

Flygtningenævnets baggrundsmateriale

Bilagsnr.:	110
Land:	Diverse emner
Kilde:	UN Human Rights Office of the High Commissioner
Titel:	Born free and equal – Sexual Orientation and Gender Identity in International Human Rights Law
Udgivet:	1. september 2012
Optaget på baggrundsmaterialet:	19. december 2012

BORN FREE AND EQUAL

Sexual Orientation and Gender Identity
in International Human Rights Law



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

BORN FREE AND EQUAL

**Sexual Orientation and Gender Identity in
International Human Rights Law**



**UNITED NATIONS
HUMAN RIGHTS**
OFFICE OF THE HIGH COMMISSIONER

Note

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a figure indicates a reference to a United Nations document.

HR/PUB/12/06

© 2012 United Nations

All worldwide rights reserved

CONTENTS

FOREWORD	5
INTRODUCTION	7
SUMMARY OF RECOMMENDATIONS	11
FIVE CORE LEGAL OBLIGATIONS OF STATES WITH RESPECT TO PROTECTING THE HUMAN RIGHTS OF LGBT PERSONS.....	12
1. Protect individuals from homophobic and transphobic violence	12
2. Prevent torture and cruel, inhuman and degrading treatment of LGBT persons.....	20
3. Decriminalize homosexuality.....	26
4. Prohibit discrimination based on sexual orientation and gender identity	36
5. Respect freedom of expression, association and peaceful assembly	52
CONCLUSION	59

FOREWORD

The case for extending the same rights to lesbian, gay, bisexual and transgender (LGBT) persons as those enjoyed by everyone else is neither radical nor complicated. It rests on two fundamental principles that underpin international human rights law: equality and non-discrimination. The opening words of the Universal Declaration of Human Rights are unequivocal: “All human beings are born free and equal in dignity and rights.”

Nevertheless, deeply embedded homophobic attitudes, often combined with a lack of adequate legal protection against discrimination on grounds of sexual orientation and gender identity, expose many LGBT people of all ages and in all regions of the world to egregious violations of their human rights. They are discriminated against in the labour market, in schools and in hospitals, and mistreated and disowned by their own families. On the streets of towns and cities around the world, they are singled out for physical attack – beaten, sexually assaulted, tortured and killed. And in some 76 countries, discriminatory laws criminalize private, consensual same-sex relationships – exposing individuals to the risk of arrest, prosecution and imprisonment.

Concerns about these and related violations have been expressed repeatedly by United Nations human rights mechanisms since the early 1990s. These mechanisms include the treaty bodies established to monitor States’ compliance with international human rights treaties, and the special rapporteurs and other independent experts appointed by the former Commission on Human Rights and its successor the Human Rights Council to investigate and report on pressing human rights challenges. In 2011, the Human Rights Council adopted a resolution expressing “grave concern” at violence and discrimination against individuals based on their sexual orientation and gender identity. The need for action to end these violations is increasingly widely recognized, if not universally accepted.

Ending violence and discrimination against individuals on the basis of their sexual orientation and gender identity is a great human rights challenge. I hope that this booklet, which sets out the legal obligations that States have towards LGBT people, can contribute to the debate both at the global level and at a national level, which is where implementation needs to occur.

For all the difficulties, this is a time of hope: an increasing number of States now

recognize the gravity of the problem and the need for action. With commitment and the combined efforts of States and civil society, I am confident that we will see the principles of equality and non-discrimination translated into reality for millions of LGBT people around the world.

A handwritten signature in dark ink, appearing to read 'Navi Pillay', is positioned above the printed name.

Navi Pillay

United Nations High Commissioner
for Human Rights

INTRODUCTION

After decades during which the words “sexual orientation” and “gender identity” were rarely uttered in formal, intergovernmental meetings at the United Nations, a debate is unfolding at the Human Rights Council in Geneva on the rights of lesbian, gay, bisexual and transgender people. The discussions at the Council have focused political attention on discriminatory laws and practices at the national level and on the obligations of States under international human rights law to address these through legislative and other measures.

In June 2011, the Council adopted resolution 17/19 – the first United Nations resolution on human rights, sexual orientation and gender identity. The resolution was approved by a narrow margin but, significantly, received support from Council members from all regions. Its adoption paved the way for the first official United Nations report on the same subject, prepared by the Office of the High Commissioner for Human Rights.¹

The High Commissioner’s report presented evidence of a pattern of systematic violence and discrimination directed at people in all regions because of their sexual orientation and gender identity – from discrimination in employment, health care and education, to criminalization and targeted physical attacks, even killings. The report included a set of recommendations addressed to States designed to strengthen protection of the human rights of lesbian, gay, bisexual and transgender (LGBT)² persons. The report’s findings formed the basis of a panel discussion that took place at the Council on 7 March 2012 – the first time a United Nations intergovernmental body had held a formal debate on the issue.

Presenting the report to the Council at the start of that debate, High Commissioner Navi Pillay challenged States to help write a “new chapter” in United Nations history, dedicated to ending violence and discrimination against all people,

¹ Report of the United Nations High Commissioner for Human Rights, “Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity” (A/HRC/19/41).

² The terms lesbian, gay, bisexual and transgender are used throughout the report – often abbreviated to ‘LGBT’. These terms have global resonance, yet across cultures other terms (including hijra, meti, lala, skesana, motsoalle, mithli, kuchu, kawein, travesti, muxé, fa’afafine, fakaleiti, hamjensgara, and Two-Spirit) are used to describe same-sex behaviour, identities or relationships and non-binary gender identities. In several places in the text, discrimination against intersex persons (persons born with atypical sex characteristics) is also addressed.

irrespective of their sexual orientation and gender identity. Speaking via video, United Nations Secretary-General Ban Ki-moon described violence and discrimination against LGBT people as a “monumental tragedy for those concerned and a stain on our collective conscience”. It is also, he noted, a violation of existing international human rights law.

The legal obligations of States to safeguard the human rights of LGBT and intersex people are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights treaties. All people, irrespective of sex, sexual orientation or gender identity, are entitled to enjoy the protections provided for by international human rights law, including in respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly.

The purpose of this booklet is to set out the core obligations that States have towards LGBT persons, and describe how United Nations mechanisms have applied international law in this context. For the past eighteen years, United Nations human rights treaty bodies and special procedures have documented violations of the human rights of LGBT people and analysed State compliance with international human rights law. They have accumulated a body of evidence that shows how individuals are targeted on the basis of their sexual orientation or gender identity, and have issued specific guidance to States. The sections that follow summarize their findings and advice to help States take the necessary steps to meet their fundamental human rights obligations. The booklet is also intended to assist human rights defenders and rights-holders generally to call States to account for breaches of international human rights law.

The booklet consists of five sections. Each section sets forth a State obligation, the relevant international human rights law, and the views of human rights treaty bodies and special procedures. Excerpts from their reporting give examples of the kinds of abuses experienced and paint a broad picture of widespread conditions of violence and discrimination. Each section concludes with recommendations to States.

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 LGBT people. Rather, it requires enforcement of the universally applicable guarantee of non-discrimination in the enjoyment of all rights. The prohibition against discrimination on the basis of sexual orientation and gender identity is not limited to

international human rights law. Courts in many countries have held that such discrimination violates domestic constitutional norms as well as international law. The issue has also been taken up by regional human rights systems, most notably by the Inter-American Commission on Human Rights and the Council of Europe.

This booklet organizes topics by issue rather than by specific right. An act or omission can undermine many different rights. It is also not comprehensive. By examining the work of the United Nations treaty bodies and special procedures only, it necessarily offers a limited view of the violations that people suffer and the specific rights that are involved. The five topics presented here are those that have appeared most frequently in the work of United Nations human rights experts. Some very important issues have not yet been addressed by United Nations human rights experts.

Nevertheless, the 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



United Nations Secretary-General Ban Ki-moon joins a discussion of LGBT equality at United Nations Headquarters, New York, 10 December 2010

³Address by United Nations High Commissioner for Human Rights Navi Pillay, Sixty-third Session of the General Assembly, New York, 18 December 2008.



SUMMARY OF RECOMMENDATIONS

– FIVE STEPS –

- 1. Protect** people from homophobic and transphobic violence. Include sexual orientation and gender identity as protected characteristics in hate crime laws. Establish effective systems to record and report hate-motivated acts of violence. Ensure effective investigation and prosecution of perpetrators and redress for victims of such violence. Asylum laws and policies should recognize that persecution on account of one's sexual orientation or gender identity may be a valid basis for an asylum claim.
- 2. Prevent** the torture and cruel, inhuman and degrading treatment of LGBT persons in detention by prohibiting and punishing such acts and ensuring that victims are provided with redress. Investigate all acts of mistreatment by State agents and bring those responsible to justice. Provide appropriate training to law enforcement officers and ensure effective monitoring of places of detention.
- 3. Repeal** laws criminalizing homosexuality, including all laws that prohibit private sexual conduct between consenting adults of the same sex. Ensure that individuals are not arrested or detained on the basis of their sexual orientation or gender identity, and are not subjected to baseless and degrading physical examinations intended to determine their sexual orientation.
- 4. Prohibit** discrimination on the basis of sexual orientation and gender identity. Enact comprehensive laws that include sexual orientation and gender identity as prohibited grounds of discrimination. In particular, ensure non-discriminatory access to basic services, including in the context of employment and health care. Provide education and training to prevent discrimination and stigmatization of LGBT and intersex people.
- 5. Safeguard** freedom of expression, association and peaceful assembly for LGBT and intersex people. Any limitations on these rights must be compatible with international law and must not be discriminatory. Protect individuals who exercise their rights to freedom of expression, association and freedom of assembly from acts of violence and intimidation by private parties.

FIVE CORE LEGAL OBLIGATIONS OF STATES WITH RESPECT TO PROTECTING THE HUMAN RIGHTS OF LGBT PERSONS

1. PROTECT INDIVIDUALS FROM HOMOPHOBIC AND TRANSPHOBIC VIOLENCE

Hate-motivated violence against LGBT people is typically perpetrated by non-State actors – whether private individuals, organized groups, or extremist organizations. Nevertheless, failure by State authorities to investigate and punish this kind of violence is a breach of States’ obligation to protect everyone’s right to life, liberty and security of person, as guaranteed by article 3 of the Universal Declaration of Human Rights and articles 6 and 9 of the International Covenant on Civil and Political Rights.

Universal Declaration of Human Rights

Article 3: Everyone has the right to life, liberty and the security of person.

International Covenant on Civil and Political Rights

Article 6: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 9: Everyone has the right to liberty and security of person.

Convention relating to the Status of Refugees

Article 33(1) : No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

POSITIONS TAKEN BY UNITED NATIONS HUMAN RIGHTS MECHANISMS

LGBT individuals are at particular risk of targeted violence at the hands of private actors. Homophobic and transphobic violence has been recorded in all regions. Such violence may be physical (including murder, beatings, kidnappings, rape and sexual assault) or psychological (including threats, coercion and arbitrary deprivations of liberty).⁴ These attacks constitute a form of gender-based violence, driven by a desire to punish those seen as defying gender norms.

Targeted killings

The State obligation to protect life requires that the State exercise due diligence in preventing, punishing and redressing deprivations of life by private parties, including in instances where the victim has been targeted on grounds of her or his sexual orientation and gender identity.⁵ States have obligations under international law to prevent extrajudicial executions, investigate such killings as occur and bring those responsible to justice. The United Nations General Assembly, in a series of resolutions, has called on States “to ensure the protection of the right to life of all persons under their jurisdiction” and investigate promptly and thoroughly all killings, including those motivated by the victim’s sexual orientation.⁶ Any failure of a State to exercise due diligence in this regard is a breach of its obligations under international law.

Sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality directed at affected individuals.

Murders of individuals targeted because of their sexual orientation or gender identity are well documented in the reports of the human rights treaty bodies and special procedures.⁷ For example in the case of El Salvador, the Human Rights Committee expressed:

⁴Article 2 of the Declaration on the Elimination of Violence against Women notes that violence against women encompasses violence within the family, within the community, and physical, sexual or psychological violence perpetrated and condoned, by the State, wherever it occurs.

