

Joint thematic dialogue on

sexual orientation, gender identity and intersex related issues

between the Inter-American
Commission on Human Rights,
the African Commission on
Human and Peoples' Rights
and United Nations human
rights mechanisms.

Final report and annexes

26-28 March 2018 Washington DC



United Nations



IACHR Inter-American
Commission on
Human Rights

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Final report on 2018 joint thematic dialogue on sexual orientation, gender identity and intersex related issues between the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights and United Nations human rights mechanisms

Context and introduction

On 26-28 March 2018, a second thematic dialogue on sexual orientation, gender identity and intersex related issues was held between the African Commission on Human and Peoples' Rights (African Commission or ACHPR), the Inter-American Commission on Human Rights (Inter-American Commission or IACHR) and United Nations (UN) human rights mechanisms.¹

The dialogue was hosted by the Inter-American Commission and was supported and organized by the Office of the High Commissioner for Human Rights (OHCHR) in collaboration with the Joint United Nations Programme on HIV/AIDS (UNAIDS), the United Nations Development Programme (UNDP) and the Secretariats of the ACHPR, IACHR and UN mechanisms.

This second dialogue was a follow up to the first joint dialogue, hosted by the African Commission, which took place on 3 November 2015 in Banjul, The Gambia.² It aimed to build upon the reflections, conclusions and recommendations of the 2015 dialogue; reflect on progress and challenges, and exchange experiences and strategic approaches on addressing violence and discrimination based on sexual orientation, gender identity and expression and sex characteristics across the three human rights systems; reflect on engagement between mechanisms and other stakeholders and collaboration between mechanisms; engage with new mandate holders in each system; reflect on current developments and political and social challenges, and share practical approaches for addressing them; and identify synergies that build on the practice of the three mechanisms.

The second joint dialogue, like the first, took place within existing frameworks, including the 1993 Vienna Declaration and Programme of Action, the regular dialogue between UN and regional human rights mechanisms mandated by the Human Rights Council, the 2009 Memorandum of Understanding between the Organization of American States and the African Union, the 2012 Addis Ababa Roadmap between the ACHPR and UN Special Rapporteurs, and the collaboration between OHCHR and the IACHR.

Ahead of the meeting, a number of background papers on human rights, sexual orientation, gender identity and expression and sex characteristics were prepared and shared with participants, including key concepts, developments in each system, and the intersection with HIV/AIDS (see annexes).

Progress since 2015

Participants highlighted that since the first dialogue in 2015, the African Commission, the Inter-American Commission and a large number of UN human rights mechanisms and mandate holders have provided further guidance on the application of international human rights norms and standards to the protection of individuals from violence and discrimination on the basis of sexual orientation, gender identity and expression, and sex characteristics through cases and petitions, advisory opinions, general comments, concluding observations, views, statements, declarations, resolutions, letters of allegations and urgent appeals, country visits and technical cooperation, among others.

Experts from the African Commission shared further steps taken since the adoption of its landmark 2014 resolution 275 on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity. These steps include the elaboration of soft law and hard law instruments that address human rights violations based on sexual orientation and gender identity such as Resolution 376 on the Situation of Human Rights Defenders in Africa,³ General Comment 4 on the Right to



Participants at the Joint thematic dialogue on sexual orientation, gender identity and intersex related issues between the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights and United Nations human rights mechanisms. 26-28 March 2018. Washington DC.

Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁴ the Guidelines for Policing Assemblies by Law Enforcement Officials in Africa,⁵ the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa,⁶ the Guidelines on Combating Sexual Violence and its Consequences in Africa,⁷ and the report on HIV, the Law and Human Rights.⁸

In relation to intersex people, the African Commission issued a joint statement, together with UN mechanisms and the Inter-American Commission, in commemoration of Intersex Awareness Day in 2016 that called for an end to harmful practices against intersex children⁹ and members of the Commission also participated in a side event at the 61st Ordinary Session on the rights of intersex persons in Africa.¹⁰

The African Commission has also increasingly used the State review process under Article 62 of the African Charter to pose questions relating to sexual orientation and gender identity to Member States. To this end, Concluding Observations to Cameroon, Liberia, Mauritius, Namibia and the Federal Republic of Nigeria have included recommendations on protecting individuals from violations of human rights based on their sexual orientation. The African Commission has also used its urgent appeals procedure, including a recent letter to the United Republic of Tanzania following raids on meetings and arrests of LGBTI human rights defenders.

Experts from the Inter-American Commission drew attention to the 2015 report on violence against lesbian, gay, bisexual, trans and intersex (LGBTI) persons¹¹ in the Americas which concluded that violence against LGBTI persons is contextualised social violence and is pervasive throughout the Americas; that violence driven by prejudice towards those with a non-normative sexual orientation or gender identity is particularly cruel and generally involves high levels of brutality; and that there is general underreporting and lack of collection of data on these acts of violence in the vast majority of countries in the region. In this report, IACHR also highlighted the invisibility of violence against specific segments of the LGBTI community, including trans men, bisexual persons and intersex persons.

The Inter-American Court on Human Rights has also made important recent pronouncements on this topic. In Advisory Opinion 24/17,¹² the Court concluded that State recognition of one's gender identity is a vital component of guaranteeing trans individuals access to the full enjoyment of their human rights and dignity. The Court also ruled that there is a right to identity comprises several rights and includes an individual's sexual orientation and gender identity. The Court further found that providing procedures to change one's name, identifying photograph, and gender or sex on official State registration documents according to self-perceived gender identity is an extension of the right to non-discrimination, a violation which could lead to the infringement of other rights. Moreover, the Court declared that the American Convention protects the family ties that may derive from a relationship between persons of the same sex, recognizing that States should guarantee them the same rights that arise from the family ties of heterosexual couples.

The Inter-American Commission through the Rapporteur on the Rights of LGBTI Persons has to date received more than 120 petitions on individual cases; granted 11 precautionary measures for the protection of rights; held six regional expert meetings; prepared two sections on the rights of LGBTI people for country and thematic reports; issued more than 30 press releases condemning violence against LGBTI individuals and expressing concern about the lack of action on the part of States; held more than 50 public hearings, with the participation of officials of 22 countries and more than 70 civil society organizations; and monitored more than 1500 news reports about violence against LGBTI people.¹³ The LGBTI Rapporteur is currently working on two thematic reports on guarantees of the rights of LGBTI people, and on the economic, social and cultural rights of trans people.

Experts from the United Nations system highlighted the 2016 Human Rights Council resolution that established the mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.¹⁴ The Independent Expert has a broad mandate to address issues of violence and discrimination based on sexual orientation and gender identity including through assessing implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination.

United Nations Experts also drew attention to the large number of treaty bodies¹⁵ and other special procedures mandates¹⁶ that have over the past decades addressed violence, discrimination and other human rights violations against LGBTI people through general comments, concluding observations, individual views, thematic reports, allegation letters, statements and public and private dialogue and engagement with States and other stakeholders.

Participants highlighted the importance of peer-to peer review processes that exist globally and regionally such as the Universal Periodic Review (UPR) and the African Peer Review Mechanism as an important complement to expert based mechanisms.

In the context of the UPR, some one hundred and sixteen Member States from all regions,¹⁷ have voluntarily accepted at least one recommendation to address violence and/or discrimination based on sexual orientation and gender identity. While there is not as yet consensus on this issue, these numbers highlight that there is growing openness on the part of States to engage in dialogue and to address human rights abuses.

The Sustainable Development Goals and the commitment to leave no one behind as part of the 2030 Agenda on Sustainable Development complement the human rights obligations of States and provide further opportunities for States to ensure that LGBTI people are included in development efforts and protected from violence and discrimination.

States in all regions have taken positive measures to protect people from violence and discrimination based on sexual orientation, gender identity and expression and sex characteristics, whether through court rulings, legislative action and/or policies and programmes implemented by the executive branch. Recent examples include the Kenyan Court of Appeal ruling prohibiting forced anal examinations of people arrested on the basis of their actual or perceived sexual orientation or gender identity,¹⁸ parliaments in Nauru and the Seychelles adopting legal reforms to decriminalize consensual same-sex relations, anti-bullying legislation in the Philippines that explicitly references bullying on the basis of sexual orientation and gender identity, and governments implementing policy

measures to investigate and combat hate crimes against LGBTI people, including in Bolivia, Brazil, Mexico and South Africa.¹⁹

Participants in the dialogue also gave due recognition to the pivotal role that civil society and human rights defenders in particular have historically played and continue to fulfil in the work of protection and promotion of human rights, including the human rights of LGBTI people. Civil society has inspired and led the movement to create human rights mechanisms. The experts agreed that it is thanks to the principled and visionary work of civil society that the work of the mechanisms in this area exists and reaffirmed the importance of creating and nurturing spaces so that the voices of civil society can continue to be heard in the regional and universal human rights systems. Some key approaches by civil society that support the work of the mechanisms include providing shadow reports to periodic State reports, providing inputs for thematic reports, monitoring and documenting human rights violations, holding multi-stakeholder events and publishing reports on the human rights situation of LGBTI people, providing support and remedy to victims in absence of adequate State mechanisms, bringing complaints on specific human rights violations faced by LGBTI people, and engaging and partnering with authorities to improve the State response to violations.

National human rights institutions (NHRIs) equally play a critical role in promoting and protecting the human rights of all persons, in line with the Paris Principles, including combating human rights violations on the basis of sexual orientation, gender identity and expression, and sex characteristics. NHRIs can contribute to raising awareness, documenting and investigating instances and patterns of violence, providing guidance to States, combatting impunity, ensuring remedy for victims, advocating

National human rights institutions (NHRIs) equally play a critical role in promoting and protecting the human rights of all persons.

for the repeal of discriminatory laws and for the adoption of policy measures to deal with human rights violations more systematically.

The Network of African National Human Rights Institutions has been implementing a project to build the capacity of NHRIs from Ghana, Kenya, Malawi, South Africa and Uganda on issues of sexual orientation and gender identity.²⁰ NHRIs can also promote multi-stakeholder dialogue at the national and regional level – an example is the first regional African seminar on finding practical solutions for addressing violence and discrimination based on sexual orientation, gender identity and expression that brought together NHRIs, civil society and authorities from the region in Ekurhuleni, South Africa in 2016.²¹

International organizations have also advanced their work under their respective mandates to support States to fulfil their international obligations and commitments in matters of human rights and inclusive and sustainable development, including through monitoring and reporting, development of tools and guidance, technical cooperation, data collection, advocacy and public information campaigns.²²

Challenges – old and new

Experts from the three systems highlighted continued widespread violations faced by persons based on sexual orientation, gender identity and sex characteristics, in all regions. Consensual same-sex relations are still criminalized in 74 countries around the world, including in 34 countries in Africa and 10 countries in Latin America and the Caribbean.²³ Individuals may be subject to the death penalty in relation to same-sex relations in five countries,²⁴ as well as in some provinces of two countries.²⁵ An important number of countries also criminalized transgender people through a range of discriminatory laws.²⁶ Criminalization fosters an environment that is permissive of violence and discrimination based on sexual orientation and gender identity. There is a causal link between criminalization and, inter alia, poor health outcomes among LGBT people due to discrimination, stigma and outright denial of care faced when seeking access to health services.

Participants highlighted the need to look past the LGBTI acronym and reaffirm in practice that lesbian, gay, bisexual, trans and intersex people face different risks of specific human rights violations. This includes the so-called “corrective” rape of lesbian and bisexual women; the pathologization of trans bodies and lack of legal gender recognition which leads to human rights violations, socio-economic exclusion as well as civil and political marginalization; and harmful and medically unnecessary surgeries on intersex children, without their free and informed consent.

LGBTI populations are not homogeneous and individual experiences also differ in relation to a wide range of factors including socio-economic status, level of education and rural or urban status. Some LGBTI people could be more vulnerable than others due to other multiple and intersecting factors, situations and identities including: women, afro-descendants, indigenous peoples, ethnic minorities, youth, older persons, people with disabilities, migrants, people living with HIV, as well as people living in poverty. LGBT youth are oftentimes denied admission in schools, expelled on the basis of their perceived sexual orientation or gender identity, or bullied by teachers and their classmates.

Experts expressed concern that some stakeholders disseminate narratives to incite or justify violence, discrimination and other human rights violations against LGBT people in the name of specific, monolithic and conservative versions of morality, culture, tradition as well as religious fundamentalism, in all regions. Politicians in different countries have campaigned on platforms to curtail the human rights of LGBT people.

Moreover, policies adopted by officials in some countries to weaken human rights protections and to exert pressure and place restrictions on the work of human rights defenders and civil society organizations across the board have led to shrinking space for civil society, with a negative impact for all human rights work, which has impacted negatively on the protection of LGBT people from violence and discrimination. Harmful policies that have been adopted to decrease funding for prevention and treatment of HIV/AIDS and to weaken human rights and other rule of law institutions, have further exacerbated this negative impact.

Participants also expressed deep concern that some States are exerting strong pressure, including through political bodies at the regional level and at the United Nations, to reduce the independence and autonomy of human rights mechanisms. This includes attacks on the general human rights work of the mechanisms, as well as specifically, the work to combat violence and discrimination based on sexual orientation and gender identity.

Enduring challenges are also the misconceptions and misunderstandings in relation to concepts and terms such as sexual orientation, gender identity, sex characteristics and lesbian, gay, bisexual, transgender and intersex people among States and other stakeholders.

Politicians in different countries have campaigned on platforms to curtail the human rights of LGBT people.

Approaches and opportunities to advance efforts to combat human rights violations based on sexual orientation, gender identity and sex characteristics

All participants emphasized the importance of a broad range of thematic and group mandates addressing violence and discrimination on the basis of sexual orientation, gender identity and expression and sex characteristics. They also recognised the work of specific mandates that have been created such as the Rapporteur on the rights of LGBTI persons at the Inter-American Commission and the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. The two approaches of integrating the issue into the work of all thematic/group mandates, as well as the work of specific/dedicated mechanisms to focus on issues of sexual orientation, gender identity and sex characteristics, complement and strengthen each other.

Cooperation and support between mechanisms and mandate holders is key in order to uphold the international human rights system, to counter attempts to attack and weaken the independence and functioning of international, regional and national human rights mechanisms, to protect the work of human rights defenders and civil society space and to dispel negative myths and stereotypes in relation to sexual orientation, gender identity and sex characteristics.

In addition to this, participants in the dialogue stressed the importance of building on and strengthening the normative basis of their work of interpretation and elaboration of human rights norms and standards through the development of general comments, adoption of resolutions, creation of new instruments, adoption of jurisprudence and other mechanisms.

It is important to look at the specific situations of lesbian women, gay men, bisexual people, transgender people and intersex people to address the different risks of violence, discrimination and other human rights violations, and to apply an intersectional and holistic approach, including through the lens of the rights of women, the rights of the child,

the rights of indigenous peoples, the rights of ethnic minorities and afro-descendants, economic, social and cultural rights, the right to health, freedom from torture and other cruel, inhuman or degrading treatment or punishment, freedom of expression, association and assembly, the situation of human rights defenders, and HIV/AIDS.

Further investment is needed in increasing visibility and awareness of the work of the various mechanisms and engaging constructively with authorities, human rights institutions and civil society stakeholders at the national level through country visits, State reporting and dialogue. Increased use of communication and human rights education tools can build and broaden the global constituency for human rights in a way that is inclusive of LGBTI people – and that counters harmful myths and stereotypes. Greater awareness and understanding is needed among States and other stakeholders of the issues at stake and to dispel harmful myths and stereotypes.

It is also important to build up internal capacity within the mechanisms on issues related to sexual orientation, gender identity and sex characteristics, including through opportunities such as the joint dialogues, as well as through engagement with civil society organizations and human rights defenders, States and national institutions to identify both challenges and good practices. Exchanges between mechanisms and mandate holders within and between different human rights systems can also strengthen coherence and synergies between approaches.

A number of strategies were identified by participants to combat violence and discrimination based on sexual orientation, gender identity and sex characteristics through their respective mandates. Key strategies include monitoring the situation, identifying trends and patterns of violations, collecting and compiling quantitative and qualitative data on human rights violations based on sexual orientation, gender identity and sex characteristics, producing specific public reports on these human rights violations and integrating these findings in other thematic and country reports, identifying and promoting good practices by Governments, Courts, Parliaments, NHRIs, CSOs and other stakeholders to uphold the human rights of LGBTI people, providing technical assistance to States for policy and legal reforms to implement their human rights

obligations, identifying entry points for constructive engagement with State authorities, including those that may not currently hold positive views on these issues, strengthening engagement with national human rights institutions, disseminating information and education tools and working with the media to increase awareness and dispel harmful myths and stereotypes, collaborating with civil society organizations, holding hearings on specific issues faced by lesbian, gay, bisexual, transgender and intersex people, engaging religious leaders, high profile allies and Member States committed to upholding the fundamental human rights of LGBTI people.

Reinforcing collaboration and continuing dialogue

Experts from the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights and United Nations Treaty Bodies and Special Procedures welcomed the second dialogue and the rich exchange of experiences and views and reaffirmed a strong commitment to the universality and indivisibility of human rights and to implementing their respective mandates in a holistic approach to protect, promote and uphold all human rights for all persons, including LGBTI people.

There was unanimous support to continue the joint dialogue and explore opportunities for exchange, collaboration and mutual support. Some of the opportunities emerging from the joint dialogue included: continued collaboration in issuing joint statements (International Day Against Homophobia, Transphobia and Biphobia; Intersex Awareness Day, etc.), joint country visits, joint press releases, exchange visits for members of the Secretariat, building on the jurisprudence of the other mechanisms, collaboration between mandate holders working on similar groups and/or human rights issues, and to continue the system of focal points in each system to support future dialogues and engagement. It was suggested that for the next dialogue, experts from other regions could also be invited to share their experiences.

Experts committed to continue their constructive dialogue with States, to monitor the human rights situation, highlight areas where there are concerns and to support them to fulfil their international human rights obligations to protect everyone from violence, discrimination and human rights violations, including on the basis of sexual orientation, gender identity and sex characteristics.

Participants also resolved to continue their strong engagement with civil society and to protect spaces for civil society so that the voice and contributions of human rights defenders and civil society organizations can continue to be heard in the regional and United Nations human rights systems.

The Office of the United Nations High Commissioner for Human Rights, the United Nations Development Programme and the Joint United Nations Programme on HIV/AIDS thanked the ACHPR, IACHR and UN human rights experts for the opportunity to support the dialogue and reaffirmed that protecting human rights for all, leaving no one behind and ending violence, criminalization, discrimination and other human rights violations against lesbian, gay, bisexual, trans and intersex persons, are priorities for the entire United Nations system, and that they will continue to support collaboration on this topic between United Nations and regional human rights mechanisms.

Experts committed to continue their constructive dialogue with States, to monitor the human rights situation.

Final report on 2018 joint thematic dialogue on sexual orientation, gender identity and intersex related issues between the Inter-American Commission on Human Rights - footnotes

1. The full list of participants is available in Annex 1
2. Report of the First Dialogue available at http://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf
3. Resolution 376 available at <http://www.achpr.org/sessions/60th/resolutions/376/>
4. General Comment 4 available at http://www.achpr.org/files/instruments/general-comment-right-to-redress/achpr_general_comment_no._4_english.pdf
5. Guidelines available at http://www.achpr.org/files/instruments/policing-assemblies-in-africa/achpr_guidelines_on_policing_assemblies_eng_fre_por_ara.pdf
6. Guidelines available at http://www.achpr.org/files/instruments/guidelines_arrest_detention/guidelines_on_arrest_police_custody_detention.pdf
7. Guidelines available at <http://www.achpr.org/instruments/combating-sexual-violence/>
8. African Commission on Human and Peoples' Rights, HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses to HIV, 2018, available at http://www.achpr.org/files/news/2017/12/d317/africancommission_hiv_report_full_eng.pdf
9. Joint Statement on Intersex awareness Day, 2016 available at <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739>
10. Information on side event available at <http://www.chr.up.ac.za/index.php/centre-news-a-events-2017/1956-centre-for-human-rights-iranti-org-and-sipd-uganda-host-panel-discussion-on-intersex-human-rights-in-africa.html>
11. Report on Violence against LGBTI Persons available at <http://www.oas.org/en/iachr/reports/pdfs/violenceigbtipersons.pdf>
12. Advisory Opinion 24/17 available at http://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf
13. See IACHR, Brochure on the work of LGBTI Rapporteurship since its installation in February 2012 until November 2014
14. UN Human Rights Council Resolution 32/2, June 2016
15. Including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee on the Elimination of All Forms of Discrimination Against Women, the Committee Against Torture, the Committee on the Rights of People with Disabilities.
16. Including mandates on arbitrary detention, extrajudicial, summary or arbitrary executions, extreme poverty, peaceful assembly and of association, freedom of opinion and expression, health, housing, human rights defenders, torture and other cruel, inhuman or degrading treatment or punishment, discrimination against women, violence against women, water and sanitation
17. 16 States from Africa, 23 from Asia-Pacific, 23 from Eastern Europe, 29 from Latin America and the Caribbean and 25 from Western Europe and Others group, during the first two UPR cycles.
18. Anal Examination to test Homosexuality is Illegal, available at <https://www.nation.co.ke/news/Appeals-court->

[rules-forced-anal-tests-illegal/1056-4353800-r7qqs8/index.html](https://www.ohchr.org/en/press/docs/20160310_rules-forced-anal-tests-illegal/1056-4353800-r7qqs8/index.html)

19. OHCHR, Living Free and Equal, 2016

20. NANHRI SOGIE Project, Available at <http://www.nanhri.org/our-work/thematic-areas/sogie-project/>

21. Ekurhuleni Declaration, 5 March 2016, On Practical Solutions for Ending Violence and Discrimination Against Persons Based on SOGI. Available at <https://www.oursplatform.org/wp-content/uploads/EKURHULENI-DECLARATION-FINAL.pdf>

22. See, for example, Role of the United Nations in Combatting Discrimination and Violence against Lesbian, Gay, Bisexual, Transgender and Intersex People – A programmatic overview, June 2018, available at: <https://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNSystem.aspx>

23. Numbers compiled by OHCHR, as at 28 March 2018.

24. Islamic Republic of Iran, Mauritania, Saudi Arabia, the Sudan, Yemen

25. Nigeria, Somalia

26. See for example report of the UN Independent Expert on sexual orientation and gender identity, A/HRC/38/43, paras 55-56.

