGHTS IN

called the “cornerstone” of the U.N.’s protection of human rights³⁷ and has been mentioned in the same vein of significance as the British Bill of Rights of 1689, the U.S. Declaration of Independence of 1776, and the French Declaration of the Rights of Man and Citizen of 1789.³⁸

It was understood from the beginning that the Universal Declaration was not intended to be a binding instrument.³⁹ Given its status as a General Assembly resolution, its nonbinding character was not inappropriate. However, in spite of its initially nonbinding character, some of its provisions have been considered to constitute general principles of law or represent elementary considerations of humanity.⁴⁰ The Universal Declaration has influenced the constitutions of many countries, and its great renown has been said to raise the question of its status as customary international law.⁴¹

The General Assembly’s role in protecting human rights during the early years of the U.N. did not end with promulgating the Universal Declaration. Indeed, the Universal Declaration was only one of several significant treaties that are often referenced collectively as the “International Bill of Human Rights,” and the General Assembly was involved with the creation of the others as well. The other treaties are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴² Some authorities

INTERNATIONAL LAW 11 (Council of Europe ed., 3d ed. 2007) (appearing first); HUMAN RIGHTS SELECTED DOCUMENTS 31 (W.J.F.M. van der Wolf ed., 1994) (appearing first after the U.N. Charter); HUMAN RIGHTS: SIXTY MAJOR GLOBAL INSTRUMENTS 2 (Winston E. Langley ed., 1992) (appearing first); THE RAOUL WALLENBERG COMPILATION OF HUMAN RIGHTS INSTRUMENTS 27 (Göran Melander & Gudmundur Alfredsson eds., 1997) (appearing first under the heading of “Universal Instruments, General Part”).

37. SHAW, *supra* note 25, at 278.

38. GLENDON, *supra* note 35, at xvii.

39. BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 36 (“The Declaration is not a legally binding instrument as such”); *cf.* SHAW, *supra* note 25, at 280 (“The intention had been that the Declaration would be followed immediately by a binding universal convention on human rights, but this process took considerably longer than anticipated.”).

40. BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 36.

41. GLENDON, *supra* note 35, at 237 (referencing incorporation into national legal systems); SHAW, *supra* note 25, at 279 (referencing national constitutions and customary international law).

42. DAVID WEISSBRODT & CONNIE DE LA VEGA, INTERNATIONAL HUMAN RIGHTS

also specifically view the 1966 Optional Protocol to the ICCPR as being part of the International Bill of Human Rights.⁴³

The ICCPR⁴⁴ and the ICESCR⁴⁵ are omnibus treaties that cover a broad array of rights that governments are required to accord to their domestic populations. For example, the ICCPR provides that “[e]very human being has the inherent right to life,”⁴⁶ that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect,”⁴⁷ that “[e]veryone shall have the right to freedom of thought, conscience and religion,”⁴⁸ and that “[e]veryone shall have the right to freedom of association with others.”⁴⁹ The ICESCR was promulgated with substantial support from the Cold War’s Soviet bloc, and was largely intended as a collectivist-oriented counterpart to the individual rights secured by the ICCPR.⁵⁰ For example, Article 7(a) states that parties recognize the right of everyone to fair wages, a decent living for themselves and their families, and safe and healthy working conditions, among other aspirations.⁵¹

The 1966 Optional Protocol to the ICCPR establishes a mechanism through which individual persons can claim to be victims of violations by their domestic governments of rights set

LAW: AN INTRODUCTION 4 (2007). *See generally* Tom J. Farer, *Introduction*, in *THE INTERNATIONAL BILL OF HUMAN RIGHTS* xvi (Paul Williams ed., 1981); *HUMAN RIGHTS: SIXTY MAJOR GLOBAL INSTRUMENTS*, *supra* note 36, at 1 (providing historical background on the documents making up the International Bill of Human Rights—the Universal Declaration, the ICCPR, the ICESCR, and the 1966 Optional Protocol).

43. The Farer compilation is an example of this. Farer, *supra* note 42; *see also* WEISSBRODT & DE LA VEGA, *supra* note 42, at 25 (including the Optional Protocol at this juncture in their discussion, although not earlier).

44. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

45. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 [hereinafter ICESCR].

46. ICCPR, *supra* note 44, art. 6(1).

47. *Id.* art. 10(1).

48. *Id.* art. 18(1).

49. *Id.* art. 22(1).

50. *See* Farer, *supra* note 42, at xvi–xvii (stating that “two distinct groups warred ferociously” over the relative significance of economic and social rights and declaring that “[t]he United States and several other capitalist democracies led the opposition against a coalition of Communist and developing states”).

51. ICESCR, *supra* note 45, art. 7(a)–(b).

forth in the ICCPR.⁵² These complaints, called “communications,” are presented to the Human Rights Committee (Committee) set up by the ICCPR, which then investigates the complaints and reports its conclusions to the subject state in each case.⁵³ These reports are often made public, and some of them furnish bases for discussion later in this article.⁵⁴

The ICCPR, the ICESCR, and the 1966 Optional Protocol to the ICCPR were drafted by the U.N. Commission on Human Rights,⁵⁵ which was created by the ECOSOC in 1946.⁵⁶ The General Assembly promulgated each of them in the late 1960s,⁵⁷ and all were then opened for signature and ratification by states. Each of them has been signed and ratified (or acceded to) by many states.⁵⁸ They are viewed as legally binding international treaties, unlike the Universal Declaration.⁵⁹

In addition to promulgating this International Bill of Rights, the General Assembly was instrumental in the advancement of two other treaties that have attained foundational status in the

52. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 383 [hereinafter *Optional Protocol to ICCPR*].

53. Optional Protocol to ICCPR, Article 1, provides the basis for “communications” setting forth individual claims of violations. Articles 4 through 6 describe the investigative activities of the Committee regarding the communications. Articles 28 through 45 of the ICCPR establish the Committee. ICCPR, *supra* note 44, art. 28–45.

54. See discussion *infra* Part IV.E.

55. WEISSBRODT & DE LA VEGA, *supra* note 42, at 25.

56. Bertrand G. Ramcharan, *Norms and Machinery*, in THE OXFORD HANDBOOK ON THE UNITED NATIONS, *supra* note 23, at 447. The U.N. Commission on Human Rights was replaced by the currently operating U.N. Human Rights Council in 2006. *E.g., id.* at 447–48.

57. ICCPR, *supra* note 44, at 52; Optional Protocol to ICCPR, *supra* note 52, at 59; ICESCR, *supra* note 45.

58. The electronic database for the U.N. Treaty Series indicates that there are currently 168 state parties to the ICCPR, 162 state parties to the ICESCR, and 115 state parties to the Optional Protocol to the ICCPR. See *Human Rights Index*, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/Pages/Treaties.aspx?id=4> (last visited Dec. 2, 2014) (providing links to the ICCPR, ICESCR, and Optional Protocol to the ICCPR).

59. See, e.g., Hurst Hannum, *Human Rights*, in THE UNITED NATIONS AND INTERNATIONAL LAW, *supra* note 31, at 138 (“[T]he Universal Declaration set forth the basic principles upon which subsequent conventions would be base[d]. At least some of the principles proclaimed in the Universal Declaration have ripened into customary international law, binding on all states.”).

international protection of human rights.⁶⁰ These are the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)⁶¹ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁶² Both of these treaties were also promulgated by the General Assembly⁶³ and then signed and ratified (or acceded to) by a large number of states.⁶⁴ The prominence of both in the current firmament of international human rights law is additional testimony to the significance of the General Assembly in this field.

The General Assembly has also issued additional declarations in the area of human rights that have not been promulgated as treaties for signature but have nevertheless attained great importance. These include the Declaration on the Protection of Women and Children in Emergency and Armed Conflict;⁶⁵ the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities;⁶⁶ and the U.N. Millennium Declaration.⁶⁷

This article emphasizes the importance of the General Assembly in contradistinction to other international bodies involved with international human rights. For example, there are several regional international organizations that make contributions in the area. Most prominent among them is the European Court of Human Rights (ECtHR), which sits in Strasbourg, France, and enforces the European Convention for the

60. See, e.g., Rebecca J. Cook, *Women, in THE UNITED NATIONS AND INTERNATIONAL LAW*, *supra* note 31, at 184–85.

61. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force Jan. 4, 1969).

62. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (entered into force Sept. 3, 1981).

63. G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/180, at 194 (Dec. 18, 1979); G.A. Res. 2106 (XXI), U.N. GAOR, 21st Sess., Supp. No. 14, U.N. Doc. A/6014, at 47 (Dec. 21, 1965).

64. The electronic database for the U.N. Treaty Series indicates that there are currently 177 state parties to the CERD and 188 states parties to the CEDAW. See *Human Rights Index*, *supra* note 58 (providing links to the CERD and CEDAW).

65. G.A. Res. 3318 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974).

66. G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992).

67. G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 8, 2000).

Protection of Human Rights and Fundamental Freedoms.⁶⁸ Another notable example is the Inter-American Court of Human Rights, which sits in San Jose, Costa Rica, and enforces the American Convention on Human Rights.⁶⁹ Other international groups and organizations (including NGOs) also play distinct roles.

All of these other organizations and groups are significant in the international protection of human rights; however, the General Assembly has special prominence in the field. It promulgated all the treaties constituting the International Bill of Human Rights, as well as the CERD and the CEDAW. Since those events, it has also issued numerous declarations designed to advance the cause of human rights in various respects. For the rights of LGBT people to attain optimal protection in the international arena, there will need to be a General Assembly resolution or declaration promoting those rights.

III. THE POWER OF LEVELS OF GENERALITY

An issue that potentially arises when discussing human rights is the generality that one uses to describe the rights involved. Descriptions of asserted rights can be viewed as falling somewhere on a spectrum, running from high levels of generality (descriptions in very broad terms) to low levels of generality (descriptions in very specific terms). Which level of generality is chosen can have substantial effects on the fate of one's arguments. If advocates for LGBT rights are going to successfully encourage the General Assembly to promulgate a resolution protecting LGBT rights, a core issue will be which level of generality the resolution will adopt.

Constitutional jurisprudence in the United States contains ample background for this issue and is reviewed at this point to provide a basis for further discussion in this article.

68. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) (as amended). The ECtHR currently operates substantially as provided in Protocol No. 11 to the Convention. Protocol No. 11 to the Convention, May 11, 1994, C.E.T.S. No. 155 (entered into force Nov. 1, 1998).

69. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 144 (entered into force July 18, 1978).

