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CEDAW and the Decriminalisation of Same Sex Relationships*

Introduction

Rosanna Flamer-Caldera is a human rights activist and the Executive Director of Equal Ground which campaigns for lesbian, gay, bisexual, transgender and intersex (LGBTI) rights in Sri Lanka.[1] She is a lesbian, and is open about her sexuality. Her activism on these issues is well-recognised both inside and outside of the country where she has worked for decades to ensure human rights for members of the LGBTI+ community. On 23 August 2018, acting under article 7(1) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[2] the author submitted a claim to the Committee on the Elimination of Discrimination against Women (CEDAW Committee), a UN human rights treaty body that monitors compliance with CEDAW.[3] The applicant complained that by its 1995 amendment to Section 365A of the Penal Code of 1883 to include sexual conduct between women, replacing the previous wording 'male person' with 'person', Sri Lanka had acted in violation of CEDAW. The author set out in her complaint how she has been subjected to discrimination, harassment, stigmatisation, high profile attacks on her character and threats of violence, all on the basis of her sexual orientation, her wearing of 'masculine attire', her activism for LGBTI+ rights, and her failure to conform to gender stereotypes. The author argued for the first time in an individual communication before the CEDAW Committee that the criminalisation of same sex conduct between women meant that discrimination, violence and harassment faced by the LGBTI+ community continues with impunity in Sri Lanka in violation of her rights under the Convention.

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[1] *Rosanna Flamer-Caldera v Sri Lanka*, CEDAW/C/81/D/134/2018, 23 March 2022. The decision is available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2f81%2fD%2f134%2f2018&Lang=en (accessed 28 March 2022).

[2] Convention on the Elimination of All Forms of Discrimination Against Women, 1979, 1249 UNTS 13; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (OP CEDAW) 1999, UNTS 2131, 83, OP CEDAW, article 7 provides that the Committee can receive and adjudicate upon individual communications against States parties which have signed and ratified the Optional Protocol. Sri Lanka ratified CEDAW on 5 October 1981 and acceded to the Optional Protocol to CEDAW on 15 October 2002.

[3] Marsha Freeman, Christine Chinkin and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (OUP, 2012).

On the 23 March 2022 the CEDAW Committee handed down a landmark opinion finding that the State had violated a number of the Convention's provisions, not only those alleged by the complainant, articles 2 (a) and (c) - (g), 5 (a) and 16, but also articles 7(b) and (c), and 15(1), which had been raised in a third party intervention. These articles were read in conjunction with article 1 of the Convention and the Committee's general recommendations 19, 33 and 35. This opinion is significant for a number of reasons, most obviously as the first finding in an individual communication by a UN human rights treaty body that the criminalisation of same sex lesbian conduct is a human rights violation. It is the second case ever by a UN human rights treaty body in relation to decriminalisation of consensual same sex conduct. While the UN Human Rights Committee established the right to non-discrimination on the basis of sexual orientation in *Toonen v Australia* back in 1994,[4] and regional human rights bodies have held that criminalisation of same sex conduct or intimacy violates the applicable human rights treaties,[5] the CEDAW Committee's views mark the first time that such a finding has been made explicitly in relation to women.[6] According to the Human Dignity Trust, 'most of the 40-plus countries that currently criminalise same-sex intimacy between women have voluntarily signed up to the Convention and are now in clear and blatant violation of its binding legal obligations'.[7]

Before discussing the case, we want to pay tribute to Rosanna for her activism and dedication to the cause of LGBTI+ rights in Sri Lanka and globally. International legal scholarship has taken a recent turn towards the sentimental,[8] recognising and questioning the place of emotion in international law, often drawing conclusions made decades beforehand by Black feminists working in the law.[9] For those of us who practice as international lawyers and who are also academics, the emotional life of international law is part and parcel of our lives. The joy that comes from establishing landmark precedents and winning a case for our client, the tears of

[4] In *Toonen v Australia*, Communication No. 488/1992; UN Doc CCPR/C/50/D/488/1992 (1994), the Human Rights Committee when considering a similar provision in the Tasmanian Criminal Code stated that the threat of prosecution itself constitutes a violation of the rights of adults consenting to same-sex conduct even if the provisions had not been enforced for a decade (para 8.2).
[5] E.g. *Dudgeon v UK*, ECtHR, App. No. 7525/76 [1981] ECHR 5; *Norris v Ireland*, ECtHR, App. No. 10581/83 [1988] ECHR 22, 13 EHRR 186; *Modinos v Cyprus*, ECtHR, App. No. 15070/89 [1993] 16 EHRR 485.
[6] There are other important international and regional cases involving the rights of lesbians. E.g. in the Inter-American Human Rights System: *Atala Riffo and daughters v Chile*, IACtHR, Merits, reparations and costs, Judgment of February 24, 2012. Series C No. 239.
[7] https://www.humandignitytrust.org/news/un-committee-rules-that-criminalisation-of-same-sex-intimacy-between-women-is-a-human-rights-violation/
[8] E.g. Gerry Simpson, *The Sentimental Life of International Law*: *Literature, Language and Longing in International Law* (OUP, 2022).
[9] E.g. Patricia Williams, 'The Obliging Shell: An Informal Essay on Formal Equal Opportunity', 87 *Mich.LR* (1989) 2128, 2140; Patricia Williams, *The Alchemy of Race and Rights*, (Harvard University Press, 1991).

