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MAKING LOVE A CRIME

CRIMINALIZATION OF SAME-SEX CONDUCT
IN SUB-SAHARAN AFRICA

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Cover photo: An activist holds a wrist band which reads "end homophobia" on World AIDS Day, Nairobi, Kenya, 2010.

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METHODOLOGY

The report has benefited from extensive desk-based research into national laws, academic materials, court judgements, international and regional human rights law, as well as Amnesty International's ongoing engagement with international and regional human rights advocacy. This report is also based on over 60 interviews with activists, survivors of violence, academics, human rights defenders, and legal and medical professionals in Uganda, Cameroon, Kenya and South Africa, which took place in 2011. The intent of these interviews is not to generate region-wide trends, but to provide specific examples of how the legal framework in these selected countries affects the enjoyment of human rights for LGBTI people. Amnesty International would like to thank Professor Matthew Waitt for his extensive contributions to this report, as well as the numerous people who agreed to be interviewed for this report. Activists, academics and others generously gave their time to share their advice and experiences, which have informed the content of, and greatly enriched, this report.

“Our old neighbours said to me, ‘Why are you still alive?’”

Frank, Uganda

EXECUTIVE SUMMARY

This report provides an analysis of the legal environment and wider context of human rights violations against lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals in sub-Saharan Africa. Recent years have seen increasing reports of people being harassed, marginalized, discriminated against and attacked because of their real or perceived sexual orientation or gender identity. This is occurring in countries whose legal systems still condone the criminalization of consensual same-sex behaviour, and in countries where the police and justice systems are failing to prevent these crimes from happening.

The continued criminalization of consensual same-sex conduct in 38 African countries is a serious cause for concern. The existence and implementation of these laws violates a raft of international and regional human rights norms, and serves to marginalize one group of Africans based on their sexual orientation and gender identity alone. The last decade has witnessed efforts in some sub-Saharan African countries to further criminalize LGBTI individuals by ostensibly targeting their behaviour, or to impose steeper penalties and broaden the scope of existing laws. Uganda has seen repeated attempts since 2009 to introduce the Anti-Homosexuality Bill – a bill which would seek to impose the death penalty for ‘aggravated’ homosexuality, and which would criminalize anyone in Uganda who does not report violations of the bill’s wide-ranging provisions within 24 hours to authorities. South Sudan, on becoming independent in 2008, criminalized consensual same-sex conduct for women and men with up to 10 years’ imprisonment. Burundi criminalized same-sex conduct for men and women in 2009 by revising the criminal code to outlaw ‘sexual relations with someone of the same sex’. In 2011 and 2012, Nigeria and Liberia respectively introduced bills to toughen penalties for same-sex conduct. And Mauritania, northern regions of Nigeria, the southern region of Somalia and Sudan, retain the death penalty for the same.

Laws criminalizing consensual same-sex conduct affect LGBTI Africans on a daily basis. In some countries, like Cameroon, individuals are regularly arrested after having been denounced to authorities as being gay or lesbian. Individuals are usually arrested, charged and sentenced without evidence of same-sex conduct, and sometimes invasive medical examinations are performed in an attempt to obtain ‘evidence’ of such. Even in countries where anti-homosexuality laws are not routinely implemented, the existence of the laws alone provide opportunities for abuse, including blackmail and extortion, both by police and by non-state actors. Furthermore, the existence of laws that criminalize one group of people based on who they are and who they (are presumed to) have consensual sex with, sends a message to the broader population that discrimination on the basis of sexual orientation and gender identity is acceptable, and that human rights do not apply to LGBTI people. This creates an environment in which harassment, intimidation and violence against LGBTI people can flourish, and people can perpetrate such acts with impunity.

The continued existence of punitive laws and policies targeting people on the basis of sexual orientation and gender identity is not the only human rights issue facing LGBTI individuals in sub-Saharan Africa. High levels of sexual and other violence targeting people because of their sexual orientation and gender identity are endemic in some areas. In South Africa for example, Amnesty International has documented 7 rapes and murders of LGBTI people since June 2012. The actual numbers are likely much higher, according to reports from various NGOs in the country. In the case of South Africa, it is the absence of an adequate police and government response to the proliferation of such crimes that is cause for ongoing concern, and a source of human rights violation in that the state is failing in its duty to protect one part of its population from violence.

However, there is reason to be optimistic. Many NGOs and grassroots LGBTI and community-based organizations throughout sub-Saharan Africa continue to push for the broader recognition and protection of the human rights of LGBTI individuals. This work goes on despite the great risks faced by human rights defenders working in this area. No doubt these individuals and organizations have contributed to the several positive developments that the last decade has seen in the fight for rights based on sexual orientation and gender identity.

In 2004, Cape Verde eliminated offences related to same-sex activity. In 2009, Mauritius committed to decriminalize homosexuality, and in 2011, Sao Tome and Principe, along with the Seychelles, committed to doing the same. The new Kenyan constitution came into force in August 2010, heralding positive developments for LGBTI rights in a number of important ways. Furthermore, a number of African countries have introduced legislation to explicitly outlaw discrimination on the basis of sexual orientation, or removed discriminatory provisions of existing employment legislation: the Seychelles in 2006, Mozambique in 2007, Cape Verde and Mauritius in 2008, and Botswana in 2010. South Africa has also seen a number of positive legal developments over the past decade, including allowing joint adoption by same-sex couples in 2002, introducing a law on legal gender recognition in 2004, and providing for same-sex marriage in 2006.

These positive developments need to be built upon, particularly at local and regional levels. Regionally, there are growing efforts amongst civil society to persuade the African Commission on Human and People's Rights to recognize sexual orientation and gender identity as grounds of discrimination in their work. Internationally, South Africa has taken a leadership role in calling for an inclusive human rights agenda at the UN. Slowly, more African governments are supporting South Africa in this work.

Amnesty International, in this report, recommends that: that States repeal all laws that criminalize or otherwise impose punitive sanctions on consensual same-sex sexual conduct, along with all discriminatory laws and policies that adversely affect or target LGBTI people; that allegations of human rights violations based on sexual orientation or gender identity are promptly and impartially investigated by competent authorities and perpetrators held accountable and brought to justice; and that States introduce ongoing training for health professionals and legal professionals, as well as the police, media and education workers, on diversity and the human rights of all as including the rights of LGBTI persons. It also calls on the African Commission on Human and Peoples' Rights to fulfil its mandate to protect the human rights of all Africans, including those of LGBTI people.

1. INTRODUCTION

In the past decade, human rights violations on the basis of real or perceived sexual orientation, gender identity, or consensual sexual conduct have become increasingly visible across Africa. In 38 African countries the law imposes criminal sanctions for consensual same-sex conduct, in contravention of international obligations to protect all individuals without discrimination on the grounds of sexual orientation or gender identity. Recent years have borne witness to increasing arrests of suspected gay men and women in Cameroon, who have been, and continue to be, arbitrarily detained; increasing incidences of harassment, violence and government closure of lesbian, gay, bisexual, transgender and intersex (LGBTI) workshops and threats against LGBTI activists, organizations and individuals in Uganda; an increase in the number of incidents of rape and murders of LGBTI individuals in South Africa; mass arrests of those who are or who are perceived to be LGBTI people in The Gambia; government-led raids of LGBTI organizations in Zimbabwe; repeated attempts in countries like Nigeria, Uganda and Liberia to criminalize same-sex conduct even further, with laws that impose harsher penalties and encompass a broader range of activities; and non-state actors using the existence of criminal laws against same-sex conduct to target LGBTI people for violence with impunity. Legal provisions that criminalize consensual same-sex relations are not the only laws used to deny LGBTI people their basic human rights in Africa. Often police and other authorities use provisions restricting (or criminalizing) cross-dressing, impersonation, prostitution, public nuisance, vagrancy and loitering, to name a few, to target LGBTI people, particularly transgender individuals, for persecution throughout Africa.

Despite these challenges, the last decade has seen several positive developments in the region. South Africa has taken a leadership role in pushing for an inclusive human rights agenda at the UN, in sponsoring the first ever resolution on sexual orientation and gender identity, with some African countries like Sao Tome, Mauritius and Cape Verde voting in favour of this resolution. Rwanda's parliament rejected an amendment to the Penal Code which would have criminalized same-sex conduct in December 2009, with the Minister of Justice publicly stating that homosexuality would not be criminalized, as sexual orientation is a private matter.¹ In Malawi, the Justice Minister in 2012 declared that the application of criminal provisions on homosexuality would be suspended.² The past decade has also seen the burgeoning of LGBTI organizations throughout the continent, and an increasing number of mainstream civil society organizations willing to speak out for the human rights for LGBTI individuals and communities.

Still, the targeting of LGBTI individuals for violence and discrimination continues and is a serious human rights problem in the region as a whole. Those who are arrested and imprisoned solely because of their real or perceived sexual orientation or gender identity, or their actual or suspected consensual same-sex conduct, are prisoners of conscience and should be immediately and unconditionally released.

Governments must ensure the full enjoyment and exercise of all human rights for all, regardless of their sexual orientation or gender expression, including sexual and reproductive rights. As an essential part of this, Amnesty International calls on all states to decriminalize consensual same-sex conduct where such laws exist, and to protect LGBTI individuals from all forms of discrimination and abuse.

This report reviews, with supporting legal authority and other relevant material, the current state of criminal provisions outlawing consensual same-sex conduct in sub-Saharan African countries. The analysis of the legal environment covers all sub-Saharan African countries. The implications of the legal environment for LGBTI people are further illuminated through examples based on interviews with activists and experts from four countries: Uganda, Kenya, Cameroon and South Africa. In this report pseudonyms have been used for some of the interviewees – an asterisk will appear to indicate where this is the case.

The report is intended both for policy makers and human rights defenders, and provides, in Appendix 12.1, the full text of existing laws (as of February 2013) criminalizing same-sex conduct. It is important, however, to locate these laws within a broader legal framework that serves to repress and discriminate. In this manner, while this report focuses on the criminalization of consensual same-sex conduct, it is vitally important to consider the wider context in which arguments for decriminalization must be made. For this reason the report lays out the recent historical context of LGBTI persecution, broadly, and also draws substantially on the international human rights obligations that provide the legal basis for the repeal of offending laws. The report also provides a summary of recent developments in the application of international human rights law, in further support of the inalienable right to not be discriminated against or otherwise targeted for abuse because of one's sexual orientation or gender identity.

2. SEXUAL ORIENTATION AND GENDER IDENTITY IN RECENT INTERNATIONAL HUMAN RIGHTS LAW

Laws that criminalize consensual same sex conduct and non-normative gender identities violate a number of universally protected human rights. By criminalizing or otherwise punishing the expression of sexual orientation and/or gender identity, punitive laws make it impossible for LGBTI individuals to live their lives with equality and dignity.

“The protection of people on the basis of sexual orientation and gender identity does not require the creation of new rights or special rights for LGBTI people. Rather, it requires enforcement of the universally applicable guarantee of non-discrimination in the enjoyment of all rights... (T)he principle of non-discrimination is cross-cutting and the obligation on the part of States is immediate. Simply put, people may not be discriminated against in the enjoyment of rights on the basis of sexual orientation or gender identity. As the High Commissioner has stated, ‘The principle of universality admits no exception. Human rights truly are the birthright of all human beings.’”³

Sexual orientation and gender identity are protected grounds of identity under international human rights law. The universality of human rights is set out in the Universal Declaration of Human Rights (UDHR), which states that “All human beings are equal in dignity and rights.”⁴ The UDHR also states that “everyone is entitled to the rights and freedoms set out in this Declaration without distinction of any kind.”⁵

In fact, the right to non-discrimination is a principle that underpins all of the major human rights treaties. Although sexual orientation and gender identity are not mentioned as specific grounds of discrimination as set out under the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the list of grounds was not intended to be exhaustive, as the negotiators acknowledged that the nature of discrimination varies according to context and that our understanding evolves over time.

As the Committee on Economic, Social and Cultural Rights has said:

*“The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.”*⁶

Over the years, the UN expert bodies mandated to oversee the implementation of human rights treaties (called treaty monitoring bodies) have clarified that treaty provisions prohibiting discrimination implicitly proscribe discrimination on the basis of age, marital status, health and disability, as well as sexual orientation and gender identity. In fact, these bodies have repeatedly noted in their authoritative comments on the treaties that, where treaties prohibit discrimination based on any 'other status', this includes sexual orientation and gender identity, and similarly, that treaty provisions proscribing discrimination based on 'sex' imply the prohibition of discrimination based on sexual orientation.⁷

Put simply, this means that any state which has ratified or signed an international human rights treaty must ensure that its own domestic legal system –its laws and the implementation and enforcement of those laws – honours its obligation to promote, protect, and fulfil the rights established in that treaty without discrimination based on sexual orientation or gender identity. This is the case not only with respect to laws that address sexual orientation and gender identity explicitly, but also those that apply generally, to all citizens irrespective of their sexual orientation and gender identity. In this manner, it is a human rights violation when a state criminalizes a person's consensual same-sex sexual conduct. And it is likewise a violation to prevent or impede organization for the purpose of advocacy for human rights on the basis of sexual orientation and gender identity, or to tolerate violence and abuse by agents of the state against any population, including against LGBTI people.

Some states base their objection to the protection of human rights for LGBTI individuals on the erroneous claim that international human rights law does not protect these rights. The jurisprudence of the treaty monitoring bodies referenced throughout this report shows just how mistaken this claim is. Yet the persistence of this notion is used as a justification to uphold highly discriminatory laws and fuel gross human rights violations against LGBTI individuals. This is the case even in South Africa, a country which is exemplary in, and should be applauded for, its active commitment to including protections against discrimination on grounds of sexual orientation and gender identity in its constitution and for seeking to persuade neighbouring countries to do the same.

Various UN entities such as the Human Rights Committee and the UN General Assembly have acknowledged that the many different ways in which states use punitive measures to persecute LGBTI people and fail to protect them against abuse from others amounts to serious human rights violations. In summary, the current status and scope of international human rights standards is derived not only from the text of treaties and conventions, but also from the case law and reports of international human rights bodies authorized by states to interpret those treaties and conventions. And the conclusion of all of these authoritative comments is that a person's ability to express his or her sexual orientation and gender identity freely and without fear is central to the full enjoyment of their human rights, and that this enjoyment is compromised where, for example, states:

- Criminalize consensual same sex conduct⁸, sexual orientation⁹ and non-normative gender identities;
- Discriminate in their application of the criminal law on grounds of sexual orientation and gender identity;¹⁰

- Impose harsher punishments on LGBTI people than they would on others;¹¹
- Fail to respect and promote the right to privacy;¹²
- Discriminate in civil marriage and family law based on sexual orientation or gender identity;¹³
- Encourage, facilitate or tolerate arrest and detention on grounds of sexual orientation and gender identity;¹⁴
- Fail to provide for the fair trial of people on grounds relating to their sexual orientation or gender identity, whether or not charges relate to these matters, or tolerate discrimination against LGBTI individuals in the justice system, whether they are alleged perpetrators, victims, or witnesses;¹⁵
- Impose or tolerate inhuman conditions of detention for LGBTI individuals;¹⁶
- Perpetrate, condone or otherwise tolerate torture or inhuman or degrading treatment on grounds relating to sexual orientation or gender identity;¹⁷
- Prevent freedom of opinion or expression for LGBTI people;¹⁸
- Prevent freedom of assembly or association for LGBTI people and organizations.¹⁹

For further information on rights as they relate to sexual orientation and gender identity under international human rights law, see Chapter 9, 'Rights under international and regional human rights law'. This report demonstrates the extent to which many African countries fail to abide by their international human rights obligations²⁰ towards LGBTI individuals, and the horrendous consequences of their neglect. Understanding the nature of the protection accorded by international and regional law is important for human rights defenders²¹ and those committed to ending this invidious form of discrimination.

3. HISTORICAL CONTEXT OF CRIMINALIZATION IN AFRICA

Often, in the debate about the rights of LGBTI people in Africa, ideas of African culture and tradition are invoked in opposition to 'Western' same-sex sexuality. However, there is in fact a long history of same-sex sexuality and non-normative gender identities in sub-Saharan Africa, and it is rather the laws that criminalize consensual same-sex conduct which are, in many cases, a Western legacy. Nonetheless, politicians in some sub-Saharan African countries and some religious leaders from disparate faiths have in the past decade characterized same-sex conduct and LGBTI identities as 'un-African' in attempts to rally conservative support. Many of these politicians and faith leaders use the media to fuel hatred and fear of LGBTI individuals, and in some countries progress in human rights based on sexual orientation or gender identity is followed by vicious backlashes. These backlashes and popular sentiments are often then used to further deny LGBTI people their basic human rights with reference to 'the will of the people.' This denial of rights can include restrictions on access to healthcare for LGBTI people.

Same-sex sexuality and transgender identities have always existed in African societies, just as they have everywhere else in the world. Different conceptions of 'sex' in some parts of Africa prior to colonization appear to have allowed for tolerance of same-sex sexual relationships.²² In addition, woman-woman marriages have been documented in over forty ethnic groups in Africa, spread over Southern Africa, Benin, Nigeria, Kenya and Southern Sudan.²³ A cave painting in modern-day Zimbabwe depicting male-male sex is over 2,000 years old.²⁴ Men who did not conform to gender norms – many of them same-sex practicing – are known to have found acceptance in Zulu, Hausa and Yoruba societies.²⁵ Amongst the Shona, traditional healers attributed non-normative sexual orientations and gender identities to possession by spirits: individuals who were possessed in this way were not blamed and were often respected.²⁶ The Shona language has words: *murumekadzi* (man-woman) for a man who takes on the role of a woman and *mukadzirume* (woman-man) for a woman who takes on the role of a man – in both cases this usually included forming a 'heterosexual' relationship with another man or woman.²⁷ The Langi of northern Uganda recognized 'mudoko dako' men who were treated as women and could marry men.²⁸ And amongst the Buganda monarchy in Uganda, there is a long tradition of homosexuality.²⁹

But while variations in sexual orientation and gender identity had been tolerated, at least to some extent in parts of Africa prior to colonization, the colonial powers in Africa imported their own views on sexual and gender norms. African people were encouraged by the colonizing powers, and by imported religions, to view dislike and fear of those expressing non-normative sexual orientation or gender expression as a sign of progress and civilization.³⁰ Some researchers have suggested that colonial writers, even while they observed same-sex behaviour in Africa, denied that it existed.³¹ Colonial models for African society had no place for gender variance or same-sex sexuality.

3.1 THE COLONIAL ERA

Most colonizing powers imposed penal codes on the areas they colonized, and these penal codes included laws on sexual behaviour (see insert for a graphic representation of the introduction of colonial laws criminalizing consensual same-sex sexual conduct). These laws did not have a basis in local customary law: they were devised and imposed precisely because the regions colonized were seen as a haven for ‘unnatural offences’, which the ruling European powers wished to expunge from their new societies.³²

In most cases, laws criminalizing consensual same-sex sexual conduct in the colonized parts of Africa reflected the law of the colonizing power, which drew on prevailing Christian moral strictures. In the United Kingdom, anti-homosexuality laws were originally incorporated into English common law in medieval times to protect the ‘Christian principles’ of the country. These principles associated sex only with procreating, and originally proscribed any non-procreative sex as well as sex with non-Christians. ‘Carnal activities against the order of nature’ were seen to violate not just the individual’s body and mind, but also society as a whole. But while the colonizing European countries have since decriminalized consensual same-sex sexual conduct, the legacies of these past laws live on in the sub-Saharan African countries formerly subject to colonial rule.

England and Wales abolished the law criminalizing consensual same-sex sexual conduct in 1967, too late for the African countries that had gained independence in the 1950s and 1960s with the laws intact.³³ Uganda and Kenya, formerly a British protectorate and colony respectively, currently have laws criminalizing ‘carnal knowledge against the order of nature’ and ‘gross indecency’; Uganda’s law was toughened in 1990 to raise the maximum penalty for ‘carnal knowledge of any person against the order of nature’ to life imprisonment.³⁴ Since 2009, there have been repeated attempts to introduce the Anti-Homosexuality Bill into the Ugandan Parliament, a bill which would see even harsher penalties applied for ‘homosexuality’.

France decriminalized homosexuality in 1791, but it imposed anti-sodomy laws on its colonies, including Cameroon, as a form of social control.³⁵ These laws continue to be enforced with alarming frequency. Dr Basile Ndjio, a senior academic from the University of Douala who conducts research on discriminatory attitudes, explained to Amnesty International his views about why violent disapproval of LGBTI individuals and communities has become so prevalent. His explanation is firmly rooted in Cameroon’s history of colonialism:

“From a historical perspective, prior to colonialism, which fundamentally changed the sexual imagination and practices in Africa, most African traditional societies were characterized by their sexual tolerance and openness. Contrary to received ideas, what western colonialization brought into African colonies was homophobia and not homosexuality, which was part of a variety of social practices. The colonial administration only extended through anti-sodomy laws the moralistic view of the Church, which perceived same-sex relationships as an expression of cultural primitivism and then encouraged African natives to move towards the so-called modern sexuality; that is, exclusive heterosexuality.”³⁶

The Netherlands imposed Roman-Dutch law in the South-Western corner of South Africa in the 17th Century, criminalizing consensual same-sex sexual conduct. This law was retained

even after the British took over in 1806.³⁷ South Africa was the first country in the world to explicitly prohibit discrimination on the grounds of sexual orientation under its 1996 constitution, and in 1998 repealed the anti-sodomy provisions in subordinate law. However, the government has yet to effectively protect LGBTI persons from violent attacks.

4. RECENT LEGAL DEVELOPMENTS IN SUB-SAHARAN AFRICA

4.1 POSITIVE LEGAL DEVELOPMENTS

Over the past decade, there have been some positive legal developments in a number of African countries with regard to the protection of the human rights of everyone, regardless of their sexual orientation or gender identity. This has been particularly evident in South Africa, where the constitution of 1996 ushered in the first explicit prohibition of discrimination on the ground of sexual orientation in Africa, and indeed the world.³⁸ South Africa continued this trend by including allowing joint adoption by same-sex couples in 2002³⁹, introducing a law on legal gender recognition in 2004⁴⁰, and providing for same-sex marriage in 2006.⁴¹

Cape Verde's penal code of 2004 eliminated offences related to same-sex activity. Previously, Article 71 of the 1886 penal code had criminalized 'vice against the nature'.⁴² On 31 January 2011, Sao Tome and Principe committed, during its review at the UN Human Rights Council, to decriminalize homosexuality in its upcoming revision of its criminal code.⁴³ On 10 February 2009, Mauritius committed to finalizing and adopting its Sexual Offences Bill, which would have the effect of decriminalizing homosexuality.⁴⁴ On 4 May 2011, the Seychelles also committed to repeal all provisions in its domestic law criminalizing consensual sexual activity between members of the same sex.⁴⁵

The new Kenyan constitution came into force on 27 August 2010.⁴⁶ Although the constitution explicitly excludes same-sex couples from the definition of marriage⁴⁷, it heralds positive developments for LGBTI rights in three ways. First, it contains an extensive Bill of Rights with an affirmative duty on the state to promote and fulfil the rights enumerated therein; second, it explicitly incorporates international laws into Kenya's domestic law⁴⁸; and third, it stipulates that "[a]ny law, including customary law, that is inconsistent with [the] Constitution is void to the extent of the inconsistency, and any act or omission in contravention of [the] Constitution is invalid."⁴⁹ Furthermore, although the constitution does not explicitly mention sexual orientation or gender identity, it outlaws discrimination 'on any ground'.⁵⁰ Some commentators have suggested that this makes Kenya's anti-homosexuality laws unconstitutional, and have noted that challenges could be brought on that ground in the future. On 8 September 2011, the new Chief Justice of Kenya, Dr Willy Mutunga, said in a speech to launch the opening of The Uganda Association of Women Lawyers (FIDA Uganda) office in Uganda:

"The other frontier of marginalization is the gay rights movement. Gay rights are human rights. Here I'm simply confining my statement to the context of human rights and social justice paradigm, and avoiding the controversy that exists in our constitutions and various legislation. As far as I know, human rights principles that we work on, do not allow us to implement human rights selectively. We need clarity on this issue within the human rights movement in East Africa, if we are to face the challenges that are spearheaded by powerful

*political and religious forces in our midst. I find the arguments made by some of our human rights activists, the so-called 'moral arguments' simply rationalizations for using human rights principles opportunistically and selectively."*⁵¹

However, the Kenyan government has defended its decision not to decriminalize same-sex sexual conduct by arguing that "same-sex unions [are] culturally unacceptable in Kenya".⁵²

On a particularly positive note, a number of African countries have introduced legislation to explicitly outlaw discrimination on the basis of sexual orientation, or they have removed discriminatory provisions of existing employment legislation, such as the Seychelles in 2006⁵³, Mozambique in 2007⁵⁴, Cape Verde⁵⁵ and Mauritius in 2008⁵⁶, and Botswana in 2010⁵⁷.

On 5 November 2012, the Malawian government said it would suspend the implementation of its laws outlawing consensual same-sex conduct and order police not to arrest any LGBTI people pending a decision on whether or not to repeal the legislation. However, the Minister for Justice, who issued the statement, subsequently denied it.⁵⁸ Currently the maximum penalty for same-sex conduct in Malawi is 14 years imprisonment for men with or without corporal punishment and five years for women.⁵⁹

Several sub-Saharan African countries have never criminalized same-sex sexual activities between adults, including Burkina Faso, Central African Republic, Chad, Congo, Côte d'Ivoire, Democratic Republic of Congo, Gabon, Madagascar, Mali, Niger and Rwanda.⁶⁰

4.2 REGRESSIVE LEGAL DEVELOPMENTS

Over the past decade there have been numerous attempts by various states throughout Africa to either criminalize consensual same-sex conduct, or to impose steeper penalties and broaden the scope of existing laws.

When South Sudan became independent in 2008 and adopted a new Penal Code, it criminalized consensual same-sex conduct, both for women and for men. Article 248, entitled 'Unnatural Offences', outlaws 'carnal intercourse against the order of nature' with up to 10 years' imprisonment and stipulates that such 'may also be liable to a fine.'⁶¹

In 2009, Burundi criminalized same-sex conduct for men and women by revising the criminal code to outlaw 'sexual relations with someone of the same sex'. Article 567 imposes penalties of up to two years in prison and/or a fine of up to 100,000 Francs (53 Euros).⁶²

In September 2011, a bill was introduced to Nigeria's National Assembly to ban 'same gender marriage' for the third time in five years. The bill set out to impose even more draconian punishments for same-sex conduct, and defined same-sex marriage — which would become criminal and subject to up to three years in prison — to include anyone who is in a same-sex relationship. Anyone who "witnesses, abet[s] and aids" such a relationship could be imprisoned for up to five years. Article 214 of the Nigerian Criminal Code Act already provides up to 14 years in prison for anyone who "has carnal knowledge of any person against the order of nature."⁶³ The Senate approved the bill at second reading.

In Liberia in 2012, two bills were proposed in the legislature seeking to toughen the penalties for consensual same-sex conduct. The “Proposed Amendment to the Domestic Relations Law of Liberia Sub-Section 2.3” (the Senate Bill), prohibiting same-sex marriage, was unanimously passed by the Senate and is awaiting consideration by the House of Representatives at the time of writing this report. At the same time, the House of Representatives is considering its own draft Bill, ‘An Act to Amend the New Penal Code Chapter 14, Sub-Chapter D and to Add a New Section 14.80 Making Same Sex Sexual Practices a Criminal Offence’ (The House of Representatives Bill). The House of Representatives Bill goes beyond banning same-sex marriage, and includes sweeping provisions that would criminalize the ‘promotion’ of consensual same sex conduct. The ambiguity of the ‘promotion’ clause (14.89 c) in the House of Representatives Bill has the potential to criminalize the work of human rights defenders, as well as public health officials and health professionals seeking to generate awareness about sexual health. Additionally, the Senate Bill provisions defining ‘same-sex marriage’ are so broad and sweeping that they could lead to the imprisonment of individuals based on assumptions or allegations about their relationship status or consensual sexual conduct.⁶⁴

Uganda has seen one of the most publicized attempts to toughen and broaden criminal provisions on same-sex relations and behaviour, with several attempts since 2009 to introduce the notorious Anti-Homosexuality Bill. Originally introduced in October 2009, the Bill lapsed in May 2011, but was re-tabled in February 2012, after Parliament passed a motion in October 2011 to retain Bills which had lapsed with the previous Parliament. The Speaker of Parliament stated, whilst attending the 127th Inter-Parliamentary Union meeting in Quebec, Canada, in October 2012, after Canada’s Foreign Minister challenged her about Uganda’s record on LGBTI rights, that the Bill would be one of her priorities upon her return to Uganda.⁶⁵ On 31 October 2012, the Ugandan Parliament passed a resolution on the Speaker’s stand on homosexuality, and urged the Legal and Parliamentary Affairs Committee to immediately table its report on the Bill for debate.⁶⁶

The Bill, if passed, would impose the death penalty for ‘aggravated homosexuality’, and would impose life imprisonment for the ‘offence of homosexuality’, for attempting to commit ‘aggravated homosexuality’ and for entering into a same-sex marriage. ‘Aggravated homosexuality’ is defined as being caught engaging in same-sex sexual conduct three times, or engaging in same-sex sexual conduct while HIV positive. The Bill would also impose criminal sanctions on anyone who does not report breaches of the Bill’s far-reaching provisions within 24 hours.⁶⁷ The Bill would contribute directly to stigmatizing LGBTI individuals and may incite violence against people perceived as sexually and gender non-conforming, and would allow their abusers to act with impunity.⁶⁸ The bill includes a clause, in contravention of international law, which declares any international treaties that conflict with the bill null and void.⁶⁹ One of the stated objectives of the bill is “[t]o ensure that no international instruments to which Uganda is already a party can be interpreted or applied in Uganda in a way that was never intended at the time the document was created.”⁷⁰ Read in context, the Bill implies that international human rights law was not intended to safeguard the rights of LGBTI individuals - a notion that does not bear out in fact - and attempts to relieve Uganda of any obligation to protect these rights.