ANNEX 1

Statement issued at the end of the 2018 joint dialogue

Introduction

Geneva/Washington D.C./Banjul - From 26 to 28 March 2018, the Inter-American Commission on Human Rights hosted an interregional meeting concerning human rights through the lens of sexual orientation, gender identity and sex characteristics at its headquarters in Washington D.C. Members of the Inter-American Commission and its Special Rapporteurships* were joined by five members of the African Commission on Human and Peoples' Rights and nine United Nations human rights experts** for a three-day dialogue on standards, best practices, challenges, and the identification of possible areas of collaboration between the systems.

ANNEX 1:

Statement issued at the end of the 2018 joint dialogue

Introduction continued

1. The meeting had three overarching objectives: to share best practices and challenges, to identify fields of collaboration, and to reaffirm the commitment of United Nations human rights experts and the inter-American and African regional human rights systems to the eradication of violence and discrimination based on sexual orientation and gender identity.

All experts present agreed that working to ensure that all persons enjoy a life free from such violence and discrimination must remain a priority.

United Nations experts underlined their support for the work carried out in this field by the African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights, and stressed the contribution of these regional bodies to the protection of individuals, groups, communities and peoples historically subjected to discrimination, among them gay, lesbian, bisexual, trans and intersex persons, and the promotion of their rights.

The regional Commissions also welcomed the exchange with members from United Nations treaty bodies and special procedures mandate holders, from long-standing bodies such as the Human Rights Committee to the recently created mandate of the Independent Expert on violence and discrimination based on sexual orientation and gender identity, and recognised that the principle of universality is best implemented when including the universal perspective into regional work.

A key element of the dialogue was the concept of intersectionality, that brings to light the substantially distinct life experience of each and every lesbian, gay, trans, bisexual and intersex person, and that may include

linkages with areas such as the rights of the child, the rights of women, economic, social, cultural and environmental rights including the right to health and combatting HIV, sexual and reproductive rights, human rights defenders, extrajudicial and summary executions, arbitrary detention, migrants, people with disabilities, afro-descendants, indigenous people, freedoms of expression, association and peaceful assembly and the prevention of torture.

In further recognition of this reality, UN experts and members of the Commissions also held side-meetings to focus on their respective portfolios and identify possibilities for bilateral cooperation.

The dialogue underscored the duty of all branches of Government within States to promote and protect the human rights of LGBTI persons, and the role of National Human Rights Institutions in this connection.

It also provided due recognition to the pivotal role historically fulfilled by civil society in the work of protection and promotion, and also in inspiring the very creation of approaches and mechanisms. The experts agreed that it is thanks to the principled and visionary work of civil society that their work in this area exists in its current form. The experts also reaffirmed the importance of creating and nurturing spaces so that the voice of civil society can continue to be heard in the regional and universal human rights systems.

The experts closed the meeting with a reflection on the many gay, lesbian, bisexual, trans and intersex lives shattered and lost as a result of violence based on sexual orientation, gender identity and sex characteristics: “No more!” said Margarett Macaulay, the President of the IACHR.

The substance of the discussions and conclusions will be published in a report.

The dialogue took place with the support of the Office of the United Nations High Commissioner for Human Rights, the United Nations Development Programme and the Joint United Nations Programme on HIV/AIDS. All three agencies reaffirmed that protecting human rights for all, leaving no one behind and ending violence, criminalization,

discrimination and other human rights violations against lesbian, gay, bisexual, trans and intersex persons, are priorities for the entire United Nations system.

* IACHR Special Rapporteur for Freedom of Expression and IACHR Special Rapporteur on Economic, Social, Cultural and Environmental Rights.

** United Nations Experts that participated included members of the UN Human Rights Committee, UN Committee against Torture, the UN Committee on the Rights of the Child, the UN Committee on the Elimination of Discrimination against Women, the UN Working Group on the issue of Discrimination against Women in Law and in Practice and mandate holders on Extrajudicial, Summary or Arbitrary Executions, Human Rights Defenders, the Right to Health and Sexual Orientation and Gender Identity.

ANNEX 2

List of participants - 2018 joint dialogue

ANNEX 2:

List of participants - 2018 joint dialogue

Margarette May Macaulay	President, IACHR
Esmeralda Arosemena de Troitiño	First Vice-President, IACHR
Luis Ernesto Vargas Silva	Second Vice-President, IACHR
Francisco José Eguiguren Praeli	Commissioner, IACHR
Joel Hernández García	Commissioner, IACHR
Flávia Piovesan	Commissioner, IACHR
Soledad García Muñoz	Special Rapporteur on Economic, Social, Cultural and Environmental Rights, IACHR
Edison Lanza	Special Rapporteur on Freedom of Expression, IACHR
Paulo Abrão	Executive Secretary, IACHR
Elizabeth Abi-Mershed	Assistant Executive Secretary, IACHR
Maria Claudia Pulido	Assistant Executive Secretary, IACHR
Marisol Blanchard Vera	Secretariat, IACHR
Rosa Celorio	Secretariat, IACHR
Luiza Drummond Veado	Secretariat, IACHR
Miguel Mesquita	Secretariat, IACHR
Soyata Maiga	Chairperson, ACHPR
Lawrence Murugu Mute	Vice-Chairperson, ACHPR
Hatem Essaiem	Commissioner, ACHPR
Maria Teresa Manuela	Commissioner, ACHPR
Remy Ngoy Lumbu	Commissioner, ACHPR
Anita Bagona	Secretariat, ACHPR
Eva Heza	Secretariat, ACHPR
Abiola Idowu-Ojo	Secretariat, ACHPR

Agnes Callamard	UN Special Rapporteur on extrajudicial, summary or arbitrary executions
Benyam Dawit Mezmur	Member, UN Committee on the Rights of the Child
Michel Forst	UN Special Rapporteur on human rights defenders
Hillary Gbedemah	Member, UN Committee on the Elimination of Discrimination against Women
Christof Heyns	Member, UN Human Rights Committee
Victor Madrigal-Borloz	UN Independent expert on sexual orientation and gender identity
Dainius Pūras	UN Special Rapporteur on the right to health
Diego Rodríguez-Pinzón	Member, UN Committee against Torture
Melissa Upreti	Member, UN Working Group on Discrimination against Women
Catherine de Preux De Baets	Human Rights Officer, OHCHR
Federica Donati	Coordinator Equality non-Discrimination and Participation Unit, OHCHR
Patrick Eba	Senior Human Rights and Law Adviser UNAIDS
Boyan Konstantinov	Policy Specialist, UNDP
Kalekye Kyalo	Associate Expert in Human Rights, OHCHR
Jason Sigurdson	Senior Policy Advisor, UNAIDS
Michael van Gelderen	Human Rights Officer, OHCHR

ANNEX

3

Agenda - 2018 joint dialogue

ANNEX 3:

Agenda - 2018 joint dialogue

**Monday
26 March
2018**

- 10:00am: Introduction to 2018 joint dialogue
- 11:00am: Reflection on 2015 joint dialogue
- 11:30am: Strategic approaches in each system to address violence and discrimination based on sexual orientation, gender identity and expression and sex characteristics
- 2:00pm: Thematic and intersectional approaches: good practices and challenges

**Tuesday
27 March
2018**

- 9:15am: Engagement by States on SOGIESC issues in political bodies and engagement between States and HR mechanisms – advances, challenges, approaches
- 11:15am: Implementation and follow up mechanisms for decisions, precautionary measures, communications, appeals, views - challenges + good practices
- 2:00pm: Collaboration between human rights mechanisms and other stakeholders – good practices, advances, impacts and remaining challenges

**Wednesday
28 March
2018**

- 9.15am: Identifying opportunities for increased collaboration on addressing violence and discrimination based on SOGIESC and against LGBTI people
- 11:15am: Identifying opportunities for increased collaboration on other issues
- 12:15pm: Wrap up of joint dialogue, closing remarks

ANNEX

4

Sexual orientation, gender identity and sex characteristics in the African human rights system

Introduction

1. Until the past decade, issues related to the human rights of sexual orientation, gender identity and sex characteristics received limited attention within the African human rights system.

ANNEX 4:

Sexual orientation, gender identity and sex characteristics in the African human rights system

Introduction continued

1. Although the “African human rights system” comprises a number of treaties and three institutions (the African Commission on Human and Peoples’ Rights (African Commission), the African Court on Human and Peoples’ Rights and the Committee of Experts on the Rights and Welfare of the Child), the focus here falls on the founding treaty, the African Charter on Human and Peoples’ Rights (African Charter), and the institution that has by far been most relevant to the topic, the African Commission. Until the past decade, issues related to the human rights of sexual orientation, gender identity and sex characteristics received limited attention within the African human rights system. Reacting to increased attention from civil society, and the then pending application for observer status of the Coalition of African Lesbians (CAL), the Commission in 2008 took a firm step forward when it requested the Secretariat to draft a discussion paper on the topic. The paper, ‘Sexual orientation under the African Charter on Human and Peoples’ Rights’, which has not been made public, was in 2010 discussed in the context of the consideration of the application for observer status of CAL. Following some tentative references to the issue in the exercise of some facets of its mandate, the Commission in 2014 made its first comprehensive pronouncement on the issue through a resolution.

I. NORMS: THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

2. The African Charter on Human and Peoples' Rights (African Charter), adopted in 1981, is the main AU human rights treaty. It has the advantage of having been ratified by all African Union (AU) Member States, with the exception of the Kingdom of Morocco, which was re-admitted as an AU member, after leaving the OAU in 1984 due to the organisation's recognition of the Saharawi Arab Democratic Republic. Similar to the other regional and United Nations (UN) human rights treaties, the African Charter does not contain any explicit reference to sexual orientation, gender identity or sex characteristics.

A. Non-discrimination on basis of sexual orientation, gender identity and sex characteristics

3. As with the other treaties, the African Charter's provisions support the conclusion that every person enjoys the Charter rights irrespective of her or his sexual orientation, gender identity or sex characteristics. In fact, in relation to sexual orientation and gender identity, the Commission's 2014 "Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity" (Resolution 275),²⁷ is premised on the basis that sexual orientation and gender identity are in fact grounds for protection from violence and other human rights violations including discrimination, under the Charter. Although the debate whether sexual minorities are rights-holders under the Charter therefore seems to have been settled, four brief supporting contentions are made below:

All-encompassing provision on rights-holders

4. The African Charter grants rights to everyone, without distinction, under a State party's jurisdiction. The formulation that "every individual" is entitled to the rights in the Charter is repeated in twelve of its provisions.²⁸ The use of the related terms "every human being", "no one" and "every citizen" confirms the inclusive and all-embracing scope of rights holders under the Charter,²⁹ and strongly supports the conclusion that individuals should therefore not cease to be rights-holders under the

Charter merely on the basis of their sexual orientation, gender identity or sex characteristics.

Broad and open-ended non-discrimination provision: “other status”

5. Article 2 of the African Charter is a general non-discrimination provision. It underlines that all the rights in the Charter are to be enjoyed without discrimination of any kind. For example, Articles 5 of the Charter, which prohibits torture and other cruel, inhuman and degrading treatment or punishment, has to be read with Article 2 of the African Charter. Article 2 provides that individuals are entitled to the rights under the African Charter “without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status”.³⁰ The use of the phrases “such as” and “or other status” clearly shows that the list of grounds for non-discrimination is not exhaustive. Leaving the list of grounds open suggests that the drafters foresaw that the African Charter ought to allow for an expansion of the specific grounds, thus accepting the principle that the exact content of the Charter is not frozen in time, but evolves.

6. There is no limit to the number of grounds that are recognised. Earlier, the Commission has pronounced itself against discrimination based on another non-enumerated ground, disability,³¹ clearly establishing that ‘other status’ can be interpreted broadly to include grounds other than those listed under Article 2 of the African Charter. Further, even though the Charter does not mention the concept ‘indigenous person’, the Commission has in its practice, resolutions and communications recognised this concept and protected the rights of ‘indigenous peoples’ in the absence of any reference to the word or concept ‘indigenous’ in the Charter. This stands as an unequivocal example that the protection of the Charter is not denied to groups merely because the Charter does

All the rights in the Charter are to be enjoyed without discrimination of any kind.

not explicitly list that group by name, and a refutation to the notion that protecting the rights of a lesbian, gay, bisexual, transgender (LGBT) or intersex person would be tantamount to illegitimately creating “new rights”.

7. In one of its decisions on a communication, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the Commission mentioned ‘sexual orientation’ as a ground of non-discrimination. It affirmed that the aim of the non-discrimination principle under Article 2 of the Charter is to ‘ensure equality of treatment for individuals irrespective of’ a number of grounds, including “sexual orientation”.³² It should be noted that this reference to sexual orientation is made in passing (as an obiter dictum), as this observation had no bearing on the issue at hand or the outcome of the case. However, this inclusive understanding of non-discrimination has been given added weight through the Commission’s subsequent restatement of this wording in a decision adopted in 2009, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*,³³ and in its General Comments on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.³⁴

Broad and open-ended non-discrimination provision: “sex” (and “gender”)

8. It may also be argued that “sex”, a factor already explicitly provided for in Article 2 of the Charter, should be understood to include “sexual orientation”. It may be argued that the adoption of the African Charter predates the more common use of terms such as “sexual orientation”. Sexual orientation is an aspect of “sexuality”, and therefore, of “sex”. At the request of the State, the Human Rights Committee in *Toonen v Australia* clarified that the meaning of “sex” in the listed grounds of non-discrimination under Article 2 of ICCPR includes sexual orientation.³⁵ Persuasive reliance can be placed on this decision, on the basis of Articles 60 and 61 of the Charter. By the same token, ‘gender’ should be interpreted to include ‘gender identity’. This is particularly important in respect of the Women’s Protocol, which defines ‘women’ as “persons of female gender”.³⁶ The ground of “sex” has also been interpreted to include intersex, for example in South Africa.³⁷

Broad and open-ended non-discrimination provision: the only logical inference

9. The logic of the Charter – a holistic reading, informed by its object and purpose – also demands that non-discrimination be understood broadly, because exclusion from the ambit of Article 2 would have the far-reaching effect of foreclosing reliance on all other Charter rights. It is, quite obviously, unthinkable that an African lesbian woman may – for example – not invoke the right not to be tortured or the right to a fair trial before the African Commission (or the African Human Rights Court) just because of her sexual orientation.

B. Violence (including rape, torture and killings) on the basis of sexual orientation, gender identity and sex characteristics

10. The extent of State-sponsored and non-State violence based on real or perceived sexual orientation and gender identity across Africa is set out in a civil society-compiled report, *Violence based on perceived or real sexual orientation and gender identity in Africa*,³⁸ which was launched in the presence of a number of members of the African Commission during the NGO Forum preceding the 54th session of the African Commission, in 2013. On the basis of this report, civil society and members of the Commission were mobilised; the NGO Forum adopted a resolution on this topic, and, at its next ordinary session, the Commission adopted the ground-breaking Resolution 275. This resolution departs from the premise that ‘corrective’ rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings and executions, forced disappearances, extortion and blackmail” on the basis of sexual orientation and gender identity are in fact occurring in African States; and emphasises that these acts amount to violations of Article 3 (equal protection of the law); Article 4 (respect of life and the integrity of the person); and Article 5 (prohibition of torture and other cruel, inhuman and degrading treatment or punishment) of the African Charter. The 2014 resolution builds on and reaffirms the Commission’s condemnation of all forms of sexual violence.³⁹

11. Intersex people, born with sex characteristics that do not fit typical definitions for male or female bodies, and in particular intersex children, face human rights violations based on their bodies being seen as

different. Some violations that have been documented internationally include medically unnecessary surgeries and other interventions to try to modify the bodies of intersex children to fit into binary norms, contrary to international norms on the prohibition of torture and ill-treatment, including Article 5 of the African Charter on freedom from torture or other cruel, inhuman and degrading treatment or punishment. There have also been reported cases of infanticide and mutilation of intersex children documented by civil society in East and Southern Africa, contrary to Articles 4 and 5 of the Charter.⁴⁰ Further, intersex people face discrimination, stigma and ostracisation due to their sex characteristics that impact negatively on education and employment opportunities in violation of Article 2 on non-discrimination, Article 17 on education and Article 15 on employment and work of the African Charter.

C. Freedom of expression, association and assembly

12. National legislation restricting or criminalising the meeting of LGBT persons, and disallowing legal recognition to associations of LGBT and intersex persons have stifled the right to free expression, association and assembly of these individuals. A number of provisions of the African Charter are of relevance in this regard – in particular Articles 9, 10 and 11, which respectively deal with freedom of expression, association and assembly. Although the Commission has not expressed itself directly on any of these aspects explicitly in relation to sexual orientation or gender identity, it has emphasised that freedom of expression implies the obligation on authorities to “promote diversity” and to take into account the interests of “vulnerable or marginalised groups”.⁴¹ Important court rulings in Botswana and Kenya on legal registration of civil society

Intersex people, born with sex characteristics that do not fit typical definitions for male or female bodies, and in particular intersex children, face human rights violations based on their bodies being seen as different.

organisations advocating for the rights of LGBT people set an important precedent at the regional level.⁴²

D. Limitation and to Charter rights and their potential justification

13. The fact that LGBT and intersex persons are rights-holders does not detract from the fact that their rights, like the rights of everyone else, may be limited, but only in a rational process guided by Article 27(2) of the Charter and the jurisprudence of the Commission and Court. Any limitation by a state of their rights will have to be assessed by the Commission or Court on a case-by-case basis according to the basic principles of limitation it has previously elaborated. Where a state seeks to limit an established right, the limitation must be “strictly proportionate with and absolutely necessary for the advantages that are to be obtained”⁴³ and most importantly, “may not erode a right such that the right itself becomes illusory.”⁴⁴ This substantive standard, which itself reflects an expression of the collective morality and common interest, acknowledges the primacy of the individual and his or her rights while allowing for consideration of broader social concerns.

14. Two potential grounds for the limitation of the rights of LGBT persons have been raised by some stakeholders: (a) African morality and traditional values allow or even require discrimination against LGBT people; (b) The moral majority demands the limitation of their rights.