sadness when we listen to difficult testimony and experiences of human rights violation, or the frustration that comes in cases of injustice that remain unaddressed are all often experienced emotions. In this article, we write and reflect as two members of the counsel team with the emotions that are sparked when a decision is handed down 4 years after filing, after the skim read to confirm the result, the flurry of emails between those involved, and the deeper read to take in its significance. It is a small sparkle of hope and a moment of queer celebration in working towards a world of greater equality, and the recognition of rainbow lives in the law.[10]

Admissibility and some procedural aspects

We start by addressing an important part of the CEDAW Committee's opinion, its admissibility finding under rule 64 of the Committee's Rules of Procedure. Satisfying the admissibility criteria is an important procedural aspect of litigating before international courts and bodies, but analysis of this preliminary issue is often glossed over in the academic literature.[11] Yet in the virtual robing rooms of those who practice international human rights law, it is often one of the key features of a case when it comes to gathering evidence, drafting an application and deciding where to submit the case.[12] The same matter cannot be submitted before multiple bodies meaning that the 'right' forum for the complaint has to be decided upon at the outset. Often there are strategic considerations in making this decision: should we go to a regional human rights body, if one is available, since its decisions are binding? Or should we go to an international treaty body, which might have specific expertise on issues such as race or sex discrimination, but which can make only recommendations?

Under article 4 of the Optional Protocol, to be successful an application under CEDAW must satisfy the Committee that the same matter is not being considered by another human rights court or body, that there has not been inordinate delay in bringing the matter to CEDAW,[13] and that all available domestic remedies have been exhausted, or that the application of such

[10] Dr Victoria McCloud, 'Rainbow Lives, Monochrome Laws: Reflections on law and identity', The Second Annual Belfast Pride Law Lecture, Queen's University, Belfast, 2 August 2018.
[11] There are of course some important reflections on the exhaustion of domestic remedies aspect of the admissibility criteria; e.g. A. A. Cançado Trindade, 'Exhaustion of Local Remedies under the UN Covenant on Civil and Political Rights and Its Optional Protocol', 28 *International and Comparative Law Quarterly* (1979) 734-765.
[12] See Gema Fernandez Rodriguez de Lievana, 'What is considered the 'same matter', matters for women seeking justice', 2 June 2017, available at https://blogs.lse.ac.uk/wps/2017/06/02/what-is-considered-the-same-matter-matters-for-women-seeking-justice/ (accessed 28 March 2022).
[13] Unlike other treaty bodies or regional courts CEDAW does not have a specific time limit.

remedies is unreasonably prolonged or unlikely to bring effective relief.[14] In practice, this means that in many cases, the matter snakes its way through the domestic courts, and only after obtaining a negative decision before a constitutional or supreme court, can an applicant bring the case before an international or regional body.[15] However, there is an important corpus of jurisprudence acknowledging that taking such steps is futile if there is no effective remedy to the problem complained of in the communication. If an author argues that a remedy is not effective, then it is the State party which must show the Committee that there is a reasonable prospect that a domestic judicial process would provide an effective remedy in the circumstances of the case. Statistical evidence that appeals can be successful are insufficient and the State must provide concrete information that the procedure is applicable to the facts and matters in the complaint. Thus in *O.N. and D.P. v Russia*,[16] discussed further below, the CEDAW Committee found that the complaint by a lesbian couple was admissible even though they had not exhausted all domestic remedies before the Court of Cassation. The Committee affirmed that 'In the absence of any clarification by the State party on the effectiveness of the cassation review procedure in cases similar to the present case, [it] finds that it is not precluded, under article 4(1) of the Optional Protocol, from examining the present communication.'[17]

In the instant case, the CEDAW Committee found there were no effective remedies upon which Ms Flamer-Caldera could rely in the domestic courts. The author argued that she had no means to challenge section 365A of the Penal Code, as there is no judicial review or other mechanism to challenge the constitutional validity of a criminal provision once enacted. The State argued on the other hand that the Sri Lankan Constitution provides a right of direct access to the Constitutional Court; that legislation can be challenged by way of pre-enactment review; that the matter was 'insufficiently substantiated' since the author invoked the Convention 'in very general terms, without specifically explaining the alleged violations'; and that the State was 'committed to reforming the Penal Code of 1883 to ensure all offences contained therein comply with its human rights obligations'.[18] The State also argued that the matter was