Most countries in Africa that criminalize consensual same-sex conduct provide for extended periods of imprisonment for those convicted of such crimes. Some, however, more influenced

by Islamic Shari'a law, provide for the death penalty. These countries include Mauritania, northern regions of Nigeria, the southern region of Somalia and Sudan. For a full list of laws criminalizing consensual same-sex conduct in Africa see Appendix 12.1.

4.3 THE IMPACT OF LAWS CRIMINALIZING CONSENSUAL SAME-SEX CONDUCT

The impact of laws criminalizing same-sex conduct reaches further than the constant threat of arrest. The existence of such laws creates a permissive environment for family members and others in the community to discriminate against, harass and intimidate LGBTI people. Sometimes states that maintain these laws justify their continued existence by saying that the laws are not implemented.⁷¹ Such an excuse is an acknowledgement that the laws are bad in the first place. Moreover, laws that criminalize same-sex behaviour constitute discrimination in and of themselves. Even if the laws are not applied, by maintaining them, states are forcing LGBTI individuals to live in fear of prosecution, and are neglecting their obligation to protect LGBTI individuals by signalling, through the law, that LGBTI individuals are criminals. In the case of *Toonen v Australia*, the UN Human Rights Committee said of the law that criminalized consensual same-sex conduct between men: "The Committee considers that Sections 122(a), (c) and 123 of the Tasmanian Criminal Code 'interfere' with the author's privacy, even if these provisions have not been enforced for a decade."⁷²

The LGBTI Security Committee in Uganda told Amnesty International about the impact of attempts to pass legislation further criminalizing same-sex conduct in Uganda:

"Some governments say 'What is all the fuss about? No one is prosecuted under our laws'. Even though the current law that criminalizes same-sex conduct had not, until 2012, been used much in practice, the effect of the legislation, and of the public statements of homophobic by politicians, religious leaders and the media every time the Anti-Homosexuality Bill comes into Parliament, is profound. Students are evicted from schools, people are evicted from their homes, bars are raided and venues closed down."⁷³

Frank Mugisha, an LGBTI activist, Director of Sexual Minorities Uganda and recipient of the Robert F. Kennedy Human Rights Award 2011, told Amnesty International that "before the initial introduction of the Anti-Homosexuality Bill in 2009, people were not reporting friends and family members [to the police], whereas now they do."⁷⁴

5. VIOLATIONS BY STATE ACTORS

Thirty-eight states in Africa still criminalize consensual same-sex conduct. Some laws apply to men only, while some target both men and women. These laws prohibit, with penalties including imprisonment or even death, same-sex consensual sexual conduct, same-sex relationships and the perceived expression of LGBTI identities. Many are vaguely worded with phrases such as ‘carnal offences against the order of nature’, or referring to ‘sodomy’. The laws are used to police public and private sexual behaviour and gender identity by legitimizing criminal investigations of sexual or gender non-conforming persons, who are perceived to be lesbian, gay, bisexual, transgender or intersex and thus breaking the law. Additionally, several countries use laws restricting vagrancy, prostitution, cross-dressing and other behaviours to justify the persecution of people on grounds of their sexual orientation and gender identity. Extortionists also use the existence of these provisions to demand money or goods in exchange for not releasing real or imagined details of an individual’s private life to the public, or to the police. LGBTI individuals often have little or no recourse to justice or support for the blackmail and violence they suffer in their communities.

In this manner, the persecution of LGBTI populations in sub-Saharan Africa has its foundation in laws that forbid people from expressing their sexual orientation freely in the context of consensual adult relationships; but it also involves, for example, discrimination on grounds of sexual orientation and gender identity in the enforcement of other criminal laws, the use of harsher penalties against LGBTI people than others for similar offences, and the failure to enforce criminal laws against non-state actors — including religious leaders and institutions — who carry out violence, abuse or extortion against those perceived to be gay or otherwise not conforming to gender norms. As the judge in the 2003 case of *Lawrence v Texas* stated:

“[w]hen homosexual conduct is made criminal by the law of the state, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and the private spheres.”⁷⁵

5.1 ARBITRARY ARRESTS, DETENTION AND DEPRIVATION OF LIBERTY

Whereas numerous African countries criminalize same-sex behaviour, only some actively apply the law. Those who apply it—which in and of itself runs counter to human rights—do so in an arbitrary and discriminatory manner. In some countries, authorities arrest, detain, prosecute and sentence LGBTI individuals not based on their behaviour, but rather based on the perception of their sexual orientation. This is particularly true for gay men. Laws designed to restrict private sexual acts become a foundation for the control of public behaviour. They provide an excuse for the police and other state actors to harass and arrest individuals who, because of their dress or demeanour, they suspect of being lesbian, gay, bisexual or transgender. Sexual behaviour becomes synonymous with identity; the police do not wait for evidence of offences as defined in the law and they arrest individuals simply on the basis that societal prejudice holds they are likely to commit them.

Under international law, it is illegitimate for the state to interpret the criminal law to prosecute individuals based on their identity or status, particularly where that identity is a protected ground such as sexual orientation or gender identity.

This stereotyping contributes to a situation where non-state actors enact violence against LGBTI people with impunity, in part because they feel emboldened by the hostility towards LGBTI populations displayed by the authorities, and in part because LGBTI individuals do not feel protected by the law and therefore rarely file complaints for abuse.

There are numerous accounts over the past decade of arbitrary arrests and detention of people solely because of their sexual orientation or gender identity. The legitimacy of this conduct is often fuelled by homophobic statements by political and religious leaders.

In Zambia, in 1998, the then Vice President Christon Tempo said in a parliamentary statement that, "If anybody promotes gay rights after this statement, the law will take its course. We need to protect public morality. Human rights do not operate in a vacuum." The police took this to be an encouragement to arrest people who failed to heed the Vice President's words and resulted in the formation of a vigilante group called Zambia Against People with Abnormal Sexual Acts (ZAPASA).⁷⁶

In 2007 in Rwanda – a country which does not criminalize same-sex activity – the police illegally arrested and detained men who were members of the Horizon Community Association (an LGB community organization) after a local Archbishop described homosexuality as "moral genocide."⁷⁷ Women travelling to attend a meeting of the Coalition of African Lesbians were detained for more than a fortnight without charges.⁷⁸

In July 2011, the Western Regional Minister in Ghana asked the Bureau of National Investigations and security forces to round up the country's gay population and called on people to inform on people they believed to be 'homosexual'.⁷⁹

In Kenya, LGBTI individuals are not usually arrested for offences directly related to same-sex conduct. However there have been a number of arrests of LGBTI people under other laws, such as loitering, soliciting, or impersonation. Amnesty International was told that sometimes individuals are threatened with arrest under the provisions of the Penal Code that criminalize same-sex relations for the purposes of extortion by the police. Solomon Wambua, an activist at the Gay and Lesbian Coalition of Kenya (GALCK), told Amnesty International:

"Police often target male sex workers, by working with the city council. They threaten to charge them with homosexuality but end up writing something else. Blackmail/extortion is a real problem – both within the community and by police using 'honeytraps'.⁸⁰ Often they will look for condoms and/or tubes of lubricant as evidence. For example, a person could be walking home from the club, and the police or city counsellor will come up and say 'we suspect you're gay' – if they don't pay they will charge them for being drunk/disorderly."⁸¹

5.1.1 RECENT ARRESTS IN CAMEROON

Cameroon in particular has seen a rise in the number and frequency of arrests over the past decade. Several women and numerous men have been arrested since the beginning of 2011.

In fact, arrests have been on the rise since 2005, when 32 men were arrested at a Yaoundé nightclub, as documented by Human Rights Watch.⁸² The *Association pour la Défense de Homosexuel-le-s* (The Association for the Defence of Homosexuals, ADEPHO) has documented at least 51 arrests and prosecutions of people for 'homosexuality' and/or 'attempted homosexuality' since 2005. Individuals arrested under Article 347 bis, the article that criminalizes 'sexual relations with a person of the same sex', are frequently held without charge for more than 48 hours, the maximum time in custody allowed by law. Detainees are reported to have been beaten, subjected to anal examinations by medical doctors without consent and other cruel, inhuman, or degrading treatment or punishment, and held in solitary confinement. Some individuals accused of same-sex sexual conduct have been imprisoned for up to three years without charge or trial. In most cases, arrests are made on the basis of appearance or because neighbours or family members denounce a person as 'homosexual', rather than on evidence of the acts that are defined as offences in the law.

CAMEROON CASE STUDIES

Jean-Claude Roger Mbede

Jean-Claude Roger Mbede was arrested in Yaoundé on 2 March 2011.⁸³ He was sentenced to three years in prison for 'homosexuality' and 'attempted homosexuality' by a court in Yaoundé on 28 April 2011. Mbede appealed against his conviction and sentence. His appeal hearing was adjourned several times before he was granted provisional release by the court of appeal in Yaoundé on 16 July 2012. Following his release, Mbede's appeal hearing took place on 19 November but no decision was made on that day. On 17 December the court upheld his three year prison sentence. Mbede told Amnesty International that he had suffered sexual assault and malnutrition whilst in prison, and he had to have a hernia operation upon release. He is now at risk of re-arrest.

Jonas Nsinga Kimie, Frankie Ndome Ndome and Hilaire Nguiffo⁸⁴

In November 2011, a court in Yaoundé found three men guilty of practising 'homosexuality' and sentenced them to the maximum sentence of five years' imprisonment and a fine of 200,000 CFA francs. The three men, Jonas Nsinga Kimie, Frankie Ndome Ndome, and Hilaire Nguiffo, aged 19, 25 and 36 respectively, had been arrested in Yaoundé on 25 July 2011 after the authorities accused them of engaging in same-sex sexual conduct. In circumstances that remained unclear, Nguiffo was released and was tried in absentia. Kimie and Ndome appealed against their conviction and sentence. The case was adjourned four times between March and July 2012 until it took place on 21 September. A decision was delayed numerous times until 19 October 2012, when the court of appeal decided to postpone the hearing for debate on 21 December, despite the fact that the case had already been debated. Jonas and Frankie were eventually released in January 2013.

Joseph Magloire Ombwa, Sylvain Seraphin Ntsama, Emma Loutsi Tiomela and Nicolas Ntamack⁸⁵

Four men accused of 'homosexuality' were arrested in August 2011 and detained. All four were subject to severe delays and a lack of due process, including that they were not arrested 'in flagrante', as required by law, and one was subject to anal examinations. One man, Joseph Magloire Ombwa, aged 46, was arrested at his home after his neighbours denounced him to the police as being gay on the basis of receiving tourists at

his home. Two others – Sylvain Séraphin Ntsama, aged 34, and Emma Loutsi Tiomela, aged 17 – were arrested when visiting Ombwa, who was then in custody at a police station in Yaoundé. A fourth man, Nicolas Ntamack, aged 19, was arrested at the home of Ntsama. Amnesty International received information that Ombwa was subjected to a forced anal examination by a military medical doctor in an attempt to find ‘proof’ of anal sex. All four individuals were held for more than one week at the Gendarmerie du lac in Yaoundé. When, on 26 August, they appeared before a court in Mfoundi, Yaoundé, they were denied bail and remanded in custody and returned to Kondengui prison. On 20 July 2012, Tiomela and Ntamack were released and allowed to go back to their respective homes. The other two remained in detention and appeared before a court in Yaoundé on 28 September but the trial was postponed on 2 October 2012 due to the absence of a judge on that day. The trial was again postponed a number of times, and Ntsama and Ombwa were still awaiting trial at the end of December 2012.

Martine Solange Abessolo, Esther Aboa Belinga and Leonie Marie Djula⁸⁶

Women too have been arbitrarily arrested, ill-treated, detained and prosecuted for their real or perceived sexual orientation. For example, three women, Martine Solange Abessolo, aged 26 years, Esther Aboa Belinga, aged 29 years, and Léonie Marie Djula, age unknown, were on 14 February 2012 arrested in Ambam, Southern province. They were accused of being lesbians after Djula’s husband told the authorities that his wife had been ‘enticed’ by the other two women into engaging in same-sex sexual relations. After four days in custody, Djula denied having same-sex relations and effectively turned into a witness for the prosecution. Both Abessolo and Belinga were charged with practising same-sex relations and defaming Djula by allegedly claiming that she was their sexual partner. When they appeared in court on 20 February, the judge adjourned the trial to 8 March and granted them provisional release. In March, the trial of the two women was adjourned twice. On 29 March the women’s lawyers appealed to the trial court to dismiss the case on the grounds that the authorities had violated the right not to be held for more than 48 hours without appearing before a judicial official and to be assisted by legal counsel during interrogation. The prosecution objected to the defence’s request for dismissal of the case and the court scheduled the hearing for 5 April. By February 2013, the court of appeal had still not pronounced itself on the appeal. Fearing for their safety, the two women moved to Yaoundé. The children of Abessolo and Belinga were reportedly subjected to verbal insults by fellow pupils and their mothers were forced to remove them from the urban school and send them to rural schools. The women were also reportedly ostracized by members of their families because of their perceived sexual orientation, following the publicity surrounding the case.

Arrests without evidence

Michel Togue, a human rights defender and leading lawyer who defends LGBTI people in Cameroon, explained the evidence used to charge and sentence Jean-Claude Roger Mbede:

“This was a case where the accused was convicted on the basis of sending a text message to another man. This was the first time that a person has been convicted on the basis of a text message.”⁸⁷

In fact, prosecutions in Cameroon are rarely, if ever, based on any actual evidence that the accused engaged in same-sex conduct. Amnesty International documented cases of doctors performing judicially-ordered anal examinations to try to ‘prove’ such conduct, despite their

scientific illegitimacy, and despite the fact that forced anal examinations are a form of sexual assault and fall under the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law.⁸⁸ According to the lawyers who defend men accused of same-sex conduct, they never have been caught in the act, or 'in flagrante', as the law requires. Togue told Amnesty International:

*"There have been no cases where any men have been caught in the act, even though Article 347 requires this. The homophobia of judges is a real problem. A regular argument by the prosecuting lawyers is that the men were 'caught in the act', but the court does not want to read the file in detail to see if this is true. Alice (Nkom)⁸⁹ and I immediately bring cases to the Court of Appeal to contest this assertion. We see at least one case per month."*⁹⁰

Alternatives Cameroon, an LGBTI advocacy organization in Douala, repeated the assertion that arrests happen on a regular basis without any evidence:

*"The most critical issue is the continuing arbitrary arrests of people suspected of being gay by police, despite the absence of any evidence. The law requires that there is evidence of sexual conduct, but the police arrest people based on suspicion alone."*⁹¹

The 'Yaoundé 32', 21 May 2005

Activists told Amnesty International about their personal experiences of the case of the 32 men arrested at a Yaoundé bar in 2005. The arrests were carried out shortly after a traditional chief alerted the police that there was a 'homosexual gang' in the neighbourhood.⁹² The police decided to arrest the men at a local bar. Some bribed police officers to avoid getting arrested, but 11 refused or could not pay, and remained in pre-trial detention in Kondegui central prison for many months and in some cases, years. Alain*, one of the 11 men who did not pay, told Amnesty International about his experience:

"We were sitting at a bar near the road, in a neighbourhood called 'Terminus'. The police (gendarmes) came and arrested all the people at the bar, because they were looking for a particular man. Once at the police station, they found out he was not among those arrested and they said they would release everyone. Once in the gendarmerie, the MSM (men who have sex with men) and gay men started being afraid, that they were arrested for their sexuality. They started calling their relatives so they could pay bribes. I refused to pay though. Here, one of the best ways to get a promotion [for a police officer] is to say you arrested a 'gay gang'. 11 of the 32 men did not pay bribes. The police presented us to the media as a 'gay gang', 'network', and as 'trainers', or 'recruiters' of young men. We were paraded on three TV channels –CRTV (Cameroon Radio and Television), Canal and STV (Spectrum Television). We were obliged to testify on camera. I wanted to sue the TV stations for allowing this. All of my family saw this on TV. I refused to speak, but we were tortured by the police, so I admitted to having friends in Europe. In the gendarmerie, there is no requirement to sign a confession [in order for it to be accepted as valid by the courts].

*We were tortured with machetes, we had to put our feet up and have our heads hanging down. After 12 months and 12 days, I was among four of the men who were released. I had to admit, in court, that I am a gay man. This was based on Alice's [my lawyer's] advice. They didn't have proof of me having had sexual relations with a man, so I was released. The other seven appealed to the Supreme Court. 11 of us got out at the same moment, but for four of us there were no charges. The other seven were sentenced to a further seven months' jail."*⁹³

In Cameroon, it is clear that the law is not applied equally even amongst LGBTI people. Dr Basile Ndjio told Amnesty International:

*"It is quite clear that Cameroon's anti-gay legislation is discriminately enforced, because it is gay people from underprivileged backgrounds who are primarily targeted by the ongoing anti-gay campaigns. There is a deliberate instrumentalization of laws against poor LGBTI people with no political connections. I have never heard that a close relative of a powerful man in the country has been arrested or prosecuted for homosexual offences."*⁹⁴

5.1.2 RIGHT TO A FAIR TRIAL IN MALAWI

Due process and procedural fairness are at the heart of a just legal system, and include the rights to be presumed innocent until proven guilty, to know of any charges, to a fair hearing, to challenge the legality of detention, to name a few. These guarantees are undermined where alleged perpetrators, victims, or those who represent them legally are discriminated against by those supposedly administering justice. As the following summary of the trial against Steven Monjeza and Tiwonge Chimbalanga in Malawi shows, this kind of discrimination exists at the highest levels.⁹⁵

Steven and Tiwonge married at a symbolic ceremony in the winter of 2009. In Malawi, their country, consensual same sex conduct between men (defined in the Penal Code as 'carnal knowledge ... against the order of nature' is criminalized. Soon after the ceremony Steven and Tiwonge were arrested and detained. At their trial, they were both convicted and sentenced to the maximum of 14 years with hard labour. The public prosecutor asked for a heavy sentence because the men had left "a scar on morality" in Malawi, and the magistrate followed this lead. The magistrate described the men's conduct as "against the order of nature" and further stated "I will give you a scaring sentence so that the public be protected from people like you, so that we are not tempted to emulate this horrendous example ... To me this case counts as the worst of its kind and carries a sense of shock against the morals of Malawi. Let posterity judge this judgment."⁹⁶

The case provoked international outrage. Apart from highlighting the unjust ruling against the two men, activists and supporters also emphasized the negative effect that the verdict would have on the fight for human rights in Malawi and in the region as a whole. Gift Trapence, director of the Centre for the Development of People responded by stating that "human rights have been trodden upon", while Undule Mwakasungura, head of the Centre for Human Rights and Rehabilitation explained that "We have been let down. Homosexuality is both a human rights and a public health issue."

In response to pressure, Steven and Tiwonge were subsequently pardoned. Homosexuality remains highly taboo in Malawi, and in January 2011 the then President Bingu wa Mutharika assented to a law being passed in Parliament that criminalized, for the first time, acts of gross indecency, whether in public or in private, between females. In a positive move, since coming to power in April 2012, President Joyce Banda has said that LGBTI people will no longer be persecuted in Malawi. The Minister of Justice said that laws criminalizing same-sex conduct would be suspended until further debate,⁹⁷ but later retracted these remarks.

5.2 POLICE ABUSE

Amnesty International received several reports of police abuse of LGBTI people in Cameroon, Uganda and South Africa. These were in addition to reports of arrests of activists under criminal provisions targeting sexual behaviour and gender non-conformity, or on other spurious grounds such as ‘promoting’ homosexuality. The reported abuse ranged from extortion and corruption, to beating LGBTI people whilst in detention, to intimidating LGBTI people by detaining them without charge.

Michel Togue told Amnesty International that in Cameroon, “corruption and extortion is a real problem – not only extortion targeted at gay men, but as happened in a recent case, men who are caught buying condoms, even though that is legal.”⁹⁸ Togue was referring to the case of two men who were buying condoms and lubricant in a pharmacy in early 2011. The staff reportedly accused the men of being gay, and called the police. The men were subsequently arrested and charged with ‘homosexuality’. Alice Nkom, barrister for the accused, president of the Project for the Support and Assistance of Sexual Minorities (PAEMH), and founder and president of the Association for the Defence of Homosexuals (ADEPHO), told Amnesty International more about the case:

“I tried to release these men from detention at the police station. The Prosecutor told me that their place is in jail. They have now been released but they are awaiting their court date for their trial. The only supposed evidence of their homosexuality was the act of buying condoms and lube. The judge ordered an anal examination. Initially, five doctors refused, for it is an act of torture and indignity, but one eventually performed the examinations.”⁹⁹

The men were eventually sentenced to six months in prison.¹⁰⁰

Blackmail and extortion – including threats of disclosing the victim’s sexual orientation or gender identity – are one of the serious and common ways in which the human rights of LGBTI people in sub-Saharan Africa are violated.¹⁰¹ The threat of disclosure is of particular concern in countries where homosexuality is criminalized, because the risks of reporting blackmail to the police involve not only those associated with exposure to family, friends and the wider community, but also the possibility of arrest and imprisonment. Even where there is nominal protection for complainants, police frequently ignore the blackmailing or extortion complaint and level charges for homosexuality.¹⁰² It is to be welcomed that there have been increasing efforts by civil society groups and others to raise the profile of the problem and to expose the people involved.¹⁰³ Sometimes, as in the following case, police perpetrate the blackmail themselves.

Frank Mugisha told Amnesty International that “[i]n 2008, the police were trying to blackmail LGBTI activists. After arresting two transgender people and putting them in police custody, they came to my place looking for me. Our lawyer confirmed that the police wanted me and other key activists. Unidentified people followed me around the city, and after being followed around I left the city for the airport to Nairobi on a boda boda (motor bike).”¹⁰⁴

In South Africa, police brutality has become an increasing concern for everyone though it affects LGBTI people in particular. Leigh-Ann told Amnesty International of three specific incidents of police brutality occurring shortly after pride events in and around Johannesburg:

*"In general, police brutality against LGBTI people is a real issue. There have been a number of incidents of abuse and harassment by police of lesbians following prides. Following KwaThema Pride (Ekurhuleni Pride) in September 2010, a woman walking home from the pride was harassed by the police. And there were two incidents following Soweto Pride. One woman, called Maki, was pulled over by the police. A female cop threw her in the back of her van, and drove her around for hours. The cop said a lot of derogatory stuff about gay people. After the last pride in Soweto (September, 2009), seven lesbians were arrested in KFC and were abused in police custody. One of the women involved, P, went on a TV show on ETV to talk about the incident. One year later, the cops raided a party where she was at, and used pepper spray on everyone, including people who were asleep. There were four vans and 20 police. They said there had been a noise complaint. They lined people up outside, and said 'fucking lesbians, where's your ETV now? Who's gonna save you now?' 11 people were taken into custody, but all got released. The court case was on the following Monday, and the prosecutor threw the case out of court."*¹⁰⁵

Again in South Africa, Nonhlanhla Mkhize from the Durban Gay and Lesbian Community and Health Centre told Amnesty International that her organization had been "trying to understand the pattern of rape, and to look at police brutality across the board. They have inherited a terrible way of handling people."¹⁰⁶ She highlighted the policing culture stemming from the apartheid era as an underlying factor. She talked about the critical issue of police impunity for attacks against LGBTI people by members of society. Nonhlanhla was attacked in an arts and recreational centre in Durban, in front of many people, just days before her meeting with Amnesty International. She said that her attacker shouted gender insensitive and homophobic remarks at her during the attack. "After the attack, the police (SAPS) at the establishment just stood there. When called to intervene they told us to wait for the police services we had called to come."¹⁰⁷ Inadequate responses by police to crimes against LGBTI people throughout South Africa are an ongoing problem, and may violate the rights to life and security of the person. More times than not, cases are not adequately investigated, prosecutions do not occur, and victims are denied justice. See section 7.2 entitled 'Lesbians' for a more detailed discussion.

Nonhlanhla also told Amnesty International about two cases that the Durban Lesbian and Gay Community and Health Centre had recently worked on – the first related to an abuse of police power and harassment against the women involved, while the second case was another example of the state's failure to hold perpetrators of violent crimes directed at LGBTI people to account:

*"One case we've been working on is the case of two (lesbian) girls who were arrested by a police officer outside a popular gay and lesbian entertainment venue for allegedly kissing in public. The police officer put them into a four door police van (a bakkie) and took them to a nearby police station, where he parked for a while before taking them for a long drive. The police officer made sexual advances in exchange for their freedom. Eventually he asked for their telephone numbers and then dropped them home. Another case was a young gay man who got beaten up by another man in his university halls of residence, for allegedly looking at him in an open plan shower room. He reported the attack, but the police refused to investigate."*¹⁰⁸

In Cameroon, Amnesty International's research suggests that although gay men are arrested more frequently than lesbians, lesbians, when they are arrested, are also subjected to abuse and brutality by police officers as well as by members of the community. Lesbians are subjected to multiple forms of discrimination, in that they are targeted and controlled by men both because of their gender and their sexual orientation.

*"In general, lesbians are more accepted, because there is an element of men wanting to witness that. But they tend to suffer more violence from their own families, as well as from the police. For example, there was a case of a lesbian woman who suffered so called 'corrective rape' in 2008. When the police arrested the perpetrator, they told her that he had had the right to 'cure' her by raping her. LGBTI people in general face extortion and police harassment. And there is no power to denounce the police as the media will not give space to LGBTI people."*¹⁰⁹

In the incidents described above, police officers discriminate against LGBTI individuals, even as the LGBTI individuals seek protection from abuse in their communities. This discrimination in practice is in violation of the human rights obligations of the state. International human rights law establishes an obligation on the state to respect, protect and fulfil the human rights of all people under their jurisdiction without discrimination on the basis of sexual orientation or gender identity. Police officers, as agents of the state, fulfil a key protection function, which is undermined by discriminatory attitudes and behaviour.

Adrian Jjuuko, the then Coordinator of the Civil Society Coalition on Human Rights and Constitutional Law in Uganda, told Amnesty International of an example of where police bring prejudice to bear in their work. He recounted an incident where he was standing outside court, assisting LGBTI activists in a case, when a police officer approached him and said: "You are a good looking man, what are you trying to do? You are helping recruiting children. If I was your mother, I would have strangled you between my legs when you were born."¹¹⁰

Pervasive attitudes about the 'proper' roles for men and women also influence how the police treat LGBTI people in the course of their work, and their targeting of LGBTI people. States have an obligation under international law to take appropriate measures to eliminate 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."¹¹¹

WORKING WITH THE POLICE IN RESPONSE TO VIOLENCE AGAINST LGBTI PEOPLE

In some countries the police are significant perpetrators of human rights violations against LGBTI people. In others, it is police inaction in the face of ongoing human rights abuses by non-state actors, as well as secondary victimization by police, that warrants attention. And in many, it is both. Secondary victimization is where police or other service providers display victim-blaming attitudes, behaviours and practices, which result in additional trauma for the victim.¹¹² In South Africa, numerous activists Amnesty International spoke to talked about a need for greater police monitoring of violence against LGBTI individuals, and for police to effectively investigate and prosecute this violence. Activists there also told how they have worked with police

to try to ensure a greater, more effective and timely police response to the ongoing cases of sexual violence and murder directed at LGBTI individuals in South Africa.

Professor Juan Nel from the Department of Psychology at University of South Africa, and a member of the Hate Crimes Working Group, told Amnesty International about what is needed in terms of police reform in South Africa, in particular, the need for the police to commit to the monitoring of hate crimes.¹¹³ Nel has been at the forefront of developing a hate crimes monitoring form to be used by the community-based and service-provider organizations to capture information about hate crimes, to identify and monitor when hate crimes have taken place, and to enable them to do the necessary follow ups and referrals:

“One recommendation from the Hate Crimes Working Group has been the need for monitoring by police. In the wake of hate crimes, there is a lot of ignorance, personal shame and secondary victimization and therefore, also delayed help and health-seeking behaviour. Delayed access to services implies delayed healing. The police, for instance, do not record any so-called ‘corrective rape’ hate crime as a hate crime. We need to increase their awareness around the reporting of such rapes. Also, we need to ensure the accessibility of the criminal justice system to all LGBTI victims of hate crimes. If we can do this, and subsequently improve services, then the healing process will be easier.”¹¹⁴

The Triangle Project, an organization based in Cape Town that advocates for the rights of LGBTI people, said that, in their experience, it makes a difference if police and the justice system record and prosecute hate crimes against LGBTI individuals as hate crimes:

“With cases of violence, we monitor cases, meet with prosecutors, and push arguments to get discrimination on the basis of sexual orientation as an aggravating factor. This influences the way that violence is viewed. What is commonly reported is a very narrow perspective.”¹¹⁵

Often police officers require training on how to treat LGBTI individuals with respect. In Katlehong (a township east of Johannesburg) the Forum for the Empowerment of Women, an organization working on a broad range of gender issues, has developed a partnership with the police, partly in response to frequent reports of secondary victimization by the police:

“Secondary victimization by the police is a serious issue. In Katlehong, we are trying to create a working model with the police. We want the police to understand sexuality issues, and be sensitive and responsive to them.”¹¹⁶

5.3 FREEDOM OF EXPRESSION AND ASSEMBLY

LGBTI people in some sub-Saharan African countries are criminalized for the expression of their sexual orientation not only in the context of their intimate relationships, but in their social lives and activities. Sometimes, the criminalization of LGBTI individuals takes the form of laws that limit their ability to communicate with others, to organize for the purpose of advocating for LGBTI rights, to dress in a manner of their choosing, to display affection for others of the same sex publicly, to write for, appear in, or possess, literature and media, and to have access to or distribute materials relating to sexual health, including HIV prevention and treatment.