A. *Levels of Generality Describing Rights*

Levels of generality are best introduced through hypothetical scenarios. For example, if one is complaining about a law that restricts abortion, one could argue that the law restricts a woman's right to have an abortion. Such an argument would adopt a specific level of generality because it refers specifically to the abortion procedure. On the other hand, one could argue that the law restricts a woman's right to make choices about her own health or her own body. This argument would adopt a higher level of generality since the phrase regarding the woman's health or body would have a much broader potential scope of applicability. The phrase could also apply to choices about disease prevention, elective surgery, or even personal health habits.

A similar contrast is illustrated when considering a law that criminalizes same-sex sexual behavior. If one believes that such a law violates individual rights, one could argue that each person has a right to engage in same-sex sexual behavior if he or she wants to. This argument would adopt a specific level of generality, since it pertains specifically to same-sex sexual relations. On the other hand, one could argue that such a law violates a right of each person to decide for himself or herself what sort of personal relationships to have. This argument would adopt a higher level of generality since the phrase regarding personal relationships would have a much broader potential scope of applicability. The phrase could also refer to heterosexual romantic relationships, personal friendships of any configuration, or even to basic family relationships.

Whenever one discusses a person's right to do a particular thing, the issue of the level of generality arises because any particular action can be described with various levels of generality. Furthermore, descriptions of asserted rights can be placed at various points along a spectrum between a very high level of generality (a very broad description) and a very low level of generality (a very specific description). This may seem self-evident at first, but in fact it has been a significant factor in many important constitutional cases decided by the United States Supreme Court.

Indeed, for nearly twenty years, the governing United States Supreme Court precedents for the two above examples used opposite levels of generality to describe the rights involved and reached opposite results. In the 1973 case of *Roe v. Wade*, the Court used a high level of generality (a very broad level) to describe a

woman's rights where abortion was concerned.⁷⁰ The Court determined that a constitutional right to "privacy" protected such decisions, rather than a right to abortion per se, and struck down the state laws involved.⁷¹

On the other hand, in the 1986 case of *Bowers v. Hardwick*, the Court used a low level of generality (a very specific level) to describe the rights of adults where private consensual same-sex sexual relations were concerned.⁷² The Court determined that at stake was a constitutional interest in engaging in "homosexual sodomy,"⁷³ rather than an interest in privacy, and so the Court sustained the state law there involved. The *Bowers* decision was overruled in 2003, in circumstances that will be discussed later.⁷⁴ During the seventeen years between the decision in *Bowers* and 2003, however, these opposing descriptions were a very visible feature of U.S. constitutional law.

B. United States Supreme Court Perspective on Levels of Generality

The United States Supreme Court has directly confronted the issue of varying levels of generality in one of its more interesting modern cases. In the 1989 case of *Michael H. v. Gerald D.*,⁷⁵ the Justices on the Court engaged in a lively discussion about the role of levels of generality in defining constitutional rights. The discussion was inconclusive because there was no majority opinion. But the case is valuable for the open and direct manner in which the Justices addressed the issue.

The case involved Michael, whose blood tests determined that he had a ninety-eight percent chance of being the natural father of

70. 410 U.S. 113 (1973).

71. *Id.* at 152–53 ("In a line of decisions . . . the Court has recognized that a right of personal privacy . . . does exist under the Constitution This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." (citations omitted)).

72. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003). The *Lawrence* Court noted that "*Bowers* was not correct when it was decided, and it is not correct today. It . . . should be and now is overruled." *Lawrence*, 539 U.S. at 578.

73. *Bowers*, 478 U.S. at 191 ("[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.").

74. *See infra* Part III.C.

75. 491 U.S. 110 (1989) (plurality opinion).

an infant girl, Victoria.⁷⁶ Michael and Carole, Victoria's mother, had been conducting an adulterous love affair while Carole was married to another man, Gerald.⁷⁷ At various points after Victoria's birth, Michael held out Victoria as his daughter.⁷⁸ Indeed, Carole and Michael at one point signed a stipulation that Michael was Victoria's natural father.⁷⁹ However, Carole later reconciled with Gerald and instructed her attorneys not to file the stipulation.⁸⁰

Michael filed a filiation action in California state court to establish his paternity.⁸¹ But, California law provided that a child born to a married woman living with her husband is presumed to be a child of the marriage.⁸² The United States Supreme Court discerned a twofold rationale for the law: (1) an aversion to declaring children "illegitimate," thereby possibly "depriving them of rights of inheritance and succession," and (2) an interest in promoting the "peace and tranquillity" of families.⁸³ Gerald argued, and the trial court agreed, that the California law effectively defeated Michael's claim.⁸⁴

Before the Court, Michael asserted that he had a constitutionally protected interest in his relationship with Victoria.⁸⁵ In their opinions, the various Justices disagreed on how to describe Michael's asserted rights.⁸⁶ Justice William Brennan, in his dissent, maintained that Michael's interest was a "generalized" interest in "parenthood,"⁸⁷ the same as any other father of any child.⁸⁸ Justice Brennan accordingly adopted a high level of

76. *Id.* at 114. The opinions in the case use only first names for all relevant parties. *Id.*

77. *Id.* at 113.

78. *Id.* at 114.

79. *Id.* at 114–15.

80. *Id.* at 115.

81. *Id.* at 114.

82. *Id.* at 113 (citing CAL. EVID. CODE § 621 (West Supp. 1989)).

83. *Id.* at 125 (quoting JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS: EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT § 225 (Boston, Little, Brown & Co. 3d ed. 1882)).

84. *Id.* at 115. The trial court found what it considered sufficient evidence that Carole and Gerald were cohabiting at the times of Victoria's conception and birth. *Id.*

85. *Id.* at 121.

86. *See id.*

87. *Id.* at 139 (Brennan, J., dissenting).

88. *Id.* at 139–44.

generality in describing Michael's asserted rights.⁸⁹ The plurality opinion by Justice Antonin Scalia, however, adopted a more specific level of generality, at one point characterizing Michael's interest as that of "the natural father of a child conceived within, and born into, an extant marital union."⁹⁰

The choice of which level of generality to use in describing Michael's asserted rights was instrumental in determining the outcome of the two opinions. According to Justice Brennan's dissent, Michael had a constitutionally protected fundamental right in his asserted relationship with Victoria because his asserted interest was in the very fundamental relationship of parenthood as a general matter.⁹¹ The dissent did not necessarily assert that Michael should have parental rights regarding Victoria, but only that the state was required to give him a hearing to try to secure his rights.⁹² Conversely, Justice Scalia's plurality opinion, defining Michael's asserted interest in much narrower terms, determined that he had no fundamental, constitutionally cognizable interest at stake.⁹³ Accordingly, the Court decided that California need not give him the hearing he sought to establish his rights.⁹⁴

In U.S. constitutional law circles, the *Michael H.* plurality opinion is probably most famous for its much-discussed "footnote 6." The discussion in the footnote extends to over five hundred words, and two of the four Justices forming Justice Scalia's plurality expressly did not join in the footnote.⁹⁵ The precise character of the footnote 6 discussion is not especially germane to the point here. However, it is worth noting that in it, Justice Scalia

89. *Id.* at 136–57.

90. *Id.* at 127 (plurality opinion).

91. *See id.* at 148 (Brennan, J., dissenting) (extolling Michael's "claim that he is Victoria's father" as paramount over the state's interest in denying him the opportunity to assert the claim).

92. *Id.* at 156.

93. *Id.* at 127 (plurality opinion) ("This is not the stuff of which fundamental rights . . . are made.").

94. *Id.* at 129–30 (characterizing the matter of a hearing as "a question of legislative policy and not constitutional law"). The judgment of the Court was against Michael because, in an opinion concurring in the judgment but not in Justice Scalia's plurality opinion, Justice Stevens determined that the California law had accorded Michael an adequate opportunity for claiming visitation rights apart from the question of parenthood. *Id.* at 133–34 (Stevens, J., concurring).

95. *Id.* at 132 (O'Connor, J., concurring in part) ("I concur in all but footnote 6 of Justice Scalia's opinion."). Justice Kennedy also joined with Justice O'Connor's opinion. *Id.*

acknowledged the significance of the choice of the level of generality in describing constitutional rights.⁹⁶

C. *A Prominent Illustration for the Importance of Levels of Generality*

The *Bowers* case discussed above, along with the *Lawrence v. Texas* case that overruled it, dramatically illustrate the decisive impact that the choice of levels of generality can have on the analysis and the ultimate results of a decision.

As noted in Part III.A, in 1986 the United States Supreme Court decided *Bowers v. Hardwick*.⁹⁷ The case involved an adult male who was charged by local police with the violation of a state statute that criminalized same-sex sexual relations, even when undertaken in private between consenting adults.⁹⁸ The man who was charged, Michael Hardwick, asserted that his constitutional right to privacy protected him from the enforcement of the statute.⁹⁹ By referring to his right to privacy—rather than, say, a right to engage specifically in same-sex sexual relations—he was describing his asserted rights with a high level of generality. By relying on this high degree of generality, Hardwick’s counsel no doubt wished to avoid using such labels as “homosexuality” and, indeed, the subject of sexual practices altogether.

However, the majority insisted on dwelling on such labels and practices, describing Hardwick’s asserted interest specifically as a “claimed constitutional right of homosexuals to engage in acts of sodomy.”¹⁰⁰ In so doing, the majority used a very low level of generality to describe the interest that Hardwick had at stake. Indeed, in a rhetorical feat much remarked upon, the majority used the phrase “homosexual sodomy” (or similar phrases denoting both the labels of “homosexual” and “sodomy”) at least

96. *Id.* at 127 n.6 (plurality opinion) (“Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”).

97. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *see supra* text accompanying notes 72–73.

98. *Bowers*, 478 U.S. at 187–88 n.1 (citing GA. CODE ANN. § 16-6-2 (West 1984)).

99. *Id.* at 190–91 (referencing the respondent’s reliance on “a right of privacy that extends to homosexual sodomy” that “for all intents and purposes ha[s] decided this case”).

100. *Id.* at 191.

fifteen times in the space of only nine pages in *U.S. Reports*,¹⁰¹ the official reporting volume in which United States Supreme Court decisions are published.

By concentrating so intently on the phrase “homosexual sodomy,” the majority drove home a very specific description of the interests involved and thereby attempted to discredit the application of a higher level of generality. Insisting that this low level of generality was the most appropriate description, the Court paraphrased Hardwick’s argument and succinctly stated its response to it: “[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.”¹⁰² The Court accordingly noted the continued existence of sodomy laws in many states at that time and determined that there was no constitutional right to engage in such relations.¹⁰³

The majority decision in *Bowers* drew two dissenting opinions, both of which adopted higher levels of generality. The first two sentences in the dissenting opinion by Justice Harry Blackmun aptly demonstrate this stance. Justice Blackmun had in mind two earlier United States Supreme Court cases applying the right to privacy—one protecting the viewing of motion pictures in one’s own home (even if they were legally obscene)¹⁰⁴ and the other protecting telephone conversations from unauthorized wiretapping (even if the conversations discussed illegal activity).¹⁰⁵ Justice Blackmun began his dissenting opinion in *Bowers* as follows:

This case is no more about a fundamental right to engage in homosexual sodomy, as the Court purports to declare, than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about the most comprehensive of rights and the right most valued by civilized men, namely, the right to be let alone.¹⁰⁶

101. See *id.* at 188 (twice); *id.* at 189 (once); *id.* at 190 (four times); *id.* at 191 (three times); *id.* at 192 (once); *id.* at 195 (twice); *id.* at 196 (twice).