“African value system” and “African family values”

15. Some claim that the Charter’s emphasis on “values of African civilisation”⁴⁵ and the family as “custodian of morals and traditional values recognised by the community”⁴⁶ may pose a justification for laws discriminating against lesbian, gay, bisexual and transgender persons. Nevertheless, aside from the absence of definitions or agreement on what are the values of African civilization, or agreed definitions of the family as well as moral and traditional values either in Africa or internationally, a factual enquiry further casts a shadow over the veracity of the characterisation of same-sex relations or transgender persons as “un-African”. Relations between consenting adults of the same sex and persons with diverse gender identities and expressions are not alien to traditional African societies⁴⁷ and there is no doubt that African lesbian,

gay, bisexual, transgender and intersex persons also exist today, in Africa. The argument that protecting the rights of LGBT and intersex persons would be destructive to African “family values” is not based on any credible evidence and makes several unjustified assumptions. First, it ignores the fact that LGBT and intersex persons have long been part of African civilizations and families and have yet to cause a collapse in the well-being of the family. Second, it denies that LGBT and intersex Africans play important roles in upholding the best and most important values of Africa in all fields, including cultural, social, scientific, political and economic life. Finally, it refuses to acknowledge that African LGBT and intersex persons are often heads-of-households supporting their families and in need of the kinds of protections the development of the African Charter was meant to afford. Indeed, the African Commission has interpreted the notion of ‘family’ in a broad sense, calling on states to take measures ‘to abolish such customs, ancient laws and practices as may affect the freedom of choice of a spouse’⁴⁸ and has recognised that contact with one’s family is essential for an individual’s dignity.⁴⁹

16. The question is not whether ‘homosexuality’ or being transgender or intersex, as such, is accepted by the majority, but rather whether tolerance for and acceptance of diversity and of minorities has value in a particular society. Clearly, in multi-lingual, multi-ethnic and multi-religious states, which predominate in Africa, the acceptance of divergence, the celebration of diversity and of the value and worth of minorities, and the protection of their fundamental rights should be of paramount importance to the African Commission and State parties to the Charter.⁵⁰

Majority morality

17. Linked to the argument based on (African) morality is the contention that discrimination against sexual minorities reflects the moral views of the majority. Although only limited scientific evidence exists about public opinion, it could be assumed that this contention is at least partially correct. Nevertheless, human rights norms and legally binding standards

were developed and adopted by States, including those on the African continent, precisely to protect, among others, the rights of minorities and those who are subject to marginalization from violence, discrimination and other human rights violations. Though some members of the public, and in some countries, even majorities, might support violence against ethnic minorities or persons with albinism, discrimination against girls and women based on their gender, or practices such as early and forced marriage and female genital mutilation, or even public lynching of persons accused of crimes – the fact that public opinion is in favour can in no way justify violations of rights and obligations of States enshrined in the African Charter. The African Commission has made it clear that the Charter’s interpretation cannot be defined with reference to the views of the majority, even as it is reflected by Parliament, acting on their behalf. In *Legal Resources Foundation v Zambia*, the African Commission held that justification of limitations cannot be derived solely from popular will: “Justification [of limitations] [...] cannot be derived solely from popular will, as this cannot be used to limit the responsibilities of states parties in terms of the Charter.”⁵¹

II. INSTITUTIONS, TOOLS AND APPROACHES RELEVANT TO SEXUAL ORIENTATION, GENDER IDENTITY AND SEX CHARACTERISTICS

18. The Commission's mandate may be divided into its "protective" and "promotional" aspects.⁵² The first relates to "communications procedure, letters of appeal/concern and protection/fact finding missions, as well as dealing with emergency situations"; the second relates to the examination of state reports, studies and statements by its special mechanism, the adoption of standards, the conduct of promotional visits to State parties, and the granting of observer status to NGOs. This part of the paper identifies how matters related to sexual orientation and gender identity have gradually been incorporated into the Commission's exercise of its mandate.

A. Communications/ complaints

19. The Commission's protective mandate consists in the main of the consideration of complaints ('communications') submitted by individuals and by States. Under the Charter, this is not an optional procedure, but follows automatically from a State's ratification of the Charter. In this respect, the African Charter differs from all UN human rights treaties, in respect of which individual complaints procedures are optional. In the course of the exercise of this aspect of its mandate, the Commission has not had the opportunity to deal head-on with an argument about equality based on sexual orientation or gender identity. In one communication, *Courson v Zimbabwe*,⁵³ the complainant asked the Commission to consider the legal status of homosexuals in Zimbabwe, the criminalisation of sexual conduct between men, and statements made by senior political figures against such practices. However, the complainant withdrew the case. The Commission thus has not had the occasion to express a view on the topic.

B. State reporting

20. The examination of State reports makes up the mainstay of the Commission's promotional mandate. Article 62 of the African Charter requires States to submit a report every two years on the legislative and other measures taken to give effect to the rights in the Charter. A number of challenges have arisen over the years. As of 1st February 2018, five States have not submitted an initial report, and all but twelve States have reports overdue. Delays in the publication of concluding observation have occasionally impeded follow-up, accountability and continuous dialogue. The Guidelines for reporting are cumbersome, and a more recent summarised version is too terse. In any event, the Guidelines make no mention of sexual orientation, gender identity or sex characteristics. Oral examination takes place in public, and all Commissioners are provided with an opportunity to ask questions of States. NGOs or other participants may be present, but only as observers. NGOs may supply the Commission with information relevant to the report under consideration, for example in the form of an 'alternative' or 'shadow' report. The questions posed by Commissioners during the examination of reports are based on their own analysis, and also take into account supplementary information received, including information provided by civil society. Consequently, reporting States are increasingly taking the process relatively seriously, as exemplified in the large and senior delegations representing reporting States during oral examinations.

21. There is an emergent trend among some Commissioners to pose pertinent questions related to sexual minorities to State delegations. In doing so Commissioners have made clear that they recognise the rights of all individuals are protected by the African Charter, regardless of their sexual orientation or gender identity. In this respect, it is clear that the Commissioners relied on information supplied by NGOs. In one of the first examples, Commissioner Pityana at the 29th session of the Commission, in 2001, asked questions of the Namibian delegation about the treatment of gay and lesbian persons in that country.⁵⁴

22. During the examination of the South African state report in 2005, Commissioner El Hassan referred to the possibility of marriage between people of the same sex.⁵⁵ He then asked what the position in South Africa is, referring to article 18 of the African Charter, which postulates the family as the natural unit and basis of society. The Minister of Justice, who headed the South African delegation, expressed the view that the principle of non-discrimination on the basis of sexual orientation does not derogate from the African Charter. She added that the Constitution enjoins the South African government to respect the rights of all its people. If members of these communities ‘push the frontiers of the right’ (for example, claiming the right to marriage), it does not pose a dilemma, and it is for the South African courts to decide the matter on the basis of the Constitution.

23. Another example is the examination of Cameroon’s report at the Commission’s 39th session in 2006, indicating the Commission’s willingness to accept that the protection of sexual minorities may fall within the ambit of the Charter. Responding to information provided by NGOs, several Commissioners raised concerns about the treatment of gay persons in the Cameroonian legal and penal system.⁵⁶ For example, Commissioner Malila asked questions related to the trial process and wanted to know whether subjecting the suspects to invasive medical examinations contravenes Article 5 of the African Charter, and Commissioner Alapini-Gansou raised the lack of tolerance on the grounds of people’s sexual orientation. In its concluding observations, the Commission expressed its ‘concern for the upsurge of intolerance towards sexual minorities’.⁵⁷

The Commission expressed its ‘concern for the upsurge of intolerance towards sexual minorities’.⁵⁷

24. This trend subsequently continued, with issues related to sexual orientation and gender identity featuring in the Concluding Observations adopted in respect of Mauritius, Cameroon, Uganda, Nigeria, Namibia and Liberia. In its Concluding Observations on the 2nd to 5th reports of Mauritius, covering the period 1995 to 2008, the Commission commended the State for “adopting the Equal Opportunities Act 2008, which prohibits discrimination on the grounds of age, caste, colour, creed, ethnic origin, impairment, marital status, place of origin, political opinion, race, sex and sexual orientation”.⁵⁸ In its Concluding Observations on Cameroon’s 3rd periodic report, adopted in 2014, the Commission identified, among the factors restricting the enjoyment of rights guaranteed by the African Charter, the following: “The judicial harassment, offences against life and other violations of the rights of human rights defenders, in particular the rights of defenders working in the area of sexual orientation”.⁵⁹ In its recommendations, the Commission called on the government to “take appropriate measures to ensure the safety and physical integrity of all persons irrespective of their sexual orientation and maintain an atmosphere of tolerance towards sexual minorities in the country”.⁶⁰ In its Concluding Observations adopted after the consideration of Uganda’s 4th periodic report, the Commission commended the state for investigating and prosecuting the perpetrator of the murder of Mr. David Kato, an activist for the rights of LGBT persons.⁶¹ In its Concluding Observations to Nigeria’s 5th periodic report, the Commission raised concern with and urged the State to review the Same-Sex Marriage (Prohibition) Act in order to prohibit violence and discrimination in access to HIV prevention, treatment and care services, as well as to ensure the protection of other human rights of sexual minorities guaranteed under the African Charter and other international instruments to which Nigeria is a party.⁶² Similarly, in its Concluding Observations to Namibia’s 6th periodic report, the Commission urged Namibia to end discrimination and stigmatization limiting access to health care for vulnerable groups including the LGBT community.⁶³ With respect to Liberia’s initial periodic report, the Commission recommended that Liberia should ensure equal rights to all its citizens without discrimination on the basis of their sexual orientation or gender identity and urged the State to apply appropriate laws prohibiting and punishing all forms of

violence including those targeting persons based on their real or imputed sexual orientation or gender identity.⁶⁴

C. Special mechanisms

25. The Commission has over the years established a wide array of special procedures, referred to as “Special rapporteurs”, “Working Groups” or “Committees”. One of these procedures has a particular and expressly stated relevance to sexuality rights, while some of the others (without any explicit mandate related to the issue) have to a limited extent “mainstreamed” SOGI-related issues into their activities.

26. Acknowledging that sexual conduct cannot be equated with sexual identity, particularly in Africa where the ‘open’ acceptance of a ‘gay identity’ is quite rare due to societal stereotyping and pressure, the Commission established a Committee on the Protection of the Rights of People Living with HIV (HIV Committee) mandated to ‘integrate a gender perspective and give special attention to persons belonging to vulnerable groups, including women, children, sex workers, migrants, men having sex with men, intravenous drugs users and prisoners’.⁶⁵ In Commission’s 2018 study report on HIV, “HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses to HIV”,⁶⁶ developed under the auspices of the Commission’s HIV Committee, puts the sexual health of ‘key populations’ at its centre. Key populations are defined as: ‘gay men and other men who have sex with men, male and female sex workers and their clients, transgender people, prisoners and people who inject drugs’.⁶⁷ The report highlights the disproportionate effect of HIV on these already marginalized groups. The report further underscores the negative effect on criminalization on access to health care. It also points out that ‘transgender women are one of the most vulnerable groups in relation to HIV, being 49 times more likely to be living with HIV than other adults of reproductive age’.⁶⁸ The report concludes with a number of questions to be posed to states during the examination of state reports, including the need for disaggregated data.

27. A number of special mechanisms have made occasional reference to sexual orientation and gender identity, and the rights of LGBT and

intersex persons. The Former Special Rapporteur on Human Rights Defenders in Africa, Commissioner Alapini-Gansou, having received information that “The Anti-Homosexuality Act, 2014” was promulgated in the Republic of Uganda, issued a press statement,⁶⁹ expressing concern that the Act would violate the rights of freedom of expression, association and assembly, protected under the African Charter. She further urged “the Ugandan authorities to take the necessary measures to abrogate or amend the law”. On the occasion of the International Day in Support of Victims of Torture the Commission and its Committee for the Prevention of Torture in Africa (CPTA) called upon African States and non-State actors to fulfil their responsibilities as reflected in the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines).⁷⁰ In particular, it called on States to “take legislative and administrative measures prohibiting and punishing all forms of violence, including violence targeting persons on the basis of their imputed or actual sexual orientation or gender identity”.

28. Some of the special mechanisms of the Commission have shown an openness to issue joint statements with other regional and the UN’s special procedures, for example, on the International Day in Support of Victims of Torture, and, most pertinent to this discussion, on the International Day Against Homophobia and Transphobia. The latter was adopted on 17 May 2014, by a number of UN Special rapporteurs, the Inter-American Commission, an Organisation for Security and Co-operation in Europe (OSCE) expert, and the Commission’s Special Rapporteur on Human Rights Defenders in Africa.⁷¹ Two Africans holding UN human rights mandates, Mr. Maina Kiai, UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, and Ms. Margaret Sekaggya, UN Special Rapporteur on the situation of human rights defenders, also joined the statement. Another declaration was also adopted on the same occasion in May 2015.⁷²

29. The African Commission in its Resolution 376 in 2017 on the Situation of Human Rights Defenders in Africa raised concerns about the threats against human rights defenders working on issues including sexual orientation and gender identity; and called upon States to adopt specific measures to recognize the status of human rights defenders and

protect their rights and the rights of their colleagues and family, including human rights defenders who work on sexual orientation and gender identity.⁷³

30. The special mechanisms have also in the recent past highlighted issues of sexual orientation and gender identity in their intersession reports. Commissioner Alapini Gansou in her intersession report as the Special Rapporteur on Human Rights Defenders, during the 60th Ordinary Session of the Commission, called on States to repeal punitive and restrictive laws, policies and practices that undermine the rights to freedom of association and assembly and stigmatise human rights defenders based on their sexual orientation and gender identity or expression. She further urged national human rights institutions to pay special attention to human rights defenders who face increased risks including those that work on issues related to sexual orientation and gender identity.⁷⁴

31. In his intersession report to the 60th Ordinary session of the Commission, the Former Chairperson for the Committee on the Prevention of Torture in Africa, Commissioner Lawrence Mute, recommended that States should respect and protect the rights of persons or groups at heightened risk to acts of torture or other ill-treatment including LGBTI persons and to ensure that the perpetrators are held accountable.⁷⁵

32. The Commission held its first ever Joint Dialogue with the Inter-American Commission on Human Rights and UN human rights mechanisms on 3 November 2015. The dialogue allowed for interactive discussion among the three human rights systems on substantive issues relating to sexual orientation and gender identity and also discussed avenues for future collaboration between the three mechanisms.⁷⁶

33. The Commission has also started to engage on the rights of intersex people. It issued a joint statement with UN and regional human rights mechanisms to mark Intersex Awareness Day in 2016, which urged States to end violence and harmful medical practices on intersex children and adults.⁷⁷ On the side-lines of the 61st Ordinary Session of the Commission, Iranti, SIPD-Uganda and the Centre for Human Rights

organized a side event on the human rights of intersex persons, which sought to raise awareness on human rights violations faced by intersex persons in Africa.⁷⁸ At the meeting, Commissioner Mute highlighted the role of the African Commission in setting minimum standards to guide legislation and policy at the domestic level and also the need to ensure that all stakeholders gain greater clarity on intersex issues, and also avoid conflating intersex issues with sexual orientation and gender identity.

D. Standard-setting (resolutions; guidelines and general comments)

34. In 2011, the Commission adopted a definition of the concept “vulnerable and disadvantaged groups” in the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter, as including “lesbian, gay, bisexual, transgendered and intersex people”.⁷⁹ Similarly in March 2014, the Commission’s Report of the Study on the situation of women human rights defenders defined a woman human rights defenders to be any woman defender who is involved, individually or in association with others, in the promotion and protection of human rights; and anyone who works on women’s rights, rights associated with gender and sexuality, irrespective of their sexual orientation.⁸⁰

35. The Commission adopted its first resolution devoted to sexual orientation and gender identity in May 2014,⁸¹ calling on states to ensure that human rights defenders, including those advocating for the rights of sexual minorities, are allowed to work in an ‘enabling environment’ that is ‘free of stigma, reprisals or criminal prosecution’ as a result of their human rights protection activities, including the rights of sexual minorities. Significantly, both sexual orientation and gender identity are mentioned in the context of violence by states and non-state actors. This resolution in many ways corresponds with the Organization of American States (OAS) resolutions of 2008 to 2012.⁸²

36. Since the adoption of Resolution 275, the Commission has increasingly incorporated issues of sexual orientation and gender identity into its norm creation work. In a resolution adopted in 2017, Resolution 376 on the Situation of Human Rights Defenders in Africa,⁸³

the Commission explicitly recognizes both the added vulnerability and the need for specific legislation to protect those working on the promotion and protection of the rights of LGBTI persons as human rights defenders.

37. The Committee on the Prevention of Torture in Africa in General Comment 4 on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 5) lists sexual orientation and gender identity as one of the grounds of non-discrimination for victims to redress.⁸⁴ Similarly, in the Guidelines on Freedom of Association and Assembly in Africa,⁸⁵ sexual orientation or gender identity are included alongside other explicit grounds for non-discrimination such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, property, socio-economic status, birth, disability and age.

38. The Guidelines for Policing Assemblies by Law Enforcement Officials in Africa recognize the vulnerability of individuals due to their status including sexual orientation and gender identity who may face limitations on their right to freedom of assembly and to other human rights violations in the context of policing assemblies.⁸⁶ Previously, the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, adopted 9 March 2015, in Guideline 30(a) ('Special measures are not discriminatory') stipulated that certain measures, including those 'designed to protect the rights of persons on the basis of gender identity' are not to be considered as 'discriminatory or applied in a manner that is discriminatory'. The Guidelines on Combating Sexual Violence and its Consequences in Africa, adopted 5 November 2017, defines 'sexual violence' defined as including 'corrective rape', which in

Since the adoption of Resolution 275, the Commission has increasingly incorporated issues of sexual orientation and gender identity into its norm creation work.

turn is defined as the use of rape against women because of their real or alleged homosexuality supposedly in order to “cure” them of this sexual orientation. As indicated in paragraph 26 above, the Commission’s 2018 study report on “HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses to HIV also addresses issues related to sexual orientation and vulnerability to HIV/AIDS and human rights violations.

39. The Draft Principles on the Declassification of Petty Offences call for the elimination of root causes of marginalization, including the criminalization of same-sex conduct.⁸⁷

E. Promotional visits

40. Promotional visits provide an opportunity for the Commission to engage State officials and to sensitise them to thematic issues of emerging concern, including non-discrimination on the grounds of sexual orientation and gender identity. For example, during its promotional visit to Namibia, in 2001, the Commission delegation interrogated the criminalization of same-sex sexual relations, as reflected in the mission report.⁸⁸ In its promotional mission to Uganda, 25-30 August 2013, the Commission delegation (comprising four Commissioners: Tlakula, Asuagbor, Kagwa, and Manirakiza) noted that the “delegation referred to reports of the obstruction of the operations of NGOs working in the areas of lesbian, gay, bisexual, and transgender (LGBT) rights, who are allegedly precluded from registering to operate legally as is required under law, and noted with concern that LGBT persons have the same rights as everyone else.”⁸⁹ Most importantly, it recommended that the government should “expand access to ARVs to all key populations, including homosexuals”.⁹⁰

F. Relationship with civil society: Observer status to NGOs

41. The African Commission has developed a close relationship with civil society. It grants observer status to NGOs, on the basis of its “Resolution for the Granting of and for Maintaining Observer Status with the African Commission on Human and Peoples’ Rights, 1999”, updated via Resolution 361 of 2016⁹¹ in compliance with the Executive Councils Decisions to “review its criteria for... “representation before the ACHPR

by non-African individuals and groups”.⁹² NGOs with observer status receive and may contribute to the Commission’s agenda; and are entitled to take the floor during the Commission’s public sessions. As of the last Ordinary Session held in November 2017, the Commission has granted observer status to close to 515 NGOs.

42. In 2008 CAL, working for the protection and promotion of the rights of lesbian, bisexual and transgender persons in Africa, applied to be granted observer status with the African Commission. In 2010, the African Commission decided to decline this application.⁹³ The two inter-related legal reasons provided for the refusal were that: (i) CAL’s objectives were not consonant with the AU Constitutive Act and African Charter; and (ii) the Charter does not explicitly recognize the rights to non-discrimination on the basis of sexual orientation or gender identity, or the rights of LGBTI persons.⁹⁴

43. After some time, CAL re-applied. On 25 April 2015, the African Commission voted in favour of granting CAL observer status. The implication is that CAL’s objectives, which are aimed at the advancement of gender equality and social justice and the protection of the rights of particularly vulnerable individuals, meet the criterion of having objectives and activities ‘in consonance with’ the fundamental principles and objectives in the AU Constitutive Act and the African Charter.⁹⁵ This decision provoked reaction from the AU political organs (see below, III.A).

44. In relation to the June 2015 request by the AU Executive Council for the Commission to withdraw the observer status of CAL, and following dismissal by the African Court of the request for an Advisory Opinion on the matter, the Commission in its 43rd Activity Report clarified that the decision to grant observer status to CAL was properly taken in terms of the Commission’s established processes and criteria, that the Commission is mandated to give effect to the African Charter without any discrimination because of status or other circumstances, that while fulfilling this mandate, the Commission remains alive to and mindful of the imperative not to encroach on domestic policy matters that fall outside its purview and that the Commission will continue to scrutinize the notion of ‘African Values’ within the framework of its mandate to interpret the African Charter.⁹⁶

III. POLITICAL ORGANS AND PROCESSES WITHIN AU RELEVANT TO SEXUAL ORIENTATION AND GENDER IDENTITY

45. The African human rights system has been established and functions within the African Union (AU). It is therefore inevitable that there would be some resonance between the legal and political strands within the AU. The African Commission reports to the highest political organs within the AU - the AU Assembly of Heads of State and Government (Assembly), in terms of Article 54 of the African Charter. As Organs which prepare the work of the Assembly, these reports are presented to and considered by the AU Permanent Representatives Committee (PRC) and the Executive Council, and the latter adopts decisions on the reports. In exceptional cases, the reports of the Commission are referred to the Assembly.

46. Closely linked to, and increasingly integrated into the AU, the New Partnership for Africa's Development (NEPAD) has set up a mechanism of a political nature, the African Peer Review Mechanism (APRM). This part of the paper considers the actual and potential extent to which these political processes have or may impact on the African human rights system.