In September 2012, Ugandan authorities detained a British theatre producer, David Cecil, for staging a satirical comedy which featured a gay Ugandan protagonist. The play was staged despite a warning from the Media Council. Cecil was subsequently charged with “disobedience of lawful orders”, and could have faced four years in jail if convicted. The Ethics Minister said that the play was banned because “the play is justifying the promotion of homosexuality in Uganda, and Uganda does not accommodate homosexual causes. We will put pressure on anyone saying that this abomination is acceptable.”¹¹⁷ The ‘promotion’ of homosexuality is not in fact illegal under Uganda’s current laws, but would be should the Anti-Homosexuality Bill 2009 be passed. In January 2013, a magistrate dismissed Cecil’s case, but in early February immigration authorities detained him for five days, for being ‘undesirable’.¹¹⁸ Ignoring a legal effort to appeal this decision, they then ‘indefinitely’ deported Cecil, separating him from his Ugandan partner of 6 years and their two children.¹¹⁹

Criminal law provisions have been used by governments in some African countries to conduct raids on LGBTI organizations’ offices, workshops and conferences, often with the subsequent arrest of defenders of the human rights of LGBTI individuals. In August 2012, police officers raided the Harare office of Gays and Lesbians of Zimbabwe (GALZ) on two separate occasions. On the first occasion, on 11 August, police assaulted many activists and arrested and detained 44 people, violating the right to personal liberty provided for in Zimbabwe’s own constitution as well as under regional and international human rights law. Although the activists were released without charge, some of them were subject to further questioning by the police at their own homes and workplaces the following week. On 20 August, the police searched the GALZ office for six hours and confiscated computers, documents and other advocacy materials. On 23 August, GALZ was charged with running an “unregistered” organization in contravention of Section 6(iii) of the Private Voluntary Organization Act. For the first time in 20 years GALZ was forced to close its offices indefinitely for fear of further police raids.

Since the introduction of the Anti-Homosexuality Bill to parliament in 2009, and particularly in 2012, the Ugandan government has increasingly clamped down on LGBTI organizations and events in Uganda. In June 2012, a police raid closed down a workshop attended by LGBTI and human rights activists and their allies.¹²⁰ The workshop, organized by the East and Horn of Africa Human Rights Defenders Project (EHAHRDP), was designed to teach human rights monitoring and documentation skills to activists from Rwanda, Tanzania, Kenya and Uganda. A dozen police officers surrounded the building and sealed the exits. A pick-up truck with police in full riot gear then pulled up outside preventing anyone from entering or leaving. Many workshop participants escaped to their hotel rooms, but the police checked the hotel register before going from room to room to round them up. Workshop participants were held against their will for over three hours in the hotel. Three staff members of EHAHRDP and three conference participants were detained for one hour in a police bus. EHAHRDP was told to bring their registration papers to police headquarters the following day. The workshop raid and closure had no basis in Ugandan law and is a blatant violation of international human rights law.¹²¹

It followed another raid of a workshop organized by Freedom and Roam Uganda (FARUG) in Entebbe in February 2012, ordered by the Minister for Ethics and Integrity, who attended the raid personally, and who proclaimed the workshop ‘illegal’, threatening the use of force if activists did not leave ‘immediately’. The raid occurred the day after the re-tabling of the Anti-Homosexuality Bill. Activist Kasha Jaqueline Nabagesera, founder of FARUG and winner

of the 2011 Martin Ennals award for human rights defenders, had to flee the hotel to avoid being arrested.¹²²

During the LGBTI pride march that took place in Entebbe on 4 August 2012, the police shut down the event and arrested many of the participants, including staff members of Freedom and Roam Uganda, as well as activists, human rights defenders, and media workers from Uganda and other countries. Police alleged that a gay marriage was taking place, and that two gay men were seen kissing. They declared that the gathering was unlawful and attempted to arrest the whole group.¹²³

In Cameroon, on 27 March 2012, government officials prevented LGBTI activists in Yaoundé from holding a workshop on the rights of sexual minorities. The workshop had been financed by the European Union. The action of the authorities followed a violent disruption of the workshop by the leader and other members of a self-confessed anti-LGBTI group known as the Rally for Cameroonian Youth. Members of the security forces arrested Stéphane Koch, the organizer of the workshop, and detained him for several hours. Though those attacked filed complaints with the authorities, to Amnesty International's knowledge no action was taken against members of the Rally for Cameroonian Youth.

5.4 INCITEMENT TO DISCRIMINATION AND HATRED

Political opposition to LGBTI rights is becoming more visible, and vocal, in some African countries. Human rights organizations have documented how increased pressure on states to extend human rights to LGBTI people has been met with fundamentalist appeals to culture and tradition.¹²⁴ This backlash can be a response to both internal pressure, when LGBTI activists gain visibility, and external pressure, either directly from other governments or indirectly in the form of progress in other states.

Even South Africa, with its progressive legislation, and its strong leadership role on sexual orientation and gender identity at the UN, has struggled to curtail public statements of some political leaders. In 2010, President Jacob Zuma appointed Jon Qwelane, who had publicly opposed gay rights, as High Commissioner to Uganda, despite the fact that part of Qwelane's job would be to express South Africa's opposition to Uganda's draft Anti-Homosexuality Bill.¹²⁵ There was a concerted public campaign in South Africa to have his appointment reversed. In 2011, Qwelane was fined 14,450 USD for an anti-gay article he wrote in 2008 which was found to have "promoted hatred against homosexuals".¹²⁶ This was in response to a complaint lodged by the South African Human Rights Commission.

In many countries in sub-Saharan Africa, governments refer to culture and tradition to justify the violation of the human rights of those who are or who are perceived to be lesbian, gay, bisexual, transgender or intersex. Laws criminalizing homosexual activity are a legacy of colonialism, but this has not stopped national leaders from framing homosexuality as alien to African culture.

Political leaders also use nationalist rhetoric to stigmatize same-sex sexuality and LGBTI people. As mentioned previously, Cameroonian officials claimed in early 2011 that an EU grant to an NGO advocating for LGBTI rights infringed Cameroon's sovereignty, and requested that the grant be blocked. Cameroon and Kenya have rejected recommendations by the UN

Human Rights Council to decriminalize homosexuality, both claiming that homosexuality was not culturally acceptable in their countries.¹²⁷

In Uganda and Kenya, there is a widespread belief that LGBTI people are ‘recruited’ and funded by the West¹²⁸, and political leaders fuel this misperception to justify legislation criminalizing same-sex conduct. The Cameroonian Minister of Justice wrote in 2006 that “by virtue of the African culture, homosexuality is not a value accepted in the Cameroonian society.”¹²⁹

According to a 2008 study in South Africa, over 80 percent of South Africans believe that gay and lesbian people are ‘un-African.’¹³⁰ In 2008, South Africa opposed the accreditation of two LGBTI organizations to the UN Economic and Social Council (ECOSOC).¹³¹ However, since then, South Africa has taken a leadership role on sexual orientation and gender identity issues at the international level.

Political leaders often use statements characterizing same-sex sexuality as ‘un-African’ and attacking lesbian, gay, bisexual and transgender people and groups to drum up support amongst conservative constituencies, to attack their opponents and to distract from issues facing the country. The Presidents of Zimbabwe and Namibia, for example, have made statements linking homosexuality to corruption, paedophilia, child murder, pornography and other social ills.¹³² For political leaders who feel vulnerable, attacking an already marginalized group such as LGBTI people can be a prelude to attacking other groups like opposition parties and the press. Political leaders sometimes express hostility towards LGBTI people in attempts to divide civil society. Fortunately, an increasing number of civil society organizations embrace and advocate for an inclusive human rights agenda, supporting the human rights of LGBTI people, such as for example the Civil Society Coalition Human Rights and Constitutional Law, the Kenyan Human Rights Commission, and ADEPHO in Cameroon.

When politicians divert negative media attention toward LGBTI populations, it can also distract attention from real social or economic problems, including by mobilising conservative constituencies against LGBTI persons and in support of the government. In Uganda, the various re-introductions of the Anti-Homosexuality Bill have coincided with periods of widespread unrest about rising fuel and food prices, and have occurred in the broader context of clampdowns on civil society. In Zimbabwe, President Robert Mugabe has over the past 15 years regularly used his denunciations of homosexuality to distract from political and economic crises at home, and to ensure his own political support. He notoriously called gays and lesbians ‘worse than dogs and pigs’, and as recently as May 2012, said at an HIV and gender conference in Harare that homosexuality will lead to the extinction of the human race.¹³³ In some cases, politicians and other public figures make LGBTI persons scapegoats for the problems they are trying to obscure. In this manner, public commentators blame same-sex sexuality for moral decay and social ills and couple such comments with nationalistic constructions of ‘authentic’ national identity and calls for the deportation of those persons perceived to be LGBTI.

6. VIOLATIONS BY NON-STATE ACTORS

“If you often come to me for salt for your sauce, why don’t I know what goes on in your bedroom?”

Adrian, Kampala

6.1 VIOLENCE, HARASSMENT, INTIMIDATION AND DISCRIMINATION

Discriminatory attitudes, violence, harassment and intimidation towards LGBTI people pose a big challenge in many African countries. Hostile attitudes towards LGBTI populations are widespread, but by no means universal throughout Africa, and there are important differences both between and within countries.

In Uganda, evictions of LGBTI people by their private landlords occur regularly, because of their sexual orientation or gender identity. Kasha Jacqueline Nabagesera told Amnesty International that her landlord had recently informed her that she was to be evicted. Kasha had only been in her accommodation for three months. The landlord told Kasha that she did not want “someone like that” in her home.¹³⁴ Pepe Julian Oziema, a human rights activist working with Sexual Minorities Uganda and recipient of the Clinton Global Citizen Award 2012, told Amnesty International about the difficulty he has experienced in trying to find stable, long term accommodation in Kampala.

PEPE’S STORY:

“I was recently evicted from my apartment with my partner. In my old place, I came out to my landlord. He was okay with it at first but he came under pressure from his wife. They kept seeing my image in the media as one of the ‘top 100 gays’. I kept my motorbike out the front of the house. One day I had my tires punctured. One day the landlord asked if there was a way I could change my job, but said, ‘I don’t have a problem with you.’

Every time I walked out of the gate in front of the house, I walked straight onto a boda boda or into Frank’s car, and I would call the shopkeeper to bring shopping to my gate (for safety). One day, the shopkeeper said ‘I am not selling stuff to someone like you.’ In the New Year, my landlord said ‘you have to leave the house in two weeks.’ I said ‘what about the contract’, and I asked him to put the request for our eviction in writing. He refused and gave us a month to leave instead of two weeks. After that, the wife started saying we had to pay for this and for that.

Finding a place is really hard. We have a broker who knows us and acts for us. When the broker found a new place, the new landlord said to the broker, 'how can you call me for this thing,' ('thing' referring to Pepe). In our current place, we have neighbours who have kids. We really fear problems with this. Our neighbours have already started shouting at their kid for doing 'high fives' with me and my partner. So there is already discomfort. We are also concerned because the wall outside our property is short, and people could jump in. Our agent also said to me, 'you look like a boy.'"¹³⁵

FRANK'S STORY

Frank Mugisha told Amnesty International about some of the harassment and violence he has faced from neighbours as well as from strangers:

"We also had problems with our neighbours. Our old neighbours said to me, 'why are you still alive?' Sometimes, people would come and gather out the front to watch me get in the car and go to the shops. Our new neighbours talk about me a lot. I can hear them. I moved because the last place became a gay haven [he had lots of LGBTI friends visiting, and that was noticed by neighbours]. I had my car tires slashed. David Kato used to come to that place a lot. A gas station owner told me 'you should never leave your car here again.' Once, a woman slashed my tires. Another time, when I was working on the Bill [the Anti-Homosexuality Bill], I parked outside, people pulled up in a car and got out. They started teasing me and said, 'if we gave you a woman would you have sex with her?' I drove off but they followed me in their car.

Another time I was out shopping. A man came up to me and slapped me hard across the face and said to everyone around, 'he is a homosexual.' After all of these incidents, I moved house.

There is so much homophobia here. I am so paranoid and do not sleep very well."¹³⁶

Denis Nzioka, a gay activist based in Nairobi and the then spokesperson for Gay Kenya, explained to us the incidents of harassment and violence he has experienced. Although the Kenyan media is generally less sensationalist than the Ugandan media when it comes to LGBTI issues, Denis has still faced threats and harassment because of his media exposure through his work. Denis told Amnesty International:

"One radio station, Easy FM, put my name on their website. This received thousands of comments. People blamed me for the drought, the tsunami, everything. There were some really nasty comments. Now I only go on TV or radio if necessary. I have a security plan in place. I have also been evicted a number of times. The first two times were because of neighbours harassing me. In the first place, the neighbours sent a letter saying, 'We, the residents of the apartment block, because we know you are homosexual, and you will target our kids, are giving you three days to leave, lest we get some of the 'boys' to come and evict you.' The neighbours also informed my deeply Christian landlord. At the time I didn't know where to move to. It was all very messy. I didn't have the money to relocate, and I wasn't talking to my family.

The third time I was evicted, I got in touch with Protection Desk Kenya, and they gave me a crash course in personal security. Personal security is a grey area. If you do not speak out, how will you push for rights? I often notice signs – for example, the boys at the barber shop staring at me, or the man behind the till at the supermarket, who said, ‘have I seen you on TV, something on homosexuals?’ I thought if he knows, then who else does?

I am single and live alone; my previous partner was not out and faced challenges whenever he was seen with me in the streets or at social events. Outside my current workplace [now previous workplace], at the beginning anyway, the mechanics downstairs jeered and called me names.

In general though the harassment here is sporadic when compared to Uganda – it is much more common there. Also, there is a lot of positivity here. A bus full of girls met me recently, and they giggled and said that they read my columns.

I am in the media a lot. I have been evicted three times, and attacked twice by strangers. Once was in a matatu (a bus), when I was holding my partner’s hand. The second time, I was walking down a street, and someone recognized me and threw stones at me. I remember an incident in Mombasa where we had a community pageant show and I was the chief judge; after the show as I was leaving some youths threw stones at me while calling me names. It was scary since I was alone and they were many. I have received countless death threats, by email, telephone and through Facebook - one of which said ‘I have been sent to kill you.’¹³⁷

In Cameroon, activists from LGBTI organization Alternatives Cameroon were subjected to aggression from neighbours and surrounding businesses when they opened their access centre. However, when people found out that the centre provided health care, and was not just an LGBTI advocacy organization, their attitudes changed. Executive Director Yves Yomb told Amnesty International:

“People are more sensitive to the health issue – it opens peoples’ minds to LGBT, in that everyone should have the right to health care etc. There was a lot of aggression when the access centre opened, but people became more sensitive due to the health issue.”¹³⁸

On 11 January 2011, the EU announced a grant of 300,000 Euros to an LGBTI organization in Cameroon led by barrister Alice Nkom, called Project for the Support and Assistance of Sexual Minorities (Project d’assistance et d’encadrement des minorités homosexuel(le)s, (PAEMH). On 14 January, the EU representative in Cameroon was summoned by the Cameroonian Minister of External Relations, and the government’s disapproval of the funding was expressed. There was an immediate negative backlash in the media, with headings such as ‘Cameroon, EU finances homosexuality: financing of illegality’¹³⁹. Community members expressed disapproval as well. Yves Yomb explained:

“We got a very strong reaction regarding the EU funding. I faced many attacks after this, and we stopped our outreach activities at Alternatives Cameroon for a while. There was also a strong media backlash. Before the funding uproar, homophobia was a lot less tangible.”¹⁴⁰

Different forms of discrimination often intersect to affect different LGBTI people in different ways. Some LGBTI people, because of their economic situation, class, caste, sex or race, for

example, are more vulnerable to discrimination, harassment, violence and targeting by state authorities.

In Uganda, many activists told Amnesty International that there was an increase in incidents of harassment and violence against LGBTI individuals, as well as more sensationalist coverage of homosexuality in the press, after US evangelicals visited the country in 2009 and publicly preached that homosexuality is evil. Incidents also went up after the first introduction of the Anti-Homosexuality Bill in the same year. Adrian Jjuuko told Amnesty International that most Ugandans want to know about the personal lives of their neighbours, and that this is largely due to the socio-economic set up of the country especially in the rural and peri-urban areas, which are characterized by mutual dependency. He said the predominant attitude can be captured by the following saying: "If you often come to me for salt for your sauce, why don't I know what goes on in your bedroom?"¹⁴¹

He said that this curiosity is coupled with a reluctance to talk about sexuality in general. He told Amnesty International that:

*"Talking about same-sex sex is almost beyond comprehension for most Ugandans. The first reaction for most people when they hear about homosexuality is fear – fear of the unknown. People have been taught to associate homosexuality with the recruitment of children. This started as a political argument but has now turned into something that people believe. Perception is more important than reality."*¹⁴²

Professor Vasu Reddy, Deputy Executive Director of the Human and Social Development research programme at the Human Sciences Research Council in Pretoria, told Amnesty International his views as to what is causing the continuing violence and discriminatory attitudes in South Africa, and urged vigilance in relation to discriminatory attitudes:

*"The main challenges are full citizenship, discrimination and prejudice still being a daily material experience, and indeed violence, whether physical, structural or psychological. Mindsets have not yet fully changed, despite us having constitutional democracy. Self-acceptance and societal acceptance is still a big issue, along with unemployment, access to justice, a broad set of inequalities, and social and economic upliftment. The majority of LGBTI people in South Africa are black, and they are shaped by the broader challenges of being black in South Africa. And, in spite of major changes since apartheid, they are still caught in the quagmire of social inequalities in comparison to other South Africans. In relation to violent crimes, men find it very hard to come forward and report them. Even though we are a secular and tolerant state that values dignity, respect and equality, at a micro level, within some churches especially, there is the doctrine of homophobia. There is also the culture and tradition debate, i.e. that homosexuality is foreign to South African culture and traditions and that homosexuality is Western, decadent, abnormal and pathological. The belief in conversion therapy within some churches prevails. There is a danger of sliding towards the Ugandan context and environment, but we hope that given our legal protections within a Bill of Rights culture, we will be able to resist and confront homophobia. A two thirds majority is needed to change the constitution. Democracy is fragile. However, we have to remain vigilant. Civil society needs to constantly mobilize."*¹⁴³

Janet Jobson, a Cape Town based activist, told Amnesty International about how different levels of homophobia and discrimination are experienced in different parts of South Africa, and by different people depending on race and class:

*"Everywhere there is homophobia in South Africa, but the severity depends on the space you are occupying. For example, in Cavendish (a primarily white upper class shopping mall in Cape Town) you could safely hold hands, but not so in most other areas. There is more of a middle class black lesbian identity in Johannesburg, where a lot of space is being reclaimed. Different threats are faced by different groups/classes which are driven by a number of factors. Part of the relative 'safety' of suburbs and middle-class spaces is simply the reality that you are able to more easily avoid 'dangerous' situations. By driving a car, having the choice of which spaces to occupy, living in a private home behind a high wall etc it is easier to control your safety. There are definitely some safe spaces within townships, and many LGBTI allies. Some people are openly gay in townships, but because lives in general are lived more in the public space – out of the reality of resource positioning – these spaces can be more dangerous or policed by other residents."*¹⁴⁴

6.2 RISKS FOR HUMAN RIGHTS DEFENDERS

In the countries where Amnesty International conducted interviews, human rights defenders working for the rights of LGBTI persons reported facing severe obstacles to carrying out their work, and some even receiving death threats. This was reported regardless of the sexual orientation and gender expression of the LGBTI human rights defenders. For example, Amnesty International spoke to Michel Togue, a heterosexual lawyer, who has found that his professional life has suffered because of his willingness to defend people accused of homosexuality in Cameroon:

*"I have definitely suffered professionally because of my willingness to defend homosexuals. My colleagues have said that as I defend gays, I must be gay myself. People believe that the EU is recruiting advocates to defend homosexuals. In my government file, it says that I have defended homosexuals. We really need training for advocates, education and sensitization. I have tried to point out to my colleagues that they defend murderers and thieves, and that gay men are merely being persecuted because of their sexual behaviour. You need a strong will in this country to defend human rights."*¹⁴⁵

Since October 2012, Michel Togue, along with his colleague Alice Nkom, has received numerous death threats, directed at him, his children and his wife. The threats, by email and by phone, have called on the human rights lawyers to stop defending people accused of homosexuality.¹⁴⁶

Again in Cameroon, Dr Basile Ndjio, senior academic from the University of Douala, found his academic freedom stifled when the university administration found out about his research on sexual orientation and gender identity issues:

"The growing homophobic sentiment that now prevails even in the academic milieu in Cameroon makes it very difficult to conduct scholarly research on homosexuality, which is increasingly considered a taboo subject by many colleagues. I still remember that I was once questioned by a former Dean of my faculty who was furious at me because he was told that I

was doing research on what he called a 'nasty and perverse topic'. I was also suspected of encouraging some of my students to switch their research interest towards same-sex relations. In reply to his concern, I had to remind him that I was an academic and for that reason there could not be a taboo or forbidden subject for me. I also explained to my boss that I wanted to move the topic (homosexuality) from the darkness of ignorance and stereotypes to the light of scientific enquiry. At the time, around 2008-2007, there was very little academic study on homosexuality. One of the first pieces of work on the topic was conducted by a former masters student from the University of Yaounde, who was later forced into exile. When I was looking for research assistants, only one of my students was brave enough to collaborate with me on research that dealt with homosexuality. The other students who were also contacted but turned down my offer, later explained to me that they feared being marked as gay or lesbian by their fellow students. Now, I am the only local scholar working on the issue along with one former student. And there is no doubt that this has had disciplinary implications that are not necessarily positive.¹⁴⁷

In South Africa, we spoke to Margaret*, a Johannesburg-based attorney who dedicates ten per cent of her time to working pro bono on cases of violent crimes committed against LGBTI individuals, ostensibly because of their sexual orientation or gender expression. She told Amnesty International about some of the challenges of the work:

"It is a high risk environment working on these cases. There is always a lot of activism outside the court, and it is often hard to work out who are the good guys and who are the bad guys."¹⁴⁸

6.3 THE GAP BETWEEN LAW AND LIVED REALITY IN SOUTH AFRICA

Amnesty International has documented a persistently high number of rapes and murders of LGBTI people in South Africa, in particular lesbians. Even though South Africa does not criminalize same-sex conduct, and in fact has one of the most progressive constitutions in the world on this topic, levels of violence and threats of violence against LGBTI people are persistently high, particularly against those living in townships and rural areas. Taunts, insults and threats are a constant reality and are in fact so common that many LGBTI people do not even recognize them as a form of violence. Sexual assault and other physical attacks against LGBTI people are also all too common. Lesbians, and LGBTI people who do not conform to culturally approved models of femininity and masculinity live in fear of being assaulted¹⁴⁹, raped and murdered¹⁵⁰ by men.¹⁵¹ Between June and November 2012, at least seven people, five of them lesbians, were murdered in what appears to be targeted violence related to their sexual orientation or gender identity.¹⁵² The other two were gender non-conforming gay men. These incidents of sexual assault and murder of lesbians have also occurred in the wider context of persistent, high levels of violence against women in general.

In one case, in the early hours of Sunday 24 April 2011, a 24-year-old lesbian activist, Noxolo Nogwaza, was murdered on her way home from a night out with friends in KwaThema – a township east of Johannesburg in Gauteng province. Her attacker or attackers raped, repeatedly stabbed and beat her before dumping her body in a drainage ditch. After Noxolo was murdered, her case was assigned to Tsakane police station for investigation. Since the time of her murder in April 2011, little progress has been made in investigating the case and

bringing the perpetrators to justice. Vital evidence and opportunities appear to have been lost. In late 2012, the family were informed by the police that they had referred the case to the Office of the Director of Public Prosecutions for a decision. In March 2013, the family were informed that an 'informal' inquest would be held in April 2013 in the local magistrate's court. This is a limited inquest inquiry procedure, and as such, would leave the family and Noxolo's supporters with many questions unanswered and little justice. For more information, see chapter 7.2 entitled 'Lesbians'.

Professor Juan Nel talked to Amnesty International about the context in which these crimes have been happening in South Africa:

*"The judicial system is so broken. Contact crimes make up a very high percentage of all crimes. We have a victimized society and a very patriarchal society. The issue of gender non-conformity and its relation to violence is very significant. In cities, there is more of a push for gender equality, but also more of a push against it from men invested in patriarchy. Gay men need to report and write about their experiences of violence more. In Gauteng, the Western Cape and KwaZulu-Natal, men's vulnerability is almost as much as that of women, according to three 'empowerment studies' conducted by OUT LGBT Wellbeing and the University of South Africa Centre for Applied Psychology between 2002 and 2005. Black gay men are subjected to the same levels of sexual assault and are highly victimized. The media though tends to only pick up stories about black lesbians in townships being attacked. The least victimized are white lesbians, white gay men are in the middle, and the most victimized are black lesbians and black gay men, according to research done by OUT LGBT Wellbeing in Gauteng."*¹⁵³

6.4 THE ROLE OF THE MEDIA

Media outlets in some sub-Saharan African countries provide a platform where discriminatory attitudes towards LGBTI people can flourish. Some media accounts whip up hostility and fear about LGBTI people. Others publish identifying details about specific individuals. Whereas media outlets have the right to freedom of expression, they do not have a right to incite violence or abuse. The government has an obligation to prevent abuse and to counter misinformation in the public space with more accurate information that mitigates discrimination. The government also has an obligation to prohibit, by law, any advocacy of hatred that constitutes incitement to violence or discrimination.¹⁵⁴ Further, where media accounts publish details about individuals in a manner that predictably leads to harassment, violence and even murder, the government must prevent violence and protect potential victims before the abuse happens, and investigate and prosecute alleged perpetrators where violence does occur.

Generalized hostile comments about LGBTI populations predictably put LGBTI people at additional risk of abuse, not just those who are named as targets. By publishing articles expressing hostility and resentment towards LGBTI individuals, media outlets may contribute to an increase in the frequency of attacks on those who do not conform to heterosexual norms. Fear of attacks forces LGBTI people to stay firmly closeted. In many cases, governments fail to evaluate whether specific media accounts amount to advocacy of hatred constituting incitement to violence or discrimination, and certainly do little to prevent the predictable surge in violence following public media attacks on LGBTI people.

In 2006, the Cameroonian newspaper *L'Anecdote* published a list of “The Top 50 Presumed Homosexuals in Cameroon.” The 47 men and three women were public figures deemed by the newspaper to be corrupt, and therefore, the paper concluded, must be homosexual. The newspaper accused “rich, corrupt homosexuals” of trying to seize power, and invented words like “homocracy” and “anusocracy” to describe them.¹⁵⁵

In many instances, media reports have demonstrably stirred and inflamed hostility against LGBTI people, and, as a result, may have put individuals suspected of being LGBTI in danger. After Zoliswa Nkonyana was killed in South Africa in 2006 by a group of men for being a lesbian, a newspaper printed names and pictures of her friends, placing them at risk of violence.¹⁵⁶

Kenyan newspapers often feature articles which express hostility against LGBTI people and rights, and sometimes border on advocating hatred and inciting violence against LGBTI people.¹⁵⁷ Tabloid newspapers in Uganda have directly advocated violence, including even hanging, against specific individuals identified as (or suspected to be) LGBTI and have printed personal information about the same since 2002.¹⁵⁸ These campaigns have intensified since the introduction of the Anti-Homosexuality Bill in 2009. *The Red Pepper*, a daily tabloid newspaper, has offered to pay its readers for stories of ‘outed’ homosexuals.¹⁵⁹ Giles Muhame, the founder of *Rolling Stone*, a weekly tabloid in Uganda, has compared homosexuality to terrorism and murder; the paper reported in 2010 that bombings in Kampala, for which members of Al-Shabab claimed responsibility, were supported by ‘sexual minorities’.¹⁶⁰

In Uganda, *Rolling Stone*, *The Onion*¹⁶¹ and *The Red Pepper* have published names, pictures and other identifying information about individuals who they claim to be LGBTI. A photograph of David Kato, a prominent LGBTI rights activist, appeared on the cover of *The Rolling Stone* in 2010, and his personal details, along with those of many other people, appeared inside. The headline read “Hang Them.” David Kato received death threats as a direct result of the article. In January 2011, he and two other LGBTI activists successfully obtained a permanent injunction preventing the paper from publishing any more details about individuals rumoured to be gay or lesbian.¹⁶² Less than a month later, David Kato was killed in his home in Mukono, Uganda.

When media outlets attempt to redress the balance by providing a platform for LGBTI activists, they are sometimes punished by government entities, seemingly for contravening the dominant discourse, or morality, about homosexuality. A radio talk show that hosted three LGBTI activists in 2006 was fined 1.8 million shillings (US \$677)¹⁶³ by Uganda’s Broadcasting Council.¹⁶⁴ In 2007, the same council suspended a broadcaster who interviewed a lesbian human rights activist; it claimed that the interview had been in violation of ‘minimum broadcasting standards’.¹⁶⁵ Such standards say that a broadcast cannot contravene ‘public morality’. International human rights bodies have clarified that the mere fact that someone is gay or lesbian can never be seen as an attack on public morality.¹⁶⁶

Adrian Jjuuko told Amnesty International that “more often than not there is no space given on television or radio to even start a dialogue on sexual rights.”¹⁶⁷ The LGBTI Security Committee echoed this sentiment by saying that: “whilst there are a small number of

supportive media partners in Uganda, usually organizations will have to buy space for anything positive at all about LGBTI people to be written, and even then it will usually be heavily edited. Papers are very wary not to be labelled as ‘pro-gay’ publications.”¹⁶⁸

International human rights law protects the right to freedom of expression and allows for the publication and expression of ideas and thoughts that are offensive to some, even deeply offensive. In fact, states may only restrict the right to freedom of expression to fulfil very specific aims and always in the least restrictive manner possible.¹⁶⁹ At the same time, international human rights law requires governments to protect everyone against discrimination and violence, including by curbing “advocacy of... hatred that constitutes incitement to discrimination, hostility or violence.”¹⁷⁰

Authoritative comments from the Human Rights Committee have clarified that ‘advocacy of hatred’ is more than just the expression of ideas or opinions that are hateful. For opinions and expression to be deemed ‘advocacy of hatred’ and therefore subject to mandatory state intervention, there must be a clear showing of intent to urge others to discriminate, be hostile (experience intense and irrational emotions of opprobrium, enmity and detestation) toward, or commit violence against the group in question, in this case LGBTI individuals.

All states in sub-Saharan Africa, save for Sao Tome and Principe, are parties to the International Covenant on Civil and Political Rights¹⁷¹ and therefore are bound to prohibit advocacy of hatred by law, as defined under Article 20 of the Covenant, and apply its legislation in a way that simultaneously fosters the free exchange of information and ideas.