[14] E.g. *E.S. and S.C. v United Republic of Tanzania*, CEDAW/C/60/D/48/2013, 2 March 2015, para. 6.3; and *L.R. v Republic of Moldova*, CEDAW/C/66/D/58/2013, 28 February 2017, para. 12.2.
[15] Authors of individual communications are not obliged to exhaust all available remedies 'but must give the State party the opportunity through a relevant chosen mechanism, to remedy the matter within its jurisdiction'. In other words, in cases where an author does take steps to exhaust domestic remedies, the CEDAW Committee and human rights courts such as the European Court of Human Rights have held that all available domestic remedies need not be exhausted but that the legal avenues and steps required can be exhausted by raising the matters in the domestic courts. See for example, *S.F.M v Spain*, CEDAW/C/75/D/138/2018, 28 February 2020, para 6.3.
[16] *O.N. and D.P. v Russian Federation*, CEDAW/C/75/D/119/2017, 24 February 2020.
[17] *Ibid.*, at para. 6.4.
[18] The State's arguments are set out at *Rosanna Flamer-Caldera v Sri Lanka*, above n. 1, at paras 4.1- 4.5.

inadmissible *ratione temporis*, on the grounds that the law had been enacted prior to the entry into force of the Optional Protocol for the Sri Lanka, which took place on 15 January 2003.[19]

The Committee held that the matter was admissible for a number of reasons. First, although available, the Committee found that the short time frame in which pre-enactment review takes place (one week for the request to be made) made the procedure ineffective. In this case the applicant was able to point to the CEDAW Committee's own findings in its concluding observations to Sri Lanka that 'article 16(1) of the Constitution does not allow judicial review for discriminatory laws which existed prior to the enactment of the Constitution'.[20] Other procedures invoked by the State party were also found to be incapable of addressing the complaint. The Committee noted that the State party did not 'refuse the stated impossibility for its courts to review adopted legislation'.[21] The Committee also held the author did not need to complain to other non-judicial mechanisms since there is no admissibility requirement to address non-judicial remedies.

With respect to the arguments *ratione temporis*, the Committee had regard to the ongoing effects of section 365A of the Penal Code as amended on the author's life, recognising that the discrimination, harassment, stigmatization, threats and attacks to which she was subjected continued after the entry into force of the Optional Protocol for Sri Lanka. This finding echoes that made by the Human Rights Committee (HRC) in *Toonen*, which considered the ongoing effects of criminalisation within both the admissibility and the merits sections of the opinion (although the CEDAW Committee merely cites *Toonen* in a footnote in reference to the author's arguments). The HRC found that Mr Toonen was a victim given 'the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected him and continued to affect him personally.'[22] The HRC held in that case that the continued existence of the criminal provisions, even though they had not been enforced for a

[19] Optional Protocol to the Convention on Elimination of All forms of Discrimination against Women, article 4 (2) (e) states that an application is inadmissible if 'The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.'

[20] CEDAW Committee, Concluding Observations on the eighth periodic report of Sri Lanka, CEDAW/C/LKA/CO/8. 3 March 2017: 'Article 16(1) of the Constitution does not allow judicial review for discriminatory laws which existed prior to the enactment of the Constitution'. The Committee recommended Sri Lanka to 'Repeal article 16(1) of the Constitution to introduce judicial review of all laws'. See also *Singarasa v Sri Lanka*, HRC CCPR/C/81/D/1033/2001, Communication No. 1033/2001, 21 July 2004.

[21] *Rosanna Flamer-Caldera v Sri Lanka*, above n. 1, at para 8.4, citing *Purna Maya v Nepal*, Human Rights Committee, No. 2245/2013, 23 June 2017.

[22] *Rosanna Flamer-Caldera v Sri Lanka*, paras 5.1 and 8.2.

decade, constituted a violation of Mr Toonen's right to privacy guaranteed by the International Covenant on Civil and Political Rights (ICCPR), article 17. The CEDAW Committee similarly held that it was not precluded from considering the merits of the communication under article 4(2)(e) of the Optional Protocol given the ongoing effects of criminalisation.[23] In finding the communication admissible, the Committee takes a common sense and practical stance, clarifying that once the author has made credible arguments that there is no effective remedy, it is for the State to then satisfy the Committee that there is in fact an effective and viable judicial avenue for redress.