A. AU Assembly and Executive Council

47. The AU has largely been silent on sexual orientation, as well as in relation to gender identity and sex characteristics. Like the OAU before it, the AU has not yet pronounced itself officially on these matters, as such. It has however on four occasions shed some – somewhat contradictory -- light on its position.

48. First, at the May 2006 Special Summit of the African Union on HIV/AIDS, in Abuja, the AU elaborated a clear 'common position' on HIV, which defined the concept of 'vulnerable people' to include men who have sex with men (MSM).⁹⁷ Second, the AU Assembly at the July 2010 session in Kampala, on the urging of Egypt, adopted a resolution related to a perceived loss of ownership of the human rights agenda. Without referring explicitly to sexual orientation, the Assembly 'strongly' rejected

attempts to “impose concepts or notions pertaining to social matters, including private individual conduct, that fall outside the internationally agreed human rights legal framework”.⁹⁸ A subsequent AU Assembly session was organized around the theme of ‘shared values’ concluded in a very general statement that made no reference to private conduct, or sexual orientation, but reiterated that all OAU/AU treaties are part of the ‘shared value’ system of Africans.⁹⁹

49. The third came in June 2015.¹⁰⁰ In the exercise of its mandate, the Commission in March 2015 granted observer status to an NGO advocating for the rights of women, including lesbian women: the Coalition of African Lesbians (CAL). This decision provoked the most explicit political response to date. When the AU Executive Council considered the Commission’s Activity Report containing the CAL decision, it “request[ed]” the African Commission to “take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values”; and to “review its criteria for granting Observer Status to NGOs” and to “withdraw the observer status granted to the Organization called CAL, in line with those African Values”.¹⁰¹ A request for an advisory opinion, aimed at clarifying the extent to which the AU political organs may direct the Commission to adopt a particular interpretation of the African Charter, was directed to the African Court on Human and Peoples’ Rights by CAL and the Centre for Human Rights at the University of Pretoria.¹⁰² The Court held that it had no jurisdiction over the matter as the parties to the request for the advisory opinion did not qualify as “African organisations recognised by the AU”,¹⁰³ a status that the Court earlier held as requiring either observer status with the African Union (and not one of its organs, such as the African Commission),¹⁰⁴ or a memorandum of understanding and/or cooperation with the AU, and so dismissed the request on procedural grounds without examining the substantive question.¹⁰⁵

50. The fourth and most recent came in January 2018 when the Executive Council expressed its concern on the non-implementation by the African Commission of the Executive Council decision of June 2015 requesting withdrawal of the observer status from CAL.¹⁰⁶ The Executive Council reiterated its ‘request’ for the Commission to ‘comply’ with its decision, and it also requested that a joint retreat

of the African Commission and the AU Permanent Representatives' Committee (PRC) be convened to resolve "various concerns" and to "find modalities for enhanced coordination and collaboration" between the African Commission, the AU organs and Member States, and resolve 'outstanding issues'.

B. The African Peer Review Mechanism (APRM)

51. NEPAD established the APRM as a voluntary process of submission to review by 'peers' (fellow heads of state) of a country's record in political, economic and corporate governance. Its substantive basis is the Declaration on Democracy, Political, Economic and Corporate Governance, which sets out the principles to which the participating states agree to adhere. Primarily a codification of existing standards adopted by the OAU/AU and other international organizations such as the UN, the Democracy and Governance Declaration accords 'an importance and urgency all of its own' to human rights. States accept the APRM process by signing a Memorandum of Understanding on the APRM (MOU). So far, 34 states have signed the MOU. Although the APRM review process provides an opportunity to interrogate the protection of sexual minority rights, none of the country reviews has so far paid any attention to this aspect.

Annex 4 - footnotes

27. Adopted at the 55th Ordinary Session of the African Commission in Luanda, Angola, 28 April - 12 May 2014.
28. Arts 2, 3, 5, 6, 7, 9, 10, 11, 12, 15, 16 and 17.
29. In Art 4, the right of “every human being” to respect for life is reiterated; Art 8 provides that the freedom of conscience of “no one” may be restricted; and Art 13 provides for the rights of “every citizen”.
30. emphases added Art 2 is akin to Art 14 of the European Convention, Art 1(1) of the American Convention
31. 241/2001, Purohit and Another v The Gambia (2003) AHRLR 96 (ACHPR 2003) paras 50, 52-54.
32. 245/02, Zimbabwe Human Rights NGO Forum v Zimbabwe (2006) AHRLR 128 (ACHPR 2006) (21st Activity Report of the ACHPR), para 169.
33. Communication 284/2003, para 155: “Article 3 guarantees fair and just treatment of individuals within the legal system of a given country. The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.”
34. Para 4.
35. CCPR/C/50/D/488/1992.
36. art 1(k), emphasis added.
37. South Africa, Judicial Matters Amendment Act, No. 22 of 2005.
38. <http://www.chr.up.ac.za/images/files/publications/other/sogj/English%20SOGI%20booklet%20for%20web.pdf>
39. See eg Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, adopted in 2007.
40. See, for example, SIPD Uganda, ‘Baseline Survey on Intersex Realities in East Africa - Specific Focus on Uganda, Kenya and Rwanda’ (2016) and Iranti, Gender Dynamix, LRC, Report to ACHPR on civil, political and socio-economic rights of transgender and intersex persons in South Africa, April 2016.
41. Declaration of Principles on Freedom of Expression in Africa, adopted by the Commission in 2002, para 3.
42. High Court of Kenya, Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others, Petition 440 of 2013 (April 2015), Court of Appeal of the Republic of Botswana, Court of Appeal, Attorney General of Botswana v Thuto Rammoge & 19 others, Civil Appeal No CACGB-128-14 (March 2016).
43. Interights and Others v Mauritania (2004) AHRLR 87 (ACHPR 2004) para 78.
44. Constitutional Rights Project, (2000) AHRLR 227 (ACHPR 1999) para. 42; Media Rights Agenda and Others v Nigeria (2000) AHRLR 200 (ACHPR 1998) paras 69 and 70.
45. Preamble to the African Charter.
46. Art 18(2) of the African Charter.
47. See e.g. M. Epprecht, Hungochani: The History of a Dissident Sexuality in Southern Africa (McGill-Queen’s University Press, Montréal, 2004; E. E. Evans-Pritchard, Witchcraft, Oracles and Magic among the Azande (Clarendon, Oxford, 1976); R. Morgan and S. Wierenga, Tommy Boys, Lesbian Men and Ancestral Wives (Jacana Media, Guateng, 2005); and S. Murray and W. Roscoe, Boy-wives and female husbands: studies of African homosexualities (1998)

48. Guidelines for National Periodic Reports, Second Annual Report of the African Commission on Human and Peoples' Rights, para II.A.28.
49. Communications 48/90, 50/91, 52/91, 89/93, Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan, 13th Annual Report, Annex V, para 54.
50. In line with Art 28, calling for mutual respect for tolerance; see also Sudan Human Rights Organisation and Another v Sudan (2009) AHRLR 153 (ACHPR 2009) para 221 (where the Commission remarked, in a different context, that "diversity ... is a cause for celebration and should not be "a source of conflict").
51. (2001) AHRLR 84 (ACHPR 2001).
52. Arts 45 and 55 of the African Charter.
53. 136/94, William Courson v Zimbabwe (2000) AHRLR 335 (ACHPR 1995) (8th Annual Activity Report of the ACHPR).
54. See generally Murray, R and Viljoen, F, 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 Human Rights Quarterly 86.
55. Authors' personal notes taken during the African Commission's thirty-eighth session.
56. Notes of Judith Oder, Lawyer, Africa Programme, Interights, who attended the session (on file with author).
57. Concluding observations on the first periodic report of Cameroon, adopted at the Commission's 39th ordinary session, 11–25 May 2005 http://www.achpr.org/english/other/Con_Observations/Cameroon/2nd_COs%20Cameroon.pdf
58. http://www.achpr.org/files/sessions/45th/state-reports/2nd-5th-2008/staterep2345_mauritius_2008_eng.pdf, para 15.
59. Adopted at 15th Extraordinary Session, 17-14 March 2014, Banjul, The Gambia, para 82.
60. Para xxxvi.
61. Para 11(xiii).
62. Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011 – 2014) para 81 http://www.achpr.org/files/sessions/57th/conc-obs/5th-2011-2014/concluding_observations_nigeria_5th_sr_eng.pdf
63. Concluding Observations and Recommendations on Sixth Periodic Reports of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples' Rights (2011 – 2013) para 50 (vi) http://www.achpr.org/files/sessions/20th-eo/conc-obs/6th-2011-2014/co_namibia_6th_sr_eng.pdf
64. Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the African Charter on Human and Peoples' Rights para 49(iv) http://www.achpr.org/files/sessions/17th-eo/conc-obs/1-1984-2012/concluding_observations_liberia.pdf
65. Resolution on the Establishment of a Committee on the Protection of the Rights of People Living with HIV and Those at Risk, Vulnerable to and Affected by HIV, 26 May 2010.
66. http://www.achpr.org/files/news/2017/12/d317/africancommission_hiv_report_full_eng.pdf
67. para 6.
68. Para 127.
69. <http://www.achpr.org/press/2014/03/d196/>

70. Statement on the Occasion of the International Day in Support of Victims of Torture – 26 June 2014
71. http://www.oas.org/en/iachr/media_center/PReleases/2014/057.asp
72. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=E>
73. 376: Resolution on the Situation of Human Rights Defenders in Africa - ACHPR/Res. 376 (LX) 2017, adopted in the 60th Ordinary Session of the African Commission on Human and Peoples' Rights 8-22 May 2017, Niamey, Niger.
74. 60th Ordinary Session of the African Commission on Human and Peoples' Rights (Niamey, 8 to 22 May, 2017) Intersession Activity Report Commissioner Reine Alapini Gansou http://www.achpr.org/files/sessions/60th/inter-act-reps/284/60os_inter_session_srhrd_comm_gansou_eng.pdf
75. Annual Situation of Torture and Other Ill-Treatment Report Presented to the 60th Ordinary Session of the African Commission on Human and Peoples' Rights http://www.achpr.org/files/sessions/60th/inter-act-reps/279/60os_inter_session_report_cpta_comm_mute_eng.pdf
76. Report of the Joint Dialogue adopted by the African Commission during its 19th Extra Ordinary Session Banjul, The Gambia 16-25 February 2016.
77. Joint Statement on Intersex Awareness Day, 26 October 2016 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>
78. <http://www.chr.up.ac.za/index.php/centre-news-a-events-2017/1956-centre-for-human-rights-iranti-org-and-sipd-uganda-host-panel-discussion-on-intersex-human-rights-in-africa.html>
79. Para 1(e).
80. <http://www.achpr.org/mechanisms/human-rights-defenders/Study-Women-HR-Defenders/>
82. Resolution 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, adopted at the 55th Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, 28 April - 12 May 2014.
82. The Commission called for an end to 'all acts of violence and abuse' based on these grounds, and to conduct 'proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims'. It mentions, as examples of specific steps that should be taken, anti-discrimination laws and laws 'prohibiting and punishing all forms of violence'.
83. ACHPR/Res. 376 (LX) 2017, 22 May 2017.
84. General Comment No.4 on the Right to Redress for Victims of Torture in Africa, adopted at the 21st Extra-Ordinary Session of the African Commission on Human and Peoples' Rights in Banjul The Gambia 23 February- 4 March 2017
85. Adopted on 21 September 2017, para 80.
86. The Guidelines for Policing Assemblies by Law Enforcement Officials in Africa, adopted at the 21st Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, in Banjul, The Gambia 23 February- 4 March 2017.
87. Draft Guidelines on the Declassification of Petty Offences African Commission on Human and Peoples' Rights mandated under Resolution 366 (EXT.OS XX1) 2017
88. Report of the Promotional Mission to the State of Namibia, 2 – 6 July 2001, DOC/OS(XXX)/244, page 7: In response, the Permanent Secretary reportedly took the position that "penal law is silent on homosexuality as such but specifies practicing sodomy as a crime", and added that "no person had yet been arrested in Namibia because of their sexual orientation".
89. Report of the Joint Promotional Mission to Uganda, report adopted at the Commission's 55th ordinary session,

28 April – 12 May 2014, Luanda, Angola, para 60.

90. Ibid, para 245.

91. Resolution 361 of the African Commission on Human and Peoples' Rights adopted at the 59th Ordinary Session, 21-4 November 2016 in Banjul, The Islamic Republic of Gambia. <http://www.achpr.org/sessions/59th/resolutions/361/>

92. Executive Council Decisions on the activities of the African Commission on Human and Peoples' Rights, [http://archive.au.int/collect/oaucounc/import/English/EX%20CL%20Dec%20902%20\(XXVIII\)%20_E.pdf](http://archive.au.int/collect/oaucounc/import/English/EX%20CL%20Dec%20902%20(XXVIII)%20_E.pdf), Ex. CL7Dec.902(XXVIII) Rev 1

93. The application for observer status was submitted to the Commission in May 2008, and deferred on numerous occasions until it was eventually considered in May 2010, at the Commission's 47th session.

94. See 28th Activity Report of the African Commission, AU Doc EX.CL/600 (XVII), para 33: 'The reason being that, the activities of the said Organisation do not promote and protect any of the rights enshrined in the African Charter.' Further clarification was provided by members of the Commission during question time at a conference organized by the Centre for Human Rights, University of Pretoria, in July 2011, celebrating 30 years since the entry into force of the African Charter.

95. The activities and principles of CAL are consistent with the following provisions of the AU Constitutive Act: promotion of human rights (art 3(h)); promotion of gender equality (art 4(l)); and promotion of social justice (art 4(h)).

96. 43rd Activity Report of the African Commission on Human and Peoples' Rights, <http://www.achpr.org/activity-reports/43/> 97. African Union, 'Africa's common position on to the UN General Assembly special session on AIDS', June 2006.

98. AU Assembly 15th ordinary session, 25-27 July 2010 Kampala Uganda, Decision on the Promotion of Cooperation, Dialogue and respect for Diversity in the field of human rights, AU Doc. Assembly/AU/17(XV) Add.9, para 4.

99. AU Doc Assembly/AU/ Decl.1(XVI), Declaration on the theme of the Summit: 'Towards greater unity and integration through shared values'.

100. See eg Murray and Viljoen, supra n 24, 86.

101. DOC.EX.CL/Dec 887 (XXVII) Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights.

102. Request for Advisory Opinion 2/2015, Centre for Human Rights and Coalition of African Lesbians, delivered 28 September 2017, <http://www.african-court.org/en/images/Cases/Judgment/002-2015-African%20Lesbians-%20Advisory%20Opinion-28%20September%202017.pdf>

103. Article 4(1) of the Protocol to the African Charter on Human and Peoples' Rights.

104. In terms of the "Criteria for Granting Observer Status and for a System of Accreditation within the African Union", EX.CL 195 (VII), Annex V of 1 to 2 July 2005.

105. Request for Advisory Opinion by Socio-Economic Rights and Accountability Project (SERAP), No. 001/2013, Advisory Opinion, 26 May 2017,

106. Decision on the African Commission on Human and Peoples Rights EX.CL/1058(XXXII)

For More Information

Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity

<http://www.achpr.org/sessions/55th/resolutions/275/>

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ANNEX

5

Sexual orientation, gender identity and expression and intersex in the Inter-American human rights system

Introduction

1. The objective of this paper is to review the main standards, cases, and practices related to the rights of lesbian, gay, bisexual, trans, and intersex (LGBTI) persons in the Inter-American human rights system.

ANNEX 5:

Sexual orientation, gender identity and expression and intersex in the Inter-American human rights system

Introduction continued

1. To achieve this aim, the paper examines the work of both the Inter-American Commission on Human Rights (the Commission, Inter-American Commission, or IACHR) and the Inter-American Court of Human Rights (the Court, Inter-American Court, or IACtHR), which over recent years have developed an important and wide-spanning corpus of norms on the protection of sexual orientation, gender identity and/ or expression and sexual characteristics (SOGIESC) within the framework of the American Convention on Human Rights (American Convention, Convention or ACHR).
2. For the purposes of this paper, the following sources were considered: petitions and cases decided by the IACHR and IACtHR; thematic and country reports issued by the IACHR; precautionary measures granted by the IACHR; press releases publicized by the IACHR; resolutions emanated by the Organization of American States (OAS); and other documents produced by the Inter-American system.
3. This paper is divided into three sections. Section I refers to norms and law cases related to the rights of LGBTI persons. Section II highlights institutional measures taken by the Commission and Court to guarantee the protections of the human rights of LGBTI persons in the Americas. Section III describes the role of the OAS General Assembly and the OAS LGBTI Core Group in establishing and protecting the rights of LGBTI persons.

I. NORMS AND CASE LAW

A. General doctrine for the protection of SOGI in the Inter-American human rights system

4. Although the American Convention does not include a direct reference to sexual orientation or gender identity and/ or expression and sexual characteristics (SOGIESC), the IACHR and the IACtHR, in accordance with their respective mandates, have developed SOGIESC-related standards based on the revision of cases and reports presented before the Inter-American System. In addition, despite these cases and reports concerning SOGIESC have been presented before the Commission and the Court since the late nineties, only in the last ten years specific protections regarding these issues have been developed. This can be seen especially in the wake of the *Atala Riffo y Niñas v. Chile* case before the Inter-American Court, a cornerstone decision containing the SOGI protection doctrine as formulated by the Inter-American System.

5. The *Atala Riffo y Niñas v. Chile* case¹⁰⁷ (*Atala v. Chile* or *Atala* case) referred to the international responsibility of Chile for discriminatory treatment and interference in the private and family life of a mother on the basis of her sexual orientation. The case centered on the result of an internal judicial process against Karen Atala that stripped her of the custody and care of her daughters. In this regard, the Inter-American Court determined that the rights of Karen Atala and her daughters were violated – in particular their rights to equality and non-discrimination, protection of privacy and dignity, protection of the family, rights of children, and judicial guarantees of due process. This became the first judicial decision of the Inter-American system regarding SOGI. It is good to remark that during this case the Court had to establish the sphere of protection with regard to SOGI, once the State's lawyers argued the absence of international consensus about legal categories of sexual orientation rights protection under the American Convention.

6. The Court's decision determined that sexual orientation and gender identity are included within "any other social condition" and therefore they constitute protected grounds under Article 1(1) of the Convention, supporting that the rights and freedoms established within the Convention are guaranteed "without any discrimination" on these grounds and other enumerated ones. In arriving at this conclusion, the Court reaffirmed that equality and non-discrimination are jus cogens norms and are therefore the cornerstone of international public law. In the words of the Court: "the Inter-American Court establishes that the sexual orientation of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person's sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by [S]tate authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation."¹⁰⁸

7. The IACtHR has ruled on two individual cases that had the SOGI thematic as to February 2018. The second decision of the Inter-American Court on LGBTI rights was in the case of *Duque v. Colombia* (*Duque v. Colombia* or *Duque case*).¹⁰⁹ In this case, the IACtHR decided on the case of Mr. Duque who lived with his same-sex partner until the partner's death. Considering their relationship to each other and shared livelihood, Mr. Duque petitioned Colombian authorities to obtain a survivor's pension, which is included in the current laws. However, his claim was consistently denied through the administrative and judicial process. According to the petition, such exclusion from the possibility of obtaining a survivor's pension was based on the fact that it was a claim from a same-sex partner. In this regard, the Inter-American Court decided that the Colombian State discriminated against Mr. Duque because he was in a same-sex relationship and that partners of the same sex should have the same patrimonial rights as the ones a heterosexual couple would have.

8. On the same year the IACtHR also decided on the case of *Flor Freire v. Ecuador*,¹¹⁰ which dealt with the international responsibility of Ecuador in the dismissal of Homero Flor Freire, an active member of the Ecuadorian army in accordance with the Rules of Military

Discipline, because of alleged acts of same-sex intimacy. The Inter-American Court recommended that the State of Ecuador must provide full reparation to the victim, as well as publicly recognize that Mr. Flor Freire was discharged from the Ecuadorian Army in a discriminatory manner. It is important to highlight that Mr. Flor Freire stated throughout the entire case that he was not a homosexual man, and that the Court developed the standard that discrimination on the perceived sexual orientation of an individual was also protected under the American Convention.

9. The most recent statement of the Inter-American Court on LGBTI rights was done at the Advisory Opinion 24/17 (AO 24/17).¹¹¹ This Advisory Opinion dealt with the questions presented by the State of Costa Rica on gender identity and the change of name of individuals according to their own gender identity and the patrimonial rights derived from relationships between persons of the same sex. The Court concluded that State recognition of one's gender identity is a vital component of guaranteeing trans individuals access to the full enjoyment of their human rights, and that there is a right to identity, which itself comprises several rights and includes an individual's gender identity. The Inter-American Court found that providing procedures to change one's name, identifying photograph, and gender on official State registration documents is an extension of the right to non-discrimination based on gender identity, a violation of which could lead to the infringement of other rights.