6.5 THE ROLE OF RELIGION

“Just as there is neither Jew nor Gentile, neither slave nor free, nor is there male or female, for you are all one under Jesus Christ. I also believe that there is neither heterosexual nor LGBT, for you are all one under Jesus Christ.” Bishop Senyonjo, Kampala

Discriminatory practices within certain religions and discrimination espoused in the name of religion mean that LGBTI people in some African countries often find themselves excluded, harassed and victimized from yet another angle. Everyone has the right to freedom of religion and conscience, including the freedom to manifest such religion or belief in ‘worship, observance, practice and teaching.’¹⁷² However, there are limitations on this right when it jeopardises the ‘fundamental rights and freedoms of others’.¹⁷³

Some politicians, religious leaders, and other public figures frequently refer to Christianity and Islam as part of an authentic African identity that excludes the possibility of LGBTI Africans. In many parts of sub-Saharan Africa, Amnesty International found that for some, discrimination is both justified in the name of religion, and religion itself is used as a vehicle to discriminate.

Many individuals, including LGBTI individuals, find deep personal meaning and strength in their religious faith. Therefore, when religious leaders promote discriminatory attitudes towards, or the rejection of, certain populations, many members of society see this as legitimate and even a mandatory part of expressing their faith.

Leaders and representatives of disparate faiths and denominations have, at times, united in their condemnation of same-sex sexuality. In Uganda, for example, the Interfaith Coalition Against Homosexuality, which is comprised of Catholic, Protestant, Muslim and Baha'i groups, called for the arrest, deportation and even murder of LGBTI persons.¹⁷⁴ In Kenya, the day before a rumoured gay wedding was to take place in the city of Mtwapa in February 2010, Christian and Muslim leaders held a joint press conference in which they promised to "stand firm to flush out gays who throng this town every weekend from all corners of this country."¹⁷⁵

In strongly religious communities, public condemnation of LGBTI people by religious leaders gives implicit permission to individuals to express their own homophobia in public, which they often do in violent ways.¹⁷⁶ In turn, LGBTI individuals, many of whom are religious, are unable to confide in their religious leaders for fear that they will be expelled from the congregation, possibly publicly. They may also fear, from experience and from reports of the experiences of others, that their stories will be published in newspapers, that they will be reported to the police, or that they will be denounced from the pulpit as evil or demonic.¹⁷⁷

Religion is often conflated with notions of culture and tradition, and then used as a justification to condemn same-sex sexuality. The very existence of LGBTI Africans is often denied and same-sex sexuality or behaviour is largely blamed on the West. Meanwhile, the loudest and most public Western influence on this issue arguably comes from Western preachers, like Pastors Rick Warren and Scott Lively, who actively fund and promote homophobia in Africa.¹⁷⁸

A closer look at elements of faith and religion, and attitudes towards LGBTI populations in sub-Saharan Africa, indicates an opportunistic use of religion to marginalize non-gender conforming individuals and maintain structures of gender inequality. Many countries practice a combination of traditional religions with Western Christianity, with some highlighting those aspects of the various religions that best serve to maintain traditional gender roles and condemn homosexuality, even where the religious tenets are at odds with each other. For example, some practitioners who are married to one wife in church might take several 'unofficial wives'—which is not accepted in the Christian church—then reference Christianity to justify their rejection of LGBTI people.¹⁷⁹

African Christianity is broadly split between 'traditional' denominations, which were largely introduced during the colonial period, and more recent evangelical churches which are growing fast. Some leaders of the African Anglican Church acknowledge and lament that the church was brought to Africa by missionaries who did not see African culture as valid. These same leaders, however, accept and promote moral prohibitions on same-sex sexuality that echo the prohibitions imported by the colonial powers.¹⁸⁰ In 2010, the African Anglican churches resolved not to work with churches that supported same-sex marriage.¹⁸¹ Mirroring political leaders, some Anglican leaders in Uganda and Kenya have used homophobic rhetoric to distract attention from problems within the church, and hold LGBTI persons responsible for perceived social decay.¹⁸² Some pastors in Uganda preach that 100 percent of HIV infections are caused by LGBTI people¹⁸³, and that LGBTI people are actively involved in 'recruiting' children to become LGBTI.¹⁸⁴ They also frequently equate homosexuality with paedophilia.¹⁸⁵

In recent years, attitudes of some churches in the West have become more accepting of 'out' LGBTI parishioners and of the human right to non-discrimination on the basis of sexual orientation and gender identity, including, in some cases, with regard to marriage. Some conservatives, particularly from the USA, are therefore increasingly turning to African congregations to further their anti-LGBTI agenda.¹⁸⁶ They rely on African delegates to block the acceptance of LGBTI clergy, and present some churches' support for human rights as cultural imperialism, forcing 'Western homosexuality' on African societies.¹⁸⁷ Their efforts seek to further the notion that same-sex sexuality is fundamentally immoral, against religion and against culture.

Newer evangelical churches in Africa often receive funding from their counterparts in the West, particularly the USA. In Uganda, religious organizations like the Family Life Network work closely with US evangelicals. The Family Life Network hosted a conference in Uganda in 2009 which featured representatives from Exodus International, a US-based Christian organization with the stated aim of 'converting' gay and lesbian people to heterosexuality,¹⁸⁸ as well as Scott Lively, an American minister who has campaigned in several countries for the criminalization of 'public advocacy of homosexuality'.¹⁸⁹ Speakers claimed that gay activists from the West paid young people in Uganda to 'recruit' others into homosexuality.¹⁹⁰ On 14 March 2012, the US-based Center for Constitutional rights filed a federal lawsuit against Scott Lively on behalf of Sexual Minorities Uganda. The suit argues that Lively's actions in Uganda, including his campaign to strip LGBTI persons of basic human rights, constitutes persecution.¹⁹¹

US-based funding for religious groups that actively advocate against homosexuality in Africa has come not just from evangelical churches, but also from US government agencies. Pastor Martin Ssempe, who runs the Makere Community Church in Uganda and who has vocally opposed homosexuality as well as condom use and women's rights, received money under the Bush administration from a US programme designed to combat HIV/AIDS.¹⁹²

Often, incidents of harassment spike after religious sermons that express hostility towards LGBTI people. Several sources in Cameroon told Amnesty International that high levels of harassment, discrimination and violence started after a homily in 2005 by the Catholic Archbishop of Yaoundé, Monsignor Victor Tonyé Bakot, in which he condemned homosexuality and called it a 'perversion'. Joseph Achille Tiedjou, an activist with the organization ADEPHO, told Amnesty International:

*"[The Archbishop] gave a homily that gay men are involved in a plot to gain power in the 'buttocks of young men'. It also included a section on the supposed western plot to destroy Africa through homosexuality, and that the dire economic situation was creating the perfect environment for the 'recruitment' of young and poor men. One month after that homily, the newspapers followed suit. They published a list of the 'top 50 homosexuals' in the media. A huge number of people bought the papers. Journalists used this as blackmail and started creating terms like 'homocracy' and 'anusocracy'. Following the 2005 homily, the number of arrests and cases went up. The church statement gave power to judges, media and the police to arrest and condemn. One judge in a case said, 'as a Catholic, I cannot release this man'."*¹⁹³

Similarly, Alain*, a Cameroonian activist, told Amnesty International that “The Catholic church is the starting block of homophobia. Before the homily, nothing was said, even though it was a taboo.”¹⁹⁴

Despite the negative role that elements of religion have played and continue to play in the oppression and persecution of LGBTI people in sub-Saharan Africa, religion is of profound personal significance for many LGBTI Africans. Furthermore, there are several religious leaders, mostly Muslim and Christian, who speak out to call for religious and societal acceptance, and who propagate interpretations of religion that do not exclude minorities. In Amnesty International’s interview with Bishop Senyonjo in Kampala, he referred to a quote from the Bible to convey his view that LGBTI people should not be excluded from religion:

“Just as there is neither Jew nor Gentile, neither slave nor free, nor is there male or female, for you are all one under Jesus Christ. I also believe that there is neither heterosexual nor LGBT, for you are all one under Jesus Christ.”¹⁹⁵

In response to allegations that LGBTI people ‘recruit’ heterosexual people or children, Bishop Senyonjo stated that “human sexuality is not recruitment, it is development. It is their nature.”¹⁹⁶ He emphasized that sexual orientation has nothing to do with the notion of ‘recruitment’, but that it is a fundamental aspect of people’s identities, just like eye colour or race. He told Amnesty International that because of discriminatory attitudes and prejudice, it is very hard for LGBTI people to gain stable employment or accommodation. His organization, St Paul’s Reconciliation and Equality Centre, invests in and supports LGBTI individuals to enable them to provide for themselves and gain employment – to become, for example, sugar cane farmers, business people and farmers, to name a few. He said that he employs religious people in this work, including Christians and Muslims. He provides services that welcome LGBTI Christians, and he is “trying to reach out to other Bishops, including Bishop Ssempe” who has been very outspoken in advocating for the passing of the Anti-Homosexuality Bill.

Amnesty International also spoke to the Reverend Pieter Oberholzer in Cape Town, of Inclusive and Affirming Ministries - an organization that works with mainstream churches towards the full inclusion of LGBTI people. The Reverend spoke about the need for greater engagement of LGBTI organizations with churches, and for LGBTI people to be able to engage constructively with different interpretations of religion, rather than dismissing all religion as being homophobic. He also challenged more Christians to tackle religious fundamentalisms that exclude and denigrate LGBTI people:

“LGBTI people don’t know how to talk to churches. We tell activists that if they want progress they cannot shout at churches. If you shout, people will automatically think it is the work of the devil. The overriding axiom is that you cannot attack a person and change his mind at the same time. If LGBTI people understand that there is not just one interpretation of God, and the bible, then that can become liberating. LGBTI people need training for diversity in the Christian faith, and in the church there is a lot of homophobia. We try to stimulate progressive groups within South Africa. There is no single LGBTI support group for churches. The biggest problem as I see it is that the main LGBTI activists have surrendered their religious voice. They have never been questioned to judge or interpret what the bible says. There’s an unspoken assumption that we know what Christianity is. We need more Christians to target religious fundamentalism. We need to look at politicians’ homophobia and attack

religious homophobia, as you cannot work for human rights if you do not analyse the indicators that inform the lack of human rights.”¹⁹⁷

Islam, like Christianity, has also been used to justify the condemnation of same-sex sexuality in Africa; some countries and regions have implemented forms of Islamic shari’a law under which the maximum penalty for male homosexual acts is death.¹⁹⁸ However, there are progressive Islamic leaders and groups who are working towards more inclusive interpretations of Islam, and who are working with mainstream mosques and Imams to educate them about diversity. Amnesty International spoke to one such organization – The Inner Circle, based in Cape Town. They spoke about some of the challenges posed by being both LGBTI and Muslim, as well as the kind of work they do to encourage inclusion within Islam:

“The biggest challenge for queer Muslims is coming out to friends and family. Many people fear losing their family. It is difficult to make a decision between sexuality, faith and family. We help people marry these elements. Shame is a big issue, and many families will cut their children off totally. We deal with people who do not necessarily identify as ‘gay’. We are trying to move away from the emphasis on sex and the body, and to break a number of misconceptions, and to focus on love, unity, and spiritual partnerships, and to emphasize the connection between sexuality and spirituality. We also provide alternative interpretations of the Koran, and make it more contextual. This allows people to breathe. Most interpretations are based on the interpretation done 500 years ago. One of our main goals is to change attitudes of Imams. Imams hold a lot of power, and many people learn Islam through Imams. There is a strong oral tradition. If Imams can start talking about sexuality in a positive way, this would be very powerful.”¹⁹⁹

7. GENDER NORMS, LESBIANS AND TRANSGENDER AND INTERSEX INDIVIDUALS

7.1 GENDER NORMS

“Researching human sexuality without looking at gender is like cooking pepper soup without pepper.”²⁰⁰

Some activists Amnesty International spoke to emphasized that incidences of violence are often precipitated by a person’s perceived refusal to conform to gender norms, rather than by a person’s actual sexual orientation. The Triangle Project said that they “try to influence activists to think differently and to look at the gendered nature of the violence. People are not just targeted for their sexuality, but when they transgress gender norms. For example, trans M to F (male to female), effeminate gay men, butch women.”²⁰¹ By the same token, the transgression of gender norms can lead perpetrators to, sometimes erroneously, identify their targets as being LGBTI. In Uganda, Kenya, South Africa and Cameroon, it is women and men who are perceived to transgress stereotypical norms of masculinity and femininity who bear the brunt of the harassment and violence that ostensibly is caused by hostility towards LGBTI people. As one organization for former football players and sympathizers based in Cameroon put it, “Lesbians have the same problems as gay men. It is effeminate men who get targeted, and butch women who get targeted.”²⁰²

This threat of persecution confines individuals to strict gender and sexual norms for fear of being labelled LGBTI; as a result, it maintains power inequalities between men and women. Lesbians and women who have sex with women are particularly vulnerable to the effects of strict gender norms which are perpetuated by anti-homosexuality laws. There is evidence of strong social norms, discriminatory laws and practices in sub-Saharan Africa which position men with greater decision-making power and control in the family, compared to women.²⁰³ Conceptions of masculinity are linked to women’s sexuality, and men’s control over their bodies.²⁰⁴ In some circumstances, individuals, especially men, garner respect within the community, through marriage.²⁰⁵ Men’s control over women’s bodies is often supported by custom and tradition, but also by institutions such as the law, the media, religion, and education systems.²⁰⁶

Lesbians can be seen as a threat to men’s position in society; choosing to have sex with other women can be seen as a rejection of male ownership of their bodies, as well as disconnecting sex from reproduction.²⁰⁷ As a result, lesbians face violence from family members in the private sphere as well as in the public sphere. Amnesty International was told by organizations in Uganda that violence against lesbian, bisexual and transgender women

occurs in the wider context of discriminatory attitudes and gender-based violence towards women in general, citing that in the week prior to Amnesty International's visit, four women had been killed in Kampala by their husbands or male partners.²⁰⁸

Men who have sex with men also threaten dominant notions of masculinity where 'real men' are defined through their sexual relationships with women. Men who engage in same-sex sexual activity are often marginalized from the category 'men'.²⁰⁹ They may be ostracized, harassed, assaulted, or even murdered as a result of not conforming to prevailing, normative masculinity.²¹⁰

There have been a number of reported cases of Kenyan girls who have been perceived as acting 'too masculine' and as a result have been expelled from their schools or beaten up by other students.²¹¹ In Cameroon, girls and young women suspected of lesbian sexual activity have been expelled from their secondary schools, sometimes after being forced to denounce their peers.²¹² In South Africa, boys in schools who are 'not masculine enough' are still taunted with words like 'moffie' and '*isitabane*', pejorative words for gay people.²¹³ Lesley Frescura, a long time Amnesty International South Africa activist, told Amnesty International that before 1994, "if you were thought to be a 'moffie' in the army, life could be very hard. A lot of white gay men of that generation suffer from post-traumatic stress syndrome."²¹⁴

In Cameroon, a person wearing unconventional clothing is often perceived as being gay or lesbian, and is thus vulnerable to threats, intimidation and violence. For women, playing football is also marked as a lesbian endeavour. LGBTI people are vulnerable to violence and blackmail; the perpetrators know that if the attack is reported to the police, the victim could be arrested and the violence or extortion is likely not to be investigated.

In South Africa, Amnesty International asked Gail, an activist then with a refugee and migrant rights organization, about whether there has been a rise in hate crimes or whether they are just more visible, or more frequently reported. Her answer emphasized the changing roles of women in society:

*"LGBTI rights are more visible, and claiming LGBTI identities is more common. This has created a backlash. But there's also a backlash against the changing roles of women and gender equality. Many men feel that they can't claim their roles, as they are poor and marginalized. There is a lag between the constitution and social attitudes. Our country has been set up, since 1994, as a liberal ideal, but society is not ready for this. There is also the extreme economic inequality, and widespread disempowerment. There are also serious issues on an international level, with the government calling homosexuality 'un-African', and [President] Zuma having made numerous homophobic remarks."*²¹⁵

7.2 LESBIANS

Much of the focus of LGBTI advocacy in Africa has been on decriminalization of consensual same-sex conduct, and has inadvertently focused on gay men and men who have sex with men, often to the exclusion of lesbian and bisexual women, as well as transgender and intersex individuals. There are human rights violations particular to lesbian and bisexual women which need to be effectively addressed by human rights organizations, governments and civil society. Lesbians and bisexual women enjoy less autonomy and greater scrutiny

from family, friends and neighbours which makes it difficult for them to be out and about and meet other women. One lesbian Muslim activist in Cape Town told Amnesty International:

“It is a very patriarchal society. Gay men have more freedom and rights than lesbians. If you know from an early age you are gay, you have more freedom to experiment, you won’t need to have a chaperone, you can come home at any time. As a woman, you have to be accompanied by men. There are many more restrictions for Muslim women. When I came out, I was told that I needed to get married. Even in mixed prayers, women still have to go to the back.”²¹⁶

Black lesbians in South Africa are particularly at risk of sexual violence and murder. Such violence has been condemned by the UN High Commissioner for Human Rights.²¹⁷ Sometimes sexual violence is perpetrated against black lesbians to punish them for, or supposedly ‘cure’ them of, their sexual or gender non-conformity. Perpetrators often state that the victim needed to be “taught how to be a black woman”.²¹⁸ They assert their sense of male superiority and reposition their victims as stereotypically female through violence.²¹⁹ Some observers note that men who are otherwise marginalized may feel entitled to control women’s sexuality and gender expression in this way in order to express their dominance over women and to overcome some of their own sense of marginalization.²²⁰

Amnesty International met with the One in Nine campaign, an organization named after the 2002 statistic from the South African Medical Research Council that out of every nine rapes in South Africa, only one is reported. The organization was particularly active during the trial of President Jacob Zuma for allegedly raping a woman,²²¹ using the generated media attention to highlight the underreporting of rape and the pressures on rape complainants.

“There has been sustained violence against lesbian women [in South Africa]. Apart from the rapes and murders, there is a lot of verbal attacks and harassment. Verbal abuse occurs before and during rape. There is a widespread culture of impunity in South Africa. The conviction for rape is less than five percent. Black women are more susceptible because of their race, class, education and freedom. Not all lesbians have to use public transport. Not all have to work shifts. Not all own property. You can’t look at any of this in isolation, outside of economic and socio-empowerment. You need a layered approach, first looking at the political, then the economic.”²²²

The high occurrence of rape against lesbians is an urgent problem that the South African government needs to address. The current response by the police and justice system is demonstrably inadequate as prevention, and also inadequate in providing redress. One in Nine told Amnesty International that:

“What is in the law does not translate [into actual protection]. Survivors are passed on from one officer to another, and the case docket often gets lost. In one case, the ‘we Sizwe’ case of a woman who was gang raped by 8 men, the matter was first struck off the role [of the court], the survivor had to be examined twice, give her statement twice, and was cross-examined after each of the eight men gave their defence.”²²³

The failure of police to adequately investigate sexual crimes against and murders of lesbians, verbal abuse by police, as well as police brutality, are serious issues in South Africa,

contributing to underreporting of crimes. Steve, a long time South African LGBTI activist, told Amnesty International that:

*"People haven't been reporting hate crimes because of fear of secondary victimization. We also need to look at even if cases aren't reported, what happened, the nature of those cases, and how and why they are underreported."*²²⁴

The term 'corrective' is sometimes used to describe the rapes that are happening to lesbians in South Africa, with the assumption that the rapes are taking place in order to 'cure' women of their lesbian sexual orientation. One activist told Amnesty International that the term 'corrective' can be useful to highlight that lesbians in particular are being deliberately targeted for sexual violence, but that authorship of the term is important. Amnesty International also heard that increasingly, lesbians are being murdered as well as raped:

*"The term 'corrective' or 'curative' rape may assist in illustrating to people that this type of sexual violence is targeted at lesbians. However, it is a very contested term as its use may also continue to perpetuate the notion that it is possible to cure lesbianism, or that there is something about being gay which needs to be corrected. It is vitally important as to who uses this terminology and when they do so. Often, these types of rapes are gang rapes. It feels like it is becoming rare for a lesbian to walk away from such an attack."*²²⁵

Many activists though told Amnesty International that the term 'corrective' is inaccurate, misleading and damaging:

*"I believe the term 'corrective' is not appropriate. It removes it from the context of violence against women in general. The term might also encourage other perpetrators. Violence is targeted at vulnerable groups, like sex workers, foreigners and women in general. LGBTI violence cannot be taken out of that context."*²²⁶

The Triangle Project echoed the concerns about the use of the term:

*"When I hear the term 'corrective rape', I cringe. It is problematic because (a) the idea behind it is that rape is used to turn somebody into a woman, whereas this is just one of the justifications used, (b) it is constructed as a separate phenomenon to the rape of women in general, (c) it is constructed as a South African phenomenon, and (d) it is offensive. Many women are being raped and murdered now...this is not corrective."*²²⁷

Black women already experience discrimination and violence in South Africa, but black lesbians are especially targeted for violence and discrimination as they can rarely draw on community support in a country where over 80 percent of the population have been found to consistently believe that "sex between two men or two women [is] always wrong."²²⁸ Human rights activist Lesley Frescura told Amnesty International that "it is often seen as a complete aberration for a woman to choose another woman. Certain men therefore believe they need to teach women a lesson."²²⁹ While sexual orientation is a protected status under the South African constitution, black lesbians are frequently not afforded the protection it promises.

In terms of the government response to the crisis of violence against lesbians, under the leadership of the Ministry of Justice and Constitutional Development and together with civil

society, the National Task Force Team was set up in 2011 to seek solutions to 'gender-based violence affecting LGBTI people', in particular lesbians. In this context, the Ministry of Justice also began to focus on developing a hate crimes policy document, which may eventually lead to draft legislation. In 2012 the Deputy Minister informed the UN HRC during the UPR hearing on South Africa that a "policy framework on combating hate crime, hate speech and unfair discrimination" was at an "advanced stage of finalization." Amnesty International is a member of the Hate Crimes Working Group (HCWG), which seeks to contribute towards the speedy enactment of comprehensive hate crimes laws; improve the policing of, and judicial responses to hate crimes; and assist in the development of effective mechanisms to monitor hate crimes incidents. Amnesty International is supporting the HCWG's position to call for hate crimes legislation in South Africa.

However, the solution does not lie only in developing legal frameworks and obligations, as is evident by the fact South Africa has a progressive constitution and other laws for LGBTI people, and yet targeted violence and killings persist. The Forum for the Empowerment of Women told Amnesty International:

*"There needs to be more of a focus on empowerment and understanding rights. Most people have their rights violated and are discriminated against in their homes. We want women to be safe without being judged, and without going into hiding or being marginalized. For lesbians, we want them to be educated about their rights and identity, and to be able to assert those rights. The broader heterosexual community needs educating about sexuality and identity. We need to start dialogues with men's organizations, or organizations that work with men, and to work with men in townships. One organization is working with men in Alexandria."*²³⁰

Amnesty International's interviews and research suggests that lesbians in Cameroon are subject to less frequent arrests by the police than gay men, but that they are at risk of violence, harassment and discrimination from family members, neighbours and acquaintances. There have also been a number of documented incidents of teenage girls being expelled from school and from church because of assumptions about their sexual orientation. Joseph Achille Tiedjou told Amnesty International:

*"In 2006, four girls were expelled from school. One of their grandmothers doxxed them in [i.e. reported them to the principal]. One of them was a player on the national football team. Now she has lost everything and been dropped from the team. The football federation issued a statement strongly condemning homosexuality. In 2009, there was the case of a girl in a church choir who was in love with another girl in the choir. She expressed her feelings and the other girl denounced her. She was expelled both from the choir and from the church. The media reported this as 'lesbian takes Presbyterian church hostage'."*²³¹

In Cameroon, Amnesty International received information suggesting that women in particular are subject to abuse within the family if their relatives discover, or suspect, that they are engaging in same-sex sexual activity. Family members exert physical violence, and sometimes separate lesbian mothers from their children. Even if they have the financial resources required for legal action, women who file complaints for abuse risk being charged under the anti-homosexuality laws.²³² Alice Nkom told Amnesty International about the breadth of challenges faced by lesbian and bisexual women in Cameroon:

*"More women than men are able to hide their sexuality, and many (lesbians) are married (to men) and have children. The Penal Code is directed towards both sexes. There have been some cases of girls being expelled from secondary school. Two months ago, a couple of lesbians were arrested after they went to a hotel and had a dispute. The newspapers here accused all of the members of the women's football team of being lesbians. Lesbians also face harassment from friends, church members and from the church itself. It is also a huge problem if employers, family or neighbours find out. Being lesbian or gay here is always seen as being inferior, even less than an animal or a dog. The church will not welcome you."*²³³

An organization for female former football players and sympathizers in Cameroon confirmed that "There is a forced bisexuality here. Many lesbians are forced to get married and have children."²³⁴ This can lead to double lives, but more often leads to women not being able to live out an essential part of their identity.

Members of the same organization also told Amnesty International about the assumptions people make about female footballers:

*"Recently, women have been expelled from the national football team. Why? They will suspect you even if there is no evidence, for example on the basis of a strong friendship. If you're in the team, and a lady comes to watch your match once or twice, or you share a kiss, you will be suspected. When you are a woman playing football, you are assumed to be a lesbian. Another example is if a man sees a group of 16 ladies together, a macho man will feel like he has to intervene. If a man is refused by a woman, he will cast her as a lesbian. Sometimes women are forced to have sex, resulting in pregnancy and abortion and so on."*²³⁵

Amnesty International also heard about the case of a lesbian woman in Cameroon who was denied access to education because of her sexual orientation:

*"She was about to end her training to be a teacher in primary school. She had one week left to get her degree, but her neighbour denounced her to the police and she was arrested with her girlfriend. They were one week in a police cell. When she got out she was expelled from university, and was therefore denied her degree. She was exiled to Douala. She can never work as a teacher again."*²³⁶

There have also been a number of cases of other arrests of alleged lesbians over the past few years. As Amnesty International was told:

*"We definitely fear being arrested, and have a fear of the police. For example, some people in this bar might be afraid, although we have had no threats yet. The leader of our group was arrested four years ago, after having had a relationship with a woman. The family of the woman reported them to the police. Another time, I woke up at 4am to a noise – the police knocking on the door. I was renting a house at the time. I was taken to the police station, and I had to speak to the top police officer. We were there for three days. We then paid money and were released."*²³⁷

Violence against lesbians must be viewed within the wider context of violence against women in general.²³⁸ Janet Jobson told Amnesty International:

"In terms of gender violence, one in three women have been subjected to it in South Africa,

and apparently only rapes are reported. This violence mostly occurs from intimates, or acquaintances, and it occurs across all racial groups.”²³⁹

Some activists in South Africa told Amnesty International that the high levels of violence need to be viewed within the context of a post-conflict society, and also the changing position of women within power structures in South Africa:

“I think we need to look at the rapes and abuse that is happening in South Africa as occurring, and potentially being driven by, the reality of South Africa as a post-conflict society. This is not to shift the blame but it is to situate them in the context of South Africa’s violent history and strong patriarchy. The violence is playing out at the intersection of gender and sexuality, race, class and culture.”²⁴⁰

Nonhlanhla Mkhize told Amnesty International that the normalization of violence and the attribution of love to domestic violence has contributed to the high levels of contemporary violence: “Men (and women) have been raised with a lot of violence. They have been socialized to it. It is a society that makes violence normal. Consider the mums who come home from a crazy day at work, and who are likely to vent it out by hitting their children, in the name of homework or discipline. And then you still find a lot of women who still believe or still have the attitude that, ‘if he doesn’t beat me then he doesn’t love me’.”²⁴¹

A number of activists in South Africa told Amnesty International that issues of masculinity need to be explored by NGOs, community-based organizations and academics, and that strategies to prevent violence against women should include and specifically target men, as well as women.

7.3 TRANSGENDER AND INTERSEX INDIVIDUALS

“I am intersex, but I struggle with my identity. I was comfortable being a gay male. At university in Cairo, men were attracted to me. An imam I went to said that he was attracted to me, and that he would pay for me to become a woman, and he did. I now wear a hijab, and am heterosexual. But using the term ‘heterosexual’ denies the route I took to get here.”²⁴²

Much of the debate about criminalization in Africa has focused on its impact on lesbian, gay and bisexual people (LGB), and on those who – while not identifying with these categories – engage in same-sex sexual activity. In that debate, the particular experience of transgender and intersex²⁴³ people has often been ignored or sidelined. This is particularly unfortunate, since discrimination against, and violence towards, transgender and intersex people appears to be significant in some African countries. This discrimination and violence takes many forms, including but not limited to medical abuses, and, like all other forms of discrimination, is contrary to international human rights law.²⁴⁴

Transgender people are especially targeted through violence and hate crime. According to the Trans Murder Monitoring Project, there were 1123 reported murders of transgender people in 57 countries worldwide between January 2008 and December 2012.²⁴⁵ Due to

underreporting and other limitations on monitoring, that figure is likely to be just the tip of the iceberg. Perpetrators of violence and murder can often count on impunity. Perceived and real discrimination by law enforcement authorities increases the level of under reporting by transgender individuals out of shame, fear and disbelief in prosecution. These factors have detrimental effects on transgender individuals and their communities. Invisibility, ridicule and misconceptions are strong drivers of further alienation and social exclusion. Few countries have hate crime legislation covering transphobic motivation in hate crime and hate speech, and none in Africa. When the violence is committed by state actors, transgender individuals have little or no recourse to reparations.²⁴⁶

Transgender individuals experience violations of their right to health, both in obtaining treatment related to their gender identity and in obtaining general medical care, as a result of laws and policies that prevent access to treatment, as well as health professionals' prejudice or lack of knowledge about healthcare requirements for transgender people. Problematic approaches of medical staff, outdated approaches to gender identity and expression and lack of knowledge and facilities lead to mistrust, medical abuses and transgender people often avoiding a doctor's visit for as long as possible. As a result the physical and mental health status of transgender individuals is often worse than that of the general population.²⁴⁷ These situations likely intensify for those persons who experience intersectional discrimination due to ethnic origin, refugee status or other grounds.²⁴⁸ Restrictive policies and practices on access to transgender-related health care mean that such care is often not accessible.