While it is tempting to skip over the admissibility arguments and reasoning, we explain the Committee's findings in this case as an important element of the practice of international human rights law. We suggest that this case offers guidance to those who may not have available adequate or effective remedies to challenge domestic laws which criminalise sexual behaviours and who seek to uphold their Convention rights. Mr Toonen similarly did not exhaust domestic remedies before bringing his challenge against the criminalisation of homosexuality in Tasmania to the HRC, as he considered that they would be ineffective.[24] Where an author seeks to go directly to an international body because there are no effective domestic remedies, it is crucial to ensure that the individual communication is 'sufficiently substantiated' with evidence to prevent the case being found inadmissible for lacking in substance or being 'manifestly ill-founded'.

Criminalisation of Same Sex Conduct under CEDAW

[23] *Ibid.,* at para 8.5.
[24] The Australian government did not challenge the admissibility of Mr Toonen's complaint. The Human Rights Committee nevertheless satisfied itself that he was a victim for the purposes of the ICCPR; *Toonen v Australia*, above n. 4, at para 5.1.

In *Flamer-Caldera* the CEDAW Committee found violations of articles 2(a)[25] (c)-(g),[26] 5 (a),[27] 7 (c),[28] 15[29] and 16[30] in conjunction with article 1, and in light of its general recommendations on violence against women and access to justice.[31] We will take those articles in turn to explain the Committee's reasoning and findings. First by way of background, same-sex activity between consenting adults is a criminal offence in Sri Lanka under Sri Lanka's Penal Code.[32] While there are a number of provisions which make same-sex conduct illegal generally, in 1995 the law was amended to criminalise same-sex female conduct. The relevant provision under s365A of the Penal Code 1883, as amended by the Amendment Act No. 22, on 'acts of gross indecency between persons' currently in force provides as follows:

> *Any person who, in public or private, commits, or is a part to the commission of, or procedures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be guilty of an offence, and shall be punished with imprisonment of either the description for the term which may extend to two years or with fine or with both…*

[25] CEDAW, article 2 provides: 'States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle.'

[26] CEDAW, article 2 (d): 'To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation'; (e): 'To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'; (f): 'To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'; (g): 'To repeal all national penal provisions which constitute discrimination against women'.

[27] CEDAW, article 5 (1) provides: 'States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.

[28] CEDAW, article 7 (c) provides for women the equal right with men 'to participate in non-governmental organizations and associations concerned with the public and political life of the country.'

[29] CEDAW, article 15 (1) provides that: 'States Parties shall accord to women equality with men before the law.'

[30] CEDAW, article 16 provides for equality in the family. The Committee did not point to any specific subsection of article 16.

[31] Committee on the Elimination of Discrimination against Women, General Recommendation No. 19: Violence against women, 11th session 1992, HRI/GEN/1/Rev.8, 1992.9; Committee on the Elimination of Discrimination against Women, General Recommendation No. 33 on Women's Access to Justice, CEDAW/C/GC/33, 2015; Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19, CEDAW/C/GC/35, 2017.

[32] Penal Code Provisions online http://www.commonlii.org/lk/legis/num_act/pca22o1995213/ (last accessed: 28 March 2020).

The Penal Code (Amendment Act) No 22 of 1995, amended the 1883 Penal Code to substitute the previous words 'male person' for 'person' thereby making the provision gender-neutral. But gender neutrality had the effect of criminalising lesbian sexual activity. The author argued that this amendment and the ongoing enforcement of these criminal laws violated her Convention rights.[33] Additionally, the criminalisation of same sex consensual activity by women compounded discrimination against women, putting her under constant risk of arrest, detention and investigation of her private life.

The Committee found that the State party had subjected the author to direct and indirect discrimination 'emanating from the Penal Code of 1883 as amended'. The Committee contextualised this within the broader discriminatory environment in which women live, stating that 'certain groups of women, including lesbian women, are particularly vulnerable to discrimination through civil and penal laws, regulations and customary laws and practices'.[34] The Committee also noted that Ms Flamer Caldera was well-known in Sri Lanka for being a lesbian and activist for LGBTI rights and agreed that this did indeed put her at risk of arrest, detention and intrusion into her private life given that the law continues to be enforced. For these reasons the Committee found violations of article 2(a) and (d) - (g) of the Convention which *inter alia* condemns discrimination and calls on States without delay to repeal discriminatory laws and to take appropriate measures to eliminate discrimination.