10. Regarding same-sex couples, the IACtHR reiterated that the American Convention's protection of family is not limited to any particular structural model. The Court highlighted the following marital rights and responsibilities that must be afforded to same-sex couples in equal respect to heterosexual couples: taxes, inheritance and property rights, rules of succession, authority to make medical decisions, the rights and benefits of survivors, birth and death certificates, professional ethics standards, financial restrictions on election contributions, workers' compensation benefits, health insurance, and custody of the children. The Court held that it was not sufficient for States to merely create an alternative legal institution, such as a civil

union distinct from marriage, for same-sex couples, that equal marriage should be guaranteed.

B. Killings, sexual violence and other forms of violence based on prejudice

11. The America is one of the regions with the highest levels of violence in general, and the highest number of reported cases of violence against LGBTI persons. In this regard, the Court has established that the rights to life, physical integrity, and personal freedom must be respected and guaranteed according to the American Convention. This includes the duty to apply due diligence in the effective investigation of all acts of violence, as well as the obligation to avoid impunity.¹¹² In particular, the Court has considered that certain forms of violence can be construed as discrimination.¹¹³ The Court concluded that States must not only respect the right to life and personal integrity but must also guarantee these rights through the adoption of prevention measures, investigation and punishment, as well as guarantees of non-repetition, especially with regard to communities that have experienced historically discrimination.

12. According to this, the IACHR's 2015 Report on Violence against LGBTI Persons inaugurated the concept of violence based on prejudice, aiming to examine violence committed against LGBTI persons. In this Report the IACHR indicated that violence based on prejudice "is a concept that signals an understanding of violence as a social phenomenon, as opposed to violence being understood as taking place in isolation."¹¹⁴ Further the Commission found that violence

The America is one of the regions with the highest levels of violence in general, and the highest number of reported cases of violence against LGBTI persons.

based on prejudice requires context and social complicity¹¹⁵ and has a symbolic impact sending a message to the whole LGBT community.¹¹⁶ As such, the IACHR concluded that violence against LGBT persons¹¹⁷ constitutes a contextualized social violence in which the perpetrators' motivation needs to be understood as complex and multi-faceted, and not only as an individual act.¹¹⁸ Similarly, the IACHR found that violence against intersex persons constitutes violence based on prejudice towards persons whose bodies differ from the standard for male and female anatomies.¹¹⁹

13. For many years, the Commission has systematically analyzed violence based on sexual orientation and gender identity in the region. In this regard, the IACHR received information on this topic during its 1992 onsite visit to Colombia, where it was presented with reports of a practice known as “social cleansing”, consisting of the selective killings of “prostitutes, street children, vagabonds, beggars and homosexuals”.¹²⁰ Throughout the years the IACHR has continued following-up on this issue. In its 2013 Report on the human rights situation in Colombia, the Commission indicated that this practice was being perpetrated by illegal armed groups, which use pamphlets to threaten LGBT persons and LGBT human rights defenders by declaring them military targets.¹²¹ According to the IACHR, the situation is aggravated by the levels of impunity and the lack of investigation by authorities in cases of violence against LGBT persons in the context of the internal armed conflict.¹²²

14. Starting in 2008, the Commission, through the Unit on the Rights of LGBTI Persons¹²³ - which later became the Rapporteurship on the Rights of LGBTI Persons¹²⁴ – has conducted a thorough monitoring of the violence against LGBTI persons in the Americas through its press releases and country reports. In December 2014, the Commission published its Registry of Violence, a monitoring tool that reviewed the media and reports from civil society organizations over the course of 15 months (from January 2013 to March 2014). During this period, the IACHR received information of at least 594 LGBT persons who were killed and 176 LGBT persons who were the victims of serious, non-lethal attacks. The majority of persons killed were gay men and trans

women and, in many of the cases, the extreme cruelty of the acts was an additional cause of concern. According to the data collected by the IACHR, 80% of trans women killed were 35 years old or younger, and the violence against them could be seen as exacerbated by their exclusion, poverty, and social marginalization. Also, reportedly, lesbian women are more vulnerable to certain types of violence linked to misogyny, such as sexual and domestic violence, and attacks coming from persons close to them or perpetrated by family members. Concerning States' obligations in this respect, the Commission expressed serious concerns about the lack of official data produced and collected by States.¹²⁵

15. The IACHR has found general trends regarding violence based on prejudice against LGBTI persons in the region, which led the Commission to conclude that: 1. violence against LGBTI persons is pervasive throughout the Americas; 2. that violence based on prejudice towards non-normative sexual orientations and gender identities is particularly cruel and generally depict high levels of brutality; 3. that there is general underreporting of these acts of violence and the vast majority of countries in the region do not collect data on violence against LGBTI persons.¹²⁶ Also, the IACHR highlighted the invisibility of the violence against certain groups within the LGBTI acronym, such as violence against trans men, bisexual persons and intersex persons.¹²⁷

16. Moreover, the Commission has received information regarding instances of so-called “corrective” rape, mostly targeting lesbian, bisexual, and trans women, or those perceived as such, including women who are perceived to be “masculine” or who defy traditional gender norms.¹²⁸ Regarding this type of violence, the IACHR indicates that it is used to punish nonconforming sexuality or gender targeting persons who defy traditional gender norms because of their sexual orientation, gender identity or expression.¹²⁹ The Commission has also indicated the stigma faced by gay men who are victims of sexual violence,¹³⁰ and reports of acts of sexual violence against intersex persons committed with the intention to “cure intersex bodies”.¹³¹

C. Torture and other cruel, inhuman or degrading treatment: violence by law enforcement officials and in prisons

17. The IACHR reports that in many countries in the region there have been complaints of acts of torture, physical and verbal attacks, and cruel, inhuman and degrading treatment towards LGBT people.¹³² Acts of violence and abuse committed by law enforcement agents are rarely denounced which leads to high levels of impunity. The situation of incarcerated LGBT persons has also been a subject followed by the IACHR. The Commission has made statements about this issue on various occasions, manifesting its concern about the conditions of detention, particularly of trans persons.¹³³ In many cases, these conditions do not comply with the standards that guarantee their fundamental rights and dignity due to overcrowding, ill-treatment, discrimination, and barriers to access basic services.¹³⁴

18. In its 2011 Report on the Human Rights of Persons Deprived of Liberty in the Americas,¹³⁵ the IACHR called for the protection of detained or incarcerated LGBTI persons because they, along with other vulnerable groups, are at higher risk of suffering human rights violations while in detention.¹³⁶ Also, it recommended that States regulate intimate visits “without distinctions based on considerations of gender or sexual orientation”.¹³⁷ In this trend, in 1999 the case of Martha Lucía Alvarez Giraldo,¹³⁸ who claimed discrimination and violation of her human rights by the State of Colombia for denying her intimate visits with her female partner and for suffering sanctions and persecution when claiming this right.

Acts of violence and abuse committed by law enforcement agents are rarely denounced which leads to high levels of impunity.

19. The Commission has also noted the heightened vulnerability of LGBT persons, particularly trans women, to be subjected to sexual violence while in detention, either by other inmates or by custodial staff.¹³⁹ According to the IACHR, “trans women are at a heightened risk of sexual violence because of their routine imprisonment in male facilities, without regard to the specificities of the person or the case”.¹⁴⁰ Also, the Commission has noted with concern that in some instances LGBT persons are segregated in detention centers, and that while this measure of segregation “arguably responds to a need to guarantee their safety,” the IACHR has received information about “worse living conditions in these cells or units, when compared to other units in the facility,” as well as “the possible limitation of programs and benefits afforded to the general population, which are key to rehabilitation or participating in early release programs.”¹⁴¹ In its 2015 Report on Violence against LGBTI Persons in the Americas, the Commission examined the situation of LGBTI persons deprived of liberty and in this regard indicated that “discrimination against persons deprived of liberty on the grounds of their gender identity or sexual orientation is not justified under any circumstance”.¹⁴² In this Report the IACHR made a series of recommendations to OAS Member States regarding LGBT persons deprived of liberty, including, but not limited to: (i) ensuring that measures aimed at protecting LGBT persons who are deprived of liberty do not place undue restrictions on them; (ii) restrict the indiscriminate and prolonged use of solitary confinement in places of detention; and (iii) adopt the necessary measures to ensure that the decision on where to house trans persons in detention is conducted on a case-by-case basis, with due respect to the person’s dignity, and whenever possible with prior consultation of the person concerned.¹⁴³

D. Laws that criminalize LGBT persons

20. In the Americas, eleven countries criminalize same-sex intimacy between consenting adults in private: Antigua and Barbuda, Barbados, Belize¹⁴⁴, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, St. Vincent and the Grenadines, Saint Lucia, and Trinidad and Tobago. The Commission has consistently called on these countries to repeal laws that criminalize consensual sexual relations between persons

of the same sex.¹⁴⁵ The Commission considers that there is a strong correlation between these norms and violence against LGBT persons, or those perceived to be LGBT, as these laws send a social message that discrimination and violence are condoned or tolerated.¹⁴⁶ Also, the IACHR received information on how the criminalization of same-sex intimacy impacts the defense of human rights, restricting access to justice and fueling intolerance, and that those who defend the rights of LGBTI persons in these countries are viewed as ‘self-avowed criminals’¹⁴⁷, by hindering the work of human rights defenders. In addition to the legislation that criminalizes same sex intimacy, the Commission found that Guyana had legislation criminalizing cross-dressing, or dressing with clothes socially attributed to another gender. For the IACHR, this provision reinforced gender stereotypes and constituted discrimination on the grounds of gender identity and expression.¹⁴⁸

21. The IACHR also made reference to the impact of laws against vagrancy and loitering, legislation that seeks to protect “public morals” or local misdemeanor codes. While these laws do not directly criminalize same-sex activity or trans persons, they are often construed and applied to criminalize LGBT persons.¹⁴⁹ The vaguely defined terms used in these legal provisions opens the door to arbitrary enforcement with respect to persons who are perceived to defy socially established and traditional gender norms, particularly trans persons.¹⁵⁰ Specifically, that these laws “facilitate police abuse, extortion, and arbitrary detention, particularly of trans sex workers, and often without effective judicial oversight,” through highly subjective and prejudiced interpretations of the vague concept of ‘public morals’.¹⁵¹ Also, the IACHR has expressed concern over the existence of laws that ban the entry of gay persons in Belize and Trinidad and Tobago.¹⁵²

22. In its 2015 Report on Violence against LGBTI Persons in the Americas, the IACHR urged OAS Member States which “have laws criminalizing consensual sex and sexual intimacy between adults of the same sex, serious and gross indecency laws –in as much as they criminalize same-sex intimacy-, and legislation criminalizing cross-dressing, to repeal those laws, and, in the interim, to impose an explicit

and formal moratorium on enforcement of those laws. This would send a clear message to society in general, and law enforcement agents in particular, that such laws cannot be used to threaten or extort LGBT persons or those perceived as such.”¹⁵³ Additionally, the Commission recommended Member States to “review legislative frameworks that criminalize and stigmatize sex workers.”¹⁵⁴

E. Freedom of association and human rights defenders

23. In its Second Report about the Situation of Human Rights Defenders in the Americas, the Commission found that the main obstacles throughout the region to protecting defenders are killings, threats, criminalization of activities, high levels of impunity for acts that violate the freedom of association, and discrediting and stigmatization of them.¹⁵⁵ In particular, regarding the risks to life and personal integrity of the defenders of the human rights of LGBTI persons, the IACHR has adopted 11 precautionary measures to protect these persons in Jamaica, Mexico, Honduras, Guatemala, Cuba and Belize.¹⁵⁶ Additionally, the Commission has demanded that States create and consolidate participation spaces for human rights defenders of LGBTI persons, especially for the design and discussion of public policies.¹⁵⁷

24. In its 2015 Report on Violence against LGBTI Persons in the Americas, the IACHR made an in-depth analysis of the situation of human rights defenders and issued a series of recommendations to OAS Member States to protect these defenders from violence and discrimination.¹⁵⁸

F. Freedom of expression

25. The American Convention prohibits discourse that consists of “advocacy of national, racial, or religious hatred that constitute[s] incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin” (Article 13.5 of the American Convention). Despite the absence of a mention of discrimination in the definition of what constitutes incitement to lawless violence in the American Convention, the IACHR has expressed its concern with

negative statements by state authorities against LGBTI persons and the defenders of their rights. Such discourses are reprehensible as they have disastrous effects not only on the recognition of the rights of the LGBTI population but also through the intimidation of the LGBTI rights defenders, which serve to accentuate the vulnerability of these groups.¹⁵⁹

26. In its 2015 Report on Violence against LGBTI Persons, the IACHR and its Special Rapporteur on Freedom of Expression held that Article 13(5) of the American Convention applies to hate speech that “incites lawless violence against a group on the grounds of sexual orientation, gender identity, and/or bodily diversity.”¹⁶⁰ In it, the IACHR and its Special Rapporteur on Freedom of Expression recommend that “States should establish appropriate sanctions for hate speech that incites lawless violence by public officials,”¹⁶¹ and that in response to hate speech, States must adopt a “comprehensive approach that goes beyond legal measures and includes preventive and educational measures”.¹⁶² As such, they have indicated that “States should implement measures to strengthen the obligations of public broadcasters to serve the informational and expressive needs of the LGBTI community, as well as to promote awareness of issues that concern LGBTI persons.”¹⁶³ Furthermore, that States should “create an enabling legal framework for community media, and provide support, whether of a financial or regulatory nature, for media outlets or media content that provide information to and voice needs of LGBTI individuals and groups.”¹⁶⁴ And finally, the IACHR and its Special Rapporteur recommended “that States encourage media to play a positive role in countering discrimination, stereotypes, prejudices, and biases, including by highlighting their dangers, by adhering to the highest professional and ethical standards, and by addressing issues of concern to groups that have historically suffered discrimination and providing an opportunity to them to speak and to be heard.”¹⁶⁵

G. Economic, social and cultural rights

27. Regarding the right to education, the Commission, along with the UN Committee on the Rights of the Child and UN human rights experts,

has denounced discrimination and violence against children and young LGBTI persons. In particular, it has rejected discrimination in education (manifested as bullying and possible desertion as a result), restrictions to access, and expulsion from schools. This can generate self-esteem problems and suicide, as well as social exclusion and poverty.¹⁶⁶ To the IACHR, education is a fundamental tool to prevent and eliminate prejudice and stereotypes related to diverse sexual orientation and gender identity expressions. The Commission also considered it troubling that the gender perspective is referred to pejoratively as a “gender ideology” in several countries in the region. The gender perspective is a critical instrument for combatting discrimination and violence against women and against people with different sexual orientations and gender identities; it is a concept that seeks to raise awareness of the position of structural inequality and subordination of women in relation to men because of gender.¹⁶⁷

28. Regarding the right to health, the IACHR has recognized that the stigmatization and discrimination of persons living with HIV in the Americas is endemic and mainly affects populations that are most at risk of HIV infection, such as men who have sex with other men and trans women who engage in sex work. This has an impact on the quality of life and the health of persons that live with HIV. For this reason, the IACHR has recognized that education is central to preventing discrimination and has recommended that the States establish positive measures to guarantee the rights of these persons.¹⁶⁸

29. The Commission has expressed concern over the existence of centers which pretend to “cure homosexuality” in Ecuador¹⁶⁹ and other countries in the Americas,¹⁷⁰ where particularly young lesbian women and gay men are subject to all forms of violence, including rape. The Commission also found that even though “gender identity is not determined by body transformations, surgical interventions or medical treatment”, these “could be necessary for the construction of the gender identity of some trans persons.”¹⁷¹ In this regard, in its 2015 Violence Report, the IACHR affirmed that “the socioeconomic status of trans persons determines the quality of medical services that they receive, including gender affirmation surgeries and other related body modifications. The prevalence in Latin America of informal and risky

gender affirmation procedures causes a high number of (preventable) deaths of trans women.”¹⁷² The Commission stated in its 2017 “Report on Poverty and Human Rights” that trans people are immersed in a cycle of exclusion and poverty that makes them more vulnerable to violence; as well as that trans people face high rates of exclusion of income generation opportunities and programs of social welfare what often relegates them to unemployment and making them resort to sex work. The IACHR stated that trans people face “a chronic lack of access to educational and health services, employment opportunities and housing adequate”, so they suffer from severe impoverishment the most of their lives.¹⁷³

30. Regarding the rights of intersex persons,¹⁷⁴ the Commission has expressed concern about the information it received regarding systematic and generalized human rights violations that they are subjected to, because their bodies differ from the standard female and male bodies. As such, the IACHR has been informed that intersex babies and children are subjected to medical interventions, without their informed consent or that of their parents. Most of the time, these interventions are irreversible in nature and aimed at “normalizing” their genitals, in the attempt to make them look “normal”. The IACHR has stated that these interventions, are rarely medically necessary and cause intersex children and adults great harm, including, but not limited to, chronic pain and life-long trauma, genital insensitivity, sterilization, and mental suffering. Therefore, the Commission indicated that States must review these medical procedures on persons under the age of 18 in order to guarantee the dignity and rights of boys and girls.¹⁷⁵

Trans people are immersed in a cycle of exclusion and poverty that makes them more vulnerable to violence.

31. Regarding the right to work, the IACHR has examined discrimination at the workplace.¹⁷⁶ With regards to employment discrimination, the IACtHR reviewed the case of *Homero Flor Freire v. Ecuador*.¹⁷⁷ This case is about the international responsibility of Ecuador in the dismissal of Homero Flor Freire, an active member of the Ecuadorian army in accordance with the Rules of Military Discipline, because of alleged acts of same-sex intimacy. The Inter-American Court recommended that the State of Ecuador make full reparation to the victim and to publicly recognize that Homero Flor Freire was discharged from the Ecuadorian Army in a discriminatory manner. Further, the Court recommended adoption of measures by the State to ensure that people who work in the Ecuadorian Army or in any of its offices or sections are not subject to discrimination based on their actual or perceived sexual orientation, among other measures.

32. More in the right to work, the Commission has congratulated “the State of Argentina for establishing a minimum quota of at least one percent of trans persons for jobs in the public sector in the Province of Buenos Aires.”¹⁷⁸ The IACHR found a link between policies that uphold the economic and social rights of trans persons and violence, indicating that such policies are “a means to prevent poverty, violence and discrimination faced by trans persons in the region.”¹⁷⁹

33. Specifically, with respect to trans persons, the IACHR has received information about the lack of recognition of trans persons’ gender identity, the violence they suffer, and the violation of their economic, social, and cultural rights.¹⁸⁰ In this regard, the IACHR has taken note “of the vicious cycle of violence, discrimination, and exercise of rights. As the petitioners indicated, trans women’s lack of access to formal employment is due in large part to exclusion and discrimination in family, educational, and social arenas.”¹⁸¹ As a result, trans women “have to resort to occupations that place them at greater risk of suffering violence and becoming criminalized, which in turn means that they have even fewer possibilities for working in the formal sector.”¹⁸² In this trend, the IACHR has affirmed “trans persons face poverty, social exclusion and high rates of lack of access to housing, pressing them to work in highly criminalized informal economies, such as sex work

or survival sex. As a result, trans women are profiled as dangerous, making them vulnerable to police abuse, criminalization and to be imprisoned.”¹⁸³ The IACHR has also called on OAS Member States to adopt gender identity laws and undertake specific measures to ensure that trans persons have access, without discrimination, to employment, social security, housing, education and health care.¹⁸⁴ The Commission has also noted the “close link between exclusion, discrimination and the short life expectancy of trans persons”.¹⁸⁵

H. Legal protection and recognition of gender identity

34. With regard to gender identity, in 2017 the IACtHR has published its Advisory Opinion 24/17 in which it concluded that State recognition of one’s gender identity is a vital component of guaranteeing trans individuals access to the full enjoyment of their human rights. The Court also ruled that there is a right to identity, which itself comprises several rights and includes an individual’s gender identity. The Inter-American Court found that providing procedures to change one’s name, identifying photograph, and gender on official State registration documents is an extension of the right to non-discrimination based on gender identity, a violation of which could lead to the infringement of other rights.

I. Protection of the family and definition of the family

35. The IACtHR established in the Atala case that families made up of LGBT persons are protected by the Convention because “the American Convention does not define a limited concept of family, nor does it only protect a ‘traditional’ model of the family”.¹⁸⁶

36. In the case *Ángel Alberto Duque v. Colombia*¹⁸⁷, the IACtHR decided on patrimonial rights derived from relationships between persons of the same sex under the American Convention. Mr. Duque lived with his same-sex partner until the partner’s death. Considering their relationship and shared livelihood, Mr. Duque petitioned Colombian authorities to obtain a survivor’s pension. However, his claim was consistently denied through the administrative and judicial process. According to the petition, such exclusion from the possibility of

obtaining a survivor's pension was based on the fact that it was a claim from a same-sex partner. The Colombian State based its denial on the protection of the family and the financial sustainability of the general pension system. For the Inter-American Court decided that there was a discrimination against Mr. Duque for the fact that he was in a same-sex relationship.