102. *Id.* at 191.

103. *Id.* at 196 (“We . . . are unpersuaded that the sodomy laws of some twenty-five States should be invalidated on this basis.”).

104. *Stanley v. Georgia*, 394 U.S. 557 (1969).

105. *Katz v. United States*, 389 U.S. 347 (1967).

106. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (citations omitted)

In focusing on “the right to be let alone,”¹⁰⁷ the Blackmun dissent adopts the higher level of generality eschewed by the *Bowers* majority.

Seventeen years after the *Bowers* decision, the United States Supreme Court reversed itself on the subject of same-sex sexual relations. The case was *Lawrence v. Texas*.¹⁰⁸ Once again, the facts involved the imposition of criminal charges in the enforcement of a state law that criminalized same-sex sexual relations, even between consenting adults in private.¹⁰⁹ Once again, those subject to the charges imposed under the statute argued that their constitutional rights had been violated.¹¹⁰ Had the Court followed the then-binding precedent in *Bowers*, it would have adopted a low level of generality, determined that the petitioners were arguing for a “constitutional right of homosexuals to engage in sodomy,”¹¹¹ found no such constitutional right, and ruled against them.

However, in *Lawrence*, the Court adopted a high level of generality. Rather than focus narrowly on “homosexual sodomy,” the majority viewed the interest involved more broadly as an interest in “liberty.”¹¹² In beginning its discussion of the merits, the Court majority indicated the breadth that it would be employing in its description of the rights involved: “We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their *liberty* under the . . . Constitution.”¹¹³

The ensuing discussion by the Court repeatedly extols the value and the breadth of “liberty” as a constitutional right and interest. Indeed, in an apparent rhetorical response to the majority opinion in *Bowers*, the word “liberty” appears twenty-five times in the *Lawrence* majority opinion, in the space of seventeen pages in *U.S. Reports*.¹¹⁴ As part of its summation, the Court in *Lawrence*

(internal quotation marks omitted).

107. *Id.* (citing *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting)).

108. 539 U.S. 558 (2003).

109. *Id.* at 563 (citing TEX. PENAL CODE ANN. § 21.06(a) (West 2003)).

110. *Id.*

111. *Bowers*, 478 U.S. at 191.

112. *See Lawrence*, 539 U.S. at 567.

113. *Id.* at 564 (emphasis added).

114. *See id.* at 562 (three times); *id.* at 564 (three times); *id.* at 565 (twice); *id.* at 567 (four times); *id.* at 571 (once); *id.* at 572 (once); *id.* at 573 (once); *id.* at 574 (twice); *id.* at 575 (once); *id.* at 577 (three times); *id.* at 578 (four times).

referenced the persons charged under the law there at issue and noted that “[t]heir right to liberty . . . gives them the full right to engage in their conduct without intervention of the government.”¹¹⁵ This focus on liberty clearly adopts a high level of generality; it is not stated in terms of same-sex sexual relations or even sexual relations in general.¹¹⁶ The generality of its terms extends beyond the realm of sex, even though sexual relations were the subject of the facts involved.¹¹⁷

The Court majority in *Lawrence* explicitly overruled the majority decision in *Bowers*.¹¹⁸ In so doing, it reversed the determination in the earlier case that there was no constitutional protection for private consensual same-sex sexual behavior between adults.¹¹⁹ However, it also demonstrated the potential power of adopting higher levels of generality when addressing issues of constitutional rights.

D. A Variant-Form Sense of Generality

The following segments of this article refer to levels of generality in two distinct senses. The first embodies the sense of generality illustrated by the United States Supreme Court’s contrasting approaches in *Bowers* and *Lawrence*.¹²⁰ In this respect, “levels of generality” refers to the description used for asserted rights: a low level of generality describes the asserted rights using the specific facts relevant to the asserted rights, while a high level of generality describes the asserted rights using the broad concepts that could be said to encompass many different types of specific facts. This sense of “levels of generality” could be called “descriptive

115. *Id.* at 578.

116. *See generally id.* at 562–78. Of the twenty-five times that the word “liberty” appears in the *Lawrence* majority opinion, a variant of the word “sex” (either the word itself or “homosexual,” “heterosexual,” “sexuality,” “sexual,” or the like) appears in the same sentence as the word “liberty” only three times. *Id.* at 567 (fourth such usage of the word “liberty”); *id.* at 567 (eleventh such usage); *id.* at 572 (fourteenth such usage). While some of the other usages refer to intimate behavior without using a variant of the word “sex,” the conscious decision to avoid a specific connection between liberty and sex is apparent.

117. *Id.* at 562–78.

118. *Id.* at 560–64 (“*Bowers* was not correct when it was decided *Bowers v. Hardwick* should be and now is overruled.”).

119. *See Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

120. *See supra* Part III.C.

generality,” since it concerns the ways in which rights or interests are described.

However, there is another sense of “levels of generality” that does not relate to the characterization of the asserted rights involved. Rather, this sense of generality relates to the range of factual circumstances that a particular interpretation of a rule is likely to affect. If a court or decision maker issues an opinion that is likely to affect a broad range of factual situations, it could be said that the decision is issued at a high level of generality.¹²¹ If the decision maker issues an opinion that will only address a narrow range of circumstances, it could be said that the decision is issued at a low level of generality.¹²² This sense of generality could be called “decisional generality,” since it tends to materialize when courts or other tribunals make decisions that could have varying degrees of applicability.

In Part IV of this article, the various actions by the international actors addressed focus on both kinds of generality.¹²³ Often a low level of descriptive generality is favored by those who also employ a low level of decisional generality in making decisions. This article treats the two concepts as being analogous, even though they could be viewed as being technically distinct. The preference underlying this article in favor of a high level of generality applies in both senses of the term.

IV. LEVELS OF GENERALITY AND THE INTERNATIONAL ADVANCEMENT OF LGBT RIGHTS

In recent decades, the international path of LGBT rights has experienced slow, albeit inconsistent, progress. Anti-LGBT governmental action in some states has been partially offset by

121. For an example of the implications of high levels of generality, both in the descriptive and decisional senses, see the discussion of the *Lawrence v. Texas* decision in *supra* Part III.C. The Court in *Lawrence* described “liberty” in very broad terms and issued an opinion that it intended to affect a broad range of factual situations. *Lawrence*, 539 U.S. 558 (2003).

122. For an example of the implications of low levels of generality, both in the descriptive and decisional senses, see the discussion of the *Bowers v. Hardwick* decision in *supra* Part III.C. The Court in *Bowers* described the interest involved in very specific terms and seemed to believe the opinion would affect only what it considered to be an unworthy minority—those who engaged in homosexual sodomy. *Bowers*, 478 U.S. 186 (1986).

123. See *infra* Part IV.

positive developments in international tribunals, the projects of some NGOs, and some U.N. bodies. These affirmative results have been framed at varying levels of generality.

A. *Key Recent Developments*

Recently, several countries around the world have supported or instituted anti-LGBT legislation. In June 2013, the Russian Duma passed a law banning the distribution of “propaganda” to minors regarding nontraditional sexual relationships.¹²⁴ In December 2013, the Indian Supreme Court determined that the previously existing prohibition of sodomy was indeed constitutional under Indian law.¹²⁵ In early 2014, Nigeria passed a “Same-Sex Marriage Prohibition Bill,” which imposed prison sentences for people who enter into same-sex unions, or aid such practices, or who assist LGBT NGOs.¹²⁶ In February 2014, the Ugandan parliament passed an Anti-Homosexuality Act that increased punishments for same-sex sexual relations, in some cases including life imprisonment.¹²⁷ Although the Ugandan constitutional court invalidated the Act in August 2014, observers maintain that the situation in Uganda for LGBT individuals still subjects them to “ongoing discrimination, arrest, and prosecution.”¹²⁸

On the other hand, in recent years, international tribunals, multilateral international organizations, and NGOs have taken steps that have advanced the cause of LGBT rights, albeit perhaps slowly.¹²⁹ A review of the more significant of these actions is in

124. *Amendments to the Law Protecting Children from Information Harmful to Their Health and Development*, PRESIDENT RUSS. (June 30, 2013, 12:40 PM), <http://eng.kremlin.ru/news/5660>. See also, e.g., *The Facts on LGBT Rights in Russia*, COUNCIL FOR GLOBAL EQUAL., <http://www.globalequality.org/newsroom/latest-news/1-in-the-news/186-the-facts-on-lgbt-rights-in-russia> (last visited Dec. 2, 2014).

125. See, e.g., Harmeet Shah Singh, *India’s Supreme Court Declares Homosexual Sex Illegal*, CNN (Dec. 11, 2013, 1:13 AM), <http://www.cnn.com/2013/12/11/world/asia/india-same-sex-relationship/>.

126. See, e.g., *LGBTI Rights—Still Not There Yet*, IRIN (Aug. 14, 2014), <http://www.irinnews.org/printreport.aspx?reportid=100487>.

127. See, e.g., *Briefing: What Next for Uganda’s Anti-Gay Law?*, IRIN (Aug. 14, 2014), <http://www.irinnews.org/report/100490/briefing-what-next-for-uganda-s-anti-gay-law>; Elias Biryabarema, *Uganda Plans Tougher Gay Sex Law Targeting Foreign NGOs*, HUFFINGTON POST (Apr. 28, 2014), http://www.huffingtonpost.com/2014/04/28/uganda-gay-sex-law-ngos_n_5226932.html.

128. See *Briefing: What Next for Uganda’s Anti-Gay Law?*, *supra* note 127.

129. See *infra* Part IV.B–H.

order to consider levels of generality used to frame the issues in each context.