The Committee held that the State party had also violated article 2 (c)-(f) of the Convention in conjunction with general recommendations Nos 19 and 35 on gender-based violence against women for failing to respect and protect the author's right to life free from such violence. The Committee drew attention to how gender-based violence against women takes multiple forms and reiterated that States should repeal provisions that allow, tolerate or condone forms of gender-based violence against women. Through this finding the Committee recognises how criminalisation of same sex conduct exacerbates gender-based violence, exposing lesbians, bisexual and transgender women in same sex relationships to attacks, threats and harassment by both State agents and non-State actors. The decision thus contributes to the Committee's

[33] The author pointed to *Galabada Wimalasiri v Officer in Charge Police Station Maradana and the Attorney General* 30.11.2016 (unreported) where the Sri Lankan Supreme Court had confirmed the validity of sections 365 and 365A of the Penal Code and upheld the conviction of two men; *Rosanna Flamer-Caldera v Sri Lanka*, above n. 1, at n. 5.
[34] *Rosanna Flamer-Caldera v Sri Lanka*, above n. 1, at para 9.2. The Committee offered no analysis of this finding.

growing jurisprudence on gender-based violence against women and reinforces its 2017 general recommendation No. 35 that recognises the intersecting discriminations that render some women especially vulnerable to forms of gender-based violence and seeks repeal of all criminal laws that disproportionately affect women.[35] Framing the case as one of intersectional discrimination and placing the decision within its broader jurisprudence of ensuring that all women are protected and have a right to live their life free from gender-based violence[36] highlights the importance of the Committee's general recommendations, concluding observations, inquiries and individual complaints that supplement the Convention, which famously does not have a stand-alone provision in relation to violence against women, and ensures its status as a 'dynamic instrument that accommodates the development of international law'.[37]

Gender Stereotyping, Non-Heterosexual Relationships and LGBTI+ activism

In addition to detailing the harassment and threats that she has faced, the author set out in her communication how she had faced continual harmful stereotyping, including by State authorities, the media and the public. The author argued that the criminalisation of same sex activity legitimates societal prejudices and gender stereotypes, contributing to the threats and harassments that she experiences. As an example, she cited one such stereotype - that lesbians spread paedophilia (of which she was falsely accused of doing by a State agency). Article 5(a) of the Convention places an obligation on State parties to eliminate prejudicial stereotypes. The CEDAW Committee has developed particularly important jurisprudence under this article that requires States to modify and transform social behaviours and eliminate wrongful gender stereotyping, which it understands as 'a root cause and consequence of discrimination against women'.[38] The author had told how to protect herself and her girlfriend she had had to alter her behaviour, 'changing how she lives and conducts herself in public and private'.[39] Article 5 (a) reverses this, requiring social not individual change. With respect to this case the Committee noted that 'decriminalization of consensual same sex relations is essential to prevent and

[35] CEDAW Committee, General Recommendation No 35, above n. 31, at paras 12 and 31 (a).
[36] This builds on CEDAW Committee, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 2010, para 31 where it explained how certain groups of women, including lesbian women, 'are particularly vulnerable to discrimination through civil and penal laws, regulations and customary law and practices.'
[37] *Ibid.,* at para 1.
[38] *Anna Belousova v Kazakhstan*, CEDAW/C/61/D/45/2012, 25 August 2015, para 10.10.
[39] *Rosanna Flamer-Caldera v Sri Lanka,* above n. 1, at para 2.7.

protect against violence, discrimination and harmful gender stereotypes'.[40] The Committee found the State to be in violation of this article as it had not effectively refused or indicated any measures taken to eliminate the prejudices to which she had been exposed as a woman who wears masculine attire, lesbian and activist. It accordingly found a violation of article 5(a) in conjunction with article 1 of the Convention.

Violations of participatory rights, equality before the law and in the family

In addition to its findings with respect to the non-discrimination in article 2, and the gender stereotyping provision, the Committee found violations of three other Convention articles. Significantly, the Committee held that article 7(c) of the Convention, which ensures women's participation in civil society organisations, had been violated. This finding follows a 2021 opinion of the Committee in the case of *Adaiba v Libya* where the Committee held that the author's rights as a women's rights activist and the right to participate in activism had been violated.[41] The Committee held that the State in this case had 'failed to protect the author against, and [has] partaken in, harassment, abuse and threats against the author's work' promoting LGBTI communities' rights in Sri Lanka.

Equality before the law requires that those who experience harassment and threats are able to access the State's justice system – the police and the courts – to file a complaint and to seek remedies; this is essential for realisation of the full panoply of Convention rights.[42] Rosanna Flamer-Caldera has not been able to do this for fear of being arrested herself and indeed has been placed under surveillance by the Criminal Investigation Department. The Committee accordingly found there to be a violation of article 15 (1) of the Convention. This finding is particularly important since it reflects the reality that women who are criminalised are less likely to report abuse or violence to the police since they themselves risk the threat of imprisonment. Criminalisation thus acts as a barrier to effective access to justice. The lack of firewall protections for migrant women, who have been arrested for immigration offences, detained and deported after approaching police officers for protection, is an example of current practice which would fall foul of CEDAW's analysis under article 15 (1).