37. In its Advisory Opinion 24/17, the IACtHR made a statement on both patrimonial rights derived from relationships between persons of the same sex and the right to equal marriage within the region. The Court stated that the American Convention's protection of family life is not limited to a particular family model. The Court highlighted the following marital rights and responsibilities that must be afforded to same-sex couples in equal respect to heterosexual couples: taxes, inheritance and property rights, rules of succession, authority to make medical decisions, the rights and benefits of survivors, birth and death certificates, professional ethics standards, financial restrictions on election contributions, workers' compensation benefits, health insurance, and custody of the children. The Court held that it was not sufficient for States to merely create an alternative legal institution, such as a civil union distinct from marriage, for same-sex couples, that equal marriage should be guaranteed.

J. Access to justice

38. The IACHR has examined the State's obligations to prevent, investigate, punish, and provide reparations for violence motivated by the sexual orientation, gender identity, or bodily diversity of the victim.¹⁸⁸ The Commission has stated that impunity for violence is a serious problem in the region and "lack of judicial statistics further complicates the analysis of situations of impunity in cases of violence against

The Court highlighted the following marital rights and responsibilities that must be afforded to same-sex couples in equal respect to heterosexual couples.

LGBTI persons.”¹⁸⁹ In addition, the IACHR has identified deficiencies in the investigation and prosecution, such as prejudice in the conduct of investigations, and lack of a differentiated approach that often leads to violence against LGBTI persons not being “categorized as often as they should be as hate crimes or crimes motivated by prejudice”¹⁹⁰; and the “acquittal or mitigated sentencing” of perpetrators due to the sexual orientation or gender identity of the victim.¹⁹¹

II. INSTITUTIONAL CHANGES IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS TO GUARANTEE THE RIGHTS OF LGBTI PERSONS

39. As examined above, the IACHR has been fundamental in the process of recognition and protection of the rights of LGBTI persons in the Americas. On the part of the IACHR, it has engaged in actions such as the issuing of statements about the human rights situation of LGBTI persons, denouncing human rights violations, condemning acts of violence against this population, reprimanding States about it, granting precautionary measures in favor of persons in grave risk, creating a new institution dedicated to the rights of LGBTI persons, and bringing cases before the IACtHR where violations of LGBTI rights occur. Specifically, as of February 2018 the Commission has issued nine reports on admissibility,¹⁹² three decisions on merits,¹⁹³ three inadmissibility reports,¹⁹⁴ one friendly settlement¹⁹⁵ and sent three cases to the Court.¹⁹⁶ The Commission has also included analysis on issues regarding sexual orientation and gender identity in its annual,¹⁹⁷ thematic reports in other areas,¹⁹⁸ and country reports.¹⁹⁹

40. In November 2011, the Commission took a fundamental step in strengthening the protection of the LGBTI people by announcing the creation of the Unit for the rights of lesbian, gay, bisexual, trans, and intersex persons.²⁰⁰ The Unit was crucial in establishing the foundation of the work in the protection and promotion of human rights of LGBTI persons in the Americas; as it has denounced violations through press releases, conducted promotional activities, and held expert meetings, among other activities.

41. On November 8, 2013, the Inter-American Commission created the Rapporteurship on the Rights of LGBTI Persons with the purpose of giving specialized attention and continuing the work carried out by the former LGBTI Unit in the advancement and protection of LGBTI rights.²⁰¹ As of February 2018, the Commission, through the Rapporteurship, had received more than 120 petitions against Member States; granted 11 precautionary measures for the protection of rights; held 6 regional expert meetings;²⁰² prepared two sections on the rights of LGBTI persons for country and thematic reports; issued more than 30 press releases condemning violence against the LGBTI population and has denounced the lack of action on the part of the States; held more than 50 public hearings, with the participation of 22 countries and more than 70 NGOs; and monitored more than 1500 news reports about violence against LGBTI persons.²⁰³ In November 2015 the IACHR approved the first thematic report focusing exclusively on the human rights of LGBTI persons in the Americas, which focused on violence. This report consists of a regional analysis of killings, acts of torture and other forms of violence against LGBTI persons, including at the intersection with race, ethnicity, sex, migration situation, deprivation of liberty, and poverty, and includes a series of recommendations to OAS Member States in order to prevent, protect and provide reparations and redress concerning acts of violence against LGBTI persons.

III. THE ROLE OF THE OAS GENERAL ASSEMBLY IN PROMOTING THE RIGHTS OF LGBTI PERSONS

42. The OAS General Assembly has been an institution of fundamental importance to the promotion of the rights of LGBTI persons in the Americas through nine resolutions about “Human Rights, Sexual Orientation, and Gender Identity.” The first resolution was approved in 2008 and expresses “concern about acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity.”²⁰⁴ Over the following years, the terms of the resolution were broadened and have been made more complete

on each subsequent occasion. For example, in 2009, the Assembly broadened the resolution to include the following issues: condemnation of violence and human rights violations against persons because of their sexual orientation and gender identity; State investigations of violent acts; protecting defenders of human rights of LGBTI persons; and the role of organs of the Inter-American system, in particular the IACHR, in continuing to work on these issues.²⁰⁵

43. The 2010 resolution maintained the earlier issues and expanded the statement to include “ways to combat discrimination of persons because of their sexual orientation and gender identity.” The 2011 resolution asked the IACHR and the Inter-American Judiciary Committee for a judicial and conceptual study on the matter. Afterwards, in the 2012 resolution, the IACHR was asked to conduct a study on the laws that limit the human rights of persons as a consequence of their sexual orientation or gender identity and to create a guide to stimulate the decriminalization of homosexuality.

44. The resolutions of 2013 and 2014 maintained a similar structure, expanding to other areas of rights, but several States began to include footnotes (seven in 2013 and thirteen in 2014) to avoid considering the decriminalization of homosexuality and to avoid making changes that allow the recognition of the families of LGBTI persons.

45. In addition, the OAS General Assembly approved two human rights treaties, which for the first time in the Inter-American system explicitly include sexual orientation and gender identity as protected categories and require measures against discrimination on these grounds. These treaties are: the Inter-American Convention against All Forms of Discrimination and Intolerance;²⁰⁶ and the Inter-American Convention on Protecting of the Human Rights of Older Persons.²⁰⁷

46. In 2016, in the framework of the 46th OAS General Assembly, eight OAS State members adopted on committed, among other things, to support the implementation of mandates contained in OAS resolutions on human rights, sexual orientation, and gender identity and expression. The Core Group also commits to support regional and OAS efforts aimed at ensuring that all people can exercise their right to live

free from violence and discrimination, recognizing the need to address the multiple forms of discrimination they face due to different factors. The OAS LGBTI Core Group is formed by Argentina, Brazil, Canada, Chile, Colombia, El Salvador, Mexico, United States and Uruguay has been serving as a great ally in the maintenance and the advance of the rights of the LGBTI persons in the General Assembly. The Core Group has also been supportive for the role of the IACHR and the IACtHR in regard of the decisions based on SOGIESC rights.

Annex 5 - footnotes

107. See I/A Court HR, Case of Karen Atala Riffo and daughters v. Chile. Merits, Reparations and Costs. Judgment of 24 February 2012. Series C No. 239. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf

108. Ibid. Para. 91.

109. IACtHR Case of Duque v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 26, 2016. Series C No. 310.

110. IACtHR, Case of Flor Freire v. Ecuador. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2016. Series C No. 315.

111. IACtHR, Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24.

112. In that respect, the Court established in the Velasquez Rodriguez case: “166. The second obligation of the States Parties is to “ensure” the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation”. See Case of Velásquez-Rodríguez v. Honduras, Judgment of July 21, 1989 (Reparations and Costs) Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_07_ing.pdf.

113. See I/A Court H.R., Case of González et al. (“Cotton Field”) v. Mexico, Judgment of November 16, 2009. Series C No. 205. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf; See also I/A Court H.R., Case of the Miguel Castro-Castro Prison v. Peru. Judgment of November 25, 2006. Series C No. 160. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_160_ing.pdf.

114. IACHR, Report on Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, November 12, 2015, OAS/Ser.L/V/II. Doc. 36/15 Rev. 1, para. 44, citing María Mercedes Gómez, interview, Centro Latinoamericano de Sexualidades y Derechos Humanos, 2007.

115. IACHR, Report on Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, November 12, 2015, OAS/Ser.L/V/II. Doc. 36/15 Rev. 1, para. 44, citing Gómez, María Mercedes. Chapter 2:

Prejudice-based Violence, in Motta, Cristina and Sáez, Macarena (eds.), *Justice's Gaze: A Casebook on Diverse Sexualities and Jurisprudence in Latin America*. Vol. 2, Bogotá, Colombia: Siglo del Hombre Editores, Red Alas, 2008, p. 99.

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For More Information

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ANNEX 6

Sexual orientation, gender identity and sex characteristics in the United Nations human rights system

Introduction

1. The Universal Declaration of Human Rights (Universal Declaration) provides a foundation for subsequent human rights treaties, and has served as a critical tool for the protection of the human rights of lesbian, gay, bisexual and transgender (LGBT) as well as intersex persons. Equality and non-discrimination are fundamental human rights principles embodied in the Universal Declaration, the Charter of the United Nations and the core international human rights treaties.

ANNEX 6:

Sexual orientation, gender identity and sex characteristics in the United Nations human rights system

2. The human rights mechanisms of the United Nations (UN) have increasingly brought attention to human rights violations based on sexual orientation, gender identity and sex characteristics/intersex status, including killings, sexual violence, torture and ill treatment in detention and medical settings, attacks on human rights defenders, denial of free expression and assembly, arbitrary detention, criminalization and discriminatory laws, lack of access to remedies, lack of recognition of gender identity, pathologisation, and discrimination in access to education, health care, housing, and employment.

3. A range of tools have been used by the UN human rights mechanisms and entities to address these issues, including:

- State reviews, recommendations, concluding observations
- General comments, discussion papers, issue papers, guidelines
- Decisions on individual cases
- Letters of allegation, urgent appeals, other letters
- Joint statements/declarations
- Consultations, expert meetings
- Booklets, fact sheets, handbooks, infographics
- Case studies, reports, research
- Policy briefs, position statements
- Articles, op-eds, opinion pieces, letters to the editor, press releases

I. UN STANDARDS ON VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION, GENDER IDENTITY, SEX CHARACTERISTICS

A. Rape, torture, killings and other forms of discriminatory violence

4. The rights to life, liberty, security of person, privacy and freedom from torture, cruel, inhuman or degrading treatment are enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture (CAT).²⁰⁸ UN human rights mechanisms have affirmed that these rights apply to all persons, regardless of sexual orientation, gender identity or sex characteristics/intersex status.

Death penalty

5. UN treaty bodies and special procedures have repeatedly raised concern about penal code provisions and/or the application of the death penalty as punishment for consensual same-sex relations between adults.²⁰⁹ As confirmed by the Commission on Human Rights (the predecessor of the UN Human Rights Council) and the Human Rights Committee, the use of the death penalty in these circumstances is a violation of article 6 of the ICCPR, which provides that, in countries that have not abolished the death penalty, a “sentence of death may be imposed only for the most serious crimes.”²¹⁰

Killings

6. UN human rights mechanisms have drawn attention to extrajudicial killings committed by both State and non-State actors based on actual or perceived sexual orientation or gender identity. Examples include killings for purpose of so-called “social cleansing,”²¹¹ LGBT persons killed by police,²¹² floggings, stonings and killings of women by communities aiming to restrict and regulate female sexuality,²¹³ brutal murders of gay men,²¹⁴ lesbians,²¹⁵ transgender persons²¹⁶ and LGBT human rights defenders.²¹⁷ Sexual orientation and gender identity have been recognised as grounds for protection from extrajudicial, summary and arbitrary executions by the UN General Assembly.²¹⁸ States are required

to exercise due diligence in preventing, investigating, punishing and redressing extrajudicial killings, including in instances where the victim has been targeted on grounds of sexual orientation, gender identity or intersex status.²¹⁹ UN human rights mechanisms have received reports of infanticides of intersex children on the basis of their sex characteristics.²²⁰

Torture and other cruel, inhuman or degrading treatment

7. States are obliged under international law to prohibit, investigate, punish and provide redress for torture and other cruel, inhuman or degrading treatment.²²¹ The Committee against Torture has highlighted that the protection of certain minority or marginalised individuals or populations especially at risk of torture is a part of the State obligation to prevent torture or ill treatment, affirming that “States parties must ensure that, insofar 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”.²²²

8. Certain forms of abuses against LGBT and intersex persons may cross a threshold of mistreatment that is tantamount to torture or cruel, inhuman or degrading treatment or punishment. Examples include denial of medical treatment, verbal abuse and public humiliation, a variety of forced or coercive procedures such as sterilisation, forcible anal examinations of persons suspected of engaging in consensual same-sex relations, invasive virginity examinations conducted by health-care providers, forced hormone therapy, genital-normalising surgeries or treatments on intersex children and unethical and harmful so-called “therapies” to change sexual orientation or gender identity.²²³

9. The Committee on the Rights of the Child has noted that children who are lesbian, gay or transgender, or gender non-conforming, are particularly vulnerable to violence.²²⁴ Lesbians and transgender women are also at particular risk because of gender inequality and power relations within families and wider society.²²⁵

Arbitrary detention

10. States have an obligation to protect the right not to be subjected to arbitrary arrest and detention.²²⁶ Arrest or detention on the basis of sexual orientation, gender identity or intersex status, whether pursuant to a court order or otherwise, is arbitrary and is a breach of international law.²²⁷ States are obliged to refrain from arresting or detaining persons on discriminatory grounds, including sexual orientation and gender identity.²²⁸

11. UN mechanisms have called upon States to fulfil these obligations by repealing laws used to arrest or punish individuals based on their sexual orientation and gender identity, including laws criminalising homosexuality, consensual same-sex relations and cross-dressing, and have rejected attempts to justify such laws on grounds of the protection of public health or morals.²²⁹ Furthermore, all persons under arrest, regardless of their sexual orientation, gender identity or intersex status, are entitled to be informed of the reasons for arrest and the nature of any charges against them, to be brought promptly before a judicial officer and to bring court proceedings to determine the lawfulness of detention, whether or not charged with any offence.²³⁰ In a number of States, laws criminalising sex workers are used to arrest and harass people based on their sexual orientation or gender identity and UN human rights mechanisms and entities have also called upon States to repeal laws criminalising adult consensual sex work.²³¹

States are obliged to refrain from arresting or detaining persons on discriminatory grounds, including sexual orientation and gender identity.²²⁸

Right to privacy

12. Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. As confirmed by UN human rights mechanisms, the criminalization of consensual same-sex relations violates the rights to privacy and to non-discrimination and constitutes a breach of international human rights law.²³² In addition, human rights mechanisms have stressed the importance of encryption and anonymity on the internet in protecting the privacy of persons persecuted on basis of sexual orientation and gender identity.²³³

Incitement to hatred and violence

13. Under international law, everyone has the right to freedom of expression. However, the exercise of the right to freedom of expression should not violate the rights and freedoms of others, including the right to equality and non-discrimination. The human rights of LGBT and intersex persons are undermined when deep-rooted hatred and incitement to violence based on sexual orientation, gender identity or intersex status is manifested and expressed. Various forms of incitement to hatred and violence against LGBT persons, including by politicians, the media, religious leaders and others, have been addressed by UN human rights mechanisms over the years.²³⁴ International human rights law recognises that in certain limited circumstances, and with due regard to appropriate safeguards, the right to freedom of expression can be restricted where it presents a serious danger for others and for their enjoyment of human rights, and that States have a responsibility to combat hate speech through appropriate measures, in line with international human rights norms and standards.²³⁵

Asylum and refuge

14. Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation, gender identity or sex characteristics.²³⁶ A State may not remove, expel or extradite a person to any State where that person would face a

threat to their life or freedom, including violence, arrest, discrimination, persecution, torture, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation, gender identity or intersex status.²³⁷

B. Freedom of expression, association and assembly

15. The rights to freedom of expression, association and assembly for all persons without discrimination based on any grounds are protected under the Universal Declaration and the ICCPR.

16. United Nations treaty bodies and special procedures have systematically rejected restrictions that seek to prohibit or restrict public discussion of sexual orientation and gender identity, the work of human rights defenders and civil society organizations working on the human rights of LGBT people and events related to these issues, finding that such restrictions were, inter alia, not based on any credible evidence, were not necessary, were not proportionate, were discriminatory, and amounted to violations of rights enshrined in international law.²³⁸

Freedom of expression

17. Everyone has the right to freedom of opinion and expression,²³⁹ regardless of sexual orientation, gender identity or intersex status.²⁴⁰ This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation, gender identity or intersex status, through any medium and regardless of frontiers.

18. The Human Rights Committee considered that the Russian Federation had violated the right to freedom of expression under article 19, paragraph 2 (read in conjunction with article 26 on the right to non-discrimination) of the ICCPR in *Fedotova v Russian Federation* (2012) by establishing an administrative sanction and a fine on an individual for having publically expressed positive messages about her sexual orientation near a secondary school.²⁴¹ The Committee on the Rights of the Child has highlighted how, far from protecting minors, such legislation

in fact “encourages stigmatization of and discrimination against LGBTI persons, including children, and children of LGBTI families” and “leads to the targeting and ongoing persecution of the country’s LGBTI community, including abuse and violence, in particular against underage LGBTI rights activists”.²⁴²

Freedom association and assembly

19. Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations,²⁴³ regardless of sexual orientation or gender identity.²⁴⁴ In *Alekseev v Russian Federation* (2009) the Human Rights Committee considered that by banning the Moscow Gay Pride March the Russian Federation had violated the right to peaceful assembly under article 21 of the ICCPR.²⁴⁵ Anyone may form and have recognised, without discrimination, associations related to sexual orientation, gender identity and intersex status, as well as associations that distribute information to or about, facilitate communication among, or advocate for the rights of LGBT and intersex persons. UN human rights mechanisms have drawn attention to the arbitrary denial to register human rights associations working to protect the human rights of LGBT persons, underscoring State party obligations under article 22 of the ICCPR.²⁴⁶

C. Discrimination

20. Everyone is entitled to enjoy all human rights without discrimination,²⁴⁷ including discrimination on the basis of sexual orientation, gender identity or intersex status.²⁴⁸ Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected.²⁴⁹ Discrimination includes any distinction, exclusion, restriction or preference based on sexual orientation, gender identity or intersex status which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation, gender identity or intersex status may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.²⁵⁰

21. The section below examines some of the areas where individuals are particularly susceptible to discriminatory treatment, marginalisation and restrictions on enjoyment of rights because of their sexual orientation, gender identity or intersex status. Additional areas of concern not addressed here include discrimination in employment, housing and social benefits.

Health

22. Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation, gender identity or intersex status.²⁵¹ Criminal laws and homophobic, sexist, transphobic and other discriminatory practices and attitudes on the part of health-care institutions and personnel may deter LGBT persons from seeking health services, which in turn has a negative impact on efforts to tackle HIV/AIDS and other health concerns.²⁵² Concerns include breaches of confidentiality, stigma and violence.²⁵³ The Committee on the Elimination of Discrimination against Women has expressed concern about lesbian, bisexual, transgender and intersex women as victims of abuses and mistreatment by health service providers,²⁵⁴ and has recommended the abolishment of requirements for psychiatric assessment, sterilisation and surgery for transgender women who wish to obtain legal recognition of their gender identity.²⁵⁵ Intersex children, who are born with atypical sex characteristics, are often subjected to discrimination and medically unnecessary surgery, performed without their informed consent.

23. Such instances should be investigated and legal provisions be adopted in order to provide redress to the victims of such treatment, including adequate compensation. States should educate and train medical and psychological professionals on the range of sexual, and related biological and physical, diversity.²⁵⁶

Everyone has the right to the highest attainable standard of physical and mental health.