B. The Yogyakarta Principles

The Yogyakarta Principles are among the most prominent efforts by NGOs to advance the legal rights of LGBT people internationally.¹³⁰ The International Commission of Jurists¹³¹ and the International Service for Human Rights (ISHR)¹³² undertook the task of developing “a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity.”¹³³ A group of human rights experts drafted and adopted the principles on behalf of the two organizations at a conference in the Indonesian city of Yogyakarta in November 2006.¹³⁴

The principles generally take the form of twenty-nine numbered and specifically denominated rights. For example, Principle 4 is “[t]he Right to Life,” Principle 5 is “[t]he Right to Security of the Person,” Principle 8 is “[t]he Right to Education,” and Principle 24 is “[t]he Right to Found a Family.”¹³⁵

The principles bearing the lowest numbers in this list tend to be stated in broader terms than the principles bearing higher numbers in the list. For example, Principle 1 is “[t]he Right to the

130. THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY (2007), available at http://www.yogyakartaprinciples.org/principles_en.pdf [hereinafter THE YOGYAKARTA PRINCIPLES].

131. According to its website, the International Commission of Jurists is “[c]omposed of [sixty] eminent judges and lawyers from all regions of the world,” and it “promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems.” *About*, INT’L COMMISSION JURISTS, <http://www.icj.org/about/> (last visited Dec. 2, 2014). The website also states that it was established in 1952, has its offices in Geneva, and is active on five continents. *Id.*

132. The website of the ISHR states that it was “established in 1984 to support human rights defenders and advocate for stronger and more effective human rights laws and institutions.” *History and Impact*, INT’L SERVICE FOR HUM. RTS., <http://www.ishr.ch/history-and-impact> (last visited Dec. 2, 2014). It lists offices in Geneva and New York City. *Id.*

133. THE YOGYAKARTA PRINCIPLES, *supra* note 130, at 7.

134. *Id.*

135. *Id.* at 5.

Universal Enjoyment of Human Rights,” and Principle 3 is “[t]he Right to Recognition before the Law.”¹³⁶

However, the effect of the twenty-nine principles presented as a whole is the assertion of a formidable set of rights, stated with remarkable specificity. This particularity and specificity is magnified by the manner of their presentation throughout the thirty-five-page booklet in which they were electronically published.¹³⁷ Each of the twenty-nine principles is followed by a detailed description of the rights covered by the principle,¹³⁸ and the discussion then continues with a set of specific state actions that are required in order to implement each principle.¹³⁹ There are generally four to six such specific state actions dictated for every principle.

For example, the entry for Principle 20, “The Right to Freedom of Peaceful Assembly and Association,” reads in its entirety as follows:

Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations, regardless of sexual orientation or gender identity. Persons may form and have recognised, without discrimination, associations based on sexual orientation or gender identity, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations and gender identities.

States shall:

- (a) Take all necessary legislative, administrative and other measures to ensure the rights to peacefully organise, associate, assemble and advocate around issues of sexual orientation and gender identity, and to obtain legal recognition for such associations and groups, without discrimination on the basis of sexual orientation or gender identity;
- (b) Ensure in particular that notions of public order, public morality, public health and public security are

136. *Id.*

137. *See id.*

138. *See id.* at 10–31.

139. *See id.*

not employed to restrict any exercise of the rights to peaceful assembly and association solely on the basis that it affirms diverse sexual orientations or gender identities;

- (c) Under no circumstances impede the exercise of the rights to peaceful assembly and association on grounds relating to sexual orientation or gender identity, and ensure that adequate police and other physical protection against violence or harassment is afforded to persons exercising these rights;
- (d) Provide training and awareness-raising programmes to law enforcement authorities and other relevant officials to enable them to provide such protection;
- (e) Ensure that information disclosure rules for voluntary associations and groups do not, in practice, have discriminatory effects for such associations and groups addressing issues of sexual orientation or gender identity, or for their members.¹⁴⁰

This degree of specificity seems justified as a policy matter in view of the magnitude of societal and legal hostility that can be leveled at people around the world on the basis of their sexual orientation or gender identity. This article is not asserting that the specificity of the Yogyakarta Principles (or any other document or instrument) is a bad idea. The point, for the moment, is simply to note that the Yogyakarta Principles were drafted with a high degree of specificity (that is to say, a very low level of generality).

C. The United Nations High Commissioner for Human Rights

The Office of the U.N. High Commissioner for Human Rights (OHCHR) has been one of the more prominent U.N. agencies to explicitly address LGBT rights. For the moment, two especially influential reports by the OHCHR stand out as its most noteworthy contributions in this effort. The first of these is its November 17, 2011, report to the U.N. Human Rights Council (HR Council), prepared at the HR Council's request earlier the same year. It is titled: *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*.¹⁴¹

140. *Id.* at 25.

141. U.N. High Comm'r for Human Rights & U.N. Secretary-General,

The HR Council has stated its appreciation for this report, and has requested that it be updated.¹⁴² The second is its 2012 publication for external distribution: *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*.¹⁴³ Both can be said to have adopted conspicuously specific levels of generality.

1. *Office of the High Commissioner for Human Rights, November 17, 2011, Report to the United Nations Human Rights Council*

As noted above, the OHCHR prepared this report at the request of the HR Council. The HR Council's methodology here is evident: the report was intended as a preliminary step for action. It was anticipated that the OHCHR would investigate, review, and describe in detail the myriad of ways in which governmental and private actors around the world discriminate against and oppress LGBT people. With such a report in hand, there would be an especially coherent foundation upon which to urge corrective action by governments and international organizations. The report would furnish a documented basis for addressing abuses against persons on the basis of sexual orientation and gender identity.

Accordingly, the report is detailed, twenty-five pages in length, and preceded by a thematic table of contents.¹⁴⁴ As befits such a report, it catalogs a detailed list of the types of discriminatory practices against LGBT people (such as in employment, health care, education, freedom of expression, and so on).¹⁴⁵ It also focuses on violence against LGBT people and discriminatory laws against them.¹⁴⁶ Since this document was framed and mandated as a report, this structure is appropriate.

At the end of the report, the last section sets forth a set of eight highly specific recommendations. Each recommendation

Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011) [hereinafter *Discriminatory Laws*].

142. Human Rights Council Res., Human Rights, Sexual Orientation and Gender Identity, 27th Sess., Sept. 8–26, 2013, U.N. Doc. A/HRC/27/L.27/Rev. 1 (Sept. 24, 2014).

143. U.N. High Comm'r for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, U.N. Doc. HR/PUB/12/06 (Sept. 14, 2012) [hereinafter *Born Free and Equal*].

144. See *Discriminatory Laws*, *supra* note 141, at 2.

145. See *id.*

146. See *id.*

suggests that member states enact specifically described legislative measures or take other prescriptive action.¹⁴⁷ Although all of these recommendations are laudable and well-supported by the body of the report, they are stated with a high degree of specificity. That is, they are stated at a very low level of generality.

2. *Born Free and Equal*

This publication takes the form of a sixty-two page, folio-style booklet prepared by the OHCHR, which has as its declared purpose, “[T]o set out the core obligations that States have towards LGBT persons.”¹⁴⁸ The booklet is then organized according to five steps that are enumerated and described as “five core legal obligations of States” for protecting LGBT persons.¹⁴⁹ These are to

- (1) Protect individuals from homophobic and transphobic violence;
- (2) Prevent torture and cruel, inhuman and degrading treatment of LGBT persons;
- (3) Decriminalize homosexuality;
- (4) Prohibit discrimination based on sexual orientation and gender identity; and
- (5) Respect freedom of expression, association and peaceful assembly.¹⁵⁰

After the broad statement of each step, the booklet provides a detailed discussion of specific actions states should take to implement the steps. For example, under the first step, “Protect Individuals from Homophobic and Transphobic Violence,” the booklet asserts that “[s]tates have obligations under international law to prevent extrajudicial executions, investigate such killings as occur and bring those responsible to justice.”¹⁵¹

Also, as part of that step, the booklet asserts, “States have an obligation to enact . . . hate crime laws that address homophobic and transphobic violence.”¹⁵² As well, the discussion of this step provides that “[s]tates also have a duty to provide safe refuge to

147. *Id.* paras. 84(a)–(h).

148. *Born Free and Equal*, *supra* note 143, at 10.

149. *Id.* at 5.

150. *Id.*

151. *Id.* at 15.

152. *Id.* at 19.

individuals fleeing persecution on grounds of their sexual orientation or gender identity.”¹⁵³

Each of these individual prescriptions is specific in character, and each of the five steps contains numerous such prescriptions. All of the prescriptions are well-considered, thorough, and unquestionably well-founded. The booklet as a whole operates at a very high level of specificity, which is to say at a low level of generality.

D. European Court of Human Rights

Political leaders established the Council of Europe in 1949 as part of the aftermath of World War II.¹⁵⁴ One of the primary goals for the Council of Europe was to facilitate “a closer unity between all like-minded countries of Europe.”¹⁵⁵ To that end, a year later the Council of Europe member states entered into the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁵⁶ sometimes called the European Convention on Human Rights (ECHR). Section II of the ECHR, in its present form, establishes the European Court of Human Rights (ECtHR), which is charged to “ensure the observance of the engagements undertaken” by the states party to the ECHR.¹⁵⁷

The ECtHR has issued a number of rulings significantly protective of LGBT rights. Most of them relate to Article 8(1) of the ECHR, which provides, “Everyone has the right to respect for

153. *Id.* at 20.

154. *E.g.*, DAVID MCKAY, RUSH TO UNION: UNDERSTANDING THE EUROPEAN FEDERAL BARGAIN 39 (1996) (noting that among “the tentative moves towards European cooperation in the immediate post-war years, [the first was] the creation of the Council of Europe in 1949”).

155. Statute of the Council of Europe, pmbl., para. 4, May 5, 1949, 87 U.N.T.S. 103 (as amended). It should be noted that the Council of Europe is entirely separate from the European Union and all of its institutions. *E.g.*, T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN UNION LAW 21 (7th ed. 2010) (“EU terminology can be confusing. The ‘European Council,’ the ‘Council,’ and the ‘Council of Europe’ are three quite different things. The first two are European Union institutions. The latter is not even part of the EU, but is an entirely separate European organization . . .”).

156. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (as amended) [hereinafter European Convention].

157. *Id.* art. 19.

his private and family life, his home and his correspondence.”¹⁵⁸ Nothing in the ECHR specifically mentions the rights of gay men, lesbians, bisexuals, transgender persons, homosexuals, or (for that matter) heterosexuals. However, the ECtHR has consistently interpreted this provision to provide a substantial measure of protection to LGBT people who have been disadvantaged by national legislation. The first of the ECtHR precedents in this area was *Dudgeon v. United Kingdom*, from 1981.¹⁵⁹ The case involved a shipping clerk in Belfast, Northern Ireland, Jeffrey Dudgeon, whom the reported facts described as “a homosexual.”¹⁶⁰ The police went to his address to execute a warrant regarding the misuse of drugs.¹⁶¹ They seized a quantity of cannabis, which led to another person being charged on drug offenses.¹⁶² Some of Dudgeon’s personal papers mentioning same-sex sexual activities were seized, and he was asked to go to a police station, where he was questioned for about four and a half hours concerning his sexual life.¹⁶³ At the time of his questioning, the criminal law applicable to Northern Ireland penalized “buggery” and “gross indecency” between males.¹⁶⁴ Ultimately, criminal proceedings were never instituted, and his papers, with annotations on them, were returned to him.¹⁶⁵

The ECtHR determined that the case concerned “a most intimate aspect of private life” and that “there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate.”¹⁶⁶ Finding the reasons given by the U.K. government to be insufficient,¹⁶⁷ the ECtHR held that there was a breach of Article 8 of the ECHR.¹⁶⁸

In terms of levels of generality, the ECtHR chose to view Dudgeon’s rights using a high level of generality (a very broad description). It described his interest as being in his private life.¹⁶⁹ This was in line with the United States Supreme Court’s later

158. *Id.* art. 8.