[40] *Ibid.*, at para 9.4.
[41] *Abaida v Libya*, CEDAW/C/78/D/130/2018, 18 February 2021.
[42] CEDAW General Recommendation No. 33, above n. 31, at para 1.

One of the key findings in this case, of particular interest to scholars who are 'queering international law' and to those who work on LGBTI+ rights, is the finding that the criminalisation of same sex sexual conduct between women breaches the rights under article 16 of the Convention, which relates to marriage, family relations, autonomy and choice. The Committee states that the 'rights enshrined in the Convention belong to all women, including lesbian, bisexual, transgender and intersex women' and that it applies to 'non-heterosexual relations'.[43] The Committee in this way underlines its commitment to inclusivity and responds to scholarly criticism that under CEDAW 'women's experience of "family life" is assumed to be married and heterosexual'.[44] Dianne Otto's contribution to the case as an *amicus curiae* is recognised in the body and footnote of the opinion in a rare and welcome acknowledgment in the jurisprudence of the Committee of the role of third party interventions.

Recommended reparations

Following its finding that Sri Lanka had violated the author's Convention rights, in line with its usual procedure, the Committee made a number of specific recommendations to redress the individual's situation and some more general recommendations that seek to have transformative impact within the State. The status of recommendations made within individual communication decisions depends upon domestic law and vary across jurisdiction. For example, following the case of *Angela González Carreño v Spain*, the Spanish Supreme Court made a landmark finding that these decisions are binding on the Spanish courts.[45] In other jurisdictions, they may not be of legally binding character, but the Committee's follow-up procedure means that there is some oversight into whether such recommendations are implemented.

In *Rosanna Flamer-Caldera v Sri Lanka* the Committee made 11 recommendations in total.[46] Individual recommendations looked to redress the situation of the complainant and to ensure

[43] *Rosanna Flamer-Caldera v Sri Lanka,* above n. 1, at para 9.7
[44] Dianne Otto, 'Women's Rights', in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (OUP, 3rd ed. 2017) 319.
[45] *Angela González Carreño v. Spain,* Communication No. 47/2012, 16 July 2014.; Judgment No. 1263/2018 of July 17, 2018, ROJ: STS 2747/2018, ECLI: ES:TS:2018:2747 (Tribunal Supremo [Sup. Ct.], Sala de lo Contencioso-Administrativo [Contentious-Administrative Chamber]) (Spain). See Gema Fernandez Rodriguez de Lievana 'Ángela González, o cuando la justicia no protege a las mujeres ni a sus hijos e hijas de la violencia de género', *Tiempo de paz,* Nº. 134, 2019, 108-113; Machiko Kanetake '*María de los Ángeles González Carreño v. Ministry of Justice'* 113 *American Journal of International Law* (2019) 586-592.
[46] *Rosanna Flamer-Caldera v Sri Lanka,* above n. 1, at para 11.

her personal security as well as that of her organisation. They therefore recommended the State to make appropriate reparation and compensation 'commensurate with the gravity' of the Convention violations, and to take preventative and protection measures to stop threats, abuse and harassment, as well as measures to ensure that the author and Equal Ground can carry out their activism safety and freely. The Committee also recommended criminal procedures to hold those responsible for threats and harassment to account. The general recommendations seek to bring about social change through such measures as legal and policy reform, enhanced data collection and training of law enforcement agencies. Foremost, the Committee recommended that Sri Lanka 'decriminalise consensual same-sex conduct between women having passed the age of consent'.[47] Other recommendations covered the provision of effective protection against gender-based violence against women; of protection, support systems and remedies for lesbian, bisexual, transgender and intersex women who are victims of discrimination; and access to effective civil and criminal remedies. Importantly, given the author's role as an LGTBI activist the Committee also recommended the State to take 'specific and effective measures to ensure a safe and favourable environment for women human rights defenders and female activists'.

The Committee also recommended the collection of data and statistics on hate crimes and, repeating its recommendation in the *O.N. and D.P.* case against Russia,[48] training for law enforcement personnel on the human rights of lesbian, bisexual, transgender and intersex women to raise awareness and to facilitate recognition of homophobia in the commission of crimes against these people so that they are properly understood as gender-based violence and hate crimes that require active State intervention. In these recommendations the Committee has moved beyond general recommendation No. 35 which does not address gendered hate crimes and has opened the door for further examination of how both hate crimes and hate speech might be more fully understood as violations of the Convention.[49]

The Committee's views also follow those given by other UN treaty bodies to Sri Lanka in their concluding observations to periodic reports that recommend reform of discriminatory laws criminalising consensual same sex sexual conduct. For example, in 2017, the Committee on Economic, Social and Cultural Rights recommended Sri Lanka to amend the Penal Code with