24. United Nations human rights mechanisms have also noted that medical classifications that pathologize LGBT and intersex people – i.e.: label them as ill, disordered, malformed or abnormal on the basis of their sexual orientation, gender identity/expression, or sex characteristics – are one of the root causes of the violence, discrimination and stigma that they face.²⁵⁷ Such classifications are particularly widespread in relation to transgender and intersex people, but also exist in some places with regards lesbian, gay and bisexual people. These classifications can also create significant barriers for LGBT and intersex people to access services that address their actual health needs, and in some countries pose a grave obstacle to legal recognition of gender identity.²⁵⁸ United Nations human rights bodies have called for the reform of these outdated medical classifications and for States to ensure that LGBT and intersex people can access health services, including gender affirming healthcare for trans people, based on informed consent and free from stigma, pathologization and discrimination.²⁵⁹

Education

25. Everyone has the right to education, without discrimination on the basis of their sexual orientation, gender identity or intersex status.²⁶⁰ Some education authorities and schools discriminate against young people because of their sexual orientation or gender expression, sometimes leading to them being refused admission or being expelled.²⁶¹ LGBT and intersex youth frequently experience violence and harassment, including bullying, from classmates and teachers in school.²⁶² States should adopt specific legislation prohibiting discrimination in education against persons based on sexual orientation, gender identity or intersex status and take measures, in particular awareness-raising, to ensure that LGBT and intersex persons are not discriminated against in their access to education.²⁶³

Right to recognition before the law

26. Everyone has the right to recognition everywhere as a person before the law.²⁶⁴ Transgender persons, like everyone else, are entitled to legal recognition of their preferred gender identity, including in their official documents. Each person's self-defined gender identity is integral to their personality and is one of the most basic aspects of self-determination,

dignity and freedom. No one should be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. States should provide for a simple administrative process, allow for recognition of non-binary identities, and give minors access to recognition of their gender identity.²⁶⁵

Access to justice

27. United Nations human rights mechanisms have condemned the persistence of impunity for human rights violations based on sexual orientation, gender identity and intersex status and repeatedly called for investigation, prosecution and punishment, and reparations for victims. Reported concerns raised by UN mechanisms include ineffective police action, failure to register cases, loss of documents, inappropriate classification of acts, including physical assault as a minor offence, and investigations guided by stereotypes and prejudices.²⁶⁶

Political participation and consultation

28. United Nations human rights mechanisms and entities have emphasized the importance of States upholding the right to participate on the basis of equality in public and political life, without discrimination, and have expressed concern about discrimination, and severe limitations, obstacles and barriers to this right targeting people on the basis of their sexual orientation and gender identity.²⁶⁷

II. ADDRESSING HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION, GENDER IDENTITY, SEX CHARACTERISTICS

A. UN Special Procedures

29. The UN Special Procedures are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. The Special Procedures have increasingly drawn attention to a broad range of violations of the human rights of LGBT and intersex people in both thematic and country-specific contexts. Mandate holders present reports to the Human Rights Council annually, engaging member States and accredited NGOs in interactive dialogue on the content of their reports.²⁶⁸ In 2016, the Human Rights Council created a new special procedures mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.²⁶⁹ The Special Procedures have a number of tools at their disposal for addressing violations of the rights of LGBT and intersex persons.

30. Mandate holders have consistently raised these issues as part of their country visits.²⁷⁰ For example, in 2015 the Special Rapporteur on extrajudicial, summary and arbitrary executions drew attention to the persecution of LGBT persons in a country report on the Gambia,²⁷¹ and the Special Rapporteur on the right to health expressed concern about discrimination against transgender women in Malaysia.²⁷²

31. They have also included sexual orientation, gender identity and intersex issues in their thematic reports. A 2014 report of the Special Rapporteur on human rights defenders for example noted that defenders of the rights of LGBT and intersex persons are among those most at risk.²⁷³

32. To better inform their work, mandate holders sometimes hold consultations or attend conferences or meetings that include addressing the rights of LGBT and intersex persons. For example, in preparation for a report on gender-related killings, the Special Rapporteur on violence

against women invited defenders of the rights of LGBT and intersex persons to an expert consultation on the theme of her report.²⁷⁴ Similarly, the Special Rapporteur on the freedom of association and assembly included defenders of the rights of LGBT and intersex persons in an expert consultation to inform a report on challenges faced by groups most at risk when exercising or seeking to exercise the rights to freedom of peaceful assembly and association.²⁷⁵

33. Special Procedures can act on individual cases by sending letters of allegation and urgent appeals to governments. Often these are sent jointly between mandate holders. In 2006, Special Rapporteurs on violence against women and human rights defenders sent a joint letter of allegation regarding the arbitrary denial of registration of an organization working on the rights of transgender people.²⁷⁶ In 2013, mandates on freedom of expression, freedom of association and assembly, human rights defenders and extrajudicial executions sent a joint urgent appeal regarding the murder of a defender of the rights of LGBT persons and acts of intimidation against other human rights defenders.²⁷⁷

34. Special Procedures have been involved in the development of new human rights guidance documents and principles. For example, along with judges, academics, a former UN High Commissioner for Human Rights, members of treaty bodies, NGOs and other experts, UN Special Procedures were part of the group that developed and adopted the Yogyakarta Principles on the Application of International Human Rights Law Relating to Sexual Orientation and Gender Identity as well as the 2017 update and extension of these principles.²⁷⁸

35. Mandate holders are required to present their reports to the Human Rights Council on an annual basis and to engage in an interactive dialogue with UN Member States. They have regularly included issues pertaining to the human rights of LGBT and intersex persons in their statements to the Council and have responded to State criticisms of their attention to these issues. For example, during the 26th session of the Human Rights Council the Special Rapporteur on the rights to freedom of peaceful assembly and association highlighted LGBT and intersex persons as being among those most at risk of violations of these rights.

At the end of the interactive dialogue, the Special Rapporteur addressed in great detail the claims of some States regarding the cultural relativity of LGBT and intersex issues. In his response he cited excerpts of the Human Rights Council and African Commission for Human and Peoples' Rights resolutions on sexual orientation and gender identity.²⁷⁹

36. Mandate holders have also issued joint statements, letters and press releases. For example, in 2010, the Special Rapporteurs on the situation of human rights defenders and on the right to freedom of expression issued a joint statement on the proposed anti-homosexuality bill in Uganda.²⁸⁰ The Special Rapporteur on the right to freedom of expression has also published a cross-regional joint declaration recognising that LGBT and intersex persons struggle in equal enjoyment of the right: “Ten key challenges to freedom of expression in the next decade” with the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe; the Special Rapporteur on Freedom of Expression of the Organization of American States; and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information.²⁸¹

37. The mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has a broad mandate to address these issues, including through assessing implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, while identifying both best practices and gaps; raising awareness

Agencies and entities in the UN system have increasingly addressed human rights issues relating to sexual orientation, gender identity and intersex status in recent years.

of violence and discrimination against persons on the basis of their sexual orientation or gender identity, identifying and addressing the root causes of this violence and discrimination; engaging in dialogue with States, United Nations agencies, regional human rights mechanisms, national human rights institutions, civil society organizations, academic institutions and other stakeholders; working in cooperation with States in order to foster the implementation of measures that contribute to the protection of all persons against violence and discrimination based on sexual orientation and gender identity; addressing the multiple, intersecting and aggravated forms of violence and discrimination faced by persons on the basis of their sexual orientation and gender identity; conducting, facilitating and supporting the provision of advisory services, technical assistance, capacity-building and international cooperation in support of national efforts to combat violence and discrimination against persons on the basis of their sexual orientation or gender identity.²⁸² The Independent Expert has to date held a consultation with stakeholders, submitted two reports to the Human Rights Council, carried out a country visit to Argentina, and has sent a number of communications and issued statements with regards to situations of concern.²⁸³

B. Treaty monitoring bodies

38. The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties. Each State party to a treaty has an obligation to take steps to ensure that everyone in the State can enjoy the rights set out in the treaty. The principles of equality and non-discrimination are present in all of the major human rights treaties and provide the central theme of some of international human rights conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.²⁸⁴ The treaty bodies have increasingly addressed human rights issues relating to sexual orientation, gender identity and intersex status.

39. Treaty bodies have raised the rights of LGBT and intersex persons in their “lists of issues” prior to reporting. For example, in its list of issues and questions in relation to the eighth periodic report of the Russian Federation, the Committee on the Elimination of Discrimination against Women requested information from the State party on violence and discrimination against lesbian, bisexual, transgender and intersex women.²⁸⁵

40. Committee experts can also participate in thematic briefings during sessions to develop their understanding of a particular issue or in order to get up-to-date information from relevant stakeholders. For example, members of the Committee on the Rights of Persons with Disabilities engaged in a briefing with civil society experts on the human rights of intersex persons during its review of Germany in March 2015.²⁸⁶

41. During the review of a State party’s implementation of the treaty, committee members have the opportunity to engage in dialogue with the State delegation, as well as with civil society and other stakeholders. For example, in response to a question by the chairperson of the Committee against Torture about the situation of LGBT persons, Croatia addressed conditions of detention for LGBT persons in prisons.²⁸⁷ The consideration of the State report by the treaty bodies culminates in the adoption of concluding observations and recommendations to the State. Treaty bodies have addressed an increasingly broad range of violations of the rights of LGBT and intersex persons in concluding observations and recommendations. In its concluding observations on Ukraine, adopted in 2014, the Committee on Economic, Social and Cultural Rights expressed concern about discrimination on the grounds of sexual orientation and gender identity in employment, social security, health care and education and regretted the lack of information on measures taken to combat

The principles of equality and non-discrimination are present in all of the major human rights treaties.

and prevent such discrimination. The Committee recommended that the State party take all the necessary measures to combat and prevent discrimination against LGBT persons and ensure enjoyment of the Covenant rights on an equal basis with others.²⁸⁸

42. The treaty bodies also produce general comments or general recommendations that serve as authoritative guides for States on how to implement and interpret the conventions to which they are a party, including through providing substantive guidance on specific articles of each Convention. For example, the Committee on the Elimination of Discrimination against Women's most recent General Comment, no. 33 on women's access to justice, recognises that discrimination and criminalization obstruct access to justice for lesbian, bisexual and transgender women and that intersex women also face discrimination in accessing justice.²⁸⁹

43. Under certain circumstances, some of the treaty bodies can receive petitions from individuals alleging a violation of their rights under the respective treaty. The treaty bodies have over the years considered a number of individual cases. In 1994 the Human Rights Committee adopted ground-breaking views in *Toonen v Australia*, challenging legal provisions criminalising sexual relations between consenting adults in private. The Committee found that the laws were a violation of the right to privacy under article 17 of the ICCPR – even if not enforced in practice, and noted that criminalization of homosexuality also “would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention”. The Committee interpreted “sex” as listed in articles 2 and 26 to include “sexual orientation.”²⁹⁰

44. Finally, treaty bodies occasionally issue joint statements with other human rights mechanisms addressing a particular country situation or theme. For example, in May 2015, the Committee on the Rights of the Child, along with UN Special Procedures mandate holders, the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights and the Council of Europe, issued a joint statement calling for an end to discrimination and violence against lesbian, gay, bisexual, transgender and intersex young people and children.²⁹¹

III. THE POSITION OF THE UN

A. General Assembly and Human Rights Council

45. A series of joint statements on sexual orientation and gender identity delivered by UN Member States at the UN General Assembly and Human Rights Council between 2005 and 2011, provides evidence of increasing support among Member States to address these issues at the UN.²⁹²

46. Since 2000, the UN General Assembly has included a reference to sexual orientation in its biennial resolutions on extrajudicial, summary and arbitrary executions,²⁹³ as did the former Commission on Human Rights.²⁹⁴ The latter had also addressed the use of the death penalty for sexual relations between consenting adults in its annual resolutions on the death penalty between 2002 and 2005.²⁹⁵ In recent years the General Assembly resolution on executions also covered gender identity as a ground for protection.²⁹⁶

47. In June 2011 the Human Rights Council adopted the first UN resolution on “human rights, sexual orientation and gender identity.”²⁹⁷ It adopted a follow up resolution on this theme in September 2014.²⁹⁸ The 2011 resolution was led by South Africa and tabled jointly with Brazil, a combined effort reflecting South Africa’s commitment to non-discrimination on the basis of sexual orientation as enshrined in its Constitution, and Brazil’s experience of resolutions on this theme at the Organization of American States (OAS). The Human Rights Council resolution took its title from the OAS resolutions and the text and theme was closely based on earlier OAS texts, focusing on violence and discrimination as the areas of consensus. The resolution was adopted by a vote of 23 to 19, with 3 abstentions.

48. Human Rights Council resolution 17/19 called for the UN High Commissioner for Human Rights to commission a study “documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of

the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity”.

49. The second Human Rights Council resolution was led by Brazil, Chile, Colombia and Uruguay, further building on the successes of the resolutions at the regional level, and it passed with an increased vote margin (25 to 14, 7 abstentions), reflecting the trend for increased support by Member States to address these issues at the international level. It requested the High Commissioner to update the 2011 report “with a view to sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards”. The update was presented to the Human Rights Council in June 2015.²⁹⁹

50. Both reports contained a number of concrete recommendations to Member States and to the Human Rights Council to respond to human rights violations based on sexual orientation and gender identity. The second report included recommendations regarding the human rights of intersex persons.

51. Building on the recognition that there was a protection gap at the international level with regards to violence and discrimination based on sexual orientation and gender identity, the Human Rights Council adopted resolution 32/2 creating the mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity in June 2016. The creation of the mandate was subsequently affirmed through several votes at the UN General Assembly.

B. UN agencies and entities

52. Agencies and entities in the UN system have increasingly addressed human rights issues relating to sexual orientation, gender identity and intersex status in recent years, including through research, reports, policy briefs, awareness raising materials, press releases and op-eds and joint statements. An early and important milestone was passed in 1994 when the World Health Organization clarified that homosexuality was neither a disorder nor a disease when it removed sexual orientation

from the International Classification of Diseases.³⁰⁰ Since then other UN entities have made efforts to integrate issues concerning LGBT and intersex persons into their work, including the OHCHR, the United Nations Development Programme (UNDP), the United Nations Children's Fund (UNICEF), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Labour Organization (ILO), the United Nations Population Fund (UNFPA) and the Joint United Nations Programme on HIV/AIDS (UNAIDS). For example, in 2013 the ILO issued the results of a pilot research on discrimination on the basis of sexual orientation and gender identity.³⁰¹ In 2014, UNDP released a discussion paper on transgender health and human rights,³⁰² and UNICEF published an issues paper on eliminating discrimination against children and parents based on sexual orientation and/or gender identity.³⁰³ The OHCHR has dedicated efforts to produce an awareness-raising campaign, "Free & Equal", and related materials, such as fact sheets and infographics, relating to the human rights of LGBT and intersex persons.³⁰⁴

53. Since 2014, the OHCHR, UNDP, UNFPA, UNHCR, UNICEF, UN Women, ILO, UNESCO, WHO, the World Bank and UNAIDS have issued an annual summary of the work of UN bodies in combating discrimination and violence against LGBTI people, and related work in support of their inclusion, together with a contact list of focal points in each UN entity and links and references to documents, reports and other materials that can be consulted for further information.³⁰⁵ In 2015, the ILO, OHCHR, UNAIDS, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP and WHO issued a joint statement calling on States to act urgently to end violence and discrimination against LGBT and intersex adults, adolescents and children, with a set of key recommendations on protecting people from violence, repealing discriminatory laws, and combatting discrimination.³⁰⁶

C. Universal Periodic Review

54. The Universal Periodic Review is a peer review process whereby all UN Member States are given recommendations on human rights on a four and a half year cycle. The working group reviews are based on 3 input documents: a national report, a compilation of UN information,

and a summary of stakeholder submissions.³⁰⁷ National civil society organizations have been diligent in submitting information on the human rights of LGBT and intersex persons to this process, and it is now rare that SOGI issues are not addressed in one form or another during each country review.³⁰⁸

55. To date at least 116 States have voluntarily accepted at least one recommendation to address violence and/or discrimination based on sexual orientation, gender identity or against intersex people over the first two cycles of the Universal Periodic Review, including 16 States from Africa,³⁰⁹ 23 from Asia-Pacific,³¹⁰ 23 from Eastern Europe,³¹¹ 29 from Latin America and the Caribbean³¹² and 25 from Western Europe and Others group.³¹³

56. Accepted recommendations include investigating attacks and threats, protecting LGBT and intersex human rights defenders, launching awareness campaigns, fighting violence and discrimination based, adopting anti-discrimination legislation, ensuring the right to health without discrimination, decriminalising same-sex relations between consenting adults, and establishing human rights education programmes for police, prison and judicial staff on these issues.³¹⁴

Annex 6 - footnotes

208. UDHR: articles 3, 5 & 12; ICCPR: articles 6, 9 & 17; CAT
209. See for example, E/CN.4/1996/39/Add.2 (Iran), A/HRC/14/24 para.52, A/67/275 para. 36 & 38, E/CN.4/2006/53/Add.4 para. 35, A/HRC/14/23/Add.1 (Uganda), E/CN.4/2002/74 para.65, A/HRC/7/3/Add.4 (Nigeria)
210. See the concluding observations of the Human Rights Committee on the Sudan (CCPR/C/SDN/CO/3), para. 19; and E/CN.4/2000/3, para. 57.
211. E/CN.4/1995/111
212. E/CN.4/1998/68/Add.1
213. E/CN.4/1997/47
214. E/CN.4/2005/7/Add.1
215. A/HRC/4/34/Add.1
216. A/HRC/14/23/Add.1, E/CN.4/2001/9/Add.1. (2001); El Salvador. Paragraph 175.
217. Supra note 8
218. A/RES/69/182
219. Human Rights Committee, General Comments 6 & 31
220. CSO submissions to the review of second periodic report of South Africa by the Committee on the rights of the Child, 2016
221. UDHR, article 5; ICCPR, article 7; CAT, article 2
222. CAT/C/GC/2. (2008).
223. A/HRC/22/53. (2013); CEDAW/C/NLD/CO/5. (2010). Para.47; CAT/C/DEU/CO/5. (2011); E/C.12/DEU/CO/5. (2011); A/HRC/29/23 (2015).
224. CRC/C/GC/13. (2009).
225. A/HRC/19/41. (2011). Para.21
226. UDHR, article 9; ICCPR, article 9; CRC, articles 37(b) and (d).
227. See for example, opinions No. 7/2002 (Egypt) (E/CN.4/2003/8/Add.1), No. 22/2006 (Cameroon) (A/HRC/4/40/Add.1) and No. 42/2008 (Egypt) (A/HRC/13/30/Add.1).
228. See CCPR/C/GC/35, paras. 3, 17, A/HRC/4/40/Add.1, opinion 22/2006, para. 19; A/HRC/22/44, para. 38.
229. See CCPR/C/50/D/488/1992, paras. 8.3-10, E/C.12/IRN/CO/2, para. 7, CEDAW/C/UGA/CO/7, paras. 43-44, CRC/C/GAM/CO/2-3, paras. 29-30, A/HRC/14/20 paras. 17-26, CCPR/C/KWT/CO/2, para. 30.
230. U.N. General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment [Principles for the Protection of Persons under Detention], adopted by General Assembly resolution 43/173, 9 December 1988, Principles 10 and 11.
231. See inter alia, CEDAW Concluding Observations on Fiji (CEDAW/C/FJI/CO/4), 2010, paras.22-23 and CEDAW General Recommendation No. 35 (CEDAW/C/GC/35), 2017, para.31(a), Special Rapporteur on Health (A/HRC/23/41), 2013, para. 60; (A/HRC/14/20), 2010, para.76(b); report on a mission to Ghana (A/HRC/20/15/Add.1), 2012, para.60(b), Joint United Nations Statement on Ending Discrimination in Health Care Settings, July

2017, Global Commission on HIV and the Law, 2012.

232. See, for example, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994); CCPR/C/TGO/CO/4; CCPR/C/UZB/CO/3; CCPR/C/GRD/CO/1; CEDAW/C/UGA/CO/7; A/54/38/Rev.1; CRC/C/CHL/CO/3.