"Direct barriers include poor treatment by providers who refuse to or do not know how to treat trans people, the short supply of providers worldwide who are trained to provide transition-related care, and refusal by many national health systems and health insurance programs to cover transition-related care and sometimes any care for trans people at all."²⁴⁹

These barriers prevent access to necessary treatment, triggering self-medication, such as unsupervised hormone use, injection of industrial-grade silicone or motor oil and backyard surgery, often with disastrous effects. In some places, medical guidelines prescribe certain treatment routines, e.g. invasive surgery or forced psychological treatment, in a one-size-fits-all manner that violates the individual's right to self-determination, and bodily integrity and health. Most African countries simply do not allow gender reassignment surgery. South Africa allows such surgeries, but only a very small number are performed each year, with the waiting list currently over ten years long.

Transgender individuals who wish to change the name and/or gender marker that they were assigned at birth face legal, social and institutional hurdles in order to do so. Transgender individuals whose gender identity and/or gender expression do not match their official identification papers risk having their right to privacy violated whenever they are required to prove their identity. They are also at risk of violations of their economic, social and cultural rights through significant discrimination in employment, education, accessing goods and services, and housing.

Many states have no legal provisions recognizing transgender individuals and some use criminal penalties against same-sex behaviour, cross-dressing, loitering or public nuisance to target transgender people. This violates transgender people's right to equal recognition before the law, as well as the right to freedom from arbitrary detention.

Even when legal name and gender marker changes are possible, transgender individuals sometimes have to submit to mandatory medical or psychological treatments in order to obtain official documentation reflecting this change, violating their rights to protection from medical abuses. Individuals who are married or in a civil/domestic partnership are sometimes forced to divorce their spouses if they wish to have their gender marker changed officially; this can lead to the loss of child custody, inheritance or state welfare benefits, and violates the right to found a family.

A stark example of the double oppression that some transgender and intersex people suffer is that of Tiwonge Chimbalanaga, a Malawian transgender woman, and her husband, Steven Monjeza, who were prosecuted under Malawi's indecency laws after committing to each other in a traditional marriage ceremony in 2009. Because Tiwonge's gender identity is not recognized in Malawian law, she was charged with an offence that applies to men, thereby denying in the strongest possible way her right to determine her gender identity.²⁵⁰ In addition, the criminalization of consensual adult sexual activity or relationships is, in and of itself, a human rights violation.

Tiwonge's experience²⁵¹ was not an exceptional one, as activists and human rights defenders in Africa have documented.²⁵² Homophobia and transphobia in Africa is often expressed as hostility towards non-normative gender expression. Academic commentators²⁵³ and others²⁵⁴ have drawn attention to the need to be attuned to the specific needs and difficulties faced by transgender and intersex people in Africa and other parts of the developing world. In particular they have noted the fact that law reform which focuses on LGB rights, and approaches based on strategies that were successful for these groups in Europe and North America, may fail in Africa through a lack of cultural sensitivity.

STOSH'S STORY

Amnesty International spoke with Stosh, a transgender man living in Kampala.

"In 1992 I was raped, and that gave me HIV. I was 16. I have been living with HIV for 20 years. I tried to make myself straight. I tried to date a man for two years. He was the first man who understood me. He said I needed to move on and 'find out who you are'. I had always identified as a lesbian, but then I realized that I am trans. It is so complicated to live here. I feel like a fugitive in my own country. The situation I'm living in is very hard. Where I used to live, the boys and straight men started throwing stones at me and my house, even though we used to be friends. Two days after David Kato's²⁵⁵ death, they smashed my window. In my new place, there are no hooligans but it is not safe. I am living a life of lies. I did an interview with CNN, and the footage is now on the internet. *Red Pepper* [the tabloid paper in Kampala] also outed me to the Ugandan public. My girlfriend was sacked from work as a result. My parents have been disappointed by me. My uncles and aunts told me that I put myself in the paper to make money, and that they won't give me any money because of that.

I am a trans man and I love God. I pity the Christians here. Sometimes I feel like I should fight. When I go to cafes, everybody turns around and looks at me. One person recently said to me 'You either have to be a man or a woman.' Since 2009, things have got a lot worse. It's even harder for trans men than for lesbians. I can't put a skirt on for God's sake. I went for a job at a fishery – I wanted a manual job there. They said I could have a

job on reception, but that I would have to wear skirts and grow my hair. The boss met up with me the night after my interview, and said, 'if you have sex with me, I'll give you a job'."²⁵⁶

Despite the high levels of violence, harassment and discrimination against transgender and intersex people in many African countries, there has been some progress around the recognition of gender identity. The Kenyan High Court decided a landmark case in December 2010, awarding 500,000 Kenyan Shillings to Richard Muasya, an intersex person, who had been subjected to inhuman and degrading treatment at Kamiti Maximum Prison. His application to have a third gender introduced into the statute book, however, was rejected.²⁵⁷

8. ECONOMIC AND SOCIAL IMPLICATIONS OF CRIMINALIZATION

8.1 HEALTH IMPLICATIONS²⁵⁸

“He spent two weeks in there. The doctors and nurses refused to treat him. They were very openly homophobic. He died at the end of those two weeks, in hospital. The hospital ignored him. His drag queen friends went to visit him, so he was very visible. He was supposed to get urgent medications and injections, but the doctors and nurses refused to treat him and said, ‘I’m busy.’ He was denied medication and did not get it in time. This is why he died.” Najib, Uganda

The criminalization of sexual orientation and gender identity has a devastating impact on access to healthcare generally and on HIV prevention work in particular.²⁵⁹ Everyone has the right to the highest attainable standard of health, both physical and mental, without discrimination on the basis of sexual orientation and gender identity.²⁶⁰ The former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, defined sexual health as “a state of physical, emotional, mental and social well-being related to sexuality, not merely the absence of disease, dysfunction or infirmity; sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence”.²⁶¹

Sexual and reproductive health is a fundamental aspect of the right to health. This has been explicitly affirmed by the Committee on Economic, Social and Cultural Rights, in its authoritative commentary on the right to health, in which it stated that:

“...the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.”²⁶²

HIV is a health priority in sub-Saharan Africa, and yet there is evidence to suggest that men who are living with sexually transmitted infections associated with same-sex conduct, or who are on anti-retroviral treatment, are more likely to experience discrimination in access to health services than other men.²⁶³ HIV prevention and access to health services are negatively affected by the social stigma associated with HIV and its association with male homosexuality, although in sub-Saharan Africa most persons living with HIV, as well as most new infections, are heterosexual.²⁶⁴ This misperception coupled with hostility against LGBTI persons in general makes LGBTI individuals less likely to seek out care or information when needed, making it harder to undertake HIV prevention work for, and to deliver treatment

where it is available to, gay and bisexual men and men who have sex with men (as well as for lesbian and bisexual women).²⁶⁵ An alarming example of this problem was seen in Kenya in 2010, where the Kenya Medical Research Institute – which has been providing HIV services to men who have sex with men – was mobbed by community members after church leaders claimed it was providing “counselling services to criminals”.²⁶⁶

Similarly, our interviews with activists suggested that myths linking homosexuality to paedophilia or the recruitment of children, along with general stigma against LGBTI people, make discussions of safer sex more difficult, if not impossible, among those of school age.

Recognizing the importance of a human rights response to HIV, UNAIDS, the joint UN Programme on HIV/AIDS, in 2009 published policy guidance²⁶⁷ that urges states to ensure a supportive and non-discriminatory legal, policy and social environment in the delivery of HIV-related healthcare. The issue is also central to the work of the Global Commission on HIV and Law, a NGO that works to promote and protect the rights of people living with HIV.²⁶⁸ Their 2012 report, ‘Risks, Rights and Health 7’ stated that “punitive laws, discriminatory and brutal policing and denial of access to justice for people with and at risk of acquiring HIV are fuelling the epidemic.”²⁶⁹

Meanwhile, although HIV and AIDS must remain a top priority, it is important to acknowledge that discrimination in access to healthcare more generally is an issue for LGBTI people. As Claire Mahon, an expert in international human rights law explains:

“The solution to the myriad of health and human rights problems faced by LGBTI people is not to be found merely through the adoption of health systems strategies, but also through human rights strategies directed towards ending discrimination [...] State-sponsored and/or state-sanctioned homophobia is the pathology, and the cure for this must include better training for medical practitioners regarding the needs of the LGBTI community and other same-sex practicing people. Governments must act on their responsibility to respect, protect and fulfil the highest attainable standard of physical and mental health by devising and implementing policies which are not just LGBTI-friendly, but which are specifically directed towards enhancing the health of the LGBTI community and addressing their unique health service requirements.”²⁷⁰

LGBTI individuals, like heterosexual individuals, have a right to health. But anti-homosexuality legislation restricts their ability to access healthcare, and prevents governments from addressing problems that disproportionately affect members of the LGBTI community. The preamble to the repeal of the anti-homosexuality laws in Queensland, Australia, goes to the heart of the problem in stating that “rational public health policy is undermined by criminal laws that make those who are at high risk of infection unwilling to disclose that they are members of a high-risk group.”²⁷¹

In Africa, men who have sex with men—whether or not they live in heterosexual relationships—are nine times more likely to have contracted HIV than other men. Organizations including the Global Fund for AIDS, Malaria and Tuberculosis, the UN Human Rights Committee and UNAIDS have all documented that laws criminalizing same-sex sexuality accelerate the spread of HIV.²⁷² The 2012 report by the Global Commission on HIV also called on states to “decriminalize private and consensual adult sexual behaviours,

including same-sex sexual acts...".²⁷³ These laws drive LGBTI people underground, often placing them beyond the reach of programmes designed to prevent and treat HIV/AIDS.²⁷⁴

In many countries, patients fear disclosing their sexual orientation to medical staff who, in their experience, are likely to become verbally abusive or breach confidentiality. Alain*, an LGBTI activist based in Yaoundé, told Amnesty International that in Cameroon, "doctors in small towns will often breach confidentiality."²⁷⁵ In the same country, Humanity First Cameroon, a sexual rights organization, told Amnesty International that there should be sanctions for doctors who do not hold their patients' confidence:

*"The Council of Doctors should condemn those medical professionals who breach confidentiality. Gays fear to go to the hospital because they think they will be denounced or betrayed to members of their community or neighbourhood, or to their families."*²⁷⁶

LGBTI people are reluctant to seek testing or treatment for HIV/AIDS or other sexually transmitted infections, for fear of being turned away or ridiculed.²⁷⁷ In Cameroon:

*"HIV testing is a problem. In some towns, people are afraid to have testing because if they are positive, the whole town will know their status. A friend of mine came and got tested in Yaoundé rather than getting it done in his small town. HIV medication is also another big problem. I give medication to some people in Douala, because they are afraid that if they ask for it from their doctor, they will be denounced as gay."*²⁷⁸

Health centres risk becoming targets for violence or closure if they provide services to LGBTI people, even if they also provide services to the rest of the community. In 2008, community leaders in Malindi, Kenya, ordered the closure of the offices of a reproductive health NGO, claiming, inaccurately, that its activities were causing an increase in homosexuality and commercial sex work in the area.²⁷⁹

Men in prisons in many African countries do not have access to condoms, making prisons a place where HIV transmission can flourish. Amnesty International was told that in Kenya, men in prison do not have access to condoms, despite government acknowledgement that same-sex sexual activity between prisoners occurs and impossible to prevent. Kenya's national HIV plan has identified prisoners as a vulnerable group, and that HIV transmission occurs in prison at a higher rate than in the rest of the population.²⁸⁰ Kenya's prison authorities have long argued that because both sex between men and sex in prison are against the law, their hands are tied when it comes to condom distribution.²⁸¹

Cameroon also prohibits the distribution of condoms in prisons.²⁸² In addition, despite its assurances to the UN of inclusive HIV/AIDS policies, Cameroon's HIV/AIDS policies do not include provisions for men and women engaging in same-sex sexual activity.²⁸³ Work by two LGBTI rights organizations has shown that penal code provisions prohibiting same-sex conduct have a strong negative impact on the effectiveness of HIV/AIDS strategies, and on access to health care for LGBTI Cameroonians more generally.²⁸⁴

The large number of US-influenced abstinence programmes in Africa has also increased stigma and contributed to the ill health of LGBTI people. Many of these programmes use materials that only mention same-sex sexuality in chapters on 'morally unacceptable

behaviour'.²⁸⁵ United Families International, a US-based organization running abstinence-only programmes across Africa, teaches that homosexuality is a "developmental disorder that can often be prevented or successfully treated."²⁸⁶ These programmes are targeted at heterosexual audiences, and promote abstinence until marriage, and fidelity thereafter, as the only way to protect from HIV/AIDS. In countries where same-sex marriage is prohibited, they send a message that there is no safe way for LGBTI individuals to have sex. Another problem is that lesbians are often left out of development health interventions, as they are classified as both 'unlikely-to-get-pregnant' and 'unlikely-to-get-AIDS'.²⁸⁷

Laws that criminalize behaviour related to same-sex relationships or non-normative gender identity do not only present risks to sexual health. Research findings internationally suggest that because of discriminatory attitudes, individuals who are same-sex practicing are susceptible to psychological ill-health, healthcare provider neglect and decision-maker 'deprioritisation'.²⁸⁸ Additionally, in countries where police and non-state actors are able to harass and arrest LGBTI individuals with impunity, the likelihood for ill-treatment in detention is great. An LGBTI activist who was arrested in Uganda in 2008 was denied medical treatment for diabetes while in custody.²⁸⁹ Detainees in Cameroon charged under the anti-homosexuality law often remain in pre-trial detention for months before their trial, in contravention of international norms. Individuals in detention frequently suffer beatings by police officers, and rape and violence perpetrated by other prisoners.²⁹⁰ They may also be forced to undergo anal examinations in order to 'prove' that sex with another man took place, even though such exams have no scientific basis and are a form of cruel, inhuman, or degrading treatment or punishment and are thus prohibited by international human rights law.

Dr Steave Nemande, a medical doctor and human rights defender in Cameroon, told Amnesty International:

"Anal examinations are a big problem in Cameroon. They are usually forced, and the men undergoing them are forced to wear handcuffs. They are not even done properly with an 'anoscope', but with fingers. The doctors say that the anus has lost elasticity to 'prove' that anal sexual activity has taken place. This is not scientific at all. The National Medical Council must take a position on these exams in criminal cases."²⁹¹

Alain* works for a MSM health project in Yaoundé. He was one of the Yaoundé 32 – the men who were arrested in a Yaoundé bar in 2005 for alleged homosexuality, and detained for long periods without trial, some for over a year. He subsequently successfully sued the Cameroonian government for arbitrary arrest:

*"In this country, doctors have the right to conduct anal examinations, and to talk about them publically. One doctor said to his assistant in front of me, 'why do they send me gay men to be treated?' It is also hard to get health checks at the doctor, as they will say, 'do you have a problem with your anus, or with sexual activity?' Many cases breach confidentiality. Many doctors refuse to treat gay men."*²⁹²

In countries where same-sex sexuality is illegal, many LGBTI people have heterosexual relationships in order to camouflage their sexual orientation. Even where sexual health advice is adequate, the presence of violent hostility against LGBTI people in the community often means that individuals cannot disclose their sexual orientation to their spouses. In a context

where HIV infection is linked to male homosexuality in the public imaginary, some fear violent reprisals if they insist on condom-use within marriage, because this may be seen to suggest they have had sex with a man. In this manner, criminal provisions on homosexuality and gender expression, and the stigma they create or fuel, limit the potential for individuals to keep themselves, their partners, and their families safe, and to access healthcare when they need it.

In Uganda, the government has consistently blocked efforts to include services for LGBTI people in national HIV/AIDS plans. In 2004, the Uganda AIDS Commission stated that they “had no mandate to create a policy supportive of gays when their activities were not recognized under national laws.”²⁹³ The following year, the government told UNAIDS that education programmes for men who have sex with men would be considered a crime, and threatened to expel the UNAIDS office from the country.²⁹⁴ By 2008, the Director General of the Uganda AIDS Commission acknowledged that gay people were affected by HIV/AIDS, but claimed that “because of meagre resources, we cannot direct our programmes at them at this time.”²⁹⁵

In South Africa, which has the highest number of people living with HIV globally, government prevention and treatment programmes have tended to overlook the health of the LGBTI population and of men who have sex with men. Health rights activists have raised concerns in the last several years that the push to expand treatment has not included specific and budgeted programs to combat discriminatory attitudes and practices, including on the ground of sexual orientation and gender identity, in the health sector and in the wider society.²⁹⁶ This failure can particularly affect socio-economically disadvantaged South Africans, most of whom are black. Levels of HIV infection amongst black lesbians and women who have sex with women are also high in South Africa compared to international levels.²⁹⁷ This may be linked to the growing problem of sexual violence against lesbians.²⁹⁸ It is difficult to accurately monitor the risk of HIV infection for women who have sex with women, as epidemiological categories used to describe HIV transmission internationally do not include non-heterosexual risks for women.²⁹⁹

Sexual health is not the only healthcare area in which LGBTI individuals experience discrimination in South Africa; in Gauteng province, 7.6 percent of black gay men and 8.4 percent of black lesbians reported being refused medical treatment because of their sexual orientation.³⁰⁰

Discriminatory treatment within health systems can range from medical professionals using insulting language and mocking LGBTI patients to refusing to treat them altogether. Najib Kabuye from Youth on the Rock Foundation, a group working with LGBTI youth just outside Kampala, told Amnesty International that he started activism because of the death of a friend of his, who was gay. His friend was HIV positive, and had been receiving HIV medication from an LGBT-friendly doctor. However, he fell ill and was admitted to Mukono Hospital:

“He spent two weeks in there. The doctors and nurses refused to treat him. They were very openly homophobic. He died at the end of those two weeks, in hospital. The hospital ignored him. His drag queen friends went to visit him, so he was very visible. He was supposed to get urgent medications and injections, but the doctors and nurses refused to treat him and said, ‘I’m busy.’ He was denied medication and did not get it in time. This is why he died.”³⁰¹

While Amnesty International was talking to the LGBTI Security Committee in Kampala, Uganda, they were contacted about a friend of theirs who was in a hospital in Kampala. Another friend had called to say the doctors had written on his form, “known homosexual”. The Committee told Amnesty International that this is common practice at the hospital, jeopardising both the safety and critical medical care of LGBTI patients.³⁰²

8.2 SOCIO-ECONOMIC IMPACT

The impact of laws criminalizing same-sex conduct often varies greatly depending on an individual's economic status and ability to evade or pay off law enforcement officials. Yves Yomb from Alternatives Cameroon told Amnesty International that police target poorer gay men, and that it is easier for men with money to evade arrest or charges:

*“It is easier if you are gay and have resources. The lower classes without money are much more vulnerable. These are the ones who call me from jail. They don't have access to healthcare and they are neglected by their families.”*³⁰³

Private disputes can also result in unwanted police scrutiny of private life in states that criminalize same-sex conduct. In Cameroon, Alice Nkom told Amnesty International:

*“There were three men who had an issue over money, so they went to the police to resolve the issue. The police asked them a series of questions and then accused them of being gay. All three were arrested on the spot. I called the prosecutor and said, how can you arrest these men without any evidence?”*³⁰⁴

Socio-economic privilege can help create a buffer against attacks, while poorer LGBTI individuals are much more vulnerable. Phumi Mtetwa, the then Director of the Equality Project in Johannesburg, said: “These crimes are happening in impoverished communities, mostly black people's townships. You don't see many hate crimes in suburbs like Melville - a more mixed, middle class and affluent suburb of Johannesburg.”³⁰⁵ Cherith Sanger, then with the Women's Legal Centre in Cape Town, told Amnesty International that in South Africa, hate crimes happen across the board, but that money allows people to better guard against such crimes:

*“Violence is not only perpetrated by black men in townships against black lesbians. We have worked on a recent case of two middle class Afrikaaner lesbians who were attacked by Afrikaaner men from their community. Sexual gender-based violence happens across the board. The difference is that white women, in general, have better access to resources, giving them greater economic empowerment.”*³⁰⁶

Levels of economic empowerment also determine whether or not LGBTI teenagers and young adults are able to move out of their family homes, which is intricately related to whether or not they are able to freely exercise their sexual orientation or gender identity. Activists in Cameroon and Kenya told Amnesty International that many LGBTI people are still living with their parents in their late teens and twenties, partially because of fewer job opportunities for LGBTI youth. Most do not have supportive families, and coming out, accessing health services, and keeping safe from family and neighbour-based violence related to sexual

orientation or gender identity, can be very difficult. “An additional complication is when gay people are still economically dependent on their parents,” said Denis Nzioka in Nairobi.³⁰⁷

Amnesty International spoke to an LGBTI organization, Youth on the Rock Foundation, operating in one of the slums just outside of Kampala. A representative from the organization spoke to us about the particular challenges faced by LGBTI people living in an economically disadvantaged area:

“The accommodation and sanitation is poor. Many LGBTI individuals there are sex workers, as there are very few other options. They are vulnerable to lots of sexually transmitted diseases, and medications are not available. There are different needs for sex workers and for LGBTI people. There are needs for transport, for education. There are very high levels of homophobia against trans women sex workers.

In our slum, it is a predominantly Islamic area. It is easily known when somebody is gay. There are usually five people sharing each house. We often have to change where we meet as we have received threats that wherever we meet will be burned down.

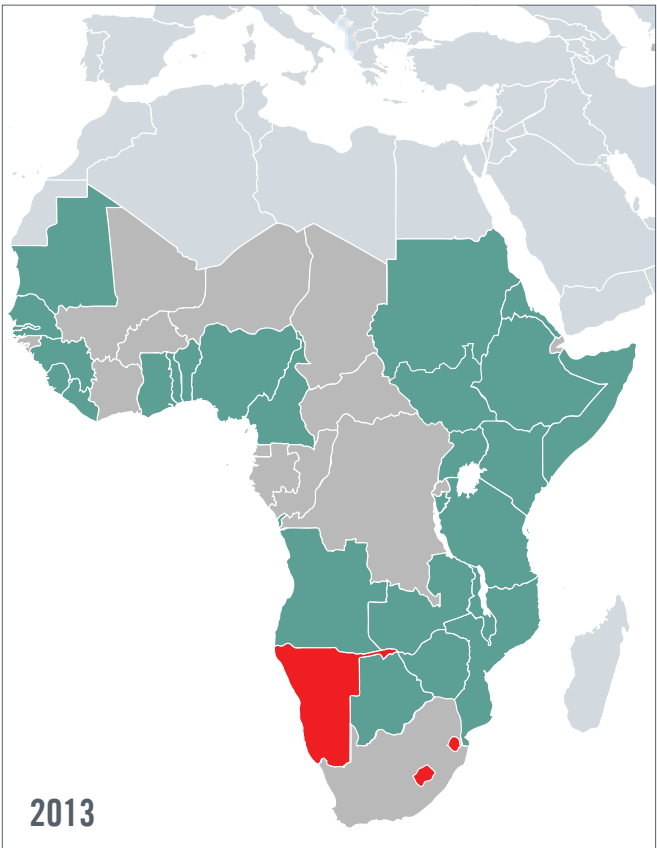
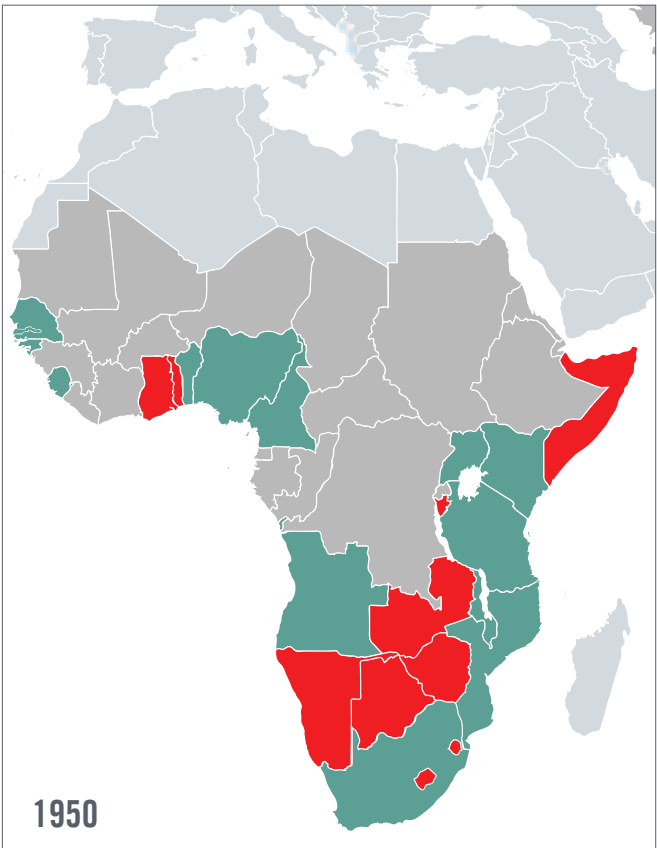
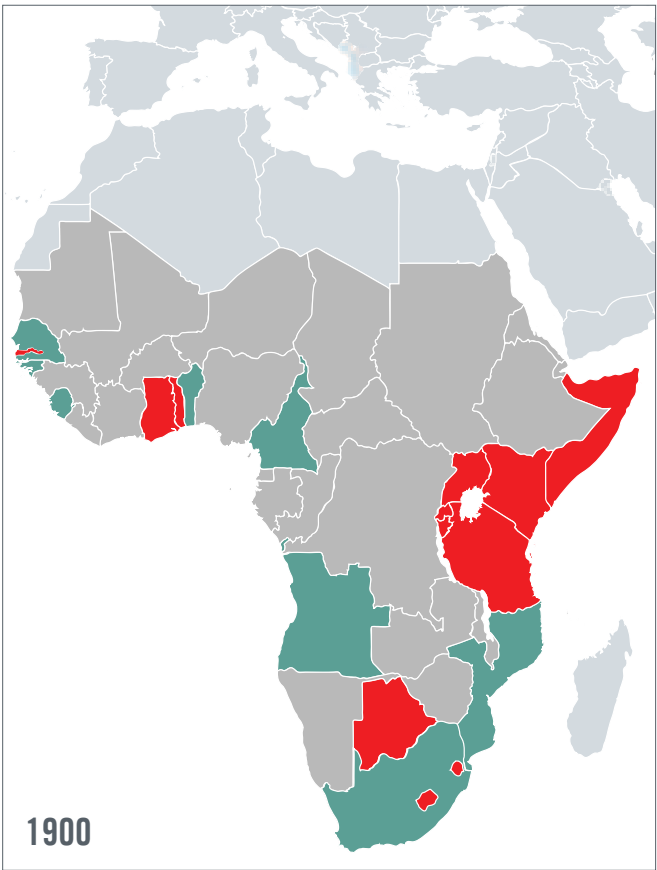
I am aware of four serious attacks against LGBTI people in the slum, and there are frequent instances of shopkeepers saying ‘I won’t give you change because you’re gay,’ or other people in the slum saying ‘I won’t share a cup with you because you’re gay’.”³⁰⁸

One strategy some organizations are utilising in order to humanize LGBTI people in the eyes of the broader public is linked to highlighting the positive contributions of LGBTI individuals to the local economy. Some organizations have developed economic empowerment programmes for their members. The rationale for such programmes, as told to us by Youth on the Rock Foundation, Bishop Senyonjo³⁰⁹ and East and Horn of Africa Human Rights Defenders Project, is that if people start recognizing LGBTI people for who they are and their professions, and their sexuality as simply one part of their character, then attitudes might start to change. Najib Kabuye from Youth on the Rock Foundation said that professions tend to humanize people. Instead of thinking “he is gay”, people think: “He is a garbage collector, and he is gay; or he is a dancer, and he is gay, or he is a doctor, and he is gay.”³¹⁰

Dismus Aine Kevin from the Rainbow Health Foundation in Mbarara, Uganda, said that economic empowerment is intimately associated with rights, and with power:

“Most LGBTI persons in Mbarara [a town in Western Uganda] don’t have jobs, or are low income earners. Discrimination and oppression is at its peak. When issues of money come in, power is money. Wealthy people can get away with anything with the poor. LGBTI people don’t even know their rights. We need training in human rights, and we need a safe space in which to provide training, as well as a place to socialize.”³¹¹

TIMELINE OF LAWS CRIMINALIZING SAME-SEX CONDUCT IN (MAINLAND) SUB-SAHARAN AFRICA



- Countries with common law derived from colonial power criminalizing consensual same-sex sexual conduct
- Countries with penal or criminal codes criminalizing consensual same-sex sexual conduct
- Countries without laws criminalizing consensual same-sex sexual conduct

These maps do not cover laws in North Africa or the Middle East region.



9. RIGHTS UNDER INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW

9.1 RIGHTS ARTICULATED

The Universal Declaration of Human Rights, the International Covenants on Civil and Political and Economic, Social and Cultural Rights enumerate a wide range of human rights that are universal and interdependent. The following references some of the rights of which LGBTI individuals are most often deprived.

9.1.1 THE RIGHT TO NON-DISCRIMINATION AND EQUALITY BEFORE THE LAW

Laws criminalizing sexual orientation and gender identity violate the right to non-discrimination,³¹² a fundamental principle of all international human rights treaties³¹³, including regional treaties such as the African Charter on Human and Peoples' Rights.³¹⁴ Such laws also violate the right to equality before the law.³¹⁵ The list of categories of discrimination in all human rights treaties is not exhaustive, and the inclusion of 'other status' allows the inclusion of sexual orientation and gender identity as prohibited grounds. The Human Rights Committee has affirmed that the discrimination provisions of the ICCPR include sexual orientation.³¹⁶ So too has the Committee on Economic, Social and Cultural Rights confirmed that the ICESCR prohibits discrimination on the ground of sexual orientation.³¹⁷ In addition, sexual orientation has been recognized as a prohibited ground of discrimination by the Committee Against Torture³¹⁸ and by the Committee on the Rights of the Child.³¹⁹

Where states maintain or adopt criminal laws and other punitive measures to restrict consensual same-sex conduct, states should repeal or amend them. These include laws and policies that in theory apply to all people but in practice are enforced only against LGBTI people (e.g. sexual activity such as anal intercourse described as "against the order of nature" and used as synonymous with sex between two men).