[47] *Ibid.*, *at* para 11 (b)(i).
[48] *O.N. and D.P. v Russian Federation*, above n. 16, at para 9 (b) (i).
[49] See Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 18 June 2018 for discussion of hate speech in the context of on-line violence against women.

a view to decriminalising same sex conduct and to 'take urgent steps to combat and prevent violence against lesbian, gay, bisexual, transgender and intersex persons'.[50]

Toonen and *Rosanna Flamer-Caldera* compared

Given that there are only two UN treaty body decisions on the criminalisation of same sex conduct, it is worth comparing the rationale and findings of violations in each of the cases. In *Toonen,* the HRC considered whether articles 2.1 (respect and ensure Covenant rights without discrimination), 17 (the right to privacy) and 26 (equality before the law) of the ICCPR had been violated by Australia by the criminalisation of consensual same sex male conduct in Tasmania. Australia had tried to justify the criminalisation of 'private homosexual behaviour' on the basis of public health and moral grounds, namely to prevent the spread of HIV/AIDS. The HRC rejected that argument and made it clear that the criminalisation of 'homosexual practices cannot be a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV'.[51] The HRC held that there was no link between decriminalising 'homosexual activity' and the effective control of HIV. The Committee further rejected arguments on the basis of the protection of morals and found that Australia was in violation of the ICCPR, article 17. In considering whether the State was in violation of article 26, the Committee held for the first time that the term 'sex' in articles 2.1 and 26 is to be taken as including sexual orientation. Since it had found violations of article 17 in conjunction with article 2.1 of the Covenant it did not have consider separately whether there had been a violation of article 26. The *Toonen* decision remains a significant and important precedent given that the majority of States which criminalise same sex conduct continue to focus on gay and bisexual same sex activity. The *Flamer-Caldera* decision builds on *Toonen* and the cases which have been decided since by regional courts to underline that criminalisation is a breach of multiple Convention rights, including the discrimination provisions. But the Committee's decision is broader than *Toonen*, setting out not only how criminalisation is a breach of non-discrimination and private life, in the context of the Convention's protection of family life, but also recognises the harmful gender stereotyping that lesbians face. Further, like Mr Toonen, Rosana Flamer

[50] Committee on Economic, Social and Cultural Rights, Concluding Observations on the fifth periodic report of Sri Lanka, 4 August 2017, E/C.12/LKA/CO/5. See also: Human Rights Committee, Concluding observations on the fifth periodic report of Sri Lanka, 21 November 2014, CPPR/C/LKA/CO/5; Committee on the Rights of the Child, Concluding Observations on the combined fifth and sixth periodic reports of Sri Lanka, 2 March 2018, CRC/C/LKA/CO/5-6.

[51] *Toonen v Australia*, above n. 4, at para 8.5.

Caldera is an activist and this decision recognises how criminalisation violates the rights of those working in LGBTI+ civil society organisations thus also creating important precedent in this respect.

Contextualising Flamer-Caldera within CEDAW's LGBTI+ jurisprudence

The *Rosanna Flamer-Caldera* case marks the second decision concerning lesbian women within two years of the Committee's work. In *O.N. and D.P.* adopted in 2020, some years after the filing of *Rosanna Flamer-Caldera*, the Committee considered whether Russia had violated the rights of a lesbian couple who were attacked by two men as they walked home in St Petersburg. The homophobic attack was so vicious that one of the women, O.N., suffered concussion and a haematoma. The women reported the incident to the police and asked them to investigate the violence and the threats to kill them. They stressed that the offences had been motivated by hatred in relation to their sexual orientation. But the police refused to investigate. Despite repeated attempts and steps taken in the national system to have the crimes against them investigated, the investigation was repeatedly closed, suspended and re-opened, with no effective investigation taking place until the statute of limitation had expired, time-barring any further attempts to bring the perpetrators to justice. The two women brought their case to the CEDAW Committee claiming a violation of articles 1, 2(b), (c), (e) and (f) and 5(a) of the Convention on account of the State party's failure to effectively investigate a violent offence committed by private individuals 'owing to their non-traditional sexual orientation'.[52]

The Committee found that the State had violated the women's' rights under the CEDAW. In a significant passage the Committee decided for the first time in an individual complaint and foreshadowing the *Rosanna Flamer-Caldera* case, that 'discrimination against women is inextricably linked to other facts that affect their lives, including being lesbian women.'[53] Given the importance of access to justice and criminal laws for ensuring women's equality, the Committee considered that Russia's compliance with the Convention, in particular to eliminate