⁵Human Rights Committee, General Comments No. 6 (on the right to life), and No. 31 (on the nature of the general legal obligation imposed on States parties to the Covenant), at para. 8.

⁶General Assembly resolution 57/214, 18 December 2002, at para. 6; resolution 61/173, 16 December 2006, at para. 5(b); resolution 65/208, 21 December 2010, at para. 6(b).

⁷**Documentation of extrajudicial killings of LGBT:** Concluding observations of the Human Rights Committee on Poland (CCPR/CO/82/POL), at para. 18; and El Salvador (CCPR/CO/78/SLV), at para. 16; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on her mission to Mexico (E/CN.4/2000/3/Add.3), at paras. 91-92; Report of the Special Rapporteur on violence against women on her mission to El Salvador (A/HRC/17/26/Add.2), at para. 28; Report of the Special Rapporteur on human rights defenders on her mission to Colombia (A/HRC/13/22/Add.3), at para. 50; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, (A/HRC/14/24/Add.2), at para. 74; concluding observations of the Committee on the Elimination of Discrimination against Women on South Africa (CEDAW/C/ZAF/CO/4), at para. 39.

*concern at the incidents of people being attacked, or even killed, on account of their sexual orientation (art. 9), at the small number of investigations mounted into such illegal acts . . . The State party should provide effective protection against violence and discrimination based on sexual orientation.*⁸

Since 1999, the Special Rapporteur on extrajudicial, summary or arbitrary executions has regularly drawn attention to persons being subjected to death threats or killed because of their sexual orientation and gender identity.⁹ Many of the cases involved transgender persons.¹⁰ Presenting his 2006 report to the Human Rights Council, the Special Rapporteur stated:

One issue which in the past has given rise to particular controversy in relation to this mandate concerns the situation of individuals who are gay, lesbian, bisexual or transsexual. Yet based on the information I have received, it is difficult to imagine an issue which should be less controversial in terms of this mandate.

*In essence, the members of this group have come to my attention in two contexts. The first concerns those who have been killed for the very fact of their sexual identity, often by agents of the State, and their murders go unpunished. Indeed no prosecution is ever brought. After all, they were only gay. In contrast, the second context involves prosecution with a vengeance, directed not against the murderers but against those who engage in consensual practices in private. I continue to receive reports of such individuals who have been sentenced to death by stoning. Both of these phenomena involve a fundamental negation of all that human rights norms stand for. These practices should be a matter of deep concern rather than a source of controversy.*¹¹

⁸Concluding observations of the Human Rights Committee on El Salvador (CCPR/CO/78/SLV), at para. 16.

⁹See reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions: E/CN.4/1999/39, at para. 76; E/CN.4/1999/39, at para. 76; E/CN.4/2000/3, at para. 54; E/CN.4/2001/9, at para. 48; E/CN.4/2002/74, at para. 62; A/57/138, at para. 38; E/CN.4/2003/3, at para. 66; A/59/319, at para. 60; A/HRC/4/20 and Add.1; A/HRC/4/29/Add.2; A/HRC/11/2/Add.7; A/HRC/14/24/Add.2; and A/HRC/17/28/Add.1.

¹⁰**Killings of transgender individuals:** Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions: E/CN.4/2000/3, at para. 54 ("transvestite sex worker" in Brazil); E/CN.4/2001/9, at para. 49 (transvestite shot and killed in El Salvador); E/CN.4/2003/3/Add.2, at para. 68 (transsexual sex-worker reportedly murdered behind San Pedro Sula Cathedral); E/CN.4/2003/3, at para. 66 (killings of three transsexual persons in the Bolivarian Republic of Venezuela without initiation of a Government investigation).

¹¹Oral presentation of report E/CN.4/2006/53 by the Special Rapporteur to the Human Rights Council, 19 September 2006, available at www.un.org/webcast/unhrc/archive.asp?go=060919 (accessed 1 June 2012).

In his 2007 report on his mission to Guatemala, the Special Rapporteur on extrajudicial, summary or arbitrary executions stated:

[R]egardless of the extent to which State agents may be involved, the evidence shows that the State has responsibility under international human rights law for the widespread killings of . . . gay, lesbian, transgender, and transsexual persons . . . There has been impunity for murders motivated by hatred towards persons identifying as gay, lesbian, transgender, and transsexual. Credible information suggests that there were at least 35 such murders between 1995 and 2006. Given the lack of official statistics and the likely reticence if not ignorance of victims' family members, there is reason to believe that the actual numbers are significantly higher.¹²

The Special Rapporteur encouraged:

Governments to renew their efforts to protect the security and the right to life of persons belonging to sexual minorities. Acts of murder and death threats should be promptly and thoroughly investigated regardless of the sexual orientation of the victims. Measures should include policies and programmes geared towards overcoming hatred and prejudice against homosexuals and sensitizing public officials and the general public to crimes and acts of violence directed against members of sexual minorities. The Special Rapporteur believes that decriminalizing matters of sexual orientation would greatly contribute to overcoming the social stigmatization of members of sexual minorities, and thereby curb impunity for human rights violations directed against these persons.¹³

LGBT persons are also among the victims of so-called “honour” killings, carried out against those seen by family or community members to have brought shame or dishonour on a family, often for transgressing gender norms or for sexual behaviour, including actual or assumed same-sex sexual activity. While women are generally the targets of this sort of punishment, these attacks can be directed at individuals of any sex.¹⁴

¹²Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Guatemala (A/HRC/4/20/Add.2), at paras. 12 and 32.

¹³Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2000/3), at para. 116.

¹⁴See Report of the Secretary-General on violence against women (A/61/122/Add.1), para. 124. Reports of the Special Rapporteur on violence against women: E/CN.4/2002/83, paras. 27-28; A/HRC/4/34/Add.2, para. 19, and A/HRC/4/34/Add.3, para. 34.

Non-fatal attacks

In addition to being targets of murder, LGBT persons are often victims of other forms of violence by non-State actors.¹⁵ Allegations of lesbians being attacked, raped, forcibly impregnated and otherwise punished because of sexual orientation come from many regions.¹⁶ The Committee on the Elimination of Discrimination against Women expressed grave concern about reported sexual offences committed against women on account of their sexual orientation.¹⁷ The Special Rapporteur on violence against women has reported alleged incidents of gang rapes, family violence and murder experienced by lesbian, bisexual and transgender women in El Salvador, Kyrgyzstan and South Africa,¹⁸ where the Rapporteur noted that “lesbian women face an increased risk of becoming victims of violence, especially rape, because of widely held prejudices and myths”, including “for instance, that lesbian women would change their sexual orientation if they are raped by a man”.¹⁹ In its concluding observations on South Africa, the Committee on the Elimination of Discrimination against Women stated:

*[T]he Committee expresses grave concern about reported sexual offences and murder committed against women on account of their sexual orientation. The Committee further expresses serious concern about the practice of so-called “corrective rape” of lesbians.*²⁰

As with extrajudicial killings, official discrimination can legitimize such violence and create a climate in which perpetrators go unpunished. As the Special Rapporteur on health noted, “Sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality

¹⁵Report of the Special Rapporteur on violence against women on her mission to Kyrgyzstan, A/HRC/14/22/Add.2, at para. 37-38 (describing high level of violence against lesbian, bisexual and transgender people, including rapes and family violence).

¹⁶See A/HRC/17/26, para. 40. See also A/HRC/14/22/Add.2, para. 23, A/HRC/17/26/Add.1, paras. 204-213, E/CN.4/2002/83, para. 102, A/HRC/4/34/Add.3, para. 34, and the concluding observations of the Committee on the Elimination of Discrimination against Women on the Russian Federation (C/USR/CO/7), paras. 40-41.

¹⁷Concluding observations on South Africa (CEDAW/C/ZAF/CO/4), para. 39-40.

¹⁸See A/HRC/14/22/Add.2, paras. 37-38, and A/HRC/17/26/Add.2, paras. 28-29.

¹⁹A/HRC/4/34/Add.1, paras. 632-633. Both the Committee on the Elimination of Discrimination against Women and the Special Rapporteur on violence against women have addressed so-called “curative” or “corrective” rape, perpetrated by men who claim their intent is to “cure” women of their lesbianism. See, for example, the concluding observations of the Committee on South Africa (CEDAW/C/ZAF/CO/4), para. 39; and the report of the Special Rapporteur on her mission to Kyrgyzstan (A/HRC/14/22/Add.2), para. 38.

²⁰Concluding observations of the Committee on the Elimination of Discrimination against Women on South Africa (CEDAW/C/ZAF/CO/4), at paras. 39-40.



directed at affected individuals.²¹ Thus, in its concluding observations on Togo, the Human Rights Committee recommended decriminalization of consensual sexual relations between adults of the same sex. It stated, furthermore, that the State should:

*take the necessary steps to put an end to prejudice and the social stigmatization of homosexuality and send a clear message that it does not tolerate any form of harassment, discrimination or violence against persons based on their sexual orientation.*²²

States have an obligation to enact legislation to prohibit discrimination by private parties, including through hate crime laws that address homophobic and transphobic violence.²³ In the case of Jamaica, where the Committee received

²¹Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/14/20), at para. 20.

²²Concluding observations of the Human Rights Committee on Togo (CCPR/C/TGO/CO/4), at para. 14.

²³**Enact hate crime laws:** Concluding observations of the Human Rights Committee on the United States of

reports of song lyrics inciting anti-gay violence, the Committee stated that the State party “should ensure that individuals who incite violence against homosexuals are investigated, prosecuted and properly sanctioned.”²⁴ In the case of Poland, the Human Rights Committee noted “with concern a significant rise in manifestations of hate speech and intolerance directed at lesbian, gay, bisexual and transgender people.”

States are required to protect “all persons, regardless of . . . sexual orientation (or) transgender identity from torture and cruel, inhuman or degrading treatment or punishment.”

United Nations Committee against Torture

*The State party should ensure that all allegations of attacks and threats against individuals targeted because of their sexual orientation or gender identity are thoroughly investigated. It should also . . . amend the Penal Code to define hate speech and hate crimes based on sexual orientation or gender identity among the categories of punishable offences; and intensify awareness-raising activities aimed at the police force and wider public.*²⁵

The Human Rights Committee has also made similar statements concerning Mongolia, stating that the State should “ensure that LGBT persons have access to justice, and that all allegations of attacks and threats against individuals targeted because of their sexual orientation or gender identity are thoroughly investigated.”²⁶

Asylum claims

States also have a duty to provide safe refuge to individuals fleeing persecution on grounds of their sexual orientation or gender identity. Article 33 of the Convention relating to the Status of Refugees provides that States parties have an obligation not to expel or return a refugee to a place where their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. The United

America [CCPR/C/USA/CO/3], at para. 25; Uzbekistan [CCPR/C/UZB/CO/3], at para. 22; concluding observations of the Committee against Torture on Poland [CAT/C/POL/CO/4], at para. 19; Mongolia [CAT/C/MNG/CO/1], at para. 25; Republic of Moldova [CAT/C/MDA/CO/2], at para. 27; Report of the Special Rapporteur on violence against women on her mission to Kyrgyzstan [A/HRC/14/22/Add.2], at para. 92; Report of the Special Rapporteur on violence against women on her mission to El Salvador [A/HRC/17/26], at paras. 28-29, 77; Report of the Special Rapporteur on the human rights of migrants on his mission to South Africa [A/HRC/17/33/Add.4], at para. 77(a) (“Make any act of violence against individuals or property on the basis of a person’s race, nationality, religion, ethnicity, sexual orientation or gender identity (‘hate crime’) an aggravating circumstance.”).

²⁴Concluding observations of the Human Rights Committee on Jamaica [CCPR/C/JAM/CO/3], at para. 8.

²⁵Concluding observations of the Human Rights Committee on Poland [CCPR/C/POL/CO/6], at para. 8.