233. A/HRC/29/32

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244. A/HRC/4/37 (2007), para.96; A/HRC/4/37/Add.1 (2007), para.454; A/61/312 (2006), para.71

245. CCPR/C/109/D/1873/2009

246. See, for example, A/HRC/26/29/Add.1, 10 June 2014: Botswana

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

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310. Bangladesh, China, Cyprus, Fiji, India, Iraq, Japan, Kazakhstan, Kyrgyzstan, Marshall Islands, Micronesia, Mongolia, Nauru, Nepal, Palau, Republic of Korea, Samoa, Solomon Islands, Thailand, Timor-Leste, Tonga, Vanuatu, Viet Nam

311. Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czechia, Estonia, Georgia, Hungary, Latvia, Lithuania, Macedonia FYR, Moldova, Montenegro, Poland, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Ukraine

312. Antigua and Barbuda, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St Lucia, St Vincent & the Grenadines, Suriname, Trinidad and Tobago, Uruguay, Venezuela

313. Australia, Austria, Belgium, Canada, Denmark, Finland, Germany, Greece, Iceland, Ireland, Israel, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Turkey, United Kingdom, United States

314. <http://s.upr-info.org/1VHfwwa>

For More Information

Joint UN statement on Ending violence and discrimination against LGBTI people

www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTIstatement.aspx

Office of the High Commissioner for Human Rights – sexual orientation and gender identity

www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx

United Nations Independent Expert on sexual orientation and gender identity

www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/Index.aspx

Programmatic overview of UN entity work on sexual orientation and gender identity

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UN Free & Equal campaign:

www.unfe.org

ANNEX

7

HIV, human rights and sexual orientation and gender identity

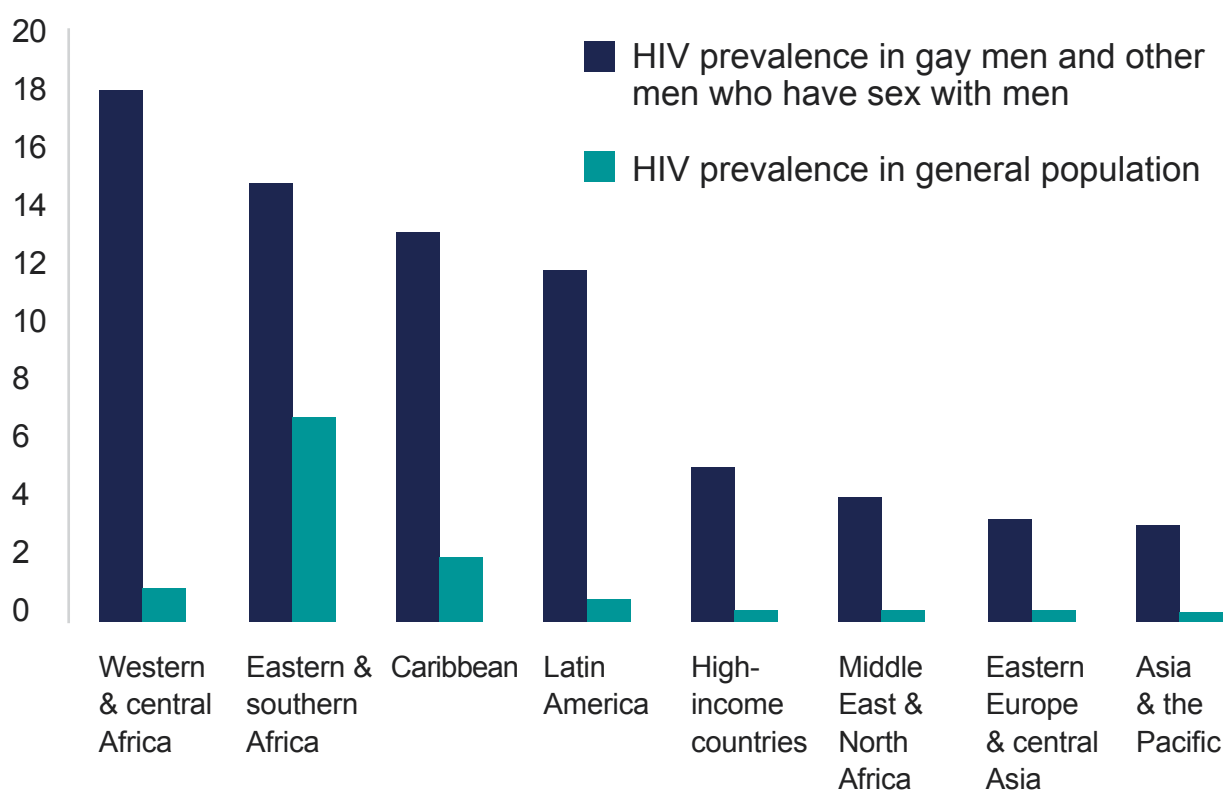
Introduction

In recent years, new HIV cases have been declining in most parts of the world. However, UNAIDS' data shows that among transgender people, gay men and other men who have sex with men (MSM),³¹⁵ new HIV infections (HIV incidence) appear to be rising in several regions.³¹⁶

ANNEX 7:

HIV, human rights and sexual orientation and gender identity

HIV prevalence among men who have sex with men and the general population by region, 2009-2013



Region (number of countries reporting)

Source: UNAIDS, Gap report, 2014, p 205

High HIV incidence and prevalence are mainly caused by structural factors, such as stigma, discrimination, violence and other human rights violations that lesbian, gay, bisexual and transgender (LGBT) people³¹⁷ face.³¹⁸ These human rights violations contribute to making members of these populations—particularly transgender people, gay men and other MSM—vulnerable to HIV while at the same time hindering their access to and uptake of HIV prevention, testing and treatment services.³¹⁹

This background paper describes how human rights violations based on sexual orientation and gender identity (SOGI) negatively impact the response to HIV. It also shows that creating legal and social environments for LGBT people that are based on human rights has important public health benefits, including for the response to HIV.

1. Human rights violations based on SOGI negatively impact HIV responses.

Criminalization, violence, discrimination and other human rights violations based on SOGI are contrary to international human rights law. Moreover, available evidence shows that they have significant negative consequences on the HIV epidemic and public health.

A. Human rights violations limit access to HIV education, prevention, treatment and care services for LGBT people.

Human rights violations based on SOGI contribute to creating an environment of fear that drives LGBT people away from HIV services. In Senegal, the arrest in 2008 of nine HIV prevention and outreach personnel working with MSM and charges against them for “acts against nature” negatively impacted HIV prevention efforts. According to a study conducted in Senegal following these arrests:

All participants reported pervasive fear and hiding among MSM as a result of the December 2008 arrests and publicity. Service providers suspended HIV prevention work with MSM out of fear for their own safety. Those who continued to provide services noticed a sharp decline in MSM participation.³²⁰

More recently in Nigeria, research has shown the negative impact on access to HIV treatment and care of the passage of new legislation criminalising same-sex sexual conduct and related activities, including higher numbers of gay men and other MSM reporting fear of seeking health care services.³²¹

In places where same-sex sexual relations are criminalized, possession of HIV and health commodities that are associated with or labelled for

use by MSM, such as lubricants, has been used as evidence in criminal cases.³²² The use of such evidence and prosecutions based on these grounds are likely to further stigmatise and compromise the use of HIV prevention methods by MSM and other LGBT people.

Perceived homophobia, transphobia, ignorance and insensitivity within the health care system, have also been shown to affect access to and uptake of HIV services by LGBT people. In Botswana, Malawi and Namibia, MSM also report being denied access to HIV and health services based on actual or perceived sexual orientation.³²³ Poor access to health care services among MSM translates into “underutilization of services, such as HIV voluntary counselling and testing, and ultimately to low self-awareness of HIV sero-status” among this key population.³²⁴ Similar challenges exist in Jamaica where high levels of police harassment have been documented towards men who have sex with men (22%) and transgender women (43%).³²⁵

In many contexts, fear of negative consequences (including violence, prosecution, denial of services and judgemental attitudes) hinders MSM from disclosing their same-sex practices to their medical practitioners. An assessment conducted in four Caribbean countries (Guadeloupe, Suriname, Cuba, and Antigua) shows that MSM were less likely to seek medical attention for anal symptoms than for penile symptoms, and that many MSM conceal their sexual behaviour from care providers.³²⁶ In Malawi, Botswana and Namibia, more than 80% of MSM have not disclosed their same-sex sexual practices to a health practitioner. This situation has serious implications for providing information, protection and quality health care services for this population because

80%

of MSM have not disclosed their same-sex sexual practices to a health practitioner.

MSM have different HIV risks as compared to heterosexual men suggesting that the consistent association between discrimination events and [sexually transmitted infection] STI variables is reflective of the role of stigma in the general sexual health of MSM. Clinicians likely will not assess for anal [human papillomavirus] HPV infection, among other STIs, among men unless they are aware that these men are at specific risk for these infections.³²⁷

Similarly, stigma and discrimination in the health system alongside lack of knowledge of transgender people's health-related needs by health personnel has been shown to deter transgender people from using HIV services. A qualitative study in San Francisco, in the United States, showed that where transgender women had negative or transphobic experiences in the health-care system in the past, they were reluctant to seek HIV testing for fear that a diagnosis would require additional interaction with health-care providers.³²⁸

Lack of understanding of sexual orientation, gender identities and expressions, insensitivity to the needs of LGBT people, the persistence of a heteronormative construct of sexuality as well as binary constructions of sex and gender (between male and females) have been shown to also compromise access to appropriate health and HIV services for gay men, MSM and transgender people. For instance, many healthcare providers still refer to transgender individuals by the name and sex they were assigned at birth instead of the name associated with their self-identified gender.³²⁹ As a result, needed health care services are not offered or denied to people based on wrong assumptions. For instance, prostate screening is not offered to transgender women and transgender men may be denied Pap smear.³³⁰

Widespread violence, including sexual violence, against LGBT people in many settings not only violates their human rights and drives them away from health and HIV services; it also exposes them to serious risk of HIV infection.³³¹ A study conducted in four Southern African countries found that lesbian and bisexual women who reported forced sex by men were more likely to be HIV positive than those who did not.³³² In addition, several studies and reports from across the world have shown that sexual violence against LGBT people has serious other negative health

and social consequences for this population, including lower sense of belonging, risk of suicide, mental distress, alcohol and drug abuse and increased risk of STIs.³³³

In many settings, a significant proportion of young transgender women engage in selling sex.³³⁴ This is often a result of social exclusion, economic vulnerability and difficulty in finding employment. In El Salvador, close to 47% of transgender women reported that their main income is earned by selling sex.³³⁵ Transgender women who engage in sex work are at increased risk of HIV infection. A systematic review and meta-analysis in 2008 reported an overall HIV prevalence of 27.3% among transgender women who engage in sex work.³³⁶

B. Human rights violations hinder the development and implementation of effective HIV programmes for LGBT people.

In many regions across the world, legal barriers (such as criminalization of same-sex sexual relations and gender expression), social and moral constructs linked to same-sex sexual relations, and the binary gender construct hinder the ability of relevant government departments and other actors involved in the HIV response, to design and implement effective HIV prevention, treatment, care and support programmes for MSM and transgender people.

HIV prevention and education programmes often fail to specifically target MSM and transgender people and are not adapted to their health needs. According to reports from 20 countries in both 2009 and 2013, the percentage of gay men and other MSM reached by HIV prevention programmes fell from 59% to 40%.³³⁷ An international review concluded

47% | of transgender women reported that their main income is earned by selling sex.

that less than one in ten gay men and other MSM receive a basic package of HIV prevention interventions.³³⁸ In Malawi, only 17% of MSM reported to have been exposed to specific HIV prevention messaging for MSM, and only 35% of the participants had tested for HIV.³³⁹ In Zambia, 73% of MSM had misinformation about HIV, thinking that anal sex was safer than vaginal sex.³⁴⁰ Lack of HIV prevention tools and messaging for MSM and other gay men compromises their ability to know and reduce the risk of HIV infection for themselves and their sexual partners. Similarly, treatment and care services to address the specific health needs of LGBT people, including anorectal health services for gay men and other MSM are often limited or not available in many health facilities.³⁴¹

Overall, transgender people, gay men and other MSM are being left behind in the global AIDS response. In 2010, MSM benefited from less than 2% of HIV prevention resources globally.³⁴² The vast majority of investments in HIV services for gay men and other MSM comes from international donors instead of national spending.³⁴³ This is primarily because in countries where same sex relations are criminalized, governments are not investing in the health of LGBT people.

In many regions, critical gaps exist in HIV surveillance, epidemiological and programmatic research for MSM and transgender populations.³⁴⁴ Lack of data on HIV among LGBT populations has far-reaching consequences, as it renders them further invisible and limits the ability of governments and others to develop and appropriately fund programmes aimed at addressing their health needs.

2. Enabling social and legal environments for LGBT people are critical to effective HIV responses.

Evidence from more than 30 years of response to HIV shows that effective responses to HIV among transgender people, gay men and other MSM require: (i) ending criminalization and other human rights violations against LGBT people; and (ii) promoting legal and social conditions that enable meaningful participation of LGBT people in HIV and health programmes.³⁴⁵

A. Ending human rights violations based on SOGI is critical to HIV and health responses.

Protecting the human rights of LGBT people, including MSM and transgender people is not only intrinsically right; it is also a public health imperative. In many countries where same-sex sexual relations are not criminalized and where stigma and discrimination have been reduced, MSM are more likely to take up HIV prevention, treatment, care and support services.³⁴⁶ For instance, Brazil's efforts to decrease homophobia and stigma in health care settings, schools, and broader society is an example of human rights-based HIV prevention programming that has reached 3,074,980 MSM – an estimated coverage of 96 percent.³⁴⁷

A number of global health institutions, including UNAIDS and the World Health Organization, have called for ending human rights violations against LGBT people as a critical step to effective HIV responses. In particular, the 2011 WHO guidelines on Prevention and treatment of HIV and other sexually transmitted infections among men who have sex with men and transgender people, recommends that

Legislators and other government authorities should establish antidiscrimination and protective laws, derived from international human rights standards, in order to eliminate discrimination and violence faced by MSM and transgender people, and reduce their vulnerability to infection with HIV, and the impacts of HIV and AIDS.³⁴⁸

B. Meaningful participation of LGBT people in HIV and health programmes is necessary to ending the AIDS epidemic.

The involvement of community organizations has been critical to current global successes against the AIDS epidemic. Civil society and community organizations provide much needed HIV education, prevention, treatment support and care services to populations who are often underserved or are fearful to seek these services. However, community organizations working with MSM and transgender people face serious legal and social barriers that limit their efforts to provide HIV and health services for these populations.

Punitive laws have caused outreach organizations and health service providers to stop or reduce the scope of their activities owing to the fear of harassment and prosecution.³⁴⁹ As a result, coverage and access to HIV services for these populations remains inadequate. In many countries, LGBT people are not able to constitute associations or organizations to advance the human rights and health of members of their communities. In some countries, legislation prohibits any organization from supporting LGBT people. In some countries, organizations and individuals working on the protection of the human rights and access to HIV and health services for LGBT people face harassment, arrest and other violations of human rights including by police.³⁵⁰ These acts negatively impact the response to HIV as they deter advocacy and services delivery activities for populations that are particularly vulnerable to HIV.

These limitations not only infringe on freedom of association; they also compromise the ability of LGBT people and individuals supporting them to organize and participate meaningfully in the design and implementation of programmes to provide HIV-related services to populations affected by the HIV epidemic. This is particularly concerning because studies have confirmed that involvement of MSM and transgender people in peer outreach and other community-level interventions results in a 25% reduction in HIV risk behaviour.³⁵¹

UNAIDS therefore calls on all countries to create legal and social conditions to enable LGBT people and the organizations supporting them to fully participate in HIV and health responses. In a landmark

2014 judgement, the High court of Botswana held that the refusal by the government to register the organization known as LEGABIBO (Lesbians, Gays and Bisexuals of Botswana) violates the rights to freedom of expression, assembly and association protected by the country's constitution.³⁵² In its heads of arguments before the High Court, LEGABIBO had noted that once registered, it “will provide an opportunity for lesbians, gays and bisexuals to be part of an association providing information on human rights and serving as an advocate for their rights, particularly the right to access to health services”.³⁵³

In its report on HIV and human rights, the African Commission on Human and Peoples' Rights stressed the importance of protecting organizations and individuals working on HIV and SOGI as human rights defenders and reiterated the recommendations for their protection as provided under Resolution 376 on the situation of human rights defenders in Africa.³⁵⁴

Conclusion

Laws that criminalized adult consensual same-sex sexual relations and other punitive laws used against LGBT people infringe on human rights, undermine the effectiveness of HIV programmes, and limit the ability of members of these populations to seek and benefit from HIV programmes. On the contrary, a legal environment that protects human rights and ensures access to HIV programmes without discrimination, including for transgender people, gay men and other MSM helps to achieve an effective and rights-based response.³⁵⁵ UNAIDS, WHO and other global health organizations therefore call for urgent actions to end criminalization, violence and other laws and practices that violate the human rights of LGBT people as necessary to advancing public health and ending the AIDS epidemic.

Annex 7 - footnotes

315. The term “men who have sex with men” describes males who have sex with males, regardless of whether or not they have sex with women or have a personal or social gay or bisexual identity. UNAIDS UNAIDS terminology guidelines, revised version, 2011, p 30, available at http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2118_terminology-guidelines_en.pdf (accessed on 27 October 2015).
316. UNAIDS The gap report, p 203.
317. While it often refers to LGBT people in general, this paper mostly addresses the health and HIV challenges faced by gay men, men who have sex with men and transgender people. This is because there is more available research on these populations in the context of HIV. While lesbian women and intersex persons are not the focus of this paper, the human rights violations that they face and the potential or actual resulting impact on their health, including vulnerability to HIV, should be recognised and addressed.
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319. As above.
320. T Poteat et al, “HIV risk among MSM in Senegal: A qualitative rapid assessment of the impact of enforcing laws that criminalize same sex practices” 6 *PLoS ONE*, 2011, p 12.
321. S Schwartz et al “The immediate effect of the Same-Sex Marriage Prohibition Act on stigma, discrimination, and engagement on HIV prevention and treatment services in men who have sex with men in Nigeria: analysis of prospective data from the TRUST cohort”, *The Lancet HIV*, 2015, Volume 2, No. 7, e299–e306.
322. See Global Commission on HIV and the Law *HIV and the Law: Risks, Rights and Health*, July 2012, p 47, available at <http://www.hivlawcommission.org/resources/report/FinalReport-Risks.Rights&Health-EN.pdf>
323. H Fay et al “Stigma, health care access, and HIV knowledge among men who have sex with men in Malawi, Namibia, and Botswana” *AIDS Behaviour*, 2011, 15(6), doi: 10.1007/s10461-010-9861-2.
324. As above, p 2.
325. CH Logie et al “Association between police harassment and HIV vulnerabilities among men who have sex with men and transgender women in Jamaica” (2017) 19/2 *Health and Human Rights Law Journal* (L Cabal & P Eba, eds), pp 37-43.
326. Pan American Health Organization, *Improving Access of Key Populations to Comprehensive HIV Health Services: Towards a Caribbean Consensus*, p 24.
327. Fay et al (n 9 above), p 9
328. UNAIDS (n 2 above), p 224.
329. “Transgender patients are dodging doctors”, *Science Daily*, 24 April 2015, available at <http://www.sciencedaily.com/releases/2015/04/150424121116.htm> (accessed on 25 October 2015).
330. As above.
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ANNEX

8

Key concepts and terms³⁵⁶

ANNEX 8:

Key concepts and terms³⁵⁶

What does “LGBT” mean?

LGBT stands for the terms “lesbian, gay, bisexual and transgender”. While these terms have increasing global resonance, other terms may be used to describe people who are attracted to persons of the same sex and those who have non-binary gender identities (such as hijra, meti, lala, skesana, motsoalle, mithli, kuchu, kawein, travesty, muxé, fa’afafine, fakaleiti, hamjensgara and Two-Spirit). In a human rights context, lesbian, gay, bisexual and transgender people face both common and distinct challenges.

What is “sexual orientation”?

Sexual orientation refers to a person’s physical, romantic and/or emotional attraction towards other people. Everyone has a sexual orientation, which is integral to a person’s identity. Gay men and lesbian women are attracted to individuals of the same sex as themselves. Heterosexual people (sometimes known as “straight”) are attracted to individuals of a different sex from themselves. Bisexual people may be attracted to individuals of the same or different sex. Sexual orientation is not related to gender identity.

What is “gender identity”?

Gender identity reflects a deeply felt and experienced sense of one’s own gender. A person’s gender identity typically corresponds with the sex assigned to them at birth. For transgender people, their sense of their own gender does not correspond to the sex they were assigned at birth. In some cases, their appearance and mannerisms and other outwards characteristics may conflict with society’s expectations based on gender norms.

What does transgender mean?

Transgender (sometimes shortened to “trans”) is an umbrella term used to describe a wide range of identities—including transsexual people, cross-dressers (sometimes referred to as “transvestites”), people who identify as third gender, and others whose appearance and characteristics do not correspond with the sex they were assigned at birth and/or are perceived as gender atypical. Transwomen identify as women but were classified as male when they were born. Transmen identify as men but were classified female when they were born. Some transgender people seek surgery or take hormones to bring their body into alignment with their gender identity; others do not.

What is intersex?

An intersex person is born with sexual anatomy, reproductive organs, and/or chromosome patterns that do not fit the typical definition of male or female. This may be apparent at birth or become so later in life. An intersex person may identify as male, female, both or neither. Intersex status is not about sexual orientation or gender identity: intersex people experience the same range of sexual orientations and gender identities as non-intersex people. Intersex people suffer specific human rights violations based on their sex characteristics.

What are homophobia and transphobia?

Homophobia is an irrational fear of, hatred or aversion towards lesbian, gay or bisexual people; transphobia denotes an irrational fear, hatred or aversion towards transgender people.

Is it possible to change a person's sexual orientation and gender identity?

No. A person's sexual orientation and/or gender identity cannot be changed. What must change are the negative social attitudes that stigmatize LGBT people and contribute to violence and discrimination against them. Attempts to change someone's sexual orientation or gender identity often involve human rights violations and can cause severe trauma. Examples include forced psychiatric therapies intended to "cure" (sic) individuals of their same-sex attraction, as well as the so-called "corrective" rape of lesbians perpetrated with the declared aim of "making them heterosexual".

Annex 8 - footnotes

356. The questions and answers contained in this document are adapted from the OHCHR “Fact sheet. LGBT Rights: Frequently Asked Questions”, available at <https://www.unfe.org/learn-more/>