9.1.2 THE RIGHT TO LIFE

Where laws criminalizing same-sex activity provide for the death penalty, they violate the right to life and the minimum safeguards applying to the use of the death penalty.³²⁰ The right to life is essential for all other human rights. The UN Human Rights Committee has said "it is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation."³²¹ The African Commission on Human and Peoples' Rights has said it is the "fulcrum of all other rights [and] the fountain through which other rights flow."³²² In states where the death penalty has not been abolished, international human rights law makes it absolutely clear that it should be reserved for the most serious crimes,³²³ understood to mean only crimes involving intentional killing.³²⁴ The UN Special Rapporteur on extrajudicial, summary or arbitrary executions and the Human Rights Committee of the ICCPR have stated that the principle of most serious crimes excludes matters of sexual orientation.³²⁵ The then UN Human Rights Commission also

clarified that same-sex activity does not fall into that category, and states therefore have an obligation to ensure that the death penalty is not used in such cases.³²⁶

9.1.3 FREEDOM FROM ARBITRARY DEPRIVATION OF LIBERTY

Deprivation of liberty on grounds of sexual orientation or its expression is a violation of human rights³²⁷, whether or not that deprivation is provided for in a state's domestic law³²⁸. People have the right to live free from the fear of arrest or detention merely by virtue of their sexual orientation or gender identity,³²⁹ and states should ensure that this right is fully protected. A pre-condition for such protection is the amendment and repeal, as required, of all punitive laws related to same-sex sexuality.

*"The existence of laws criminalizing certain manifestations of sexual orientation or gender identity, even in circumstances where these laws are not actively enforced, will reduce the scope of liberty for persons of homosexual orientation or transgender identity. States consequently have an obligation to eliminate these laws, for reason that they necessarily lead to arbitrary deprivation of liberty."*³³⁰

Anyone deprived of their liberty solely on the basis of their sexual orientation or gender identity must be immediately and unconditionally released from custody. Any LGBTI person who is lawfully deprived of their liberty, i.e. for a crime unrelated to their sexual orientation or gender identity, must be able to exercise the same rights as all other detainees, such as the rights: to be informed of the reasons for arrest and of any charges against him or her; to be informed about his or her rights and how to exercise them; to a judicial remedy to challenge the lawfulness of the detention; to be brought promptly before a judge or judicial officer; to prompt access to a lawyer; to have access to the outside world; and to humane treatment during detention.³³¹

States must also take action to raise awareness among law enforcement agents about the illegality of depriving people of their liberty on grounds of sexual orientation or gender identity³³², and ensure both that records of detention are maintained³³³ and that there is independent scrutiny of the conditions of detention.³³⁴

9.1.4 CONDITIONS OF DETENTION

Where people are imprisoned or otherwise detained they are entitled to be held in humane conditions that respect their human rights and dignity.³³⁵ This right must be applied without discrimination. LGBTI people in detention are frequently at particular risk of violence, harassment and abuse – both from officials (police, prison guards etc) and other inmates. The increased vulnerability of LGBTI people in detention means that they should be protected not only from that violence, harassment and abuse but from other risks associated with that vulnerability.³³⁶ Failure to take steps to prevent the sexual assault of LGBTI detainees may violate the provisions on torture and other cruel, inhuman or degrading treatment or punishment, as well as slavery.³³⁷ For example, they should be assured access to the means of ensuring their sexual health and, where necessary, treatment to prevent HIV infection such as post-exposure prophylaxis. At the same time, the mere fact of a person's sexual orientation should not result in security measures that go beyond what is necessary to ensure their safety and security.

9.1.5 FREEDOM FROM TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

LGBTI individuals are frequently tortured or otherwise subjected to cruel, inhuman or degrading treatment or punishment by justice officials, including police officers and other state agents, whether or not they have been arrested on charges related to their sexual orientation or gender identity.³³⁸ An example of this is when anal exams are performed on men accused of homosexuality, in an attempt to obtain ‘proof’ of same-sex sexual conduct. International human rights law is clear that there can be no justification for torture or other cruel, inhuman or degrading treatment.³³⁹ The prohibition against torture and other ill-treatment is absolute and cannot be derogated from at any time.³⁴⁰ The African Commission on Human and Peoples’ Rights has echoed this position.³⁴¹ Furthermore, torture is considered a crime under international law.³⁴² States are obliged as a matter of international law to take measures to prevent this kind of treatment, to investigate and prosecute perpetrators,³⁴³ and to provide adequate redress and compensation for victims.³⁴⁴ Failure to prevent abuse of this kind is a gross violation of human rights.³⁴⁵

9.1.6 THE RIGHT TO A FAIR TRIAL

International human rights law protects the right to procedural guarantees and other fair trial rights without discrimination of any kind. Where LGBTI people are brought before courts on criminal charges relating to their sexual orientation or gender identity, they are entitled to a fair trial.³⁴⁶ This means that states and their agents (judges, prosecutors, police officers) have an obligation to ensure that prevailing prejudices about a defendant’s sexual orientation (or gender identity) do not result in him or her being discriminated against.³⁴⁷ It also means that the sexual orientation of witnesses,³⁴⁸ judges,³⁴⁹ lawyers, and advocates must not be used to tarnish their credibility or professionalism.

9.1.7 THE RIGHT TO FREEDOM OF EXPRESSION

Government restrictions and clampdowns on LGBTI people, content and organizations are a violation of the right to freedom of expression.³⁵⁰ The right to freedom of expression includes the right to express thoughts and ideas, to dress however one wants, as well as “to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print...”.³⁵¹ International human rights law allows very few restrictions on the right to freedom of expression, only under the following circumstances: the rights or reputations of others, national security, public order, public health, and morals. Such limitations are only valid if they fall within the very narrow three part test under Article 19(3) of the ICCPR. These restrictions must be necessary, provided by law, and have a legitimate aim. Sometimes states use the ‘morals’ restriction to justify restrictions on the freedom of expression of LGBTI individuals. However, Comment No. 34 on state obligations under Article 19 of the ICCPR reiterates that “‘the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition’. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.”³⁵²

9.1.8 THE RIGHT TO FREEDOM OF ASSEMBLY AND ASSOCIATION

Closely associated with the right to freedom of opinion and expression is the right of peaceful assembly and association. Being able to associate with other people to express shared views in public, or to otherwise congregate for peaceful purposes is an integral dimension of human

dignity. Freedom of assembly and association are also crucial for LGBTI activism and advocacy. Everyone, regardless of their sexual orientation or gender identity, is entitled under international law to peacefully organize socially and politically without the fear of criminal sanctions or oppression.³⁵³ Equally, everyone is entitled to protection by the state from private citizens who seek to disrupt or prevent such assembly or association.³⁵⁴

9.1.9 THE RIGHT TO PRIVATE LIFE

Laws which criminalize consensual adult same-sex activity violate the right to private life.³⁵⁵ All people are entitled to respect for their private and family life, and to enjoy that right without fear and discrimination, including the fear of blackmail and non-consensual disclosure³⁵⁶ of their sexual orientation. States should repeal or amend laws that prevent the enjoyment of this right. Furthermore, states have an obligation under international human rights law to guarantee the right, which includes the duty of non-interference with private life and the obligation to prevent attacks by non-state actors on private life.³⁵⁷ The right to private life includes: “integrity of the home, body and family, the determination and development of one’s own personality, personal identity and inter-personal relationships. The right is violated if an individual’s privacy is interfered with either unlawfully or lawfully but arbitrarily.”³⁵⁸

9.1.10 THE RIGHT TO SECURITY OF THE PERSON

LGBTI people are entitled to feel safe and secure in their daily lives and relationships.³⁵⁹ Their safety and security is routinely compromised where criminal laws underpin and strengthen prejudice against LGBTI and non-gender conforming individuals. States have an obligation to protect LGBTI people from violence, abuse and harassment by adopting and enforcing laws that prohibit such violence and abuse.³⁶⁰ States also have an obligation not to generate or perpetuate gender stereotypes that essentially justify violence against people because of their sexual orientation or gender identity.³⁶¹ Concrete examples of violations in this area include the failure to bring extortionists of LGBTI individuals to justice and the failure to adequately investigate and prosecute allegations of sexual violence against lesbians and of women who do not – or are perceived not to – conform to dominant notions of acceptable femininity³⁶². The failure of states, and in particular law enforcement agencies, to respond to violent crimes against LGBTI people amounts to a violation of survivors’ human rights. It is a violation because the failure to effectively prevent violence and bring perpetrators to justice amounts to a failure to ensure security of the person – something not only guaranteed in the constitutions of many African states, but also in the International Covenant on Civil and Political Rights and in the African Charter for Human and Peoples Rights. All people, irrespective of their sexual orientation or gender identity, are entitled to live their lives secure and protected, free from fear, violence and intimidation.

9.10.11 THE RIGHT TO MARRY AND FOUND A FAMILY

Article 16 of the UDHR and article 23 of the ICCPR set out the right to marry and found a family. Article 2 of the ICCPR stipulates that there can be no discrimination with regards to the rights enumerated in the Covenant which would include the right to marry and found a family. It has already been established that ‘other status’ in the ICCPR includes sexual orientation. Therefore Amnesty International’s position is that laws which prevent same-sex couples from marrying or from founding families, via adoption or assisted procreation, violate international human rights law.

9.2 RECENT UN DEVELOPMENTS

Over the past few years, various entities and bodies within the UN have begun to address human rights violations on the basis of sexual orientation and gender identity more directly. This has proven to be contentious amongst some states, particularly in Africa, who argue that sexual orientation and gender identity are not established grounds of discrimination under international human rights law. In 2008, the General Assembly of the UN put forward a statement³⁶³ (supported by a number of African countries³⁶⁴) which formed the basis of a joint statement that 85 countries took part in at the UN Human Rights Council (HRC) in March 2011, entitled “Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity.”³⁶⁵

Subsequently, in the course of its 17th session in June 2011, the HRC passed resolution 17/19 on the violation of human rights based on gender identity and sexual orientation. The resolution, Human rights, sexual orientation and gender identity,³⁶⁶ was the first on the topic presented to the HRC and passed by 23 votes in favour, 19 against, along with three countries abstaining.³⁶⁷ Expressing “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”, the resolution called, among other things, for the commissioning of a study by the High Commissioner for Human Rights to determine the extent of discrimination (both in law and practice) and violence against, people on the basis of their sexual orientation and gender identity, and to identify ways in which international human rights law might be used to combat these.

It is of special significance that the draft resolution was presented to the HRC jointly by South Africa and Brazil. Explaining the reason for the resolution, the South African representative – Jerry Matthews Matjila – acknowledged that for many countries sexual orientation and gender identity were, for historical, cultural and religious reasons, difficult subjects to discuss.³⁶⁸ He said that even in countries where discrimination based on sexual orientation was outlawed, as it was in South Africa, violence against LGBTI individuals still exists and that intergovernmental dialogue can provide an effective means of addressing the issues involved.

Despite this plea, and support from countries across the world, no other African country voted in favour of the resolution, and of the 19 countries who voted against, 9 were African (Angola, Cameroon, Djibouti, Gabon, Ghana, Mauritania, Nigeria, Senegal and Uganda). Of the three abstentions, two were African (Burkina Faso and Zambia). Central to the objections of those who voted against, and despite Mr Matjila’s argument to the contrary, was a concern that the resolution was an attempt to impose values that were not universally shared, and the (erroneous) assertion that there was no basis in international law for human rights protection on grounds of sexual orientation or gender identity. The Mauritanian representative, whose country retains the death penalty for consensual same sex conduct, went so far as to suggest that far from promoting the advancement of human rights, the recognition of sexual orientation and gender identity promoted the dehumanization of human beings.³⁶⁹

The report on discrimination and violence on the basis of sexual orientation and gender identity called for by the HRC resolution was published by the Office of the High Commissioner for Human Rights (OHCHR) in November 2011, and presented to the HRC in

March 2012.³⁷⁰ Its conclusions display the appalling fate of millions of individuals worldwide. The report states:

“1. In all regions, people experience violence and discrimination because of their sexual orientation or gender identity. In many cases, even the perception of homosexuality or transgender identity puts people at risk. Violations include – but are not limited to – killings, rape and physical attacks, torture, arbitrary detention, the denial of rights to assembly, expression and information, and discrimination in employment, health and education. UN mechanisms, including human rights treaty bodies and the special procedures of the Human Rights Council, have documented such violations for close to two decades....

82. Governments and inter-governmental bodies have often overlooked violence and discrimination based on sexual orientation and gender identity. The mandate of the Human Rights Council requires it to address this gap: the Council should promote “universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.” With the adoption in June 2011 of resolution 17/19, the Council formally expressed its “grave concern” regarding violence and discrimination based on sexual orientation and gender identity. Further action is now needed, especially at the national level, if individuals are to be better protected from such human rights violations in future.”³⁷¹

In an opening video message to the panel discussion at the Human Rights Council, UN Secretary-General Ban Ki-moon told the delegates: “Some say sexual orientation and gender identity is a sensitive subject. I understand. I did not grow up talking about these issues. But I learned to speak out because lives are at stake – and because it is our duty...to protect the rights of everyone, everywhere.” As South African Ambassador Abdul Minty opened the panel discussion, most members of the Organization of the Islamic Conference (OIC) and the African Group walked out of the Council. Mauritania (for the Arab Group), Senegal (speaking on behalf of “almost all” of the African group) and Nigeria argued that sexual orientation and gender identity pose a threat to culture and religion.

South Africa’s statement at the UN Human Rights Council panel discussion rebutted the cultural rights defence, pointing out that the African Charter on Democracy, Elections and Governance requires the elimination of “all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds as well as *any other form of intolerance*”. The Charter also calls on African states to adopt laws and other measures that guarantee the rights of marginalized and vulnerable groups.³⁷²

Under international human rights law, everyone has the right to culture and the right to freedom of religion. International law distinguishes between the right to freedom of conscience and religion—which is unlimited—and the right to express one’s conscience and religion—which must not infringe on the human rights of others. Therefore, while everyone has the right to freedom of belief, this right does not allow for discrimination, harassment or violence against, or the persecution of, one group of people based on their sexual orientation or gender identity, regardless of what one may personally believe.

Since the March 2012 panel discussion, South Africa has continued to play a leading role in international advocacy for recognition of sexual orientation and gender identity by African states. South Africa proposed a series of regional and global meetings to raise awareness of human rights issues related to sexual orientation and gender identity, with the expectation that these would lay the groundwork for a follow-up resolution at the Human Rights Council

in June 2013. Regional seminars have now taken place in Kathmandu, Paris and Brasilia, and these helped to inform the global conference in Oslo in April 2013, co-hosted by South Africa and Norway.

The Oslo conference brought together over 200 delegates from 84 countries, and the resulting Co-Chairs' conclusions are expected to form the basis of a new resolution at the Human Rights Council. The conclusions: expressed grave concern at ongoing human rights violations on the basis of sexual orientation and gender identity; acknowledged some positive developments in human rights for LGBTI people; affirmed that human rights and fundamental freedoms should be guaranteed for all; emphasized the obligations of states under international human rights law and to give effect to the recommendations of the High Commissioner for Human Rights in her report on discrimination and violence on the basis of sexual orientation and gender identity; and reaffirmed the responsibility of the UN to address human rights violations on the basis of sexual orientation and gender identity. The conclusions also called for specific action to be taken by the UN, including to: study and document trends, developments, challenges and opportunities in relation to sexual orientation and gender identity; recommend concrete and effective strategies to better protect human rights in relation to sexual orientation and gender identity; work collaboratively with other UN bodies and encourage mainstreaming of these issues throughout the UN system; present reports to the HRC and to engage its members in interactive dialogue; and offer technical assistance to states to assist them in strengthening human rights protections on these grounds.³⁷³

9.3 REGIONAL HUMAN RIGHTS LAW AND MECHANISMS

The African Charter on Human and Peoples' Rights (the Charter) sets out the rights of 'every individual' as including the following rights – rights which are, for LGBTI people, frequently violated: non-discrimination; equality before the law; life and integrity of the person; dignity and freedom from torture, or other cruel, inhuman or degrading treatment or punishment; liberty and security of the person; freedom from arbitrary arrest and detention; freedom of conscience; to receive information and express and disseminate opinions within the law; freedom of association and assembly; to leave and return to one's country; when persecuted, to seek asylum in another country; to participate freely in government; equal access to the public service; access to public property and services; property; work; to the best attainable standard of physical and mental health; education; and cultural life.

The African Commission on Human and Peoples' Rights has, to date, not considered human rights abuses on the grounds of sexual orientation and gender identity. The Charter guarantees rights to everyone under a state's jurisdiction, without distinction. The Charter uses the phrase 'every individual' throughout, in describing who is entitled to the rights contained in the treaty.³⁷⁴ The Charter also uses phrases like 'every human being' and 'every citizen' without qualification. Although 'sexual orientation' and 'gender identity' are not mentioned specifically as grounds of distinction, the use of 'other status' and 'sex' in the definition of the right to non-discrimination in Article 2 is analogous to protections in the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, which have been found by treaty monitoring bodies to proscribe discrimination on the basis of sexual orientation and gender identity. Most African states have ratified these international treaties, and must interpret all their human rights

obligations in a harmonious manner. In order to do this, the African Charter must be interpreted to include LGBTI individuals in its protection against discrimination. In addition, Articles 60 and 61 of the Charter say that the Commission will ‘draw inspiration from’ and ‘take into consideration’ international law in its jurisprudence.

A coordinated civil society effort to have the rights of LGBTI people recognized in the Commission’s work began in earnest in 2006.³⁷⁵ In May 2007, at the 41st session of the Commission in Accra, Ghana, the NGO forum adopted the first resolution explicitly mentioning rights based on sexual orientation and gender identity.³⁷⁶ This resolution was not adopted by the Commission. In May 2008, at the 43rd session in Ezulwini, Swaziland, an NGO forum resolution was adopted condemning violence against LGBTI people.³⁷⁷ Again, the resolution was not adopted by the Commission. At the same session, the Coalition of African Lesbians (CAL) applied to the Commission to be granted observer status. After many deferrals of the decision, a decision to deny CAL this status was finally communicated on 20 May 2010 following a sitting of the 47th session.³⁷⁸

In November 2009, in Banjul, The Gambia, a more expansive NGO resolution was put forward and adopted by the NGO forum.³⁷⁹ That resolution restated the obligation African states have to honour their international law commitments and noted, in particular, the impact that the failure to do so has had on efforts to eradicate HIV, on the rights of women, and on violence towards and persecution of people on grounds of their sexual orientation and gender identity. The resolution called on the Commission to: acknowledge and condemn human rights violations targeting people on the basis of sexual orientation or gender identity; condemn systemic attacks against LGBTI people by state and non-state actors, including draconian legislation such as the Ugandan Anti-Homosexuality Bill; and to create a mechanism to address violations based on sexual orientation and gender identity. It also called on the Commission to strongly urge African States to:

“8.1 Comply with the African Charter on Human and Peoples’ Rights, and other binding international treaties, by repealing laws which criminalize non-heteronormative sexualities and gender identities, such as laws criminalizing sexual conducts between consenting adults of the same sex, or laws banning cross-dressing, and by amending other laws that are implemented with the purpose of persecuting individuals and communities based on their sexual orientation and gender identity, such as laws against indecency, impersonation, and debauchery, among others.

8.2 End impunity for acts of violation and abuse, whether committed by state or non-state actors, by enacting appropriate laws, ensuring proper investigation, arrests and punishment of the perpetrators, and establishing judicial procedures favorable to the victims.

8.3 Protect the right of all people, regardless of their sexual orientation and gender identity, to freedom of association and assembly, freedom of expression, and freedom to participate in civil society and key decision-making organs of government.”³⁸⁰

Similar NGO resolutions have been put forward at subsequent sessions of the Commission. To date, the Commission has failed to adopt any resolution dealing with issues relating to sexual orientation and gender identity, or to implement the recommendations contained in the resolutions.

10. CONCLUSION

LGBTI people across sub-Saharan Africa are subject to a raft of human rights violations because of their sexual orientation or gender identity. Although some countries have witnessed positive developments over the past decade, numerous countries continue to breach their international human rights obligations by explicitly targeting and/or failing to protect LGBTI people from attacks by non-state actors. Whether it is arrests of suspected gay men in Cameroon, attempts to introduce even more draconian legislation to penalise LGBTI individuals in Uganda, or the South African government's failure to protect LGBTI persons from violent attacks, governments are failing in their human rights obligations under regional and international human rights law.

Laws that criminalize consensual same-sex conduct violate regional and international human rights law, including the rights to non-discrimination, equality before the law, and privacy. Depending on how they are applied, these laws can also violate the rights to freedom of expression, association and assembly; health; freedom from torture and other cruel, inhuman or degrading treatment or punishment; life; and bodily integrity. Such laws contribute to a climate in which LGBTI people are marginalized and kept in the closet, and often provide the broader society with a justification for the proliferation of prejudice, hatred and violence.

Penal code provisions that punish LGBTI people for who they are or what they are presumed to do make it difficult and sometimes impossible for LGBTI people to access vital health services, and provide government authorities and state security services with a ready means to harass, intimidate and sometimes blackmail LGBTI individuals. The laws can have a disproportionate effect on economically disempowered individuals, who are unable to avoid the laws' reach. LGBTI human rights defenders are at particular risk, both from governments and from members of the public due to their high profile advocacy work. Non-gender conforming individuals seem to be targeted more often by the authorities and by non-state actors for violence. The fact that their sexual orientation or gender identity is more visible, or just the fact that they do not conform to gender stereotypes, puts them at particular risk of violence or discrimination. States have an obligation to protect all members of society from violence by non-state actors, and in the majority of cases, they are failing in this duty.

In several countries, political leaders are fuelling prejudice and hatred against LGBTI people, often for political gain. This serves to reinforce discriminatory attitudes, contributes to a climate of fear for LGBTI persons, and can incite violence. And whilst freedom of the press is vital, some governments have allowed media outlets to endanger the lives of LGBTI individuals by publishing their personal details, encouraging violence and murder, reinforcing and exaggerating harmful stereotypes, and linking homosexuality to paedophilia and corruption.

Religious leaders too, sometimes influenced by US-based churches, have contributed to the climate of fear and loathing towards LGBTI individuals in many countries. They have gone beyond preaching that homosexuality is wrong, and have linked it with the 'recruitment' of children. In numerous instances they have incited hatred and encouraged violence towards LGBTI persons.

This has to change. Increasingly, it is becoming difficult for states to deny that sexual orientation and gender identity are fundamental parts of international human rights law, as the chorus for recognition grows stronger and stronger. South Africa is now leading a process at the UN level to give the right to non-discrimination on the basis of sexual orientation and gender identity a higher profile under international human rights law. In the last two years alone, there has been a resolution on sexual orientation and gender identity, a report on discrimination and violence against LGBTI persons published by the Office of the High Commissioner for Human Rights, the first ever UN panel on sexual orientation and gender identity, and an increasing number of states supporting the work.

African states will become increasingly isolated on the international stage if they do not begin to start complying with their international and regional human rights obligations, by respecting, protecting and fulfilling the rights of all members of society, regardless of sexual orientation or gender identity.

11. RECOMMENDATIONS

Amnesty International calls on African states to:

- Repeal all laws that criminalize or otherwise impose punitive sanctions on consensual same-sex sexual conduct.
- Abolish the death penalty.
- Establish an official moratorium on executions with a view to abolishing the death penalty.
- Remove from their laws any death penalty provisions which are in breach of international human rights law, such as for crimes which do not meet the threshold of 'most serious crimes' as stipulated in article 6(2) of ICCPR.
- Abolish flogging and all other corporal punishments.
- Put an end to torture and other cruel, inhuman or degrading treatment or punishment in law and in practice; and ensure that torture and other cruel, inhuman or degrading treatment or punishment is criminalized.
- Ensure that all allegations and reports of human rights violations based on sexual orientation or gender identity are promptly and impartially investigated by competent authorities and perpetrators held accountable and brought to justice.
- Take all necessary legislative, administrative and other measures to prohibit and eliminate discriminatory treatment on the basis of sexual orientation or gender identity at every stage of the administration of justice.
- Stop the harassment of human rights defenders and ensure the adequate protection of human rights defenders at risk because of their work on human rights and sexual orientation and gender identity.
- Review and amend or repeal public order legislation that is overly broad, vague, effectively criminalizes status and is easily abused, including as a pretext for prosecuting and punishing people for their sexual orientation or gender identity.
- Repeal laws that ban the "promotion" of homosexuality in order to ensure freedom of expression, association and peaceful assembly regarding issues relating to sexual orientation and gender identity.
- Repeal age-of-consent legislation that assigns a different age of responsibility depending on a person's sex, sexual orientation, gender identity, or for any other discriminatory reason.

- Repeal all laws which result in, or are likely to result in, the discrimination, prosecution and punishment of people solely for their sexual orientation or gender identity.
- Release, immediately and unconditionally, all who have been detained or convicted for actual or alleged consensual same-sex conduct.
- Respect the right of all people to exercise their freedom of expression, assembly and association without discrimination of any kind.
- Implement training for health professionals and administrators highlighting their obligation to treat all patients with respect, including LGBTI patients.
- Introduce ongoing training for all levels of police, prosecutors, magistrates, judges and court officials on human rights obligations in relation to sexual orientation and gender identity, and on efficient and impartial investigation and prosecution of violent attacks against LGBTI individuals.
- Introduce training for media and education professionals about diversity and about the human rights of all as including LGBTI individuals.
- Introduce into education curricula modules about diversity and about the human rights of all as including LGBTI individuals.
- Establish and implement accountability procedures so that LGBTI people who face discrimination or other mistreatment in health and justice systems have access to effective remedy.

Amnesty International calls on the African Commission on Human and Peoples' Rights to:

- Fulfil their mandate to protect the rights of all Africans, including LGBTI persons.
- Explicitly interpret the African Charter on Human and Peoples' Rights to include sexual orientation and gender identity as protected grounds of identity and as prohibited forms of discrimination.
- Call on African states to repeal all laws that criminalize consensual same-sex conduct.
- Call on African states to repeal all discriminatory laws and remove all discriminatory policies that adversely affect LGBTI persons.
- Grant Observer Status and stop the practice of denying such Observer Status to LGBTI organizations who seek observer status with the African Commission on Human and Peoples' Rights.