²⁶Concluding observations of the Human Rights Committee on Mongolia [CCPR/C/MNG/CO/5], at para. 9; Mexico [CCPR/C/MEX/CO/5], at para. 21.

Nations High Commissioner for Refugees (UNHCR) advises that individuals who fear persecution on account of their sexual orientation or gender identity may be considered members of a “particular social group”. State parties to the Convention should ensure that such individuals are not returned to a State where their lives or freedom would be at risk and, provided the individuals concerned meet the criteria for refugee status, recognize them as refugees to be treated in accordance with the provisions of the Convention.²⁷

UNHCR estimates that at least 42 States have granted asylum to individuals with a well-founded fear of persecution owing to sexual orientation or gender identity, although the precise figure is unclear. Some States grant asylum even without a clear policy in this regard, while others do not track reasons for granting refugee status or asylum. Even in countries that recognize these grounds for asylum, practices and procedures often fall short of international standards. Review of applications is sometimes arbitrary and inconsistent. Officials may have little knowledge about or sensitivity towards conditions facing LGBT people.²⁸ Refugees are sometimes subjected to violence and discrimination while in detention facilities and, when resettled, may be housed within communities where they experience additional sexuality and gender-related risks. Refoulement of asylum seekers fleeing such persecution places them at risk of violence, discrimination and criminalization. In some cases, they are returned with instructions to “go home and be discreet”, an approach criticized by UNHCR.²⁹

CONCLUSION

In order to respect, protect and fulfill the right to life and security of person guaranteed under international law, States must effectively investigate, prosecute and punish perpetrators responsible for extrajudicial executions, and enact hate crime laws that protect individuals from violence on the basis of sexual orientation and gender identity. Effective systems should be established for recording and reporting hate-motivated acts of violence. Asylum laws and policies should recognize that persecution on account of one’s sexual orientation or gender identity may be a valid basis for an asylum claim.

²⁷UNHCR, Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (see footnote 1), para. 3; see also UNHCR in relation to *Secretary of State for the Home Department v. Patrick Kwame Otchere*, 1988.

²⁸UNHCR, Guidance Note on Refugee Claims, paras. 37 and 41.

²⁹*Ibid.*, paras. 25, 26 and 41. See also the decision of the Supreme Court of the United Kingdom, *HJ (Islamic Republic of Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31.

2. PREVENT TORTURE AND CRUEL, INHUMAN AND DEGRADING TREATMENT OF LGBT PERSONS

States have an obligation under international law to protect individuals from torture and other cruel, inhuman or degrading treatment. This includes the obligation to prohibit torture and other forms of ill-treatment and to provide redress for such acts. The failure to investigate and bring to justice perpetrators of torture is itself a breach of international human rights law. Furthermore, the use of forced anal examinations contravenes the prohibition against torture and other cruel, inhuman or degrading treatment. These rights are guaranteed by article 5 of the Universal Declaration of Human Rights, article 7 of the International Covenant on Civil and Political Rights and article 2 of the Convention against Torture.

Universal Declaration of Human Rights

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

International Covenant on Civil and Political Rights

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Convention against Torture

Article 1(1): For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 2(1): Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

POSITIONS TAKEN BY UNITED NATIONS HUMAN RIGHTS MECHANISMS

The Committee against Torture, the Special Rapporteur on torture and other human rights bodies and mechanisms have documented substantial evidence of abuse and mistreatment of LGBT individuals by police, prison guards and other law enforcement officers.³⁰ The Committee against Torture has warned that “both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles.”³¹ The Special Rapporteur on violence against women has detailed allegations of metis³² in Nepal being beaten by police, who demand money and sex.³³ In one case in El Salvador, a transgender woman was detained in a cell with gang members where she was “raped more than 100 times, sometimes with the complicity of prison officials.”³⁴

The Special Rapporteur on torture has also highlighted allegations of mistreatment of prisoners and detainees on the basis of their sexual orientation or gender identity in his reports.³⁵ In a 2001 report, he wrote:

*[I]t appears that members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations. Indeed, discrimination on grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place.*³⁶

³⁰Concluding observations of the Human Rights Committee on the United States of America (CCPR/C/USA/CO/3), at para. 25; concluding Observations of the Committee against Torture on the United States of America (CAT/C/USA/CO/2), at paras. 32, 37; Ecuador (CAT/C/ECU/CO/3), at para. 17; Argentina (CAT/C/C/CR/33/1), at para. 6(g); Egypt (CAT/C/CR/29/4), at para. 5(e); Committee against Torture, General Comment No. 2, at para. 21; see also the Committee’s concluding observations on Ecuador (CAT/C/ECU/CO/3), at para. 17; Argentina (CAT/C/CR/33/1), at para. 6; Brazil (A/56/44), at para. 119.

³¹Committee against Torture, General Comment No. 2, at para. 22.

³²Meti is a term used in Nepal to describe people who have been assigned a male gender at birth and who have a female gender identity/gender expression.

³³Reports of the Special Rapporteur on violence against women: E/CN.4/2006/61/Add.1, at paras. 1 and 2; and A/HRC/4/34/Add.1, at paras. 448-454.

³⁴Report of the Special Rapporteur on violence against women (A/HRC/17/26/Add.2), at paras. 28-29.

³⁵Reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: E/CN.4/2001/66/Add.2, at para. 199; E/CN.4/2005/62/Add.1, at paras. 1019, 1161; E/CN.4/2004/56/Add.1, at para. 1327; E/CN.4/2003/68/Add.1, at paras. 446, 463-465, 1861; E/CN.4/2002/76/Add.1, at paras. 16, 507-508, 829, 1709-1716; E/CN.4/2001/66, at para. 1171; E/CN.4/2000/9, at paras. 145, 151, 726; E/CN.4/1995/34, at para. 614.

³⁶Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/56/156), at para. 19.

He emphasized that transgender prisoners in particular were susceptible to physical and sexual abuse if placed within the general prison population.³⁷ For example, the Special Rapporteur has reported instances of transgender women being intentionally beaten on their breasts and cheekbones so as to release toxins, of sexual minorities being subjected to victimization by police when reporting crimes, and prison guards failing to take reasonable measures to reduce the risk of physical or sexual violence against LGBT detainees.³⁸ In one case a lesbian couple in Brazil was allegedly beaten at a police station, verbally abused, and forced to perform oral sex.³⁹ In Uzbekistan, a human rights defender who had been charged with homosexuality was beaten and threatened with rape by police.⁴⁰

States are required to protect “all persons, regardless of . . . sexual orientation (or) transgender identity” from torture and cruel, inhuman or degrading treatment or punishment (hereafter “ill-treatment”).⁴¹ Under international law, States have the obligation to prohibit, prevent and provide redress for torture and ill-treatment in all contexts of State custody or control.⁴² The failure to investigate and bring to justice perpetrators of torture or ill-treatment can itself give rise to a separate breach of international law.⁴³ In its concluding observations on the United States of America, for example, the Committee against Torture expressed concern about reports of physical and sexual assaults of people of “differing sexual orientation.” The State party should ensure that “its law-enforcement personnel are independently, promptly and thoroughly investigated and that perpetrators are prosecuted and appropriately punished.”⁴⁴ In the case of Costa Rica, the Committee against Torture recommended training and awareness programmes for police officers, border guards and prison personnel to prevent abuse of people “on the grounds of their sexual orientation and/or transsexual identity.”⁴⁵

³⁷A/56/156, at para. 23.

³⁸A/56/156, at para. 18; E/CN.4/2002/76/Add.1, at paras. 16, 1711.

³⁹E/CN.4/2001/66/Add.2, at para. 199.

⁴⁰E/CN.4/2004/56/Add.1, at paras. 1878, 1899.

⁴¹Committee against Torture, General Comment No. 2, at para. 21.

⁴²Committee against Torture, General Comment No. 2, at para. 15.

⁴³Human Rights Committee, General Comment No. 31, at para. 18.

⁴⁴Concluding observations of the Committee against Torture on the United States of America (CAT/C/USA/CO/2), at paras. 32, 37.

⁴⁵Concluding observations of the Committee against Torture on Costa Rica (CAT/C/CRI/CO/2), at para. 11, 18.



One issue highlighted by experts is the practice of subjecting men suspected of homosexuality to non-consensual anal examinations. In some countries men who are arrested on charges of homosexuality are compelled to undergo medical examinations that are intended to obtain physical evidence of anal sex. In addition to being scientifically worthless, such tests are a violation of bodily integrity. In a case where men were subjected to anal examinations, the Working Group on Arbitrary Detention stated:

These tests, forcibly undertaken, are in and of themselves intrusive in nature and violative of bodily rights of the individual under human rights law ... Accordingly, the Working Group considers that ... forced anal examinations contravene the prohibition of torture and other cruel, inhumane and degrading treatment, whether if, like in the present cases, they are employed with a purpose to punish, to coerce a confession, or to further discrimination. In addition, they are medically worthless for the determination whether or not a person has engaged in same-sex sexual conduct or whether the person has been involved in the practice of habitual debauchery or the prostitution of men.⁴⁶

⁴⁶Working Group on Arbitrary Detention Opinion No. 25/2009 on Egypt (A/HRC/16/47/Add.1), at paras. 23, 28-29.

The Committee against Torture and the Special Rapporteur on torture have also criticized the use of forced anal exams to “prove” homosexuality.⁴⁷ The Special Rapporteur on torture has described “invasive forensic examinations” as being “intrusive and degrading” with the potential to “amount to torture or ill-treatment” and has protested about the practice in communications with States.⁴⁸

A second concern is sexual violence. The human rights mechanisms have repeatedly raised the issue of sexual abuse of LGBT persons, often by police or in places of custody.⁴⁹ Sexual violence may constitute torture when it is carried out by, or at the instigation of, or with the consent or acquiescence of public officials.⁵⁰ One of the prohibited purposes under the definition of torture is “discrimination of any kind.” Sexual abuse directed at LGBT individuals is often motivated by discrimination. The Special Rapporteur on violence against women has noted, “While sexual violence is often looked at in isolation, it often intertwines with other forms of discrimination, including on the basis of race, ethnicity, religion, sexual identity, social status or disabilities.”⁵¹ She emphasized the “widespread discrimination and violence suffered by some groups of women owing to their sexual orientation and gender identity.” In her report she further states:

*Under international human rights law, notably the Declaration on the Elimination of Violence against Women and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, States have the obligation to criminalize acts of torture and violence against women, to prosecute perpetrators and provide reparation to victims. Accordingly, States must do their utmost to prevent the perpetration of sexual violence, address any act of sexual violence and offer judicial remedies to the victims.*⁵²

⁴⁷Concluding observations of the Committee against Torture on Egypt (CAT/C/CR/29/4), at paras. 5-6.

⁴⁸Reports of the Special Rapporteur on torture: A/56/156, at para. 24; A/HRC/4/33/Add.1, at para. 317; A/HRC/10/44/Add.4, at para. 61; and A/HRC/16/52/Add.1.

⁴⁹**Sexual abuse of LGBT:** CAT/C/USA/CO/2, at para. 32; Reports of the Special Rapporteur on torture: E/CN.4/2003/68/Add.2, at para. 42; E/CN.4/2002/76, at Annex III; A/56/156, at paras. 18, 23.

⁵⁰Report of the Special Rapporteur on torture (A/HRC/7/3), at para. 34.

⁵¹**Sexual violence and multiple discrimination:** Report of the Special Rapporteur on violence against women (A/HRC/14/22/Add.1), at para. 17.

⁵²**State obligation re sexual violence:** A/HRC/14/22/Add.1, at para. 19.

CONCLUSION

All individuals are protected from torture and cruel, inhuman or degrading treatment. Forced anal exams and sexual violence by State agents can constitute torture or cruel, inhuman or degrading treatment or punishment. Under international law, States must prohibit and punish acts of torture and ill-treatment, and must provide redress to victims of such acts.⁵³ This means that a State must define torture and ill-treatment as offences under domestic criminal law, and must ensure that all acts of brutality by law enforcement officers and other agents of the State are independently, promptly and thoroughly investigated, and that those responsible are brought to justice. States should provide a procedure whereby victims of such acts can seek remedies, including compensation. States are also under an obligation to take preventive measures, such as training of law enforcement officers and monitoring of places of detention.