159. App. No. 7525/76, 4 Eur. H.R. Rep. 149 (1981).

160. *Id.* at 149.

161. *Id.* at 158.

162. *Id.*

163. *Id.*

164. *Id.* at 151.

165. *Id.* at 158.

166. *Id.* at 165.

167. *Id.* at 167–68.

168. *Id.* at 168.

169. *Id.* at 165.

decision in *Lawrence v. Texas*, discussed earlier in this article,¹⁷⁰ and indeed the Supreme Court cited the *Dudgeon* case in its *Lawrence* opinion.¹⁷¹ On the other hand, the ECtHR could have chosen a lower level of generality (a very specific description) and described his interest as, for example, being that of a homosexual man to engage in sodomy. This reasoning would be in line with the approach of the United States Supreme Court in *Bowers v. Hardwick*, as noted earlier in this article.¹⁷²

There were six dissenting judges in the *Dudgeon* case, and their arguments illustrate that some judges on the ECtHR would have found it preferable to apply lower levels of generality. Dissenting Judge Zekia emphasized Christian and Moslem religious beliefs against homosexuality and stated that “[a]ll civilized countries until recent years penalized sodomy and buggery and akin unnatural practices.”¹⁷³ This approach would have addressed Dudgeon’s specific circumstances rather than his general interest in privacy.

Similarly, the dissenting opinion of Judge Matscher asserted that, for some time prior to the case, there had been “no criminal prosecutions in circumstances corresponding to the present case”¹⁷⁴ in Northern Ireland—Dudgeon himself had not been prosecuted.¹⁷⁵ Judge Matscher’s view preferred a closer review of the specific facts and their likely impact on Dudgeon rather than the majority’s general views regarding privacy.¹⁷⁶ Judge Matscher’s perspective, preferring an emphasis on the lack of criminal prosecutions against Dudgeon and others, reflected a low degree of decisional generality.

A similar result was obtained seven years later in *Norris v. Ireland*.¹⁷⁷ This case involved David Norris, whom the reported facts described, among other things, as “an active homosexual [who] has

170. See *supra* notes 108–119 and accompanying text.

171. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (citing *Dudgeon*, 4 Eur. H.R. Rep. 149).

172. See *supra* notes 97–107 and accompanying text.

173. *Dudgeon*, 4 Eur. H.R. Rep. at 171 (Zekia, J., dissenting).

174. *Id.* at 175 (Matscher, J., dissenting).

175. *Id.* at 159 (majority opinion) (“The police investigation file was sent to the Director of Prosecutions. It was considered with a view to instituting proceedings for the offense of gross indecency between males. The Director . . . decided that it would not be in the public interest for proceedings to be brought . . .”).

176. See *id.* at 175 (Matscher, J., dissenting).

177. App. No. 10581/83, 13 Eur. H.R. Rep. 186 (1988).

been a campaigner for homosexual rights in Ireland since 1971.”¹⁷⁸ The criminal laws in Ireland at the time also prohibited “buggery” and “gross indecency” between men.¹⁷⁹ Unlike the situation in *Dudgeon*, there was never any police enforcement action against Norris.¹⁸⁰ Instead, the case arose because Norris brought an action attacking the Irish criminal prohibitions.¹⁸¹ He alleged that he had suffered “deep depression” on realizing that “any overt expression of his sexuality would expose him to criminal prosecution,” that a psychiatrist had advised him that “if he wished to avoid anxiety attacks . . . he should leave Ireland,” and that he had suffered “verbal abuse and threats of violence” as a result of his public activities to advance LGBT rights.¹⁸²

The ECtHR sided entirely with Norris. It agreed that “the very existence of this legislation continuously and directly affects his private life” and that “the impugned legislation interferes with Norris’s right to respect for his private life under Article 8(1).”¹⁸³ Once again, the ECtHR interpreted Article 8(1) of the ECHR using a high level of generality. Once again as well, six judges on the ECtHR dissented. The dissenters emphasized that Norris “was not subjected to any action, penalty, or other measure by his country’s authorities in respect of any homosexual acts committed by him” and maintained that “[t]he various minor difficulties of which the applicant complains were not caused by the authorities.”¹⁸⁴ Their approach would have attached more importance to the specific circumstances of the case, and accordingly, indicated application of a lower level of decisional generality.

Later cases before the ECtHR follow the same patterns. In the 1992 case of *B. v. France*,¹⁸⁵ the court determined that because the French government had not made birth certificate changes or undertaken other actions requested by the transsexual applicant, she “finds herself daily in a situation which, taken as a whole, is not

178. *Id.* at 187.

179. *Id.* at 189–90.

180. *See id.* at 189 (“It is common ground that at no time before or since the court proceedings brought by the applicant has he been charged with any offence in relation to his admitted homosexual activities.”).

181. *Id.* at 187–88.

182. *Id.* paras. 10(i), (ii), (iv), (v).

183. *Id.* at 197.

184. *Id.* at 203 (Valticos, J., dissenting). Judge Valticos’s dissent was approved by Judges Gölcüklü, Matscher, Walsh, Bernhardt, and Carrillo Salcedo.

185. App. No. 13343/87, 16 Eur. H.R. Rep. 1 (1992).

compatible with the respect due to her private life.”¹⁸⁶ Accordingly, the ECtHR concluded that there had been a violation of Article 8 of the ECHR.¹⁸⁷ As in earlier cases, six judges dissented.¹⁸⁸ One of the dissenting judges maintained, “The Convention does not guarantee the right to change sex, nor the right to amendment of civil status documents.”¹⁸⁹ This assertion illustrates the preference of at least one judge on the ECtHR for a lower level of generality, as opposed to the higher level preferred by the majority.

The following year the ECtHR reached a similar result when it addressed provisions of the Cyprus Criminal Code prohibiting “carnal knowledge . . . against the order of nature.”¹⁹⁰ The case involved a Cypriot man, whom the court described as “a homosexual who . . . states that he suffers great strain, apprehension and fear of prosecution by reason of the legal provisions which criminalise certain homosexual acts.”¹⁹¹ The ECtHR determined that “the existence of the prohibition continuously and directly affects the applicant’s private life”¹⁹² and concluded that there had been a breach of Article 8 of the ECHR.¹⁹³

186. *Id.* at 33–34, para. 63; *see also id.* at 4, paras. 13–14 (detailing the unresponsiveness of the French authorities to the earlier requests of the applicant).

187. *Id.* at 35, para. 3.

188. *See id.* at 25.

189. *Id.* at 37, para. 3 (Pinheiro Farinha, J., dissenting).

190. *See Modinos v. Cyprus*, App. No. 15070/89, 16 Eur. H.R. Rep. 486, para. 8 (1993) (citing CYPRUS CRIMINAL CODE § 171(a)).

191. *Id.* para. 7.

192. *Id.* at 494, para. 24.

193. *Id.* at 495, para. 1; *cf. Laskey, Jaggard, & Brown v. United Kingdom*, App. Nos. 21627/93, 21628/93 & 21974/93, 24 Eur. H.R. Rep. 39 (1997). This case involved the prosecution on charges of assault and wounding of several men who had engaged in, filmed, and distributed the ensuing films of consensual sadomasochistic behavior. *Id.* at 42, paras. 7–8. The ECtHR concluded that there had been no violation of Article 8 of the ECHR. *Id.* at 52. But, the ECtHR conceded that “the criminal proceedings against the applicants which resulted in their conviction constituted an ‘interference by a public authority’ with the applicants’ right to respect for their private life.” *Id.* at 56, para. 35 (quoting European Convention, *supra* note 156, art. 8). The court sustained the government’s action because it viewed the interference as the type of interference “necessary in a democratic society,” as allowed by Article 8(2) of the ECHR. *Id.* at 60, para. 50.

The decisions of the ECtHR majorities indicate a consistent preference for high levels of generality and evince a largely consistent pattern of favorable results for LGBT people. The dissenters consistently prefer lower levels of generality and reach results less favorable to LGBT people.

E. The Human Rights Committee

An earlier segment of this article introduced the International Covenant on Civil and Political Rights (ICCPR).¹⁹⁴ It was noted that the ICCPR forms part of the International Bill of Human Rights,¹⁹⁵ and that the 1966 Optional Protocol to the ICCPR established a mechanism through which individual persons can claim to be victims of violations by their domestic governments of rights set forth in the ICCPR.¹⁹⁶ The written claims in such cases are called “communications,” and they are submitted to the Committee established by the ICCPR.¹⁹⁷ The Committee often publishes opinions resolving the claims brought in this manner.¹⁹⁸

Several opinions of the Committee have addressed LGBT rights. Issues of LGBT rights have often arisen before the Committee on the basis of Article 17(1) of the ICCPR, which provides: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation.”¹⁹⁹

It can be seen that this language contains some phraseology that is similar to that in Article 8(1) of the ECHR.²⁰⁰ The ICCPR impels protection of one’s “privacy” and “family,”²⁰¹ while the ECHR language references “respect for private and family life.”²⁰²

194. See *supra* notes 42–59 and accompanying text.

195. See *supra* note 42 and accompanying text.

196. See *supra* note 52 and accompanying text.

197. See *supra* note 53 and accompanying text.

198. OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, CIVIL AND POLITICAL RIGHTS: THE HUMAN RIGHTS COMMITTEE FACT SHEET NO. 15 (REV. 1), at 28 (2005) (“The . . . final decisions on individual complaints and other documents produced by and for the Committee are all available and searchable online in the Treaty Bodies database of the Office of the United Nations High Commissioner for Human Rights . . .”).