[52] *O.N. and D.P. v Russian Federation*, above n. 16, at para 3.1.
[53] *Ibid.*, at para 7.4. The Committee has also addressed intersecting forms of discrimination in its views on *Jallow v Bulgaria*, CEDAW/C/52/D/32/2011; *S.V.P. v Bulgaria*, CEDAW/C/53/D/31/2011; *Kell v Canada*, CEDAW/C/51/D/19/2008; *A.S. v Hungary*, CEDAW/C/36/D/4/2004; *R.P.B. v Philippines*, CEDAW/C/57/D/34/2011; and *M.W. v Denmark*, CEDAW/C/63/D/46/2012; among others, and in its reports on inquiries under OP CEDAW, article 8 in particular those concerning Mexico, CEDAW/C/2005/OP.8/MEXICO; and Canada, CEDAW/C/OP.8/CAN/1.

gender stereotypes needs to 'be assessed in the light of the level of gender sensitivity' applied to the investigation (or lack thereof) in their case. The Committee concluded that:

> … by failing to investigate the authors' complaint about the violent attack against them, as lesbian women, promptly, adequately and effectively and by failing to address their case in a gender-sensitive manner, the authorities allowed their actions to be influenced by negative stereotypes associated with lesbian women. The Committee therefore concludes that the authorities failed to act in a timely and adequate manner and to provide a remedy for the authors, in violation of the obligations under the Convention.[54]

The Committee voiced particular concern about acts of violence towards lesbian, bisexual and transgender women in Russia and called on the State to provide effective protection against violence and discrimination based on sexuality, and multiple forms of discrimination. It found violations of CEDAW articles 1, 2(a) and (c)-(e) and 5(a) for the State's failure to conduct an efficient, impartial and timely investigation into the case. In other words, Russia failed in its due diligence obligations in relation to preventing gender-based violence against lesbian women. Together with the *Rosanna Flamer Caldera* decision, these opinions demonstrate that the Convention protects the rights of all women. These two individual communications present a strengthening of the rights of lesbian women and the wider LGBTI+ community at the international level.

Conclusion

There is a growing momentum of interest in the queering of international law which seeks to explore the tensions between queer activism and international human rights law.[55] Di Otto, has asked, drawing on the work of Judith Butler: 'how can appeals be made to international human rights law to make precarious queer lives more liveable *without* legitimising the heteronormative imperial heritage of the normative framework of international law?'[56] Ratna Kapur has argued that 'queer advocacy has acquired considerable prominence in international human rights advocacy' and has become 'the new focus of academics and activists working in

[54] *O.N. and D.P. v Russian Federation*, above n. 16, at para 7.8.
[55] https://www.cambridge.org/core/journals/american-journal-of-international-law/article/queer-jurisprudence-reparative-practice-in-international-law/DC662AF815F55D43A7A62C5D4EB10EA5
[56] Dianne Otto (ed.), *Queering International Law, Possibilities, Alliances, Complicities, Risks* (Routledge 2018) 7.

the field of sexuality and sexuality studies'.[57] Kapur highlights discomfort with a queer project that risks bolstering the legitimacy of the international human rights legal project and reducing the radicality of queerness.[58] Gabrielle Simm has argued that 'trying to squeeze queer into the straightjacket of CEDAW may be a compromise that is not worth making' and concluded from her analysis of concluding observations, and general recommendations that 'CEDAW has proven less promising than might have been expected'.[59] On the other hand, Odette Mazel has worked through the tension between queer theory and the law and, drawing upon Segwick and Foucault, to read LGBTQIA+ efforts as creative pursuits for transformative social and legal change.'[60] Mazel draws on interviews with Nicolas Toonen's partner and concludes that:

> Bringing these claims to the Human Rights Committee were not acts of naivety about the nature of the law, nor were they appeals for assimilation into a heteronormative ideal. They were, instead, acts of courage and defiance, commitments to carving a space in international human rights law where there had been none before…These were queer, creative, and radical acts. They were acts of counter-conduct driven by an ethics of care of the self that have influenced transformative social and legal change.

Similarly, we consider that *Rosanna Flamer-Caldera v Sri Lanka* is a case which has the potential to bring about transformative social and legal change for women living under criminalisation. With this decision the CEDAW Committee has not only confirmed that criminalisation is contrary to the Convention but also that the Convention protects non heterosexual relationships. That is a queer, creative and perhaps even radical act.

[57] *Ibid*, Ratna Kapur, 'The (im)possibility of queering international human rights law', in Dianne Otto ed. *Queering International Law*, 132
[58] *Ibid.*
[59] Gabrielle Simm 'Queering CEDAW? Sexual orientation, gender identity and expression and sex characteristics (SOGIESC) in international human rights law', 29 *Griffith Law Review*, (2020) 393.
[60] Odette Mazel 'Queer Jurisprudence: Reparative Practice in International Law', 116 AJIL Unbound (2022) 10-15. Available online https://www.cambridge.org/core/journals/american-journal-of-international-law/ajil-unbound-by-symposium/queering-international-law (last accessed 10 April 2022).