⁵³Human Rights Committee, General Comment No. 20; Committee against Torture, General Comment No. 2.

3. DECRIMINALIZE HOMOSEXUALITY

Laws that criminalize homosexuality give rise to a number of separate but interrelated violations. Such laws violate an individual's right to be free from discrimination, which is enshrined in article 2 of the Universal Declaration of Human Rights and core international human rights treaties, as well as the rights to be protected against unreasonable interference with privacy and arbitrary detention, protected by articles 12 and 9 of the Universal Declaration and articles 17 and 9 of the International Covenant on Civil and Political Rights. Furthermore, laws that impose the death penalty for sexual conduct violate the right to life, as guaranteed by article 3 of the Universal Declaration and article 6 of the International Covenant on Civil and Political Rights. Such laws, even if they are never enforced, breach State obligations under international human rights law.



Universal Declaration of Human Rights

Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.

International Covenant on Civil and Political Rights

Article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 6(2): In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

Article 9: Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 17: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

POSITIONS TAKEN BY UNITED NATIONS HUMAN RIGHTS MECHANISMS

At least 76 countries have laws in effect that are used to criminalize consensual relationships between adults of the same sex.⁵⁴ Such laws, typically prohibit either certain types of sexual activity or any intimacy or sexual activity between persons of the same sex. In some cases, the language used refers to vague and undefined concepts, such as “crimes against the order of nature” or “morality”, or “debauchery”.⁵⁵ What these laws have in common is their use to harass and prosecute individuals because of their actual or perceived sexuality or gender identity.⁵⁶

At least 76 countries have laws in effect that are used to criminalize consensual sex between adults of the same sex.

The criminalization of private, consensual sex between adults of the same sex breaches a State’s obligations under international law, including the obligations to protect individual privacy and to guarantee non-discrimination. This has been the consistent position of United Nations human rights experts since 1994, when the Human Rights Committee decided *Toonen v. Australia*.

Toonen concerned a challenge to laws in the Australian State of Tasmania criminalizing consensual same-sex sexual conduct. The Committee found that it was “undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy’” under article 17 of the International Covenant on Civil and Political Rights. It did not matter that Mr. Toonen, the author of the communication, had never been prosecuted. The mere existence of the criminal law “continuously and directly interferes with the author’s privacy.”⁵⁷ Under article 17, individuals are protected against “arbitrary or unlawful interferences” with their privacy. An “arbitrary interference” can be one provided for by law that does not meet the requirements of being “in accordance with the provisions, aims and objectives of the Covenant” and “reasonable in the particular circumstances.”⁵⁸ The Committee interpreted “the requirement of reasonableness to imply that the interference with privacy must be proportional

⁵⁴“State-sponsored Homophobia: a world survey of laws criminalising same-sex sexual acts between consenting adults”, International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), Brussels, May 2011, p. 9.

⁵⁵See A/HRC/10/21/Add.3, paras. 56-58.

⁵⁶These laws may also be used in “social cleansing” efforts. See, for example, E/CN.4/1995/111, para. 49, and E/CN.4/2005/7, para. 71.

⁵⁷*Toonen v. Australia*, Human Rights Committee Communication No. 488/1992, CCPR/C/50/D/488/1992, 4 April 1994, at para. 8.2.

⁵⁸Human Rights Committee, General Comment No. 16 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation).

to the end sought and be necessary in the circumstances of any given case.”⁵⁹ It concluded that the laws in Tasmania were neither proportional nor necessary. They did not achieve the aim of protecting public health and they were not necessary to protect public morals, as demonstrated by the fact that laws criminalizing homosexuality had been repealed in the rest of Australia and were not enforced in Tasmania.⁶⁰

Since *Toonen* was decided, United Nations human rights treaty bodies have repeatedly urged States to reform laws criminalizing homosexuality or sexual conduct between partners of the same sex and have also welcomed the legislative or judicial repeal of such laws.⁶¹ For example, in the case of Chile, the Committee stated:

*The continuation in force of legislation that criminalizes homosexual relations between consenting adults involves violations 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. Therefore: The law should be amended so as to abolish the crime of sodomy as between adults.*⁶²

A few years later the Committee noted with satisfaction that the laws in Chile criminalizing homosexual relations between consenting adults had been repealed.⁶³

Similarly, in the case of Cameroon, the Committee stated:

The Committee remains deeply concerned about the criminalization

⁵⁹*Toonen v. Australia*, at para. 8.3.

⁶⁰*Ibid.*, at para. 8.5 and 8.6.

⁶¹Concluding observations of the Human Rights Committee on Togo (CCPR/C/TGO/CO/4), at para. 14; Uzbekistan (CCPR/C/UZB/CO/3), at para. 22; Grenada (CCPR/C/GRC/CO/1), at para. 21; United Republic of Tanzania (CCPR/C/TZA/CO/4), at para. 22; Botswana (CCPR/C/BWA/CO/1), at para. 22; St. Vincent and the Grenadines (CCPR/C/VCT/CO/2); Algeria (CCPR/C/DZA/CO/3), at para. 26; Chile (CCPR/C/CHL/CO/5), at para. 16; Barbados (CCPR/C/BRB/CO/3), at para. 13; United States of America (CCPR/C/USA/CO/3), at para. 9; Kenya (CCPR/C/CO/83/KEN), at para. 27; Egypt (CCPR/C/76/EGY), at para. 19; Romania (CCPR/C/79/Add.111), at para. 16; Lesotho (CCPR/C/79/Add.106), at para. 13; Ecuador (CCPR/C/79/Add.92), at para. 8; Cyprus, (CCPR/C/79 Add.88), at para. 11; United States of America (A/50/40), at para. 287. Concluding observations of the Committee on Economic, Social and Cultural Rights on Kyrgyzstan (E/C.12/Add.49), at paras. 17, 30; Cyprus (E/C.12/1/Add.28), at para. 7. Concluding observations of the Committee on the Elimination of Discrimination against Women on Uganda (CEDAW/C/UGA/CO/7), at para. 43-44; Kyrgyzstan (A/54/38), at paras. 127, 128. Concluding observations of the Committee on the Rights of the Child on Chile (CRC/C/CHL/CO/3), at para. 29.

⁶²Concluding observations of the Human Rights Committee on Chile (CCPR/C/79/Add.104), at para. 20.

⁶³Concluding observations of the Human Rights Committee on Chile (CCPR/C/CHL/CO/5), at para. 16.

*of consensual sexual acts between adults of the same sex ... As the Committee and other international human rights mechanisms have underlined, such criminalization violates the rights to privacy and freedom from discrimination enshrined in the Covenant ... The State party should take immediate steps towards decriminalizing consensual sexual acts between adults of the same sex, in order to bring its law into conformity with the Covenant.*⁶⁴

With regards' to the United States of America, the Committee first expressed concern at "the serious infringement of private life" in those States that had criminal penalties for consensual same-sex sexual activity and the consequences of such laws for the "enjoyment of other human rights without discrimination."⁶⁵ Later, when the United States Supreme Court held such laws were unconstitutional in the case of *Lawrence v. Texas*, the Committee welcomed the decision.⁶⁶

The criminalization of consensual, adult same-sex relationships breaches a State's obligations under international law, including obligations to protect privacy and guarantee non-discrimination.

As the Committee observed in *Toonen*, an individual's privacy and non-discrimination rights are violated even if the law in question is never enforced. In its concluding observations on Ethiopia, the Committee stated: "The Committee's concerns are not allayed by the information furnished by the State party that the provision in question is not applied in practice."⁶⁷

In some countries that have decriminalized adult consensual sexual conduct, there remain different ages of consent for homosexual and heterosexual relationships. Young people who engage in same-sex sexual conduct may be subject to criminal penalties, while those who engage in heterosexual sex are not. As treaty bodies have pointed out, differing ages of consent constitute discrimination on the basis of sexual orientation.⁶⁸

The special rapporteurs and working groups of the United Nations Human Rights Council, collectively known as the special procedures, have frequently

⁶⁴Concluding observations of the Human Rights Committee on Cameroon (CCPR/C/CMR/CO/4), at para. 12.

⁶⁵Concluding observations of the Human Rights Committee on the United States of America (A/50/40), at para. 287.

⁶⁶CCPR/C/USA/CO/3, at para. 9.

⁶⁷Concluding observations of the Human Rights Committee on Ethiopia (CCPR/C/ETH/CO/1), at para. 12.

⁶⁸Differing ages of consent: Concluding observations of the Committee on the Rights of the Child on Chile (CRC/C/CHL/CO/3), at para. 29; Isle of Man, United Kingdom (CRC/C/15/Add.134), at para. 22; Austria (CCPR/C/79/Add.103), at para. 13.



expressed concern about the criminalization of same-sex sexual relationships. They have called attention to the ways in which the criminalization of homosexuality legitimizes prejudice and exposes people to hate crimes, police abuse, torture and family violence.⁶⁹ For example, the Special Rapporteur on extrajudicial, summary or arbitrary executions noted that the “criminalization of matters of sexual orientation” increased social stigmatization and made people “more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity.”⁷⁰ When Burundi was in the process of considering a draft law criminalizing sexual acts between persons of the same sex, four of the special procedure mandate-holders sent a joint letter urging the Senate to recognize that the draft law was contrary to international human rights law, would have

⁶⁹See, for example, the report of the Special Representative of the Secretary-General on human rights defenders (E/CN.4/2002/16/Add.1), at para. 154; report of the Special Rapporteur on violence against women (E/CN.4/1999/68), at para. 15. See also, reports of the Special Rapporteur on torture: C/CN.4/2002/76; and A/56/156, at paras. 18-25.

⁷⁰Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions (A/57/138), at para. 37

a negative effect on national efforts to combat HIV/AIDS, and place LGBT human rights defenders in a vulnerable position as potential targets for attack and acts of intimidation by both the authorities and the public.⁷¹

In 5 of the 76 countries, as well as some regions of at least two other countries, the death penalty may be applied for homosexuality-related offences.⁷² In addition to the fact that criminalization of consensual same-sex conduct violates rights of privacy and non-discrimination, the imposition of the death penalty gives rise to a separate violation under article 6 of the International Covenant on Civil and Political Rights and article 3 of the Universal Declaration of Human Rights. Article 6 provides that in countries which have not abolished the death penalty, a “sentence of death may be imposed only for the most serious crimes.” Sexual offences, including same-sex sexual conduct, do not qualify as “the most serious crimes.” Successive resolutions of the former Commission on Human Rights have called on States to ensure that “the death penalty is not imposed for non-violent acts such as ... sexual relations between consenting adults.”⁷³

The work of the treaty bodies and special procedures underscores this principle.⁷⁴ Concerning the Sudan, the Committee stated:

*The imposition in the State party of the death penalty for offences which cannot be characterized as the most serious, including embezzlement by officials, robbery with violence and drug trafficking, as well as practices which should not be criminalized such as committing a third homosexual act and illicit sex, is incompatible with article 6 of the Covenant.*⁷⁵

Special rapporteurs have drawn attention to the application of the death penalty as a violation of international human rights law. In her 2000 report, the Special Rapporteur on extrajudicial, summary or arbitrary executions describes the issue as follows:

⁷¹Report of the Special Rapporteur on human rights defenders (A/HRC/10/12/Add.1), at para. 353.

⁷²The five countries are the Islamic Republic of Iran, Mauritania, Saudi Arabia, the Sudan, and Yemen. See “State-sponsored Homophobia: a world survey of laws criminalising same-sex sexual acts between consenting adults”, ILGA, Brussels, May 2011, p. 10.

⁷³Commission on Human Rights resolutions (on the question of the death penalty): E/CN.4/RES/2005/59, at para. 5; E/CN.4/RES/2004/67, at para. 4; E/CN.4/RES/2003/67, at para. 4; E/CN.4/RES/2002/77, at para. 4.