199. ICCPR, *supra* note 44.

200. Compare ICCPR, *supra* note 44, with European Convention, *supra* note 156, art. 8(1).

201. See ICCPR, *supra* note 44.

202. European Convention, *supra* note 156, art. 8; see also *supra* Part IV.D.

The Committee, along lines similar to those followed by the ECtHR, has on occasion used the treaty reference to “privacy” as a means of protecting LGBT rights.²⁰³ The earliest significant decision by the Committee in the area is *Toonen v. Australia*, from 1994.²⁰⁴ It involved Nicholas Toonen, whom the Committee described as “a leading member of the Tasmanian Gay Law Reform Group.”²⁰⁵ Toonen challenged two provisions of the Tasmanian Criminal Code, which “criminalize[d] various forms of sexual contact between men.”²⁰⁶ The two provisions had not been enforced in a decade,²⁰⁷ and accordingly, had never been directly enforced against Toonen. However, he argued that because of his long-term relationship with another man, and because of his very public activism, “his private life and his liberty [were] threatened by the continued existence” of the two criminal code provisions.²⁰⁸

The Committee determined that the facts “reveal a violation” of Article 17(1) of the ICCPR.²⁰⁹ In reaching this determination, the Committee repeatedly emphasized the importance of the private character of what was being protected.²¹⁰ For his part, Toonen repeatedly referenced his interest as based in privacy,²¹¹ and even Australia itself conceded that he had been a victim of

203. The primary Committee ruling linking LGBT rights to privacy appears to be Human Rights Comm., *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994), *reprinted in* Human Rights Comm., Annual Report to the U.N. General Assembly, U.N. GAOR, 49th Sess., Supp. No. 40, U.N. Doc. A/49/40 (1994) [hereinafter *Toonen*]. Later Committee decisions appear to be based on nondiscrimination, as noted in the text *infra* notes 214–236.

204. *Toonen*, *supra* note 203.

205. *Id.* para. 1.

206. *Id.* para. 2.1.

207. *Id.* para. 8.2.

208. *Id.* para. 2.3.

209. *Id.* para. 9.

210. *E.g.*, *id.* para. 8.2 (noting that “it is undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy . . .’” in Article 17(1) of the ICCPR); *id.* para. 8.6 (“The Committee cannot accept that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee’s scrutiny a potentially large number of statutes interfering with privacy.”).

211. *E.g.*, *id.* para. 2.2 (“The author [of the communication submitting the complaint to the Committee] observes that the [relevant] sections of the Tasmanian Criminal Code empower Tasmanian police officers to investigate intimate aspects of his private life . . .”); *id.* para. 3.1(a) (“The author affirms that [the relevant provisions] of the Tasmanian Criminal Code . . . result in a violation of the right to privacy . . .”).

arbitrary interference with his privacy.²¹² Accordingly, all the parties involved in the *Toonen* case viewed the matters at interest with a high level of generality, focusing on “privacy.” Given that the criminal code provisions had never actually been enforced against Toonen, the Committee could have used a lower level of decisional generality, observing in the specific circumstances of this case that he suffered no substantial police actions against him. This had been one of the approaches of the dissenters in the *Norris* and *Dudgeon* cases before the ECtHR.²¹³ However, the Committee maintained its notably high level of generality.

A subsequent ruling by the Committee also supported the rights of LGBT people, but involved the principle of nondiscrimination rather than privacy per se. This was *Young v. Australia*, from 2003.²¹⁴ The case involved an interesting feature of the Australian veteran benefits regime under the Australian Veteran’s Entitlement Act (VEA). The relevant VEA provisions allowed for pension benefits to be paid to a person who had been a dependent of a veteran, even if the dependent had not been married to the veteran, as long as the dependent and the veteran had been in an “opposite sex . . . marriage-like relationship” before the veteran’s death.²¹⁵ However, the VEA did not provide for such payments to a dependent of a veteran in a same-sex relationship, even if it was in all other respects “marriage-like.”²¹⁶

This situation most directly involved the issue of discriminatory treatment. Accordingly, the provision of the ICCPR addressing societal discrimination was more at issue than Article 17(1), the privacy provision. The chief antidiscrimination provision in the ICCPR is Article 26, which reads:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any

212. *Id.* para. 6.1 (“[T]he State party concedes that the author has been a victim of arbitrary interference with his privacy . . .”).

213. *Norris v. Ireland*, App. No. 10581/83, 13 Eur. H.R. Rep. 186, 202–04 (1988) (Valticos, J., dissenting); *Dudgeon v. United Kingdom*, App. No. 7525/76, 4 Eur. H.R. Rep. 149, 171–88 (1981) (Matscher, J., dissenting).

214. Human Rights Comm., *Young v. Australia*, Communication No. 941/2000, July 14–Aug. 8, 2003, U.N. Doc. CCPR/C/78/D/941/2000 (Sept. 18, 2003) [hereinafter *Young*].

215. *Id.* at 3, para. 2.1.

216. *Id.*

discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²¹⁷

The Committee determined that Australia had provided “no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective.”²¹⁸ Accordingly, the Committee determined that this discrimination violated Article 26 of the ICCPR.²¹⁹

While the Committee made this decision on the basis of discrimination rather than privacy, it is still fairly viewed as reflecting a choice on the Committee’s part to adopt a broad level of decisional generality. The individual opinion appended to the Committee’s decision by Committee members Ruth Wedgwood and Franco DePasquale²²⁰ provides a point of comparison. These Committee members stated that “Australia has not chosen to enter into any discussion, pro or con, on the merits of the claim made under Article 26 of the Covenant.”²²¹ Accordingly, they viewed the Committee as having “essentially entered a default judgment”²²² and concluded that “[i]n every real sense, this is not a contested case.”²²³

In that connection, Committee members Wedgwood and DePasquale observed, “[T]he Committee has not purported to canvas the full array of ‘reasonable and objective’ arguments that other states” might offer in the future to justify such differential treatment.²²⁴ They concluded that, in their view, “the Committee must continue to be mindful of the scope of what it has, and has not, decided in each case.”²²⁵ They accordingly seem to have left

217. ICCPR, *supra* note 44, art. 26.

218. Young, *supra* note 214, at 15, para. 10.4.

219. *Id.* at 16, para. 11 (“The Human Rights Committee . . . is of the view that the facts as found by the Committee reveal a violation by Australia of article 26 of the Covenant.”).

220. *Id.* at 17–19 app. (Wedgwood & DePasquale, concurring).

221. *Id.* at 18.

222. *Id.*

223. *Id.* at 19.

224. *Id.*

225. *Id.*

the door open for opposing results in cases where the specific facts are different, that is, in which a state party makes a spirited and determined argument in favor of differential treatment. The perspective of Committee members Wedgwood and DePasquale can be considered to focus more specifically on the facts of the *Young* case, and thus, adopt a lower level of decisional generality. On the other hand, the Committee's decision, which does not emphasize the possibility of different results in later cases, can be viewed as adopting a broader perspective and higher level of decisional generality.²²⁶

A more recent decision by the Committee found prohibited discrimination in circumstances very similar to those of the *Young* case. This was the case of *X v. Colombia*, from 2007.²²⁷ This case also concerned a government program that benefitted different-sex unmarried couples, but excluded same-sex unmarried couples from benefits.²²⁸ The only major difference was that the payments involved derived from a social welfare survivorship program rather than a veterans' survivorship program.²²⁹

The Committee determined that Colombia had "put forward no argument that might demonstrate that such a distinction between same-sex partners . . . and unmarried heterosexual partners . . . is reasonable and objective."²³⁰ The Committee found that Colombia had violated Article 26 of the ICCPR.²³¹ In doing so, the Committee specifically recalled its earlier decision in *Young* addressing such similar facts and declared again that "[A]rticle 26

226. Another indication of the broad scope of generality adopted by the Committee is its determination in the *Toonen* case that discrimination on the basis of sexual orientation constitutes discrimination on the basis of sex. Toonen, *supra* note 204, para. 8.7. The Committee re-emphasized this position in its *Young* decision. *Young*, *supra* note 214, at 15 n.20.

227. Human Rights Comm., Views on Communication No. 1361/2005, March 12–30, 2007, U.N. Doc. CCPR/C/89/D/1361/2005 (May 14, 2007).

228. *Id.* at 4, para. 2.3 (indicating that benefits were payable to "members of a de facto marital union," without discrimination against them resulting from their not being married); *id.* para. 2.6 (indicating the governmental ombudsman's position that "homosexuals were not allowed to exercise rights recognized to heterosexuals such as the right to marry or to apply for a pension transfer on a partner's death").

229. *Id.* para. 2.1. The payments sought would have been from the Social Welfare Fund of the Colombian Congress and were in the nature of a pension transfer. *Id.*

230. *Id.* at 10, para. 7.2.

231. *Id.*

comprises also discrimination based on sexual orientation.”²³² Accordingly, the broad level of generality implicit in the scope of the Committee’s approach in *Young* is also observable in this more recent case from Colombia.

Again, two Committee members issued a separate opinion, but this time they were flatly dissenting.²³³ Committee members Abdelfattah Amor and Ahmed Tawfik Khalil declared simply, among other statements, that “current enforceable international law . . . does not recognize any human right to sexual orientation.”²³⁴

All of these cases from the Committee are, of course, interpreting the ICCPR, and Article 17(1) of the ICCPR is phrased in broad terms to protect “privacy,” while Article 26 is phrased in broad terms to prohibit “discrimination.”²³⁵ The separate opinions issued by some of the Committee members in the last two cases illustrates that, in spite of the encouragement of broad interpretative approaches suggested by the language, lower as well as higher levels of generality can be adopted. The pattern remains here that the higher levels of generality have been more suitable for the advancement of LGBT rights.²³⁶

F. *United Nations Human Rights Council*

We have already seen that in 2011 the HR Council asked the OHCHR to issue a report outlining discrimination and acts of violence around the world based on sexual orientation and gender identity.²³⁷

For purposes of this article, it is worth taking a special look at the resolution through which this report was requested. This was the HR Council Resolution 17/19,²³⁸ and it is justly celebrated as

232. *Id.*

233. *See id.* at 12 annex (Amor & Khalil, dissenting).

234. *See id.*

235. For example, the first sentence of Article 26 of the ICCPR declares: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” ICCPR, *supra* note 44.

236. *See infra* Part IV.F.1.

237. As noted in *supra* note 141 and accompanying text, the report was titled *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*.