12. APPENDICES

12.1 LAWS CRIMINALIZING CONSENSUAL SAME-SEX CONDUCT IN AFRICAN COUNTRIES³⁸¹

Note that there is no criminal law prohibition against consensual same sex conduct or sexual orientation in the following countries:³⁸²

- Burkina Faso
- Cape Verde
- Central African Republic
- Chad
- Congo-Brazzaville
- Côte d'Ivoire
- Democratic Republic of Congo
- Djibouti
- Equatorial Guinea
- Gabon
- Guinea-Bissau
- Madagascar
- Mali
- Niger
- Rwanda
- South Africa

Country	Criminal Laws Against Same-Sex Sexual Activity	Male / Male Criminalized	Female / Female Criminalized
Algeria	Penal Code (Ordinance 66-156 of 8 June 1966)³⁸³ Article 338 (English translation): "Anyone guilty of a homosexual act is punishable with imprisonment of between 2 months and two years, and with a fine of 500 to 2000 Algerian Dinars. If one of the participants is below 18 years old, the punishment for the older person can be raised to 3 years' imprisonment and a fine of 10,000 dinars."	Yes	Yes
Angola	Penal Code of 16 September 1886 (Inherited from the Portuguese colonial era):³⁸⁴ Articles 70 and 71 add security measures regarding people who habitually practice acts "against the order of nature," stating that such people should be sent to labour camps.	Yes	Yes
Benin	Article 88 of Benin's Penal Code of 1996 provides: "Anyone who commits an indecent act or an act against nature with an individual of the same sex will be punished by 1 to 3 years imprisonment and a fine of 100,000 to 500,000 francs." According to the response by the State of Benin on its 2008 Periodic Review, "[on the] issue of homosexuality, the phenomenon is not ignored but is marginal. Families would never allow their children to be taken to court for such an offence, so no criminal ruling has ever been rendered, although it is provided for by law."³⁸⁵	Yes	Yes
Botswana	PENAL CODE [Chapter 08:01]³⁸⁶, amended by the Penal Code Amendment Act 5, 1998. Section 164. Unnatural offences	Yes	Yes

	"Any person who; (a) has carnal knowledge of any person against the order of nature; (b) has carnal knowledge of any animal; or (c) permits any other person to have carnal knowledge of him or her against the order of nature, is guilty of an offences and is liable to imprisonment for a term not exceeding seven years." Section 165. Attempts to commit unnatural offences "Any person who attempts to commit any of the offences specified in section 164 is guilty of an offence and is liable to imprisonment for a term not exceeding five years." Section 167. Indecent practices between persons "Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence."		
Burkina Faso	LEGAL	No	No
Burundi	Law No. 1/05 of 22 April 2009 concerning the revision of the Penal Code ³⁸⁷ Article 567: "Whoever has sexual relations with someone of the same sex shall be punished with imprisonment for three months to two years and a fine of fifty thousand to one hundred thousand francs or one of those penalties." (Unofficial translation) Original Language:	Yes	Yes

	Article 567 : “Quiconque fait des relations sexuelles avec la personne de même sexe est puni d’une servitude pénale de trois mois à deux ans et d’une amende de cinquante mille francs à cent mille francs ou d’une de ces peines seulement.”		
Cameroon	Penal Code of 1965 and 1967, as amended in 1972³⁸⁸ Article 347bis: Homosexualité “Est puni d’un emprisonnement de six mois à cinq ans et d’une amende de 20.000 à 200.000 francs toute personne qui a des rapports sexuels avec une personne de son sexe.” “Whoever has sexual relations with a person of the same sex shall be punished with imprisonment from six months to five years and a fine of between 20,000 and 200,000 francs.”	Yes	Yes
Cape Verde	LEGAL	No	No
Chad	LEGAL	No	No
Comoros	Penal Code of the Federal Islamic Republic of Comoros³⁸⁹ Article 318: “(3) Without prejudice to the more serious penalties provided for in the preceding paragraphs or by articles 320 and 321 of this Code, whoever will have committed an improper or unnatural act with a person of the same sex will be punished by imprisonment of between one and five years and by a fine of 50 000 to 1 000 000 francs.”	Yes	Yes
Congo-Brazzaville	LEGAL	No	No
Côte d’Ivoire	LEGAL	No	No
DR Congo	LEGAL	No	No

Djibouti	LEGAL	No	No
Egypt	Homosexuality is not referred to in Egyptian legislation. However, article 9 (c) of law 10/1961 stating that “Anyone who habitually engages in debauchery or prostitution is liable to a penalty of three months to three years imprisonment and/or a fine of LE 25-300” is used to repress homosexuality in Egypt. Moreover, men arrested on the basis of this article can also face the additional charge of “promoting debauchery” under article 14 of Law 10/1961 and/or article 278 of the Penal Code. Law 10/1961, aimed at combating prostitution, as well as for example Penal Code article 98w on “Contempt for Religion” and article 278 on “Shameless public acts” have also been used to imprison gay men in recent years. See http://www.hrw.org/en/node/12167/section/10 for further details on distinction between simple and habitual crimes and police behaviour on entrapment of gay and bisexual men in Egypt.	Yes	Unclear
Equatorial Guinea	LEGAL	No	No
Eritrea	Penal Code 1957³⁹⁰ Statute: Art. 600, Unnatural Carnal Offences Penalty: 10 days to 3 years “simple imprisonment” (Art. 105 of the Penal Code) Unnatural Carnal Offences “(1) Whosoever performs with another person of the same sex an act corresponding to the sexual act, or any other indecent act, is punishable with simple imprisonment.”	Yes	Yes
Ethiopia	Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No 414/2004³⁹¹ Article 629: Homosexual and other Indecent Acts	Yes	Yes

	“Whoever performs with another person of the same sex a homosexual act, or any other indecent act is punishable with simple imprisonment.” Article 630: General Aggravation to the Crime “(1) The punishment shall be simple imprisonment for not less than one year, or, in grave cases, rigorous imprisonment not exceeding ten years, where the criminal: (a) Takes unfair advantage of the material or mental distress of another or of the authority he exercises over another by virtue of his position, office or capacity as guardian, tutor, protector, teacher, master or employer, or by virtue of any other like relationship, to cause such other person to perform or to submit to such an act; or (b) makes a profession of such activities within the meaning of the law (Art. 92). (2) The punishment shall be rigorous imprisonment from three years to fifteen years, where: a) the criminal uses violence, intimidation or coercion, trickery or fraud, or takes unfair advantage of the victim's inability to offer resistance or to defend himself or of his feeble-mindedness or unconsciousness; or b) the criminal subjects his victim to acts of cruelty or sadism, or transmits to him a venereal disease with which he knows himself to be infected; or c) the victim is driven to suicide by distress, shame or despair.”		
Gabon	LEGAL	No	No
Gambia	Criminal Code 1965³⁹² amended in 2005.³⁹³ Article 144: Unnatural Offences	Yes	Yes

	“(1) Any person who: - (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits any person to have carnal knowledge of him or her against the order of nature; is guilty of a felony, and is liable to imprisonment for a term of 14 years. (2) In this section, “carnal knowledge of any person against the order of nature” includes – (a) carnal knowledge of the person through the anus or the mouth of the person; (b) inserting any object or thing into the vulva or the anus of the person for the purpose of simulating sex; and (c) committing any other homosexual act with the person.”		
Ghana	Criminal Code, 1960 (Act 29), as amended in 2003³⁹⁴ Section 104: Unnatural Carnal Knowledge “(1) Whoever has unnatural carnal knowledge— (a) of any person of the age of sixteen years or over without his consent shall be guilty of a first degree felony and shall be liable on conviction to imprisonment for a term of not less than five years and not more than twenty-five years; or (b) of any person of sixteen years or over with his consent is guilty of a misdemeanour; or (c) of any animal is guilty of a misdemeanour. (2) Unnatural carnal knowledge is sexual intercourse with a person in an unnatural manner or with an animal.”	Yes	Unclear

Guinea	Penal Code of 1998³⁹⁵ Article 325: “Any indecent act or act against nature committed with an individual of the same sex will be punished by six months to three years of imprisonment and a fine of 100,000 to 1,000,000 Guinean francs. If the act was committed with a minor under 21 years of age, the maximum penalty must be pronounced. If the act was consummated or attempted with violence, the guilty person will be condemned to five to ten years of imprisonment.”	Yes	Yes
Guinea-Bissau	LEGAL	No	No
Kenya	Cap. 63 Penal Code ³⁹⁶ (Sections amended by Act No. 5 of 2003) “Section 162. Any person who - (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years: Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if - (i) the offence was committed without the consent of the person who was carnally known; or (ii) the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.” “Section 163. Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years, with or without corporal punishment.”	Yes	Yes

	“165. Any male person who, whether in public or private commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years, with or without corporal punishment.”		
Lesotho	Sodomy is prohibited as a common law offence. It is defined as an “unlawful and intentional sexual relationship through the anus between two human males.”³⁹⁷ Same sex relationships between women are not penalised under existing legislation.	Yes	No
Liberia	New Penal Law, Volume IV, Title 26, Liberian Code of Laws Revised, Approved in 1976 and published in 1978. Articles 14.74, 14.79 and 50.7 make it an offence to engage in “voluntary sodomy” , defined as “deviate sexual intercourse” between human beings who are not husband and wife, and that consists of contact between penis and anus, mouth and penis, or mouth and vulva. The offence is classified as a first degree misdemeanour.	Yes	Yes
Libya ³⁹⁸	Penal Code 1953³⁹⁹ Article 407: Sexual Assault/Rape “(1) Any individual who has sexual intercourse with another person using violence, by means of threats or through deception shall be punished with a term of imprisonment of a maximum of ten years. (2) This punishment shall also be imposed on any individual who has had sexual intercourse with the consent of a person who was not yet 14 years of age or with a person who did not resist on account of mental or physical disability. If the victim was not yet 14 years of age or was over 14 years of age but had not yet reached the age of 18, the maximum term of	Yes	Yes

	imprisonment shall be 15 years. (3) If the offender is a relative of the victim, a guardian, a tutor or a custodian, or if the victim is his servant, or if the victim has a special dependant relationship to the offender, a term of imprisonment of between five and 15 years shall be imposed. (4) If an individual has sexual intercourse with another person with their consent (outside marriage), the two persons involved shall be punished with a term of imprisonment of five years at most." Article 408:Lewd Acts "(1) Any individual who commits lewd acts with a person in accordance with one of the methods specified in the preceding article shall be punished with a period of imprisonment of five years at most. (2) This punishment shall also be imposed if the act has been committed in agreement with a person who was not yet 14 years of age or with a person who did not resist on account of a mental or physical disability. If the victim was between the ages of 14 and 18, the term of imprisonment shall be at least one year. (3) If the offender belongs to one of the groups of offenders specified in paragraphs (2) and (3) of Article 407, a term of imprisonment of at least seven years shall be imposed. (4) If an individual commits a lewd act with another person with their agreement (outside marriage), both parties shall be punished with a term of imprisonment."		
Madagascar	LEGAL	No	No
Malawi	Penal Code 7:01 Laws of Malawi ⁴⁰⁰ Section 153: Unnatural offences "Anyone who – (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of any animal; or (c) permits a male person to have carnal knowledge of him or her against the order of	Yes	Yes ⁴⁰¹

	nature Shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.” Section 156: Indecent practices between males “Any male who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment.”		
Mali	LEGAL	No	No
Mauritania	The Penal Code of 1984 (Ordonnance no. 83-162 du juillet 1984 portant institution du code pénal)⁴⁰² Article 308: “Any adult Muslim man who commits an impudent act against nature with an individual of his sex will face the penalty of death by public stoning. If it is a question of two women, they will be punished as prescribed in article 306, first paragraph.” Article 306 (1): “Any person who commits an outrage on public decency and Islamic morals or violates the sacred places or assists in the breach, will be punished by a sentence of between three months to two years imprisonment and a fine of 5,000 to 60,000 UM, if such action is not covered by the crimes of Ghissass or Diya.”⁴⁰³	Yes	Yes
Mauritius	Criminal Code of 1838⁴⁰⁴ Section 250 Sodomy and Bestiality: “(1) Any person who is guilty of the crime of sodomy or bestiality shall be liable to penal servitude for a term not exceeding 5 years.” NB: Mauritius is one of the few countries in the world	Yes	No

	not to criminalize the transmission of, or exposure to, HIV. ⁴⁰⁵		
Morocco	Penal Code of November 26, 1962 ⁴⁰⁶ Article 489: “Any person who commits lewd or unnatural acts with an individual of the same sex shall be punished with a term of imprisonment of between six months and three years and a fine of 120 to 1,000 dirhams, unless the facts of the case constitute aggravating circumstances.”	Yes	Yes
Mozambique	Penal Code of September 16, 1886, as amended in 1954 (Inherited from the Portuguese colonial era) ⁴⁰⁷ Articles 70 and 71 impose security measures on people who habitually practice acts against the order of nature. The security measures include: confinement in criminal mental hospitals or labor camps (from 6 months to 3 years), as well as have their freedom restricted (from 2 to 5 years) or the exercise of their profession interrupted (minimum of 10 months and maximum of 10 years), under the supervision of a probation officer.	Yes	Yes
Namibia	According to the inherited Roman Dutch common law “sodomy” is still a crime and was originally used as a legal label when referring to so-called “unnatural” sexual offences such as masturbation, oral sex, anal sex between persons of the same sex as well as opposite sex and bestiality. At present the common law crimes of “sodomy” and “unnatural” sexual offences criminalize sexual behaviours between men only, not heterosexuals or between women. Note conflict of Sodomy Law with Namibia’s Labour Act which specifically forbids employers to discriminate against employees on the grounds of sexual orientation. Anomaly of criminal justice system’s scope for discrimination whereas employers cannot discriminate.	Yes	No
Niger	LEGAL	No	No
Nigeria	Criminal Code Act, Chapter 77 ^{408, 409}	Yes	Yes

	Section 214: “Any person who – (1) has carnal knowledge of any person against the order of nature; or (2) has carnal knowledge of an animal; or (3) permits a male person to have carnal knowledge of him or her against the order of nature; is guilty of a felony, and is liable to imprisonment for fourteen years.” Section 217: “Any male person who, whether in public or in private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for three years. The offender cannot be arrested without warrant.” Note that a number of Northern Nigerian states have adopted Islamic Sharia laws which has resulted in the criminalization of sexual activities between persons of the same sex (both men and women). The maximum penalty for such acts between men is death penalty, while the maximum penalty for such acts between women is a whipping and/or imprisonment. The states which have adopted such laws are Bauchi (2001), Borno (2000), Gombe (2001), Jigawa (2000), Kaduna (2001), Kano (2000), Katsina (2000), Kebbi (2000), Niger (2000), Sokoto (2000), Yobe (2001) and Zamfara (2000).		
Rwanda	LEGAL	No	No
São Tomé and Príncipe	Penal Code of September 16, 1886, as amended in 1954 (Inherited from the Portuguese colonial era)⁴¹⁰ (Same as for Mozambique) Articles 70 and 71 add security measures with regard to people who habitually practice acts “against the order of nature,” stating that such people should be sent to labour camps. Although not explicitly forbidding homosexual activity, the above could be	Yes	Yes

	interpreted as an offence when it comes to same sex relationships.		
Senegal	Penal Code of 1965⁴¹¹ Article 319 (3): "Sans préjudice des peines plus graves prévues par les alinéas qui précèdent ou par les articles 320 et 321 de présent Code, sera puni d'un emprisonnement d'un à cinq ans et d'une amende de 100.000 à 1.500.000 frnacs, quiconque aura commis un acte impudique ou contre nature avec un individu de son sexe. Si l'acte a été commis avec un mineur de 21 ans, le maximum de la peine sera toujours prononcé." ("Without prejudice to the more serious penalties provided for in the preceding paragraphs or by articles 320 and 321 of this Code, whoever will have committed an improper or unnatural act with a person of the same sex will be punished by imprisonment of between one and five years and by a fine of 100,000 to 1,500,000 francs. If the act was committed with a person below the age of 21, the maximum penalty will always be applied.")	Yes	Yes
Seychelles	Criminal Code 1955⁴¹² Section 151: "Any person who - a. has carnal knowledge of any person against the order of nature; or b. has carnal knowledge of an animal; or c. permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony, and is liable to imprisonment for fourteen years."	Yes	No
Sierra Leone	Offences Against the Person Act 1861 Section 61 "Whosoever shall be convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years."	Yes	No

	Section 62 criminalizes attempts to commit 'buggery'. ⁴¹³		
Somalia	Penal Code 1962⁴¹⁴ Article 409: Homosexuality "Whoever (a) has carnal intercourse (b) with a person of the same sex shall be punished, where the act does not constitute a more serious crime, with imprisonment from three months to three years. Where, (a) the act committed (b) is an act of lust different from carnal intercourse, the punishment imposed shall be reduced by one-third. Article 410: Security Measures "A security measure maybe added to a sentence for crimes referred to in Articles 407, 408 and 409." In Southern Somalia where Islamic Shari'a law is used, same sex acts are punished by flogging or by a death penalty. The north still applies the penal code.⁴¹⁵	Yes	Yes
South Africa	LEGAL	No	No
South Sudan	Penal Code Act 2008⁴¹⁶ Section 248. Unnatural Offences: "(1)Whoever, has carnal intercourse against the order of nature with any person and whoever allows any person to have such intercourse with him or her commits an offence, and upon conviction, shall be sentenced to imprisonment for a term not exceeding ten years and may also be liable to a fine."	Yes	Yes

Sudan	The Penal Code 1991 (Act No. 8 1991)⁴¹⁷ Section 148: Sodomy. “(1) Any man who inserts his penis or its equivalent into a woman's or a man's anus or permitted another man to insert his penis or its equivalent in his anus is said to have committed Sodomy. (2) (a) Whoever commits Sodomy shall be punished with flogging one hundred lashes and he shall also be liable to five years imprisonment. (b) If the offender is convicted for the second time he shall be punished with flogging one hundred lashes and imprisonment for a term which may not exceed five years. (c) If the offender is convicted for the third time he shall be punished with death or life imprisonment.” Section 151. Indecent Acts “Whoever commits an act of gross indecency upon the person of another person or any sexual act which does not amount to Zina or Sodomy shall be punished with not more than forty lashes and shall also be liable for imprisonment for a term which may not exceed one year or fine.”	Yes	Yes
Swaziland	“Sodomy - it is sexual intercourse per anus between two human males” - is prohibited as a common law offence.⁴¹⁸	Yes	No
Tanzania	Penal Code 1945, as amended by the Sexual Offences Special Provisions Act, 1998.⁴¹⁹ Section 154: Unnatural Offences “(1) Any person who- (a) has carnal knowledge of any person against the order of nature; or	Yes	Yes

	(b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years. Section 155: Attempt to commit unnatural offences "Any person who attempts to commit any of the offences specified under Section 154 commits an offence and shall on conviction be sentenced to imprisonment for a term not less than 20 years." Section 138A: Gross Indecency "Any person who, in public or private commits, or is a party to the commission of or procures or attempts to procure the commission of any act of gross indecency with another person is guilty of an offence and liable on conviction to imprisonment for a term not less than one year and not exceeding five years or to a fine not less than 100,000 and not exceeding 300,000 shillings."		
Togo	Penal Code of 13 August 1980⁴²⁰ Article 88 – "Impudent acts or crimes against the nature with an individual of the same sex are punished with imprisonment from one to three years and 100,000-500,000 francs in fine."	Yes	Yes
Tunisia	Penal Code 1913 Article 230⁴²¹ Article 230 - " Sodomy, if it does not fit in the circumstances described in the preceding articles, shall be punished by imprisonment for three years." "La sodomie, si elle ne rentre dans aucun des cas prévus aux articles précédents, est punie de l'emprisonnement pendant trois ans."	Yes	Yes
Uganda	The Penal Code Act of 1950 (Chapter 120) (as amended)⁴²²	Yes	Yes

	Section 145: Unnatural offences Any person who— (a) has carnal knowledge of any person against the order of nature; (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life. Section 146: Attempt to commit unnatural offences “Any person who attempts to commit any of the offences specified in section 145 commits a felony and is liable to imprisonment for seven years.” Section 148: Indecent practices “Any person who, whether in public or in private, commits any act of gross indecency with another person or procures another person to commit any act of gross indecency with him or her or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or in private, commits an offence and is liable to imprisonment for seven years.”		
Zambia	The Penal Code Act, 1995 edition⁴²³ Section 155. “Any person who- (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature; is guilty of a felony and is liable to imprisonment for fourteen years. Section 156. “Any person who attempts to commit any of the offences specified in the last preceding section is guilty of a felony and is liable to	Yes	No

	imprisonment for seven years. Section 157. "Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years. "		
Zimbabwe	Criminal Law (Codification and Reform) Act (Effective July 8, 2006) ⁴²⁴ Section 73 Sodomy "(1) Any male person who, with the consent of another male person, knowingly performs with that other person anal sexual intercourse, or any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act, shall be guilty of sodomy and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding one year or both. (2) Subject to subsection (3), both parties to the performance of an act referred to in subsection (1) may be charged with and convicted of sodomy. (3) For the avoidance of doubt it is declared that the competent charge against a male person who performs anal sexual intercourse with or commits an indecent act upon a young male person— (a) who is below the age of twelve years, shall be aggravated indecent assault or indecent assault, as the case may be; or (b) who is of or above the age of twelve years but below the age of sixteen years and without the consent of such young male person, shall be aggravated indecent assault or indecent assault, as the case may be; or (c) who is of or above the age of twelve years but	Yes	No

	below the age of sixteen years and with the consent of such young male person, shall be performing an indecent act with a young person.”		
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12.2 TERMINOLOGY USED IN THIS REPORT⁴²⁵

Bisexual

A bisexual person is defined as a person who is attracted to and/or has sex with both men and women. It can also refer to a cultural identity.

Gay

The term 'gay' refers to men or women who are primarily physically, sexually and emotionally attracted to people of the same sex. It can refer to same-sex sexual attraction, same-sex sexual behaviour, and same-sex cultural identity. 'Gay' is not gender-specific, in that it can refer to both men and women who experience same-sex sexual attraction or identifies as such. However, in common usage, many people mean only gay men when they say 'gay.'

Gender and sex

The term 'sex' refers to biologically determined differences, whereas 'gender' refers to differences in social roles and relations. Gender roles are learned through socialization and vary widely within and between cultures. Gender roles are also affected by age, class, race, ethnicity, and religion, as well as by geographical, economic, and political environments. Moreover, gender roles are specific to a historical context and can evolve over time, in particular through the empowerment of women.

Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, or with the way they are made to express their gender. Gender expression includes the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.⁴²⁶ An individual's gender identity may be male, female, or a gender which is neither male nor female; it may also be more than one gender, or no gender.

Gender marker is a gendered designator which appears on an official document such as a passport or an identity card. It may be an explicit designation as 'male' or 'female', a gendered title such as Mr or Ms, a professional title, a gendered pronoun, or a numerical code which uses certain numbers for men and certain for women (for example, odd or even).⁴²⁷

Gender reassignment treatment refers to a range of medical or non-medical treatments which a transgender person may wish to undergo. Treatments may include hormone therapy, sex or gender reassignment surgery including facial surgery, chest surgery, genital or gonad surgery, and can include (voluntary) sterilization. In some states, some forms of gender reassignment treatment is compulsory for legal recognition of a change in gender. Not all transgender people feel a need to undergo gender reassignment treatment.⁴²⁸

Heterosexual/heterosexuality

The term 'heterosexual' is used to refer to people who are primarily physically, sexually and emotionally attracted to people of the opposite sex.

Intersex individuals possess genital, chromosomal or hormonal characteristics which do not correspond to the given standard for 'male' or 'female' categories as for sexual or reproductive anatomy. Intersexuality may take different forms and cover a wide range of conditions.⁴²⁹

Lesbian

The term 'lesbian' refers to a woman who is primarily physically, sexually and emotionally attracted to other women. It can refer to same-sex sexual attraction, same-sex sexual behaviour, and same-sex cultural identity for women.

Men who have sex with men (MSM)

MSM is an abbreviation used for 'men who have sex with men'. The term 'men who have sex with men' describes males who have sex with males, regardless of whether or not they have sex with women or have a personal or social gay or bisexual identity. This concept is useful because it also includes men who self-identify as heterosexual but have sex with other men.

Sexual orientation refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.⁴³⁰

Transgender people are individuals whose gender expression and/or gender identity differs from conventional expectations based on the physical sex they were assigned at birth.⁴³¹ Commonly, a transgender woman is a person who was assigned 'male' at birth but has a female gender identity; a transgender man is a person who was assigned 'female' at birth but has a male gender identity. However, not all transgender individuals identify as male or female; transgender is a term that includes individuals who identify as more than one gender or no gender at all.⁴³² Transgender individuals may or may not choose to undergo some or all possible forms of gender reassignment treatment.

Women who have sex with women

The term 'women who have sex with women' describes females who have sex with females, regardless of whether or not they have sex with men or have a lesbian or bisexual identity. This concept is useful because it also includes women who self-identify as heterosexual but have sex with other women.

ENDNOTES

¹ Amnesty International, Annual Report 2010, *Rwanda*, p. 275, at http://thereport.amnesty.org/sites/default/files/AIR2010_AZ_EN.pdf#page=220.

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⁵ Universal Declaration on Human Rights, art. 2.

⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at: <http://www.unhcr.org/refworld/docid/4a60961f2.html>. para. 27.

⁷ See *Toonen v. Australia*, (CCPR/C/50/D/488/1992), UN Human Rights Committee, 4 April 1994, available at <http://www.unhcr.org/refworld/docid/48298b8d2.html>, *Young v. Australia*, (CCPR/C/78/D/941/2000), UN Human Rights Committee, para. 10.4; *X v. Colombia*, (CCPR/C/89/D/1361/2005), UN Human Rights Committee, para. 9; and Concluding Observations on Mexico (CCPR/C/MEX/CO/5), 17 May 2010, para. 21, and Uzbekistan (CCPR/C/UZB/CO/3), 7 April 2010, para. 22. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at: <http://www.unhcr.org/refworld/docid/4a60961f2.html>, para. 32; UN Committee on the Rights of the Child (CRC), *General Comment No. 13: The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13, available at: <http://www.unhcr.org/refworld/docid/4e6da4922.html>, paras. 60 and 72(g); Committee against Torture (CAT), *General Comment no. 2*, 24 January 2008, CAT/C/GC/2, para. 21; and Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation No. 28* (CEDAW/C/GC/28), 19 October 2010, para. 18; UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para. 32, available at: <http://www.unhcr.org/refworld/docid/4a60961f2.html>.

⁸ This is implied, if not expressed directly in the International Covenant on Civil and Political Rights, arts. 2 and 26 (see *Toonen v. Australia*, (CCPR/C/50/D/488/1992), UN Human Rights Committee, 4 April 1994, available at <http://www.unhcr.org/refworld/docid/48298b8d2.html>). See also, for example, Concluding observations of the Human Rights Committee: Egypt, UN Doc. CCPR/CO/76/EGY, 28 November 2012, para. 19: "The Committee notes the criminalization of some behaviours such as those

characterized as “debauchery” [...] The State party should ensure that articles 17 and 26 of the Covenant are strictly upheld, and should refrain from penalizing private sexual relations between consenting adults.”

⁹ ICCPR, arts. 2 and 26.

¹⁰ UDHR, art. 2; ICERD, art. 5; ICCPR, art. 2(1); ICESCR, art. 2(2); CEDAW, art. 3; CAT, art. 1(1); CRC, art. 2; ICRMW, art. 1(1); *African (Banjul) Charter on Human and Peoples' Rights* [African Charter], adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, art. 2.

¹¹ See UDHR, art. 5; ICCPR, art. 7; African Charter, art. 5; See also *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [Declaration on Torture], General Assembly Resolution 3452 (XXX), annex, 30 UN GAOR Supp. (No. 34) at 91, UN Doc. A/10034 (1975).

¹² See UDHR, art. 12, ICCPR, art. 17 and HRC, *Concluding observations of the Human Rights Committee: Chile*, UN Doc. CCPR/C/79/Add.104, 30 March 1999, para. 20: “The continuation in force of legislation that criminalizes homosexual relations between consenting adults involves violation of the right to privacy protected under article 17 of the Covenant and may reinforce attitudes of discrimination between persons on the basis of sexual orientation.” See also *Toonen v. Australia*, (CCPR/C/50/D/488/1992), UN Human Rights Committee, 4 April 1994, available at <http://www.unhcr.org/refworld/docid/48298b8d2.html>.

¹³ ICCPR, arts. 2 and 23.

¹⁴ UDHR, art. 9; ICCPR, art. 9; African Charter, Art 6.

¹⁵ UDHR, art. 10; ICCPR, art. 14; African Charter, Art 7.

¹⁶ Or any other individuals. See ICCPR, art. 10; African Charter, art 6.

¹⁷ UDHR, art. 5; ICCPR, art. 7; African Charter, art. 5.

¹⁸ UDHR, art. 19; ICCPR, art. 19; African Charter, art. 9.

¹⁹ UDHR, art. 20; ICCPR, arts. 21 and 22; African Charter, arts. 10 and 11.

²⁰ For a recent, general, account see U.S. Department of State, ‘Sexual Orientation / Gender Identity References: Human Rights Reports for 2009’ (Released March 11, 2010), pp 1-16, available at <http://www.globalequality.org/storage/documents/pdf/2009%20hr%20report%20sogi%20references.pdf>.

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²² See Epprecht, M, Hungochani, p. 224, and Wieringa, ‘Women marriages and other same-sex practices: historical reflections on African women’s same-sex relations’, in *Tommy Boys, Lesbian Men and Ancestral Wives: Female Same-sex Practices in Africa*, Morgan and Wieringa, Johannesburg, 2005, p.285-6.

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²⁴ Epprecht, M., *Hungochani: The History of a Dissident Sexuality in Southern Africa*, Montreal, McGill-Queen’s University Press, 2004, p.26.

²⁵ International Gay and Lesbian Human Rights Commission (IGLHRC), 'Off the Map: How HIV/AIDS Programming is Failing Same-Sex Practicing People in Africa', 2007, p.22. Available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/6-1.pdf>.

²⁶ Epprecht, M., *Hungochani*, p.35.

²⁷ Epprecht, M., *Hungochani*, p.35.

²⁸ Tamale, S., 'Out of the Closet: Unveiling Sexuality Discourses in Uganda' in *Feminist Africa*, Issue 2, 2003, available at http://agi.ac.za/sites/agi.ac.za/files/fa_2_standpoint_3.pdf.

²⁹ Tamale, S., 'Out of the Closet: Unveiling Sexuality Discourses in Uganda' in *Feminist Africa*, Issue 2, 2003, available at http://agi.ac.za/sites/agi.ac.za/files/fa_2_standpoint_3.pdf. In fact, President Museveni recently acknowledged the historical existence of homosexuality in Uganda. See also Njoroge, J., 'No killing, marginalization of sexual minorities in Uganda; Museveni', Sunday Monitor (Uganda), 19 March 2013, at <http://www.monitor.co.ug/News/National/Uganda-does-not-kill-or-marginalise-sexual-minorities/-/688334/1724870/-/6bdtyk/-/index.html>.

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³³ Human Rights Watch (HRW), 'This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism', 2008, p. 7.

³⁴ HRW, 'This Alien Legacy', 2008, p. 3.

³⁵ HRW, 'This Alien Legacy', 2008, pp. 6-7.

³⁶ Dr Basile Ndjio, University of Douala, Cameroon, 27 April 2011.

³⁷ The Netherlands repealed the sodomy laws three years later, but this did not affect the law in South Africa.

³⁸ Section 9(3), Constitution of the Republic of South Africa, No. 108 of 1996.

³⁹ The 2002 decision of the South African Constitutional Court in the case of *Du Toit v Minister of Welfare and Population Development* amended the Child Care Act 1983 to allow both joint adoption and stepparent adoption by "permanent same-sex life partners". The Child Care Act has since been replaced by the Children's Act, 2005, (Act No. 38 of 2005) which allows joint adoption by "partners in a permanent domestic life-partnership", whether same- or opposite-sex, and step-parent adoption by a person who is the "permanent domestic life-partner" of the child's current parent.

⁴⁰ Alteration of Sex Description and Sex Status Act 2003. See <http://www.info.gov.za/view/DownloadFileAction?id=68026>.

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⁵⁷ See Botswana Network on Ethics, Law and HIV/AIDS, 'BONELA Applauds New Employment Act – Government Scraps Sexual Orientation and Health as Basis for Dismissal', 20 August 2010, at http://www.bonela.org/index.php?option=com_k2&view=item&Itemid=223&id=74:30-august-2010.

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⁷⁰ Amnesty international, 'Uganda: Anti-Homosexuality is Inherently Discriminatory and Threatens

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⁷³ LGBTI Security Committee, Kampala, Uganda, 13 April 2011.

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⁸⁷ Michel Togue, Yaoundé, Cameroon, 29 April 2011.

⁸⁸ See ICCPR, art. 7 and CAT, art. 16. In addition, state-sponsored forcible anal exams have been recognized as torture by the UN Committee against Torture. The Committee, in its 2002 review of Egypt, regarding the issue of anal examinations, called on the government "to prevent all degrading treatment on the occasion of body searches." UN Committee Against Torture, "Concluding Observations: Egypt," U.N. Doc. CAT/C/XXIX/Misc.4, November 20, 2002, at E(k).

⁸⁹ Alice Nkom is a leading barrister in Cameroon, and president of the Project for the Support and Assistance of Sexual Minorities (PAEMH), and founder and president of the Association for the Defence of Homosexuals (ADEPHO).

⁹⁰ Michel Togue, Yaoundé, Cameroon, 29 April 2011.

⁹¹ Alternatives Cameroon, Douala, Cameroon, 26 April 2011.

⁹² Joseph Achille Tiedjou, Douala, Cameroon, 26 April 2011.

⁹³ Alain* (not his real name), Yaoundé, Cameroon, 27 April 2011.

⁹⁴ Dr Basile Ndjio, Douala, Cameroon, 27 April 2011.

⁹⁵ Account and quotations taken from Mapondera, G. and Smith, D. "Human rights campaigners attach Malawi gay couple conviction", 18 May 2010, available at: www.guardian.co.uk/world/2010/may/18/malawi-gay-couple-jailed .

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⁹⁸ Michel Togue, Yaoundé, Cameroon, 29 April 2011.