⁷⁴Concluding observations of the Human Rights Committee on the Sudan (CCPR/C/79/Add.85), at para. 8. Reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions: A/HRC/14/24/Add.1, at paras. 450-451; E/CN.4/2006/53/Add.2, at para. 2; E/CN.4/2006/53/Add.4, at paras. 26, 35, 37, 104; E/CN.4/2002/74, at para. 65.

⁷⁵Concluding observations of the Human Rights Committee on the Sudan (CCPR/C/SDN/CO/3), at para. 19.

It is a cause for great concern that in some States homosexual relationships are still punishable by death. It must be recalled that under article 6 of the International Covenant on Civil and Political Rights death sentences may only be imposed for the most serious crimes, a stipulation which clearly excludes matters of sexual orientation.⁷⁶

Commenting on the application of sharia in parts of Nigeria, the Special Rapporteur on extrajudicial, summary or arbitrary executions stated: "In relation to sodomy, the imposition of the death sentence for a private sexual practice is clearly incompatible with Nigeria's international obligations."⁷⁷ When Nigeria responded that there was a de facto moratorium on executions, the Special Rapporteur emphasized that "the 'mere possibility' that it can be applied threatens the accused for years, and is a form of cruel, inhuman or degrading treatment or punishment. Its status as a law justifies persecution by vigilante groups, and invites abuse."⁷⁸

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, in his 2010 report to the Human Rights Council, states:

The Special Rapporteur believes that the imposition of the death penalty for consensual same-sex conduct is not only unconscionable, but further represents arbitrary deprivation of life, constituting an infringement of the right to life recognized in article 6 of the International Covenant on Civil and Political Rights.⁷⁹

Another concern that arises in the context of the criminalization of same-sex sexual conduct is arrest and detention on the basis of sexual orientation. The International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights both guarantee the right to be free from arbitrary arrest or detention. The Working Group on Arbitrary Detention has consistently maintained that detaining an individual on the basis of her or his sexual orientation is prohibited under international law.

⁷⁶Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2000/3), at para. 57.

⁷⁷Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2006/53/Add.4), at para. 37.

⁷⁸Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/8/3/Add.3) at para. 76.

⁷⁹Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/14/20), at para. 20.

In 2002 the Working Group considered a case involving 55 men who had been arrested at a discotheque on a riverboat on the Nile. The detainees were charged with “debauchery” and “social dissension.” The Working Group concluded that arrests on this basis were discriminatory, in violation of articles 2 and 26 of the International Covenant on Civil and Political Rights, and that therefore the detention was arbitrary.⁸⁰ In 2006 the Working Group issued an opinion concerning the arrest of 11 men in Cameroon under article 347 bis of the Criminal Code, which criminalizes sexual relations between persons of the same sex. Consistently, it found that the detention was arbitrary, in violation of international law. The Working Group stated:

[T]he existence of laws criminalizing homosexual behaviour between consenting adults in private and the application of criminal penalties against persons accused of such behaviour violate the rights to privacy and freedom from discrimination set forth in the International Covenant on Civil and Political Rights. Consequently, the Working Group considers that ... the criminalization of homosexuality in Cameroonian law is incompatible with articles 17 and 26 of the International Covenant on Civil and Political Rights, which instrument Cameroon has ratified.⁸¹

The Working Group has repeated these conclusions in more recent cases.⁸² For example, concerning the arrest and subsequent conviction of four men for debauchery in Agouza, Egypt, it stated: “The vilification and persecution of persons for their sexuality violate the principles of international human rights law.”⁸³ Similarly, in the case of the Islamic Republic of Iran, the Human Rights Committee called on the State party to “ensure that anyone held solely on account of freely and mutually agreed sexual activities or sexual orientation should be released immediately and unconditionally.”⁸⁴

CONCLUSION

The criminalization of sexual practices between consenting adults of the same

⁸⁰Working Group on Arbitrary Detention, Opinion No. 7/2002 on Egypt (E/CN.4/2003/8/Add.1).

⁸¹Working Group on Arbitrary Detention, Opinion No. 22/2006 on Cameroon (A/HRC/4/40/Add.1), at para. 19.

⁸²Working Group on Arbitrary Detention, Opinion No. 42/2008 on Egypt (A/HRC/13/30/Add.1); and No. 25/2009 on Egypt (A/HRC/16/47/Add.1). See also Report of the Working Group on Arbitrary Detention (A/HRC/16/47), at Annex para. 8(e) (categorizing deprivations of liberty based on discrimination on the ground of sexual orientation, in violation of international law, as arbitrary).

⁸³Working Group on Arbitrary Detention, Opinion No. 42/2008 at para. 25.

⁸⁴Concluding observations of the Human Rights Committee on the Islamic Republic of Iran (CCPR/C/IRN/CO/3), at para. 10.

sex breaches international legal guarantees of privacy and non-discrimination. The application of the death penalty for consensual sexual conduct is in violation of the right to life. Arresting or detaining individuals on the basis of their sexual orientation or same-sex sexual conduct is likewise prohibited by the guarantee against arbitrary detention. Even if never enforced, such criminal laws are a breach of State obligations under international human rights law. States should immediately repeal all laws criminalizing private, adult, consensual same-sex sexual conduct.



4. PROHIBIT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

Everyone has the right to be free from discrimination, including on the basis of their sexual orientation and gender identity. This right is protected by article 2 of the Universal Declaration of Human Rights as well as the non-discrimination provisions of core international human rights treaties. In addition, article 26 of the Universal Declaration provides that everyone is equal before the law and is entitled without discrimination to the equal protection of the law.



Universal Declaration of Human Rights

Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

International Covenant on Civil and Political Rights

Article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Economic, Social and Cultural Rights

Article 2: The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Convention on the Rights of the Child

Article 2: States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

POSITIONS TAKEN BY UNITED NATIONS HUMAN RIGHTS MECHANISMS

LGBT individuals experience discrimination in many different aspects of daily life. They suffer from both official discrimination, in the form of State laws and policies that criminalize homosexuality, bar them from certain forms of employment, or deny them access to benefits, and unofficial discrimination, in the form of social stigma, exclusion, and bias including at work, at home, at school and in health care institutions. Yet international human rights law prohibits discrimination on the basis of sexual orientation and gender identity. Sexual orientation and gender identity – just like race, sex, colour, or religion – are impermissible bases for distinction.

International law defines discrimination as any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on a prohibited ground of discrimination and that has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of rights guaranteed under international law.⁸⁵ Differences in treatment based on prohibited grounds are considered discriminatory, unless a State can show that there is a justification for the difference in treatment that is reasonable and objective.

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights all include lists of prohibited grounds of discrimination in their non-discrimination guarantees. These lists do not explicitly include “sexual orientation” or “gender identity”, but they all conclude with the words “other status.” The use of the phrase “other status” shows that the lists were intended to be open-ended and illustrative: in other words, the grounds of discrimination are not closed. According to the Committee on Economic, Social and Cultural Rights:

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

⁸⁵Human Rights Committee, General Comment No. 18, para. 7; and Committee on Economic, Social and Cultural Rights, General Comment No. 20, para. 7. See the International Convention on the Elimination of all forms of Racial Discrimination, article 1; the Convention on the Elimination of All Forms of Discrimination against Women, article 1; and the Convention on the Rights of Persons with Disabilities, article 2.

*experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.*⁸⁶

In their jurisprudence, general comments and concluding observations, United Nations treaty bodies have consistently held that sexual orientation and gender identity are prohibited grounds of discrimination under international law. In addition, the special procedures of the Human Rights Council have long recognized both sexual orientation and gender identity discrimination.

In *Toonen*, the Human Rights Committee stated that “the reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”⁸⁷ In *Young v. Australia*, decided in 2003, and *X v. Colombia*, decided in 2007, the Committee concluded that differences in treatment in the award of pension benefits to a same-sex partner were a violation of the right to be free from discrimination “on grounds of sex or sexual orientation.”⁸⁸

Since *Toonen*, in numerous concluding observations, the Human Rights Committee has urged State parties to “guarantee equal rights to all individuals, as established in the Covenant, regardless of their sexual orientation.”⁸⁹ States have a “legal obligation ... to ensure to everyone the rights recognized by the Covenant ... without discrimination on the basis of sexual orientation.”⁹⁰ The Committee has frequently welcomed the enactment of legislation that includes sexual orientation among the prohibited grounds of discrimination.⁹¹ It has also expressed concern when States do not recognize a change in gender by issuing new identity documents and has noted with approval legislation that grants legal recognition to a change of gender identity.⁹²

⁸⁶Committee on Economic, Social and Cultural Rights, General Comment No. 20, para. 27.

⁸⁷CCPR/C/50/D/499/1992, at para. 8.7.

⁸⁸*Young v. Australia*, Human Rights Committee Communication No. 941/2000 (CCPR/C/78/D/941/2000), at para. 10.4; *X v. Colombia*, Human Rights Committee Communication No. 1361/2005 (CCPR/C/89/D/1361/2005), at para. 9.

⁸⁹**Guarantee equal rights to all regardless of sexual orientation:** Concluding observations of the Human Rights Committee on Chile (CCPR/C/CHL/CO/5), at para. 16. See also concluding observations of the Human Rights Committee on San Marino (CCPR/C/SMR/CO/2), at para. 7; and Austria (CCPR/C/AUT/CO/4), at para. 8.

⁹⁰CCPR/C/USA/CO/3, at para. 25.

⁹¹**Welcoming non-discrimination legislation:** Concluding observations of the Human Rights Committee on Greece (CCPR/CO/83/GRC), at para. 5; Finland (CCPR/CO/82/FIN), at para. 3; Slovakia (CCPR/CO/78/SVK), at para. 4; Sweden (CCPR/C/SWE/CO/6), at para. 3; Denmark (CCPR/C/DNK/CO/5), at para. 4; France (CCPR/C/FRA/CO/4); Concluding observations of the Committee on the Elimination of Discrimination against Women on Montenegro (CEDAW/C/MNE/CO/1), at para. 4(b).

⁹²Concluding observations of the Human Rights Committee on Ireland (CCPR/C/IRL/CO/3), at para. 8; United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6), at para. 5.

*Sexual orientation
and gender identity –
just like race, sex,
colour, or religion
– are impermissible
bases for distinction.*

The Committee on Economic, Social and Cultural Rights has affirmed that the non-discrimination guarantee of the International Covenant on Economic, Social and Cultural Rights includes sexual orientation. It has reflected this in general comments relating to the right to work, the right to water, the right to social security, the right to the highest attainable standard of health, as well

as to the general meaning of the non-discrimination guarantee.⁹³ In 2009, the Committee explained that the non-discrimination guarantee includes gender identity, stating that “persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.”⁹⁴

In its concluding observations, the Committee has expressed concern about discrimination against lesbian, gay, bisexual and transgender persons in the enjoyment of their economic, social and cultural rights and has urged the adoption of legislation to protect them from discrimination.⁹⁵ It has similarly praised States for the adoption of such legislation.⁹⁶

The Committee on the Rights of the Child likewise interprets the right to non-discrimination in article 2 of the Convention on the Rights of the Child to include sexual orientation⁹⁷ and gender identity.⁹⁸ In its concluding observations, the Committee has raised concerns about legislation that does not protect individuals from discrimination on the grounds of sexual orientation or gender identity and about inadequate efforts to combat such discrimination.⁹⁹ For example,

⁹³**Sexual orientation:** Committee on Economic, Social and Cultural Rights, General Comments No. 20 (Non-discrimination in economic, social and cultural rights), at para. 32; No. 19 (Right to social security), at para. 29; No. 18 (Right to work), at para. 12(b); No. 15 (Right to water), at para. 13; No. 14 (Right to the highest attainable standard of health), at para. 18.

⁹⁴**Gender identity:** Committee on Economic, Social and Cultural Rights, General Comment No. 20 (Non-discrimination in Economic, Social and Cultural Rights), at para. 32.

⁹⁵Concluding observations of the Committee on Economic, Social and Cultural Rights on Poland (E/C.12/POL/CO/5), at para 12; China (E/C.12/1/Add.107), at para. 78; Trinidad and Tobago (E/C.12/1/Add.80), at para. 14.