238. Human Rights, Sexual Orientation and Gender Identity, G.A. Res. 17/19, U.N. Doc. A/HRC/RES/17/19 (July 14, 2011).

“the first United Nations resolution on human rights, sexual orientation and gender identity.”²³⁹ It represents the first time that any organ of the U.N. has issued a resolution substantively addressing the rights of LGBT people as human rights.²⁴⁰

A noteworthy aspect of Resolution 17/19 is that it is short and relatively terse. It begins with a set of broad but succinct observations about “the universality, interdependence, indivisibility and interrelatedness of human rights.”²⁴¹ It continues to speak in general terms about “universal respect for the protection of all human rights”²⁴² and liberally refers to the ICCPR, the ICESCR, and the Universal Declaration.²⁴³ The resolution then expresses “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.”²⁴⁴ Although sexual orientation and gender identity are mentioned several times in the resolution, such mentions are always in the larger context of human rights in general and in proximity to references to currently existing human rights instruments and offices.²⁴⁵

Resolution 17/19 of the HR Council thus reflects a high level of generality. This may, in part, stem from its role as a document soliciting further work by others.²⁴⁶ But, it is nevertheless worth noting the resolution’s positive aspects and results. As noted above, it is the first U.N. resolution addressing the rights of LGBT people as human rights,²⁴⁷ and two reports by the OHCHR were delivered in response to or in light of its terms.²⁴⁸ In this context, the generality of its presentational approach is worth noting.

Resolution 17/19 has since been followed with a new HR Council Resolution requesting that the OHCHR update its 2011 report, *Discriminatory Laws and Practices and Acts of Violence Against*

239. *Born Free and Equal*, *supra* note 143, at 9.

240. *Id.*

241. Human Rights, Sexual Orientation and Gender Identity, *supra* note 238, pmbl.

242. *Id.* para. 3.

243. *Id.* para. 1.

244. *Id.* para. 4.

245. *See id.*

246. As noted in *supra* Part IV.C.1, the HR Council used Resolution 17/19 to solicit a report from the OHCHR, and in response, the OHCHR issued its November 17, 2011 report, *Discriminatory Laws*, *supra* note 141.

247. *Born Free and Equal*, *supra* note 143, at 9.

248. *See supra* Part IV.C.

Individuals Based on Their Sexual Orientation and Gender Identity.²⁴⁹ The text of this new resolution, issued in September of 2014, tracks the language of Resolution 17/19 almost verbatim, and thus, exhibits the same degree of generality as the earlier resolution.

G. *Resolutions of Representative Bodies of Regional Human Rights Institutions*

In addition to the U.N.-based human rights instruments and bodies, there are three major regional organizations that play significant roles in the advancement and protection of human rights within their geographic areas. In recent years, representative bodies within all three of these organizations have issued resolutions designed to advance the cause of LGBT rights. The different resolutions have reflected varying degrees of generality.

1. *Parliamentary Assembly of the Council of Europe*

An earlier segment of this article introduced the Council of Europe and discussed the activities of its primary judicial organ, the ECtHR.²⁵⁰ The reported decisions of the ECtHR are important in the field of international human rights and were discussed earlier.²⁵¹ However, the Parliamentary Assembly of the Council of Europe (PACE) also meets regularly and, among other functions, issues resolutions designed to advance and protect human rights.²⁵²

On April 29, 2010, the PACE adopted its Resolution 1728 titled *Discrimination on the Basis of Sexual Orientation and Gender Identity*.²⁵³ Resolutions of PACE are nonbinding, but PACE can take a member state's compliance into account when deciding on the accreditation

249. See Human Rights Council Res., *supra* note 142 and accompanying text; see also *Discriminatory Laws*, *supra* note 141.

250. See *supra* notes 154–57 and accompanying text.

251. See *supra* notes 158–93 and accompanying text.

252. The Statute of the Council of Europe (Statute) initially created a Consultative Assembly. Statute of the Council of Europe, *supra* note 155, art. 10(ii). Now the Parliamentary Assembly, it is the “deliberative organ of the Council of Europe.” *Id.* art. 22. The Statute provides that it must meet in “ordinary session once a year,” and that it can also be convened for “extraordinary sessions.” *Id.* arts. 32, 34. The Statute also provides that it is empowered to issue resolutions, upon a two-thirds majority vote. *Id.* art. 29.

253. Eur. Parl. Ass., *Discrimination on the Basis of Sexual Orientation and Gender Identity*, 17th Sess., Doc. No. 1728 (2010).

of that state's delegation to it and can recommend the suspension of a member state from the Council of Europe.²⁵⁴

PACE Resolution 1728 consists of seventeen numbered paragraphs, of which the first fifteen are relatively general observations about the need for greater protections for LGBT persons throughout the states comprising the Council of Europe.²⁵⁵ For example, paragraph 1 declares that "sexual orientation, which covers heterosexuality, bisexuality and homosexuality, is a profound part of the identity of . . . every human being," and that "[g]ender identity refers to each person's deeply felt internal and individual experience of gender."²⁵⁶ Paragraph 2 provides that "[u]nder international law, . . . [s]exual orientation and gender identity are recognised as prohibited grounds for discrimination."²⁵⁷

Most of these fifteen initial paragraphs describe various aspects of the legal predicaments of LGBT people within the states of the Council of Europe.²⁵⁸ Paragraph 5 notes, among other things, "Discrimination on the basis of sexual orientation and gender identity can be magnified on the basis of sex and gender, with lesbian, bisexual, and transgender women, in particular, running an increased risk of violence."²⁵⁹ Paragraph 10 observes that "[t]he denial of rights to de facto 'LGBT families' in many member states must also be addressed, including through the legal recognition and protection of these families."²⁶⁰

All of these fifteen paragraphs can be viewed as being stated with a high level of generality since they do not mention the names of any states or any particular laws or regulations involved. They also do not state any specific recommendations to address the situations they are describing.²⁶¹

Paragraph 16 of the resolution, however, consists of sixteen specifically stated recommendations that PACE is directing to the

254. See, e.g., *The Powers of the Assembly*, PARLIAMENTARY ASSEMBLY COUNCIL EUR., http://website-pace.net/en_GB/web/apce/powers (last visited Dec. 2, 2014).

255. *Discrimination on the Basis of Sexual Orientation and Gender Identity*, *supra* note 253.

256. *Id.* at 1, para. 1.

257. *Id.* para. 2.

258. *Id.* at 1–2, paras. 1–15.

259. *Id.* at 1, para. 5.

260. *Id.* at 2, para. 10.

261. *Id.* at 1–2, paras. 1–15.

member states of the Council of Europe.²⁶² For example, paragraph 16.5 calls on member states to “adopt and implement anti-discrimination legislation which includes sexual orientation and gender identity among the prohibited grounds for discrimination, as well as sanctions for infringements;”²⁶³ paragraph 16.10 calls on member states to “provide the possibility for joint parental responsibility of each partner’s children, bearing in mind the interests of the children;”²⁶⁴ and paragraph 16.13 calls on member states to “promote research on discrimination on the basis of sexual orientation and gender identity” and engage in similar fact-finding and consultation activities.²⁶⁵

The numerous subparagraphs of paragraph 16 are stated with much specificity as to the goals being advanced, and thus, incorporate a lower level of generality than the first fifteen paragraphs.²⁶⁶

2. *General Assembly of the Organization of American States*

The Organization of American States (OAS) was established in 1948, through its Charter of that year.²⁶⁷ According to the OAS Charter, it has a broad range of purposes, including “[t]o strengthen the peace and security of the continent; [t]o promote and consolidate representative democracy, with due respect for the principle of nonintervention; [t]o prevent possible causes of difficulties and to ensure the pacific settlement of disputes . . . ;”²⁶⁸ and to achieve similar goals. The OAS Charter establishes an OAS General Assembly as “the supreme organ” of the OAS.²⁶⁹ The OAS Charter requires that the OAS General Assembly “shall convene annually . . . at a place selected in accordance with the principle of rotation.”²⁷⁰

262. *Id.* at 2–3, para. 16.

263. *Id.* at 3, para. 16.5.

264. *Id.* para. 16.10.

265. *Id.* para. 16.13.

266. The last paragraph of the resolution, paragraph 17, allows for the possibility of exemptions for some religious institutions and organizations. *Id.* at 4, para. 17.

267. Charter of the Organization of American States, Apr. 30, 1948, 21 U.S.T. 607.

268. *Id.* art. 2.

269. *Id.* art. 54.

270. *Id.* art. 57.

On June 4, 2014, the OAS General Assembly adopted a resolution titled *Human Rights, Sexual Orientation, and Gender Identity and Expression*.²⁷¹ In substance, the resolution consists of ten numbered paragraphs, each of which states a position of the OAS General Assembly regarding the treatment of LGBT persons within the member states of the OAS.²⁷² For example, in paragraph 2, the OAS General Assembly resolves to “encourage member states to consider, within the parameters of the legal institutions of their domestic systems, adopting public policies against discrimination by reason of sexual orientation and gender identity or expression.”²⁷³ Paragraph 4 urges member states “to produce data on homophobic and transphobic violence, with a view to fostering public policies that protect the human rights of LGBT persons.”²⁷⁴

These ten paragraphs are much more in line with the more generally phrased initial fifteen paragraphs of the PACE resolution than the specific recommendations in the lengthy paragraph 16. The OAS resolution’s paragraphs are phrased in terms more mindful of the individual political will of its member states—using more deferential language than that generally found in the PACE resolution. Being less specific about the distinct actions it is urging on the member states, the resolution is formulated in broad terms at a relatively high level of generality.

3. *African Commission on Human and Peoples’ Rights*

In 2001, the African Union assumed the mantle of the former Organization of African Unity, established in 1963.²⁷⁵ Under the auspices of the predecessor organization, the African Charter on Human and Peoples’ Rights was adopted in 1981.²⁷⁶ This 1981 Charter established the African Commission on Human and

271. Organization of American States [OAS], *Human Rights, Sexual Orientation, and Gender Identity and Expression*, AG/RES/2863 (XLIV-O/14) (June 5, 2014), available at <http://www.oas.org/consejo/GENERAL%20ASSEMBLY/Resoluciones-Declaraciones.asp> (follow “Forty-Fourth regular session” hyperlink; go to page 241).

272. *Id.*

273. *Id.*

274. *Id.*

275. HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 1063 (3d ed. 2007).

276. African Charter on Human and Peoples’ Rights, *opened for signature* June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986).

Peoples' Rights (African Commission).²⁷⁷ It provides that the African Commission consist "of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights."²⁷⁸ The African Charter on Human and Peoples' Rights indicates that the purpose of the African Commission is "to promote human and peoples' rights and ensure their protection in Africa."²⁷⁹

In May 2014 the African Commission adopted a resolution titled *Resolution on Protection Against Violence and Other Human Rights Violations Against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity*.²⁸⁰ By comparison with the PACE and OAS resolutions, the African Commission's resolution is quite short, consisting of only four operative (numbered) paragraphs following seven preamble paragraphs.²⁸¹ The first operative paragraph condemns "violence and other human rights violations" on the basis of the "imputed or real sexual orientation or gender identity" of those affected.²⁸² The other three are of a similar character, all of them addressed to one extent or another to the prevention of violence and criminal abuse directed against people on the basis of sexual orientation or gender identity.²⁸³

It seems worthwhile to compare these three regional resolutions—those of the PACE in Europe,²⁸⁴ the OAS in the Americas,²⁸⁵ and the African Commission in Africa. Of these three, the African Commission's Resolution is the least ambitious and covers the smallest number of potential circumstances in which the rights of LGBT people could be at risk.²⁸⁶ It is thus far less

277. *Id.* at 251.