⁹⁹ Alice Nkom, Douala, 26 April 2011.

¹⁰⁰ Email from Michel Togue, 9 April 2013.

¹⁰¹ A survey of men who have sex with men (MSM) in Malawi, Namibia, and Botswana found that blackmail was one of the most prevalent human rights abuses, with 18% of those in Malawi, 21.3% of those in Namibia, and 26.5% of those in Botswana reporting incidents of blackmail (Baral, S., Trapence, G., Motimedi, F. et al (2009) 'HIV Prevalence, Risks for HIV Infection, and Human Rights Among Men Who Have Sex With Men (MSM) in Malawi, Namibia, and Botswana,' 2009 PLoS ONE 4.3). See also International Gay and Lesbian Human Rights Commission, 'Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa', 2011, at <http://www.iglhrc.org/binary->

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¹⁰⁴ Frank Mugisha, Kampala, Uganda, 15 April 2011.

¹⁰⁵ Leigh-Ann, Johannesburg, South Africa, 11 May 2011.

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¹⁰⁷ Nonhlanhla Mkhize, Durban Lesbian and Gay Community and Health Centre, South Africa, 3 May 2011.

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¹⁰⁹ Joseph Achille Tiedjou, Douala, Cameroon, 26 April 2011.

¹¹⁰ Adrian Jjuuko, Kampala, Uganda, 14 April 2011.

¹¹¹ Convention on the Elimination of All Forms of Discrimination Against Women, art. 5.

¹¹² The duty to avoid secondary victimization is found in the UN Declaration on the Elimination of Violence Against Women, which expresses a commitment to "ensure that the re-victimization of women does not occur because of laws insensitive of gender considerations, enforcement practices or other interventions." Adopted by the General Assembly resolution 48/104 of 20 December 1993, A/RES/48/104 (Article 4(f)).

¹¹³ A hate crime is a crime motivated by hostility or prejudice towards the member of a particular group, whether it be based on race, disability, age, sexual orientation or gender identity, ethnicity or religion.

¹¹⁴ Professor Juan Nel, Johannesburg, South Africa, 12 May 2011.

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¹¹⁷ Jones, P., and Schenkel, M., 'British producer arrested in Uganda over play exploring gay issues', The Guardian, 7 September 2012. <http://www.guardian.co.uk/world/2012/sep/07/uganda-british-producer-arrested-gay-rights>.

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²⁸⁸ Nel, J., 'Same-sex sexuality and health: Psychosocial scientific research in South Africa' in Reddy et al, *From Social Silence to Social Science: Same-sex Sexuality, HIV & AIDS and Gender in South Africa*, 2009, p.36.

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²⁹³ HRW, 'The Less They Know, the Better', 30 March 2005, p.60, at <http://www.hrw.org/reports/2005/03/29/less-they-know-better>.

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- ³⁰³ Yves Yomb, Alternatives Cameroon, Douala, Cameroon, 26 April 2011.
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- ³⁰⁵ Phumzile Mtetwa, The Equality Project, Johannesburg, South Africa, 13 May 2011.
- ³⁰⁶ Cherith Sanger, Women's Legal Centre, Cape Town, South Africa, 6 May 2011.
- ³⁰⁷ Denis Nzioka, then with Gay Kenya, Nairobi, Kenya, 20 April 2011.
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- ³⁰⁹ Bishop Senyonjo, Kampala, Uganda, 15 April 2011.
- ³¹⁰ Najib Kabuye, Youth on the Rock Foundation, Kampala, Uganda, 15 April 2011.
- ³¹¹ Dismus Aine Kevin, Rainbow Health Foundation, Mbarara, Uganda, 15 April 2011. The Rainbow Health Foundation is an LGBTI organization based in the rural areas of Western Uganda.
- ³¹² ICCPR, arts. 2 and 26. See also, for example, the *Concluding observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/79/Add.50, (3/10/95), para. 287: "The Committee is concerned at the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without discrimination".
- ³¹³ See, for example, *Charter of the United Nations*, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (entered into force 24/10/45), arts. 1(3) and 55 and the UDHR, art. 2.
- ³¹⁴ *African (Banjul) Charter on Human and Peoples' Rights* adopted 27/6/81, OAU Doc. CAB/LEG/67/3 rev. 5, art. 2.
- ³¹⁵ UDHR, art. 7; ICCPR, art. 26.
- ³¹⁶ *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994, available at: <http://www.unhcr.org/refworld/docid/48298b8d2.html>.
- ³¹⁷ CESCR, *General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 11 August 2000, UN Doc. E/C.12/2000/4, para. 18, at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En).
- ³¹⁸ Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by State parties*, paras. 21 and 22.
- ³¹⁹ Committee on the Rights of the Child, *General Comment No. 4: Adolescent Health*, para. 6 and *General Comment No. 3: HIV/AIDS and the rights of the child*, para. 8.
- ³²⁰ The right to life is affirmed in foundational and regional human rights documents. See, for example, UDHR, art. 3; ICCPR, art. 6, African Charter, art. 4.
- ³²¹ UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, available at: <http://www.unhcr.org/refworld/docid/45388400a.html>.
- ³²² *Case of Forum of Conscience v Sierra Leone*, Communication No. 223/98 (2000), para. 19.
- ³²³ ICCPR, art. 6(2).
- ³²⁴ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the UN General Assembly, 9 August 2012, UN Doc. A/67/275, para. 67, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/457/80/PDF/N1245780.pdf?OpenElement>.
- ³²⁵ 'Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur ...', UN Doc.

E/CN.4/1999/39, 6 January 1999, para. 63; see also Concluding observations of the Human Rights Committee: Sudan, UN Doc CCPR/C/79/Add.85, 19 November 1997, para. 8.

³²⁶ UN Commission on Human Rights, *Human Rights Resolution 2005/59: The Question of the Death Penalty*, 20 April 2005, E/CN.4/RES/2005/59, para. 7 (f): "...ensure also that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as...sexual relations between consenting adults..."

³²⁷ See UDHR, art. 9; ICCPR, art. 9; African Charter on Human and Peoples' Rights, Art 6.

³²⁸ Insufficient clarity in the law may provide the basis for arbitrary arrest and/or detention. See, for example, the Committee against Torture, *Conclusions and recommendations of the Committee against Torture: Egypt*, UN Doc. CAT/C/CR/29/4, (23/12/02), para. 6: "The Committee recommends that the State party: [...] (k) Remove all ambiguity in legislation which might underpin the persecution of individuals because of their sexual orientation."

³²⁹ See HRC, *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2003/8, 16 December 2002, p. 2: "In its recommendations ... the Working Group attaches particular importance to the following questions: [...] (c) The arbitrary character - on the ground of discrimination - of detention motivated by sexual orientation"; HRC, *Opinions adopted by the Working Group on Arbitrary Detention*, UN Doc. A/HRC/4/40/Add.1, 2 February 2007, Opinion No. 22/2006 (Cameroon), p. 91, paras. 19-20; HRC, *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2004/3, (15/12/03), para. 73.

³³⁰ International Commission of Jurists, 'Sexual Orientation, Gender Identity and International Human Rights Law: Practitioners Guide No. 4', 2009, p. 76. See <http://ici.wpengine.netdna-cdn.com/wp-content/uploads/2009/07/sexual-orientation-international-law-Practitioners-Guide-2009-eng.pdf>.

³³¹ International Commission of Jurists, 'Sexual Orientation, Gender Identity and International Human Rights Law: Practitioners Guide No. 4', 2009, p. 81. <http://ici.wpengine.netdna-cdn.com/wp-content/uploads/2009/07/sexual-orientation-international-law-Practitioners-Guide-2009-eng.pdf>. See also the Standard Minimum Rules for the Treatment of Prisoners (Rule 93), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principles 17 and 18), the UN Basic Principles on the Role of Lawyers (Principles 1, 5, 6, 7 and 8), the International Convention for the Protection of All Persons from Enforced Disappearance (art. 17), Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution (Principle 6), Principles and Guidelines on the right to a fair trial and legal assistance in Africa (Principle M.2).

³³² See the UN General Assembly, *Code of Conduct for Law Enforcement Officials*, (General Assembly resolution 34/169, (17/12/79), art. 2: "In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.")

³³³ Principles for the Protection of Persons under Detention, Principle 12.

³³⁴ Principles for the Protection of Persons under Detention, Principle 29.

³³⁵ ICCPR, art. 10; *Basic Principles for the Treatment of Prisoners*, adopted and proclaimed by General Assembly resolution 45/111, 14 December 1990, para. 1; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by General Assembly resolution 43/173, 9 December 1988, Principle 1; Human Rights Committee, *CCPR General Comment No. 20: Replaces General Comment 7 concerning prohibition of torture and cruel treatment or punishment (art. 7)*, 10 March 1992, para. 2., available at <http://www.unhcr.org/refworld/docid/453883fb0.html>.

³³⁶ UN General Assembly, *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/56/156, 3 July 2001 ('Torture and discrimination against sexual minorities', paras. 17-25), para. 23.

³³⁷ See Inter-American Court of Human Rights, Judgment of 2 September 2004, Case of *Juvenile Reeducation Institute v. Paraguay*; European Court of Human Rights, Judgment of 14 June 2002, Case of *Paul and Audrey Edwards v. the United Kingdom*, Application No. 46477/9.

³³⁸ UN General Assembly, *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/56/156, 3 July 2001, ('Torture and discrimination against sexual minorities', paras. 17-25), para. 18.

³³⁹ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), arts. 2, 15, 16; UDHR, art. 5; ICCPR, art. 7; African Charter on Human and Peoples' Rights, art. 5. See also *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [Declaration on Torture], General Assembly Resolution 3452 (XXX), annex, 30 UN GAOR Supp. (No. 34) at 91, UN Doc. A/10034 (1975).

³⁴⁰ See ICCPR, art. 4.2; the UN Committee Against Torture has said that the obligations contained in articles 2.15 and 15 of the Convention Against Torture may not be derogated from under any circumstances (Declaration of the Committee Against Torture, adopted 22 November 2001, UN Doc CAT/C/XXVII/Misc. 7).

³⁴¹ Case of *Article 19 v The State of Eritrea*, African Commission on Human and Peoples' Rights, Communication No. 275/2003 (2007).

³⁴² CAT, art. 4.

³⁴³ See *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, General Assembly resolution A/RES/57/199, adopted 18 December 2002, entered into force 22 June 2006; Declaration on Torture, art. 4; Human Rights Committee, *General Comment No. 20: Replaces General Comment 7 concerning prohibition of torture and cruel treatment or punishment* (art. 7), 10 March 1992, paras. 8 and 11. See also *Rodriguez v Uruguay*, UN Doc CCPR/C/51/D/322/1988 (1994), adopted 14 July 1994; *Blanco v Nicaragua*, UN Doc CCPR/C/51/328/1988 (1994), adopted 20 July 1994; *Kurbanov v Tajikistan*, 1096/2002, UN Doc CCPR/C/79/D/1096/2002 (2003), adopted 6 November 2003.

³⁴⁴ See also Human Rights Committee, *General Comment No. 20: Replaces General Comment 7 concerning prohibition of torture and cruel treatment or punishment* (art. 7), 10 March 1992, paras. 14 and 15; UN General Assembly, *Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/55/290, 11 August 2000, para. 28.

³⁴⁵ See *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACtHR), 29 July 1988, available at: <http://www.unhcr.org/refworld/docid/40279a9e4.html>.

³⁴⁶ UDHR, art. 10; ICCPR, art. 14; African Charter, art. 7; see also *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders (Milan, Italy, 1985, endorsed by UN General Assembly resolutions 40/32 of 29/11/85 and 40/146 of 13/12/85, especially Principles 2, 5 and 6; and *Guidelines on the Role of Prosecutors*, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 1990, especially Guidelines 12-14).

³⁴⁷ Human Rights Committee, *Concluding observations of the Human Rights Committee: Chile*, UN Doc. CCPR/C/CHL/CO/5, 18 May 2007, para. 16; Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. A/HRC/4/25, 18 January 2007, para. 21.

³⁴⁸ UN General Assembly, *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/56/156, 3 July 2001 ('Torture and discrimination against sexual minorities', paras. 17-25), para. 21.

³⁴⁹ Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc. A/HRC/4/25, 18 January 2007, para. 23.

³⁵⁰ See UDHR, art. 19; ICCPR, art. 19; African Charter on Human and Peoples' Rights, art. 9.

³⁵¹ ICCPR, art. 19.

³⁵² *General Comment no. 34 on Article 19: Freedom of opinion and expression*, 12 September 2011,

CCPR/C/GC/34.

³⁵³ See UDHR, art. 20; ICCPR, arts. 21 and 22; African Charter, arts. 10 and 11. See also Human Rights Council, *Report submitted by the Special Representative of the Secretary-General on human rights defenders, Hina Jilani*, UN Doc. A/HRC/4/37, (24/1/07), para. 96; UN General Assembly, *Human rights defenders: Note by the Secretary-General* (report submitted by the Special Representative of the Secretary-General on Human Rights Defenders, Hina Jilani, in accordance with General Assembly resolution 60/161), UN Doc. A/61/312, (5/9/06); Human Rights Council, *Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, Addendum: Summary of cases transmitted to Governments and replies received*, UN Doc. A/HRC/4/37/Add.1, 27 March 2007, paras 511 (Nigeria), 559, 568 and 686.

³⁵⁴ UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* [Declaration on Human Rights Defenders], adopted by General Assembly resolution 53/144, (9/12/98), art. 12; Human Rights Council, *Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, Addendum: Summary of cases transmitted to Governments and replies received*, UN Doc. A/HRC/4/37/Add.1, 27 March 2007, para. 374.

³⁵⁵ See, for example, UDHR, art. 12, ICCPR, art. 17 and HRC, *Concluding observations of the Human Rights Committee: Chile*, UN Doc. CCPR/C/79/Add.104, 30 March 1999, para. 20: "The continuation in force of legislation that criminalizes homosexual relations between consenting adults involves violation of the right to privacy protected under article 17 of the Covenant and may reinforce attitudes of discrimination between persons on the basis of sexual orientation". See also *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994, available at: <http://www.unhcr.org/refworld/docid/48298b8d2.html>.

³⁵⁶ See, for example, UN General Assembly, *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/56/156, (3/7/01) ('Torture and discrimination against sexual minorities', paras. 17-25), para. 21: "[...] Silencing through shame or the threat by law enforcement officials to publicly disclose the birth sex of the victim or his or her sexual orientation ... may keep a considerable number of victims from reporting abuses."

³⁵⁷ The Human Rights Committee has observed that the "obligations imposed by...article 17 [of the ICCPR] require the State to adopt legislative and other measures to give effect to the prohibition against interferences or attacks as well as to the protection of this right...Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible." UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, paras 1 and 11, available at: <http://www.unhcr.org/refworld/docid/453883f922.html>.

³⁵⁸ International Commission of Jurists, 'Sexual Orientation, Gender Identity and International Human Rights Law: Practitioners Guide No. 4', 2009, pp. 47, 67. See <http://ici.wpengine.netdna-cdn.com/wp-content/uploads/2009/07/sexual-orientation-international-law-Practitioners-Guide-2009-eng.pdf>.

³⁵⁹ See, UDHR art. 3; ICCPR, art. 9; African Charter of Human and Peoples' Rights, art. 6; Declaration on the Elimination of Violence against Women, art. 3(c), A/RES/48/104, 20 December 1993, <http://www.un.org/documents/ga/res/48/a48r104.htm>.

³⁶⁰ Committee against Torture, *Conclusions and recommendations of the Committee against Torture: Poland*, UN Doc. CAT/C/POL/CO/4, 25 July 2007, para. 20.

³⁶¹ CEDAW, art 5.

³⁶² HRC, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women*, UN Doc. E/CN.4/2002/83, 31

January 2002, para. 102.

³⁶³ The text of the statement can be found here:

http://www.dayagainsthomophobia.org/IMG/pdf/First_Statement_on_SOGI_at_the_UN_General_Assembly_19-12-08.pdf.

³⁶⁴ Cape Verde, Central African Republic, Gabon, Guinea-Bissau, Mauritius, Sao Tomé and Príncipe.

³⁶⁵ UN Human Rights Council, *Joint Statement on Ending Acts of Violence Related Human Rights Violations Based on Sexual Orientation and Gender Identity*, 22 March 2011, available at: <http://www.unhcr.org/refworld/docid/4eb8f32e.html>.

³⁶⁶ A/HRC/17/L.9/Rev.1. The text of the resolution can be found here:

<http://ilga.org/ilga/static/uploads/files/2011/6/17/RESOLUTION%20L9rev1.pdf>. Narrative account here: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11167&LangID=E>.

³⁶⁷ Countries in favour: Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Guatemala, Hungary, Japan, Mauritius, Mexico, Norway, Poland, Republic of Korea, Slovakia, Spain, Switzerland, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay. Countries against: Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Republic of Moldova, Russian Federation, Saudia Arabia, Senegal, Uganda. Countries abstaining: Burkina Faso, China, Zambia.

³⁶⁸ A webcast of Mr Matjila's oral submission may be found here:

<http://www.un.org/webcast/unhrc/archive.asp?go=110617>.

³⁶⁹ Reported at <http://www.undispatch.com/un-adopts-first-lgbt-resolution>.

³⁷⁰ See UN Office of the High Commissioner for Human Rights, 'United Nations Human Rights Council Panel on Sexual Orientation and Gender Identity' March 2012, at

<http://www.ohchr.org/EN/Issues/Discrimination/Pages/PanelSexualOrientation.aspx>.

³⁷¹ Human Rights Council, 19th Session, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity', Report of the UN Commissioner for Human Rights, 17 November 2011, at

http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/a.hrc.19.41_english.pdf.

³⁷² Amnesty International, Gray, E., 'I am because you are: the first ever UN panel on sexual orientation and gender identity', 23 March 2012, at <https://livewire.amnesty.org/2012/03/23/i-am-because-you-are-the-first-ever-un-panel-on-sexual-orientation-and-gender-identity/>.

³⁷³ See 'Co-Chairs' Summary of Conclusions', *Human Rights, Sexual Orientation and Gender Identity*, International Conference, Oslo, 15-16 April 2013, Republic of South Africa and Norwegian Ministry of Foreign Affairs.

³⁷⁴ It can be found in arts. 2, 3, 5, 6, 7, 9, 10, 11, 12, 15, 16 and 17.

³⁷⁵ Ndashe, S., 'Seeking the Protection of LGBTI Rights at the African Commission on Human and Peoples' Rights', *Feminist Africa* 15, p.17, at

http://agi.ac.za/sites/agi.ac.za/files/2_case_study_sibongile_ndashe.pdf.

³⁷⁶ Ibid, p. 18.

³⁷⁷ Ibid, p. 19.

³⁷⁸ Ibid, p. 31.

³⁷⁹ 9 November 2009, TRES/001/11/09 , at <http://www.scribd.com/doc/44508339/Thematic-Resolutions-of-the-Forum-on-the-Participation-of-NGOs-in-the-46th-Ordinary-Session-of-the-African-Commission-on-Human-and-People-s-Rights> .

³⁸⁰ Ibid.

³⁸¹ Compiled by Professor Matthew Weait and Leena Ahammed for Amnesty International, and using material from ILGA, 'State-Sponsored Homophobia', May 2012, at: http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf.

³⁸² See, generally, ILGA, 'State-Sponsored Homophobia', May 2012, available at: http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf.

³⁸³ <http://www.lexalgeria.free.fr/penal.htm>

³⁸⁴ <http://mygsa.ca/State-SanctionedHomophobia>. For text of law in Portuguese see http://www.portaldogoverno.gov.mz/Legisla/legisSectores/judiciaria/codigo_penal.pdf

³⁸⁵ ILGA World Report 2012.

³⁸⁶ Available at : <http://www.laws.gov.bw/VOLUME%202/CHAPTER%2008-01%20PENAL%20CODE.pdf>

³⁸⁷ http://www.oag.bi/IMG/rtf/code_penal_burundais-2.rtf

³⁸⁸ German Bundestag; Printed Paper 16/3597, p. 9. See footnote 5 for the link.

³⁸⁹ <http://mygsa.ca/State-SanctionedHomophobia> and <http://www.comores-droit.com/code/penal>.

³⁹⁰ <http://mail.mu.edu.et/~ethiopia/laws/criminalcode/criminalcodepage.htm>

³⁹¹ <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/70993/75092/F1429731028/ETH70993.pdf>
pp213-215

³⁹² <http://www.ilo.ch/dyn/natlex/docs/SERIAL/75299/78264/F1686462058/GMB75299.pdf>

³⁹³ http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_isn=75289 Note specific provision for categorising sexual activities between women.

³⁹⁴ <http://www.unhcr.org/cgi-bin/txis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=44bf823a4>.

³⁹⁵ <http://www.unhcr.org/refworld/docid/44a3eb9a4.html>.

³⁹⁶ "THE SEXUAL OFFENSES BILL/LAW GAZETTED", available at <http://www.gaykenya.com>.

³⁹⁷ Initial Report of Lesotho, CCPR/C/81/Add.14.

³⁹⁸ <http://ilga.org/ilga/en/countries/LIBYAN%20ARAB%20JAMAHIRIYA/Law>

³⁹⁹ See German Bundestag, Printed Paper 16/3597, p. 16.

http://www.volkerbeck.de/cms/files/16_3597_minor_interpellation.pdf

⁴⁰⁰ In January 2011, President Bingu Wa Mutharika assented to a parliamentary bill, Section 137A of which ("Indecent practices between females") provides that any female person who, whether in public or private, commits "any act of gross indecency with another female" shall be guilty of an offence and liable to a prison term of five years. See <http://www.unhcr.org/refworld/pdfid/4d6cd8522.pdf>

⁴⁰¹ ICJ, 'Sex Between Women Now a Crime in Malawi: New Law Violates Human Rights Obligations of Malawi', available at: <http://icj.org/dwn/database/Malawi%20Section%20137A%20Press%20Release.pdf>

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- ⁴⁰² <http://www.droit-afrique.com/images/textes/Mauritanie/Mauritanie%20-%20Code%20penal.pdf>.
- ⁴⁰³ ghissas and diyas are private compensation payments that, inter alia, are intended to satisfy demands for revenge and / or reparation.
- ⁴⁰⁴ <http://www.gov.mu/portal/sites/legaldb/files/criminal.pdf>.
- ⁴⁰⁵ See Open Society Institute (2008) 10 Reasons to Oppose the Criminalization of HIV Transmission and Exposure, available at: http://www.gnpplus.net/images/stories/Rights_and_stigma/10reasons_english.pdf.
- ⁴⁰⁶ German Bundestag; Printed Paper 16/3597, p. 19.
http://www.volkerbeck.de/cms/files/16_3597_minor_interpellation.pdf.
- ⁴⁰⁷ http://www.portaldogoverno.gov.mz/Legisla/legisSectores/judiciaria/codigo_penal.pdf
- ⁴⁰⁸ <http://nigerianlawguru.com/legislations/STATUTES/CRIMINAL%20CODE.pdf>
- ⁴⁰⁹ Note Implementation of Sharia Laws in Northern Nigeria. <http://www.sharia-in-africa.net/pages/publications/sharia-implementation-in-northern-nigeria.php>
- ⁴¹⁰ Original Portuguese text available at www.portaldogoverno.gov.mz/Legisla/legisSectores/judiciaria/codigopenal.pdf.
- ⁴¹¹ : <http://www.justice.gouv.sn/droitp/CODE%20PENAL.PDF>.
- ⁴¹² <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaSeychelles.pdf>.
- ⁴¹³ See generally, Thompson, Bankole (1999) *The criminal law of Sierra Leone* (Lanham: University Press of America).
- ⁴¹⁴ As per http://www.somalilandlaw.com/Penal_Code_English.pdf ; http://www.somalilandlaw.com/Criminal_Law/body_criminal_law.html.
- ⁴¹⁵ Somaliland Penal Code, available at: http://www.somalilandlaw.com/Criminal_Law/body_criminal_law.html.
- ⁴¹⁶ Available at: http://www.goss-online.org/magnoliaPublic/en/Laws--Legislation--Policies/mainColumnParagraphs/0/content_files/file12/15.pdf.
- ⁴¹⁷ Available at: <http://www.ecoi.net/> (Choose “Sudan” and then “National laws”); see also http://www.ecoi.net/file_upload/1329_1202725629_sb106-sud-criminalact1991.pdf. There are some good resources at <http://freedom Sudan.webs.com/apps/documents/>
- ⁴¹⁸ See Swaziland section on Sexual Offences laws, Interpol: <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaSwaziland.pdf>.
- ⁴¹⁹ <http://www.parliament.go.tz/Polis/PAMS/Docs/4-1998.pdf>
- ⁴²⁰ <http://www.togoforum.com/Societe/DS/DROIT/codepen.htm>
- ⁴²¹ <http://www.iurisitetunisie.com/tunisie/codes/cp/cp1200.htm>
- ⁴²² Text of the law is available at: www.ulii.org/ug/legis/consol_act/pca195087;
http://www.ulii.org/ug/legis/consol_act/pca195087
- ⁴²³ Text of the law is available at: http://www.hurid.org.zm/downloads/Zambian_Laws/volume7.pdf.
- ⁴²⁴ http://www.kubatana.net/docs/legisl/criminal_law_code_050603.pdf
- ⁴²⁵ These definitions are taken from the Amnesty International Transgender and Intersex policies, as well as UNAIDS Terminology Guidelines (January 2011), available at: http://www.unaids.org/en/media/unaids/contentassets/documents/document/2011/jc1336_unaids_termin

ology_guide_en.pdf.

⁴²⁶ http://www.yogyakartaprinciples.org/principles_en.htm.

⁴²⁷ Discrimination on grounds of sexual orientation and gender identity in Europe, Council of Europe, June 2011, p.130.

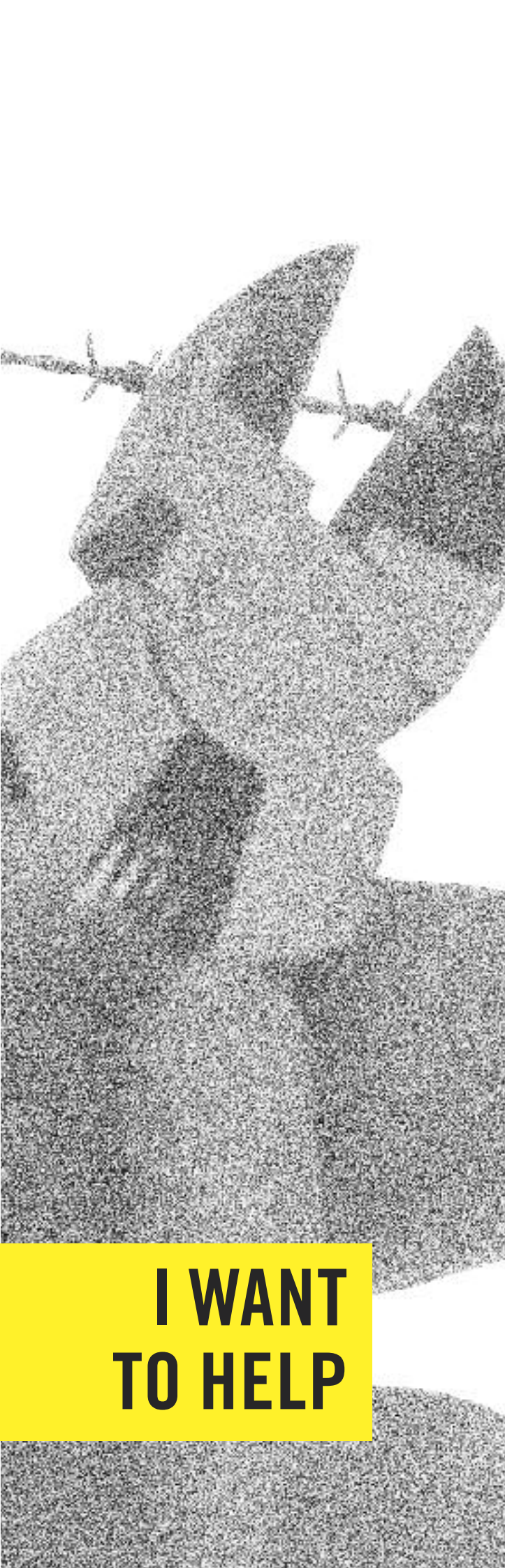
⁴²⁸ Discrimination on grounds of sexual orientation and gender identity in Europe, Council of Europe, June 2011, p.130.

⁴²⁹ Discrimination on grounds of sexual orientation and gender identity in Europe, Council of Europe, June 2011, p.131. Definition of 'intersex' from World Health Organization, "Genetic components of Sex and Gender". See also Federal Anti-Discrimination Agency, Benachteiligung von Trans Personen, insbesondere im Arbeitsleben, Berlin, 2010, p. 11.

⁴³⁰ http://www.yogyakartaprinciples.org/principles_en.htm

⁴³¹ An Activist's Guide to the Yogyakarta Principles, August 2010, p.24.

⁴³² An Activist's Guide to the Yogyakarta Principles, August 2010, p.24.



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MAKING LOVE A CRIME

CRIMINALIZATION OF SAME-SEX CONDUCT IN SUB-SAHARAN AFRICA

Thirty-eight countries in sub-Saharan Africa have laws criminalizing consensual same-sex sexual conduct. In four of these countries, anyone convicted of such conduct may face the death penalty. These laws are routinely used to harass individuals because of their real or perceived sexual orientation or gender identity, and to attack those working for the human rights of lesbian, gay, bisexual, transgender and intersex people. Underpinning these laws are deeply entrenched discriminatory social attitudes.

Discrimination on the basis of sexual orientation and gender identity, and the criminalization of consensual same-sex sexual conduct are violations of international human rights law. Nonetheless, discriminatory social attitudes remain widespread and criminalization laws remain active and enforced. In fact in recent years, a number have been strengthened.

This report, based on research carried out in four countries in sub-Saharan Africa, examines the effects of the criminalization laws on, and discriminatory social attitudes towards, lesbian, gay, bisexual, transgender and intersex people. Amnesty International is urging governments to repeal laws criminalizing consensual same-sex conduct and to enact and enforce laws protecting lesbian, gay, bisexual, transgender and intersex people from discrimination, harassment and violence, in accordance with their obligations under international law.

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