⁹⁶Concluding observations of the Committee on Economic, Social and Cultural Rights on Ireland (E/C.12/1/Add.35), at para. 5; Sweden (E/C.12/1/Add.70), at para. 8; Liechtenstein (E/C.12/LIE/CO/1), at para. 6; Monaco (E/C.12/MCO/CO/1), at para. 3; Brazil (E/C.12/CO/BRA/2), at para. 3.

⁹⁷Committee on the Rights of the Child, General Comments No. 4 (Adolescent health and development in the context of the Convention on the Rights of the Child) at para. 6; and No. 3 (HIV/AIDS and the rights of the child), at para. 8.

⁹⁸Committee on the Rights of the Child, General Comment No. 13 (The right of the child to freedom from all forms of violence), at paras. 60 and 72(g) (stressing that States parties must address discrimination against vulnerable or marginalized groups of children including children who are lesbian, gay, transgender or transsexual).

⁹⁹Concluding observations of the Committee on the Rights of the Child on New Zealand (CRC/C/NZL/CO/3-4), at para. 25; Slovakia (CRC/C/SVK/CO/2), at para. 27; Malaysia (CRC/C/MYS/CO/1), at para. 31;



with respect to the United Kingdom, the Committee expressed concern that “in practice certain groups of children, such as ... lesbian, bisexual, gay, and transgender children (LGBT) ... continue to experience discrimination and social stigmatization.”¹⁰⁰ The Committee recommended that the State strengthen its awareness-raising and other preventive action against discrimination and, if necessary, take affirmative action for the benefit of such groups of children.

The Convention against Torture does not include a list of grounds of discrimination. Instead, article 1 provides that the intentional infliction of severe pain or suffering for a variety of purposes, including reasons “based on discrimination of any kind”, constitutes torture. In its General Comment No. 2, the Committee against Torture explained that the obligation of States Parties to prevent torture includes the obligation to ensure that “their laws are in practice applied to all persons, regardless of” a variety of personal characteristics, including “sexual orientation” and “transgender identity.”¹⁰¹ In its concluding observations, the Committee has expressed concerns about sexual and physical abuse by police and prison officials against individuals “on the grounds of their sexual orientation and/or transsexual identity.”¹⁰² It stated:

China (CRC/C/CHN/CO/2), at para. 31; Isle of Man, United Kingdom (CRC/C/15/Add.134), at para. 22.

¹⁰⁰Concluding observations of the Committee on the Rights of the Child on the United Kingdom of Great Britain and Northern Ireland (CRC/C/GBR/CP/4), at paras. 24-25.

¹⁰¹Committee against Torture, General Comment No. 2 (Implementation of article 2 by States Parties), at para. 21.

¹⁰²Concluding observations of the Committee against Torture on Costa Rica (CAT/C/CRI/CO/2), at paras. 11, 18; see also, Latvia (CAT/C/LVA/CO/2), at para. 19 (raising concern about acts of violence and discrimination directed against LGBT community); Poland (CAT/C/POL/CO/4), at para. 20 (hate speech and intolerance against gays and lesbians); United States of America (CAT/C/USA/CO/2); Ecuador

*The Committee considers that, in particular, the rules on public morals can grant the police and judges discretionary power which, combined with prejudices and discriminatory attitudes, can lead to abuse against this group.*¹⁰³

*LGBT individuals
experience
discrimination in
many different
aspects of daily life.*

The Convention on the Elimination of All Forms of Discrimination against Women does not include a list of discriminatory grounds. Nevertheless, the Committee on the Elimination of Discrimination against Women has emphasized the intersectionality of all forms of discrimination as key to understanding the scope of State obligations under the Convention. “The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity ... States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.”¹⁰⁴ In General Recommendation No. 27, the Committee described the discrimination facing older women as “often multidimensional, with the age factor compounding other forms of discrimination based on gender, ethnic origin, disability, poverty levels, sexual orientation and gender identity, migrant status, marital and family status, literacy and other grounds.”¹⁰⁵

The Committee on the Elimination of Discrimination against Women has called attention to discrimination against women on the basis of their sexual orientation and gender identity.¹⁰⁶ In its 2010 concluding observations on Uganda, the Committee voiced “serious concern about reported harassment, violence, hate crimes and incitement of hatred against women on account of their sexual orientation and gender identity. The Committee is further concerned that they face discrimination in employment, health care, education and other fields.” It called on Uganda to “provide effective protection from violence and discrimination against women based on their sexual orientation and gender identity, in particular through the enactment of comprehensive anti-discrimination legislation covering, inter alia, the prohibition of multiple forms of discrimination

(CAT/C/ECU/CO/2), at para. 17.

¹⁰³CAT/C/CRI/CO/2, at para. 11.

¹⁰⁴Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 (on the core obligations of States parties under article 2), at para. 18.

¹⁰⁵Committee on the Elimination of Discrimination against Women, General Recommendation No. 27 (on older women and the protection of their rights), at para. 13.

¹⁰⁶Concluding observations of the Committee on the Elimination of Discrimination against Women on Panama (CEDAW/C/PAN/CO/7), at para. 22; see also, Germany (CEDAW/C/DEU/CO/6), at paras. 61-62; Argentina (CEDAW/C/ARG/CO/6), at paras. 43-44; South Africa (CEDAW/C/ZAF/CO/4), at paras. 39-40; Kyrgyzstan (A/54/38, 20), at para. 128.



against women on all grounds, including on the grounds of sexual orientation and gender identity.”¹⁰⁷

A number of human rights treaty bodies have particularly noted laws that discriminate on the basis of gender identity. In the case of Kuwait, the Human Rights Committee expressed concern about “the new criminal offence of ‘imitating members of the opposite sex’ and called upon the State party to repeal this legislation “in order to bring its legislation in line with the Covenant.”¹⁰⁸ The Committee on Economic, Social and Cultural Rights has observed with dismay that trans and intersex people are characterized as mentally ill and has also expressed concern at violations of their sexual and reproductive health rights, in violation of article 12 of the Covenant. It called on Germany to enact measures to protect the “personal integrity and sexual and reproductive health rights” of transgender and intersex individuals.¹⁰⁹ In the case of Costa Rica, the

¹⁰⁷Concluding observations of the Committee on the Elimination of Discrimination against Women on Uganda (CEDAW/C/UGA/CO/7), at paras. 43-44.

¹⁰⁸Concluding observations of the Human Rights Committee on Kuwait (CCPR/C/KWT/CO/2), at para. 30.

¹⁰⁹Concluding observations of the Committee on Economic, Social and Cultural Rights on Germany (E/C.12/DEU/CO/5), at para. 26.

Committee on the Elimination of Discrimination against Women welcomed new identity card regulations that respected individual gender identity.¹¹⁰

Particular Areas of Concern

The right to be protected against discrimination on the basis of sexual orientation and gender identity applies to the enjoyment of all civil, political, economic, social and cultural rights. The particular areas of employment, health and education are discussed here, but the treaty bodies and special procedures have also noted discrimination in the areas of access to other basic services, such as housing and social benefits.¹¹¹

With regard to employment benefits, the State cannot distinguish between heterosexual and same-sex unmarried couples.

Employment

Article 6 of the International Covenant on Economic, Social and Cultural Rights provides: “The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.” The Committee on Economic, Social and Cultural Rights has stated that the Covenant “prohibits discrimination in access to and maintenance of employment on grounds of ... sexual orientation.”¹¹² This principle of non-discrimination applies to all aspects of the right to work. States thus have an immediate obligation to guarantee that the right to work will be exercised without discrimination of any kind. States must respect the right to work by refraining from denying or limiting access to decent work for all persons and especially for “disadvantaged and marginalized groups and individuals.”¹¹³

¹¹⁰Concluding observations of the Committee on the Elimination of Discrimination against Women on Costa Rica (CEDAW/C/CRI/CO/5-6), at para. 40.

¹¹¹**Discrimination in access to basic services:** Concluding observations of the Human Rights Committee on the Russian Federation (CCPR/C/RUS/CO/6), at para. 27; Japan (CCPR/C/JPN/CO/5) at para. 29; Committee on Economic, Social and Cultural Rights, General Comment No. 20, at para. 32; Reports of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/10/7/Add.3, at para. 50; A/HRC/4/18/Add.2, at para. 125; E/CN.4/2006/118, at para. 30; E/CN.4/2005/43, at para. 63; Reports of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2004/49, at para. 38; E/CN.4/2003/58, at para. 68; Reports of the Special Rapporteur on the right to education, E/CN.4/2006/45, at para. 113; E/CN.4/2001/52, at para. 75; Reports of the Special Rapporteur on adequate housing, A/HRC/10/7/Add.3, at para. 50; A/HRC/7/16; A/HRC/4/18/Add.2, at para. 125; E/CN.4/2006/118, at para. 30; E/CN.4/2005/43, at para. 63; Report of the Special Rapporteur on violence against women, E/CN.4/2005/72/Add.1, at paras. 232-234.

¹¹²Committee on Economic, Social and Cultural Rights, General Comment No. 18 (right to work), at para. 12(b)(1).

¹¹³*Ibid.*, at para. 23.

Any discrimination in access to the labour market or to means and entitlements for obtaining employment “constitutes a violation of the Covenant.”¹¹⁴

With regards to employment benefits, a State cannot distinguish between heterosexual and same-sex unmarried couples. In the case of *X v. Colombia*, the Human Rights Committee found that the state failure to extend pension benefits to an unmarried same-sex partner, when such benefits were granted to unmarried heterosexual couples, was a violation of rights guaranteed by the Covenant.¹¹⁵ In the case of *Young v. Australia*, which concerned broadly similar facts, the Committee stated:

The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced.

In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.¹¹⁶

Health

LGBT and intersex people also face a variety of impediments in exercising the right to health. Article 12(1) of the International Covenant on Economic, Social and Cultural Rights provides: “The States parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” In its General Comment on article 12, the Committee on Economic, Social and Cultural Rights stated:

The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast,

In many countries, transgender persons face particular difficulties in accessing health care.

¹¹⁴*Ibid.*, at para. 33.

¹¹⁵CCPR/C/89/D/1361/2005, at para. 7.2.

¹¹⁶CCPR/C/78/D/941/2000, at para. 10.4.

*the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.*¹¹⁷

In General Comment No. 14, the Committee on Economic, Social and Cultural Rights stated that the Covenant “proscribes any discrimination in access to health care and the underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of . . . sexual orientation”.¹¹⁸ In General Comment No. 20, the Committee explained that the “other status” ground in article 2 of the Covenant includes both sexual orientation and gender identity.¹¹⁹ Ensuring the “right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups” is an immediate obligation of States.¹²⁰

Although the World Health Organization removed homosexuality from its classification of diseases in 1992, a number of countries still classify homosexuality as an illness. The Special Rapporteur on torture has noted that “sexual minorities are said to have been involuntarily confined to State medical institutions, where they were allegedly subjected to forced treatment on grounds of their sexual orientation or gender identity, including electric shock therapy and other ‘aversion therapy’, reportedly causing psychological and physical harm.”¹²¹

The criminalization of same-sex sexual conduct affects the right to health because it prevents individuals from accessing health care out of fear that they may reveal potentially criminal conduct and because it encourages medical professionals to deny services. In addition, the criminalization of sexual conduct means that national health plans and policies do not consider the specific health needs of LGBT communities. In his 2010 report to the Human Rights Council, the Special Rapporteur on the right to health explained:

Criminal laws concerning consensual same-sex conduct, sexual orientation and gender identity often infringe on various human rights, including the right to health. These laws are generally inherently discriminatory and, as such, breach the requirements of a right-to-health approach, which

¹¹⁷Committee on Economic, Social and Cultural Rights, General Comment No. 14, at para. 8.

¹¹⁸*Ibid.*, at para. 18.

¹¹⁹Committee on Economic, Social and Cultural Rights, General Comment No. 20, at para. 32.

¹²⁰Committee on Economic, Social and Cultural Rights, General Comment No. 14, at para. 43(a).