278. *Id.* at 252.

279. *Id.* at 251.

280. African Commission on Human and Peoples' Rights [African Commission], *Resolution on Protection Against Violence and Other Human Rights Violations Against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity*, Res. 55/275 (Apr. 28–May 12, 2014), available at <http://www.achpr.org/sessions/55th/resolutions/275/>.

281. *Id.*

282. *Id.*

283. *Id.*

284. See *supra* Part IV.G.1

285. See *supra* Part IV.G.2.

286. The African Commission resolution, as noted in its description in the text, deals explicitly only in terms of violence and criminal abuse. The other two

particular in its application than either of the other two and, being less specific in many circumstances, is adopting a broader level of generality.

H. American Bar Association Resolution of August 11, 2014

The ABA, founded in 1878, with nearly 400,000 members, is one of the world's largest voluntary professional organizations.²⁸⁷ Its activities are not restricted to the United States.²⁸⁸ The ABA states that it promotes "the international rule of law through programs in more than forty countries that focus on access to justice, human rights, anti-corruption, judicial reform and more."²⁸⁹ The policy-making body of the ABA is its House of Delegates, which meets twice annually.²⁹⁰

On August 11, 2014, the House of Delegates adopted a resolution addressing the rights of LGBT persons throughout the world.²⁹¹ In four succinct but powerful points, the ABA recognized that LGBT people have a right to be free from discrimination, threats, and violence; urged governments to repeal discriminatory laws and practices against them; urged other bar associations and attorneys in jurisdictions around the world to work to defend the victims of anti-LGBT discrimination or conduct; and urged the U.S. government to work to end discrimination against LGBT people and ensure their rights.²⁹²

The four paragraphs of the ABA resolution cover, in general terms, the many types of discrimination and abuse that LGBT people can encounter throughout the world.²⁹³ It avoids, however,

regional resolutions also address, for example, issues of discrimination and decriminalization of homosexuality.

287. *About the American Bar Association*, A.B.A., http://www.americanbar.org/about_the_aba.html (last visited Dec. 2, 2014).

288. *Membership in the ABA*, A.B.A., <http://www.americanbar.org/membership.html> (last visited Dec. 2, 2014).

289. *Id.*

290. *ABA House of Delegates*, A.B.A., http://www.americanbar.org/groups/leadership/house_of_delegates.html (last visited Dec. 2, 2014).

291. *American Bar Association House of Delegates Adopts Resolutions on Cybersecurity, Domestic Violence*, A.B.A., http://www.americanbar.org/news/abanews/aba-news-archives/2014/08/american_bar_associa.html (last visited Dec. 2, 2014).

292. ABA House of Delegates, Resolution 114B (2014), *available at* http://www.americanbar.org/content/dam/aba/images/abanews/2014am_hodres/114b.pdf/.

293. *See id.*

the very specific catalogs of recommendations found, for example, in the PACE resolution and the Yogyakarta Principles.²⁹⁴ The ABA resolution was formulated at a high level of generality rather than a low one.

V. AN ASSESSMENT OF HIGH GENERALITY FOR THE GENERAL ASSEMBLY

This article suggests that in the circumstances of the General Assembly, activists should work toward an initial resolution that adopts a high level of generality rather than a low level of generality. Several points regarding this suggestion are in order.

A. *Contrast with Patterns of Some Earlier General Assembly Resolutions*

Certain earlier General Assembly resolutions regarding human rights have reached nearly iconic status. Indeed, some treatise authors have determined that some General Assembly resolutions have become so celebrated and respected that they provide the basis for rules of customary international law.

Prominent examples of such resolutions are the Declaration on the Granting of Independence to Colonial Countries and Peoples²⁹⁵ and the Declaration on the Rights of Indigenous Peoples.²⁹⁶ Other famous General Assembly resolutions that have had substantial impact on the field of human rights include the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,²⁹⁷ the Declaration on

294. Compare *id.*, with *supra* Parts IV.B, G.I.

295. G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514 (Dec. 14, 1960); see, e.g., JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 42 (8th ed. 2012) (suggesting that the Declaration on the Granting of Independence to Colonial Countries and Peoples provides "a basis for . . . the speedy consolidation of customary rules"); SHAW, *supra* note 25, at 115–16 (stating that the declaration "was adopted with no opposition and only nine abstentions and followed a series of resolutions in general and specific terms attacking colonialism and . . . it would seem, [transmuted a] moral principle to a legal right and consequent obligation").

296. G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); see, e.g., CRAWFORD, *supra* note 295, at 42 (suggesting that the Declaration on the Rights of Indigenous Peoples also provides "a basis for . . . the speedy consolidation of customary rules").

297. G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625 (Oct. 24, 1970).

Permanent Sovereignty over Natural Resources,²⁹⁸ and the Declaration on the Definition of Aggression.²⁹⁹

All of these resolutions were formulated with careful attention to specific recommendations. It was part of their apparent aim to be as thorough as possible in addressing the international ills involved in each case. Accordingly, an initial General Assembly resolution advancing and protecting LGBT rights at a high level of generality would not follow the same pattern as many of the most prominent historical General Assembly human rights resolutions. This is not to assert that an LGBT resolution would be less important than any of its predecessors, but rather, to note that its formulation and drafting will need to follow a path distinct from many earlier resolutions.

B. Record of Success in the European Court of Human Rights, Before the Human Rights Committee, and with the United Nations Human Rights Council

Among the international authorities and precedents reviewed in Part IV of this article, the more successful of those have adopted higher levels of generality. The *Dudgeon* opinion of the ECtHR was cited with approval by the United States Supreme Court in overruling *Bowers v. Hardwick*.³⁰⁰ The *Toonen* decision of the ICCPR Human Rights Committee has been received with approval by commentators.³⁰¹ Resolution 17/19 issued by the Committee was notable for having attained agreement from states in virtually all regions of the world, no doubt in part due to its highly general style of formulation.³⁰²

298. G.A. Res. 1803 (XVII), U.N. Doc. A/RES/1803 (Dec. 14, 1962).

299. G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974).

300. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (citing *Dudgeon v. United Kingdom*, App. No. 7525/76, 4 Eur. H.R. Rep. 149 (1981)).

301. *E.g.*, Lawrence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 Harv. Hum. Rts. J. 61, 74 (1996) (noting, among other comments of varying effects, the “maturation” of the Committee as evidenced by the *Toonen* decision, characterizing the Committee as “adept” and lauding the Committee’s “searching analysis”); Michael Kirby, *Law and Sexuality: The Contrasting Case of Australia*, 12 Stan. L. & Pol’y Rev. 103, 105 (2001) (noting with approval that “the history of the *Toonen* decision and its consequences shows the growing impact in many parts of the world of the international norms of human rights and of the decisions of international courts and tribunals which uphold those rights”).

302. Human Rights, Sexual Orientation and Gender Identity, *supra* note 238.

By contrast, among the more specifically drafted authorities and precedents covered in Part III, success appears to have been less conspicuous. The Yogyakarta Principles and the recommendations of the PACE resolution from 2010 were notable for the detail and specificity of their scope. Yet, in the context of their continued presence in the discourse of LGBT rights, adverse developments of recent years have nevertheless occurred.³⁰³

Without presenting a perfect contrast, this pattern is sufficiently robust to suggest that the high level of generality rather than a lower, specific level, would be most appropriate for the first U.N. General Assembly resolution addressing LGBT rights.

C. *Record of Success in U.S. Courts*

Also worth noting is the success of higher levels of generality regarding LGBT rights before the United States Supreme Court. As noted earlier, the initial anti-LGBT ruling in *Bowers v. Hardwick* defined LGBT interests at a specific level of generality.³⁰⁴ It was then overturned by *Lawrence v. Texas*, which adopted a high level of generality.³⁰⁵

Similarly, the United States Supreme Court's ruling in *United States v. Windsor*, favorable from an LGBT-rights perspective, could also be viewed as adopting a broad level of generality.³⁰⁶ The Court's partial reliance on the doctrine of federalism, combined with its extolling of marriage as an aspect of family rather than as a site of specifically sexual relations, allows for this characterization.

D. *Lack of Success of 2008 Attempt in the General Assembly*

In the closing days of 2008, advocates operating at the General Assembly attempted to gain that body's approval for a resolution that would have advanced and attempted to protect the cause of LGBT rights.³⁰⁷ On December 18 of that year, as part of the General

303. See *supra* Part III.A.

304. See *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *supra* notes 97–103 and accompanying text.

305. 539 U.S. 558.

306. 133 S. Ct. 2675 (2013).

307. The discussion of these points in the General Assembly was captured in a press release issued for that day. Press Release, General Assembly, General Assembly Adopts 52 Resolutions, 6 Decisions Recommended by Third Committee on Wide Range of Human Rights, Social, Humanitarian Issues, U.N. Press Release

Assembly's plenary deliberations, the representative of Argentina, backed by those of several other countries, suggested the adoption of a resolution advancing protections for LGBT people.³⁰⁸ Representatives from Syria, the Russian Federation, Belarus, and the Holy See, however, spoke against the suggested resolution.³⁰⁹ The suggested resolution did not even come up for a vote.³¹⁰

The attempted resolution consisted of thirteen short numbered paragraphs that were of only moderately specific generality.³¹¹ For example, paragraph 11 called upon all states "to take all the necessary measures, in particular legislative or administrative, to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention."³¹²

The difficulty encountered by this attempted resolution, in light of the international precedents and authorities reviewed above, is instructive. If a resolution of only moderate specificity was so unsuccessful, a resolution of an even higher level of generality is well-advised for the next effort before the General Assembly.

VI. CONCLUSION

Many advocates and activists for LGBT rights around the world have tried to be as thorough and specific as possible when advancing their aims in formulating principles and recommendations for action. This is, in many respects, laudable. However, attention should be given to the most appropriate strategy for obtaining the first U.N. General Assembly resolution advancing and protecting LGBT rights. This article has reviewed relevant and influential international precedents and authorities from the standpoint of the relative degrees of generality with which they were formulated. It appears from this review that a strategy incorporating a very high level of generality is available. It is

GA/10801 (Dec. 18, 2008).

308. *Id.*

309. *Id.*

310. *Id.*

311. Permanent Reps. of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the U.N., Letter dated Dec. 18, 2008 from the Permanent Reps. of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/63/635 (Dec. 22, 2008).

312. *Id.* para. 11.

suggested that this strategy will be most appropriate in the effort before the General Assembly.