¹²¹Report of the Special Rapporteur on torture (A/56/156), at para. 24.



requires equality in access for all people. The health-related impact of discrimination based on sexual conduct and orientation is far-reaching, and prevents affected individuals from gaining access to other economic, social and cultural rights. In turn, the infringement of other human rights impacts on the realization of the right to health, such as by impeding access to employment or housing.¹²²

The Special Rapporteur categorized the effects of criminalization on the right to health in three ways: inhibition of access to health services, violence and abuse, and social stigmatization. Where same-sex sexual conduct is criminalized, individuals are unable to gain access to effective health services and preventive health measures are not tailored to the needs of LGBT communities. Health professionals may refuse to treat same-sex practising clients or may respond with hostility.¹²³ Criminalization perpetuates stigma “through the reinforcement of existing prejudices and stereotypes.”¹²⁴ Stigmatization, in turn, “prevents legislative and policymaking institutions from adequately addressing health-related matters in communities that are especially vulnerable to the infringement of the enjoyment of the right to health.”¹²⁵ According to the Special Rapporteur, States must decriminalize same-sex consensual conduct “in order to meet core obligations of the right health and create an environment enabling full enjoyment of the right.”¹²⁶

¹²²Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/14/20), at para. 6.

¹²³**Criminalization and health:** Ibid., at paras. 17-21.

¹²⁴Ibid., at para. 22.

¹²⁵Ibid., at para. 23.

¹²⁶Ibid., at para. 26.

Criminalization of consensual sexual relationships also has a negative impact on public health campaigns against HIV/AIDS.¹²⁷ In *Toonen*, the Human Rights Committee rejected the Tasmanian authorities' claim that laws criminalizing consensual same-sex conduct were a necessary public health measure. On the contrary, as the Australian Government had observed, "statutes criminalizing homosexual activity tend to impede public health programmes by driving underground many of the people at risk of infection. Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention."¹²⁸

The negative public health consequences of criminal laws are frequently raised by the special procedures. In a joint letter of allegation concerning the draft anti-homosexuality bill in Uganda, four special procedures wrote:

*If the Bill came into force, it would impede access to HIV- and health-related information and services for LGBT individuals and could thereby undermine the national HIV response, not only by discouraging LGBT individuals from seeking and accessing services, but also by preventing service providers from providing information and services to members of this community.*¹²⁹

Concerning a proposed law in Burundi, the Special Rapporteur on health wrote that criminalization of homosexuality would have a prejudicial effect on Burundi's efforts in the battle against HIV/AIDS. He stated:

*Public health policies regarding the HIV/AIDS epidemic clearly demonstrate that decriminalization of homosexuality, coupled with efforts to fight against LGBT discrimination, constitute a substantial tool to halt the spread of the virus. Besides, if the draft code in question comes into force, it will impede access to information, care and treatment for HIV-positive homosexuals in Burundi and could consequently jeopardize the national response to the HIV/AIDS epidemic.*¹³⁰

¹²⁷Criminalization and HIV/AIDS: Concluding observations of the Human Rights Committee on Cameroon (CCPR/C/CMR/CO/4), at para. 12; Jamaica (CCPR/C/JAM/CO/3), at para. 9.

¹²⁸CCPR/C/50/D/488/1992, at para. 8.5.

¹²⁹Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/14/24/Add.1), at para. 1141.

¹³⁰Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/14/20/Add.1), at para. 14 (unofficial translation).

Similar comments were made concerning a law proposed in the Democratic Republic of the Congo.¹³¹

In many countries, transgender persons face particular difficulties in accessing health care. Gender reassignment therapy, where available, is often prohibitively expensive and State funding or insurance coverage is rarely available. Health-care professionals are often insensitive to the needs of transgender persons and lack the necessary professional training.¹³² In addition, intersex children, who are born with atypical sex characteristics, are often subjected to discrimination and medically unnecessary surgery, performed without their informed consent, or that of their parents, in an attempt to fix their sex.¹³³

It is often in the primary school playground that boys deemed by others to be too effeminate or young girls seen as tomboys endure teasing and sometimes the first blows.

Education

Discrimination in schools and other educational settings can severely impair the ability of young people perceived as lesbian, gay, bisexual, transgender or intersex to enjoy their right to education. In some cases, education authorities and schools actively discriminate against young people because of their sexual orientation or gender expression, sometimes leading to their being refused admission or being expelled.¹³⁴ In addition, LGBT and intersex youth frequently experience violence and harassment, including bullying, in school from classmates and teachers.¹³⁵ Confronting this kind of prejudice and intimidation requires concerted efforts from school and education authorities and integration of principles of non-discrimination and diversity in school curricula and discourse. The media also have a role to play by eliminating negative stereotyping of LGBT people, including in television programmes popular among young people.

The Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child have expressed concern about homophobic discrimination in schools, and called for measures to counter

¹³¹Report of the Special Rapporteur on the right to freedom of opinion and expression (A/HRC/17/27, 27), at para. 675.

¹³²"Human Rights and Gender Identity", the Council of Europe Commissioner for Human Rights, 2009, para. 3.3; "Prevention and treatment of HIV and other sexually transmitted infections" World Health Organization, pages 30-31.

¹³³Concluding observations of the Committee on the Elimination of Discrimination against Women on Costa Rica (CEDAW/C/CRI/CO/5-6), at para. 40.

¹³⁴E/CN.4/2006/45, para. 113.

¹³⁵See, for example, E/CN.4/2001/52, para. 75, and E/CN.4/2006/45, para. 113.

homophobic and transphobic attitudes.¹³⁶ According to UNESCO, “it is often in the primary school playground that boys deemed by others to be too effeminate or young girls seen as tomboys endure teasing and sometimes the first blows linked to their appearance and behaviour, perceived as failing to fit in with the hetero-normative gender identity.”¹³⁷

Isolation and stigma generate depression and other health problems and contribute to truancy, absenteeism, children being forced out of school¹³⁸ and, in extreme cases, attempted or actual suicide.¹³⁹ A survey in the United Kingdom found that almost 65 per cent of lesbian, gay and bisexual youth had been bullied in schools because of their sexual orientation and more than a quarter had been physically abused.¹⁴⁰ These findings are mirrored by results of studies carried out in other countries.¹⁴¹

A related concern is sex education. The right to education includes the right to receive comprehensive, accurate and age-appropriate information regarding human sexuality in order to ensure young people have access to information needed to lead healthy lives, make informed decisions and protect themselves and others from sexually transmitted infections.¹⁴² The Special Rapporteur on the right to education noted that “in order to be comprehensive, sexual education must pay special attention to diversity, since everyone has the right to deal with his or her own sexuality.”¹⁴³

¹³⁶See, for example, concluding observations of the Human Rights Committee on Mexico (CCPR/C/MEX/CO/5), para. 21; concluding observations of the Committee on Economic, Social and Cultural Rights on Poland (E/C.12/POL/CO/5), paras. 12-13; and Committee on the Rights of the Child General Comments No. 3 (CRC/GC/2003/3), para. 8; and No. 13 (CRC/GC/13), paras. 60 and 72 (g); and the Committee’s concluding observations on New Zealand (CRC/C/NZL/CO/3-4), para. 25; Slovakia (CRC/C/SVK/CO/2), paras. 27-28; and Malaysia (CRC/C/MYS/CO/1), para. 31.

¹³⁷“International consultation on homophobic bullying and harassment in educational institutions”, UNESCO concept note, July 2011. See also, “Education Sector Responses to Homophobic Bullying”, UNESCO, 2012.

¹³⁸See, for example, E/CN.4/2006/45, para. 113.

¹³⁹E/CN.4/2003/75/Add.1, para. 1508.

¹⁴⁰Ruth Hunt and Johan Jensen, “The experiences of young gay people in Britain’s schools: the school report”, London, Stonewall, 2007, page 3.

¹⁴¹“Social Exclusion of Young Lesbian, Gay, Bisexual and Transgender People in Europe”, ILGA-Europe and the International Gay and Lesbian Youth Organization, 2006.

¹⁴²See Committee on the Rights of the Child General Comment No. 4 (CRC/GC/2003/4), paras. 26 and 28. See also International Conference on Population and Development, Programme of Action, para. 7.47; Commission on Population and Development resolution 2009/1, para. 7; and UNESCO International Technical Guidance on Sexuality Education, sections. 2.3 and 3.4.

¹⁴³A/65/162, para. 23. See also “Comprehensive sexuality education: giving young people the information, skills and knowledge they need”, UNFPA; and “Standards for Sexuality Education in Europe”, World Health Organization Regional Office for Europe and the Federal Centre for Health Education, including page 27.

Recognition of relationships

In some countries, the State provides benefits to married and unmarried heterosexual couples but denies these benefits to unmarried homosexual couples. Examples include pension entitlements, the ability to leave property to a surviving partner, the opportunity to remain in public housing following a partner's death, or the chance to secure residency for a foreign partner. Lack of official recognition of same-sex relationships and absence of legal prohibition on discrimination can also result in same-sex partners being discriminated against by private actors, including health-care providers and insurance companies.

Under international human rights law, States are not required to allow same-sex couples to marry.¹⁴⁴ Even so, the obligation to protect individuals from discrimination on the basis of sexual orientation extends to ensuring that unmarried same-sex couples are treated in the same way and entitled to the same benefits as unmarried opposite-sex couples.¹⁴⁵ The Human Rights Committee has welcomed measures to address discrimination in this context. In its concluding observations on Ireland, the Committee urged the State party to ensure that proposed legislation establishing civil partnerships not be “discriminatory of non-traditional forms of partnership, including taxation and welfare benefits.”¹⁴⁶

CONCLUSION

States are required to guarantee non-discrimination in the exercise of all human rights for everyone, regardless of sexual orientation or gender identity. This is an immediate and cross-cutting obligation under international human rights law. States should enact comprehensive legislation that prohibits discrimination on the grounds of sexual orientation and gender identity in both the public and private sphere. Such legislation should include remedies for victims of discrimination. States should also adopt awareness-raising campaigns and training programmes to prevent discrimination by tackling discriminatory social attitudes.

¹⁴⁴CCPR/C/75/D/902/1999; and 10 IHRR 40 (2003).

¹⁴⁵CCPR/C/78/D/941/2000, para. 10.4.

¹⁴⁶Concluding observations of the Human Rights Committee on Ireland (CCPR/C/IRL/CO/3), para. 8.

5. RESPECT FREEDOM OF EXPRESSION, ASSOCIATION AND PEACEFUL ASSEMBLY

Limitations on the right to freedom of expression, association and peaceful assembly that are based on the sexual orientation or gender identity of an individual violate rights guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21 and 22 of the International Covenant on Civil and Political Rights. Limitations on these rights must be compatible with the non-discrimination provisions of international law.



Universal Declaration of Human Rights

Article 19: Everyone has the right to freedom of thought and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas.

Article 20(1): Everyone has the right to freedom of peaceful assembly and association.

International Covenant on Civil and Political Rights

Article 19(2): Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 21: The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22(1): Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

POSITIONS TAKEN BY UNITED NATIONS HUMAN RIGHTS MECHANISMS

The Universal Declaration of Human Rights guarantees to everyone the rights to freedom of opinion and expression, peaceful assembly, and association. These same rights are guaranteed by articles 19, 21 and 22 of the International Covenant on Civil and Political Rights. Freedom of expression includes the right to “seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”¹⁴⁷ It is integral to the enjoyment of the rights of association and assembly. Freedom of association involves individuals joining together to collectively express, promote, pursue and defend common interests. Freedom of assembly refers to any kind of meeting, in public or private, including demonstrations, marches and parades. These are rights that are at the heart of an active civil society and a functioning democracy. They are also rights that are essential to the work of human rights defenders.

¹⁴⁷Article 19(2) of the International Covenant on Civil and Political Rights.



Restrictions on the enjoyment of the rights to freedom of association, expression and assembly by LGBT individuals and organizations are extensively documented by the human rights mechanisms of the United Nations. Laws that prohibit “public promotion of homosexuality” or “homosexual propaganda” may silence any discussion of sexuality in the public sphere. In some countries, LGBT marches, parades and other gatherings are refused permits or are met with threats and violence from spectators.¹⁴⁸ Many groups face a denial of permission to register officially as a non-governmental organization or association. For example, in a case involving death threats against the Jamaica Forum of Lesbians, All-Sexuals and Gays (JFLAG), the Special Rapporteur on the right to freedom of opinion and expression sent a letter of allegation expressing concern that

*individuals and associations defending the rights of homosexual men and women, in particular the members of JFLAG, might [be] at risk of, on the one hand, attempts by public authorities to suppress their exercise of free speech, and, on the other hand, of violent attacks by homophobic individuals who may have gained the impression that the Government would not vigorously pursue such violence.*¹⁴⁹

¹⁴⁸See, for example, Report of the Special Rapporteur on contemporary forms of racism (E/CN.4/2006/16/Add.1), at para. 72.

¹⁴⁹Report of the Special Rapporteur on the right to freedom of opinion and expression (E/CN.4/2005/64/Add.1), at para. 494; and Report of the Special Representative of the Secretary-General on human rights defenders (E/CN.4/2005/101/Add.1), at para. 342.

After LGBT pride marches were banned in Moscow, the Human Rights Committee urged the Russian Federation to “take all necessary measures to guarantee the exercise in practice of the right to peaceful association and assembly for the LGBT community.”¹⁵⁰ When the Lithuanian Parliament was considering a draft law that would have banned public dissemination of information about homosexuality and bisexuality, the Special Rapporteurs on freedom of opinion and expression and on human rights defenders issued a joint urgent appeal expressing concern that the law would limit the right to freedom of expression and restrict “the legitimate work of human rights defenders, particularly those working to defend the rights of Lesbian, Gay, Bisexual and Transgender (LGBT) people”.¹⁵¹ Similarly, in another joint letter concerning a proposed law in the Democratic Republic of the Congo, the Special Rapporteurs stated:

*This draft bill would also have a negative effect on the situation of human rights defenders working towards the promotion and protection of LGBT Equality in the Democratic Republic of the Congo. The draft bill would put human rights defenders in a state of increased vulnerability indeed, as they could become targets of attacks and acts of intimidation from both the authorities and the population.*¹⁵²

In some countries, LGBT marches, parades and other gatherings are refused permits or are met with threats and violence from spectators

States often invoke “public morality” to justify limitations on the rights to freedom of association, expression and assembly of individuals and organizations. The International Covenant on Civil and Political Rights provides that these rights may be restricted when the restrictions are provided for by law, are necessary in a democratic society and are for a legitimate purpose. The legitimate purposes listed in articles 19, 21 and 22 are similar, and all include protecting public health and morals. However, laws restricting these rights “must themselves be compatible with the provisions, aims and objectives of the Covenant” and must “not violate the non-discrimination provisions of the Covenant.”¹⁵³

The special procedure mandates dealing with human rights defenders and

¹⁵⁰Concluding observations of the Human Rights Committee on the Russian Federation (CCPR/C/RUS/CO/6), at para. 27.

¹⁵¹Report of the Special Rapporteur on the right to freedom of opinion and expression (A/HRC/14/23/Add.1), at para. 1405.

¹⁵²Report of the Special Rapporteur on the right to freedom of opinion and expression (A/HRC/17/27/Add.1), at para. 676 (unofficial translation).

¹⁵³Human Rights Committee, General Comment No. 34 (article 19), at para. 26; see also, General Comment No. 22 (article 18), at para. 8 (“Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.”).

the right to freedom of expression and opinion have each been very active in recording violations of the rights of LGBT and intersex defenders and those working on related issues.¹⁵⁴ As the Special Representative of the Secretary-General on human rights defenders stated:

*In numerous cases from all regions, police or government officials are the alleged perpetrators of violence and threats against defenders of [lesbian, gay, bisexual, transgender and intersex (LGBTI)] rights. In several of these cases, the authorities have prohibited demonstrations, conferences and meetings, denied registration of organizations working for LGBTI rights and police officers have, allegedly, beaten up or even sexually abused these defenders of LGBTI rights. The authorities have generally attempted to justify action against these defenders by arguing that “the public” does not want these demonstrations to take place, or these organizations to be registered, or that “the people” do not want LGBTI people in their community. The Special Representative recalls articles 2 and 12 of the Declaration on Human Rights Defenders to remind States of their responsibility for protecting defenders against violence and threats.*¹⁵⁵

In the context of article 19, the relevant United Nations special procedures have reaffirmed that the right to freedom of expression is a right held by everyone, regardless of sexual orientation and/or gender identity. Commenting on a draft law in Nigeria that would have penalized public advocacy supporting the rights of LGBT people, the Special Representative on human rights defenders stated, “In particular, serious concern is expressed in view of the restriction such law would place on freedoms of expression and association of human rights defenders and members of civil society, when advocating the rights of gays and lesbians.”¹⁵⁶

¹⁵⁴**Highlighting risk to LGBT defenders:** Reports of the Special Rapporteur on human rights defenders: A/HRC/16/44, at paras. 37, 43, 85; A/HRC/13/22/Add.3; A/HRC/13/22, at para. 49; A/HRC/10/12, at paras. 21, 65, 72, 74, 82; A/HRC/4/37, at paras. 93-96; Annual Report of the Special Representative to the General Assembly (A/61/312), at para. 7; Report of the Special Representative of the Secretary-General on human rights defenders (C/CN.4/2001/94), at para. 89. Reports of the Special Rapporteur on the promotion and protection of freedom of expression and opinion: A/HRC/17/27/Add.1, at paras. 671-676, 1654-1659, 2228-2231, and 2012-2018; A/HRC/14/23/Add.1, at paras. 485-505, 1018-1048, 2483-2489, 2508-2512 2093-2113 and 1400-1414; A/HRC/14/23/Add.2, at para. 5; A/HRC/7/14/Add.1, at paras. 529-530; E/CN.4/2006/55/Add.1, at para. 1046; E/CN.4/2005/64/Add.3, at paras. 75-77; E/CN.4/2002/75/Add.1, at paras. 122-124; E/CN.4/2005/64/Add.1, at paras. 494, 648, 790, 972 and 981.

¹⁵⁵Report of the Special Representative of the Secretary-General on human rights defenders (A/HRC/4/37), at para. 96.

¹⁵⁶Report of the Special Representative of the Secretary-General on human rights defenders (A/HRC/4/37/Add.1), at para. 511.

Similarly, when the anti-homosexuality bill was introduced in Uganda in 2009, two Special Rapporteurs issued a joint statement that said in part:

*This Bill would further unjustifiably obstruct the exercise of the right to freedoms of opinion and expression, peaceful assembly and association, by prohibiting the publication and dissemination of materials on homosexuality, as well as funding and sponsoring related activities.*¹⁵⁷

In his report on his visit to Colombia, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression emphasized that “[A]ll citizens, regardless of, inter alia, their sexual orientation, have the right to express themselves, and to seek, receive and impart information.”¹⁵⁸

CONCLUSION

States must guarantee the rights to freedom of expression, association and peaceful assembly to everyone, regardless of sex, sexual orientation or gender identity, and must ensure that any restrictions on these rights are not discriminatory. In order to protect the exercise of these rights, States must prevent or effectively investigate and punish acts of violence and intimidation by private parties.



¹⁵⁷Joint Statement from the Special Rapporteur on human rights defenders and the Special Rapporteur on the right to freedom of opinion and expression, 1 March 2010.

¹⁵⁸Report of the Special Rapporteur on the right to freedom of opinion and expression on his mission to Colombia (E/CN.4/2005/64/Add.3), at paras. 75 and 76.



CONCLUSION

As the preceding chapters show, protecting LGBT people from violence and discrimination does not require the creation of a new set of LGBT-specific rights, nor does it require the establishment of new international human rights standards. For all the heat and complexity of the political debate about LGBT Equality at the United Nations, from a legal perspective the issue is straightforward. The obligations that States have to protect LGBT persons from violations of their human rights are already well established and are binding on all United Nations Member States.

This booklet seeks to explain the source and scope of those legal obligations with reference to the substantial body of decisions, recommendations and guidance issued by United Nations human rights mechanisms. It breaks down State responsibilities into five core areas where national action is most urgently needed – from protection from violence, to prevention of torture, decriminalization of homosexuality, prohibition of discrimination, and respect for freedom of expression, association and peaceful assembly.

In recent years, many States have made a determined effort to strengthen human rights protection in each of these areas. An array of new laws has been adopted – including laws banning discrimination, penalizing homophobic hate crimes, granting recognition of same-sex relationships and making it easier for transgender individuals to obtain official documents that reflect their preferred gender. Training programmes have been developed for police, prison staff, teachers, social workers and other personnel, and anti-bullying initiatives have been implemented in many schools.

In the coming years, much more needs to be done to confront prejudice and protect LGBT people in all countries from violence and discrimination. OHCHR hopes that this publication can help contribute to this end, by providing a practical resource for all those working for change – whether from the perspective of the United Nations, regional organizations, Governments, national human rights institutions or civil society.

Inquiries should be addressed to

Office of the United Nations High
Commissioner for Human Rights
United Nations Office at Geneva
8-14, Avenue de la Paix
1211 Geneva 10 Switzerland

New York Office

Office of the United Nations
High Commissioner for Human Rights
United Nations
New York, NY 10017
United States of America

Credits

Prepared by the New York Office
of the United Nations High Commissioner
for Human Rights.

Consultant: Allison Jernow, Sexual
Orientation and Gender Identity
Project, International Commission
of Jurists (ICJ), Geneva.

Photos by:

Emma K. Lydersen/Norway United Nations Mission (p.9);
Luca Zennaro/EPA (p. 10)
Zsolt Szigetvary/EPA (p.17)
Jordi Matas (p.23)
Orlando Barria/EPA (p. 26)
Gil Yarri/EPA (p. 31)
Tatyana Zenkovich/EPA (p.35)
Francis R. Malasig/EPA (p. 36)
Jim Lo Scalzo/EPA (p. 41 and p. 57)
Divyakant Solanki/EPA (p.43)
Jagadeesh NV/EPA (p. 47)
Zsolt Szigetvary/EPA (p.52)
Abir Sultan/EPA (p.54)
United Nations Photos (p. 58)

Layout and design:

Stefan Einarsson / www.stefaneinarsson.com

Printed at the United Nations in New York.



BORN FREE AND EQUAL

"To those who are lesbian, gay, bisexual or transgender, let me say: You are not alone. Your struggle for an end to violence and discrimination is a shared struggle. Any attack on you is an attack on the universal values the United Nations and I have sworn to defend and uphold. Today, I stand with you and I call upon all countries and people to stand with you, too"

*– United Nations Secretary-General
Ban Ki-moon, March 2012*

"When I raise the issue of violence and discrimination against individuals based on their sexual orientation or gender identity, some complain that I'm pushing for "new rights" or "special rights". But there is nothing new or special about the right to life and security of person, the right to freedom from discrimination. These and other rights are universal: enshrined in international law but denied to many of our fellow human beings simply because of their sexual orientation or gender identity."

*– United Nations High Commissioner for Human Rights
Navi Pillay, May 2012*

"The prohibition against discrimination under article 26 (of the International Covenant on Civil and Political Rights) comprises also discrimination based on sexual orientation."

*– United Nations Human Rights Committee,
X v. Colombia (2007)*

"States parties (to the International Covenant on Economic, Social and Cultural Rights) should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights ... In addition, gender identity is recognized as among the prohibited grounds of discrimination."

*– United Nations Committee on Economic,
Social and Cultural Rights, General Comment
No. 20 (2009)*

"The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as ... sexual orientation and gender identity."

*– United Nations Committee on the Elimination of
Discrimination against Women, General
Recommendation No. 28 (2010)*

"States parties (to the Convention against Torture) must ensure that, in so far as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of ... sexual orientation (or) transgender identity."

*– United Nations Committee against Torture, General
Comment No. 2 (2009)*