

# **ENDING VIOLENCE**

**and other human rights violations  
based on sexual orientation  
and gender identity**

A joint dialogue of the  
African Commission on Human and Peoples' Rights,  
Inter-American Commission on Human Rights  
and United Nations



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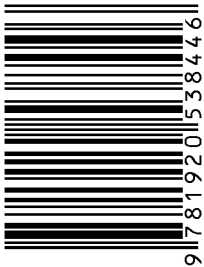
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Yolanda Boozyen, Centre for Human Rights



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Inter-American Commission on Human Rights and  
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# Acknowledgments

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The papers provided as annexes to this publication were written and reviewed as follows:

- Annex 4: Norms, case law and practices relevant to sexual orientation and gender identity in the African human rights system. This paper was written by Professor Frans Viljoen, Director of the Centre for Human Rights, University of Pretoria.
- Annex 5: Norms, cases and practices relevant to sexual orientation and gender identity in the Inter-American human rights system. This paper was written by Mauricio Albarracín, independent consultant. It was reviewed and edited by Fanny Gómez-Lugo and Elizabeth Abi-Mershed of the Secretariat of IACHR.
- Annex 6: Norms, case law and practices relevant to sexual orientation, gender identity and intersex status in the United Nations system. This paper was written by Sheherezade Kara, independent consultant. It was reviewed and edited by Michael van Gelderen of OHCHR.
- Annex 7: HIV, human rights and sexual orientation and gender identity. This paper was written by Patrick Eba, Luisa Cabal and Christine Kim of UNAIDS.

The contribution of Professor Frans Viljoen and the Centre for Human Rights was invaluable in coordinating the development of the papers, facilitating the joint dialogue and preparing the present publication.

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# Key concepts and terms

## 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). It is therefore particularly important to use and respect the names, terms and pronouns that people use to refer to themselves. 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.





## List of acronyms

ACHPR	African Commission on Human and Peoples' Rights
APRM	African Peer Review Mechanism
AU	African Union
ECOSOCC	Economic, Social and Cultural Council of the African Union
HIV	Human Immunodeficiency Virus
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
LGBT	lesbian, gay, bisexual and transgender (persons)
LGBTI	lesbian, gay, bisexual, transgender and intersex (persons)
MSM	men who have sex with men
NEPAD	New Partnership for Africa's Development
OAS	Organisation of American States
OHCHR	Office of the High Commissioner for Human Rights
PLHIV	people living with HIV
SDGs	Sustainable Development Goals
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
UPR	Universal Periodic Review

## Message of support

We congratulate the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights and United Nations Human Rights Mechanisms for their leadership in holding this important joint dialogue on sexual orientation and gender identity.

Protecting human rights for all, and ending violence, criminalisation, discrimination and other human rights violations against lesbian, gay, bisexual, trans and intersex persons, are priorities for our organisations and for the entire United Nations system.

This timely dialogue builds on many achievements in each system, including resolution 275 of the African Commission and the work of several of the Commission's thematic rapporteurs; resolutions of the Organization of American States and the work of the Rapporteurship on the rights of lesbian, gay, bisexual, trans and intersex persons at the Inter-American Commission; and the work of United Nations agencies, treaty bodies, and special procedures, and resolutions at the United Nations Human Rights Council.

The richness of the discussions and the innovative ideas and experiences shared by experts from the African, Inter-American and United Nations human rights systems illustrate the value of such dialogues and exchanges to address the common challenges that we all face as we seek to combat human rights violations, including those committed on the basis of sexual orientation and gender identity.

We take good note of the findings of the dialogue, including with regards to gravity and range of human rights violations documented by the mechanisms in all regions. We welcome the emphasis on the full applicability of international and regional human rights treaties to such violations, as well as the opportunities for further collaboration and action by States and other stakeholders for the effective respect and protection of the human rights of all persons, including lesbian, gay, bisexual, trans and intersex persons.

Our organisations stand ready to support future efforts in this regard.



Zeid Ra'ad Al Hussein  
High Commissioner for Human Rights



Michel Sidibé  
Executive Director  
Joint United Nations Programme on HIV/AIDS

## Foreword

Over the years, the African, Inter-American and United Nations human rights systems have forged important partnerships on a wide-range of human rights issues and approaches. Grounded in the universality of human rights, the three systems have collaborated through actions ranging from joint statements to joint meetings and country visits, the exchange of information on country situations, individual cases and thematic issues, as well as relying on each other's case law, decisions and procedural developments.

This collaboration has been anchored in frameworks such as the 1993 Vienna Declaration and Programme of Action, the regular dialogue between global and regional human rights mechanisms mandated by the Human Rights Council, the 2009 Memorandum of Understanding between the Organisation of American States and the African Union, the 2012 Addis Ababa Roadmap between the special procedures of the UN Human Rights Council and those of the African Commission on Human and Peoples' Rights and the 2010 and 2014 Memorandums of Understanding between the Office of the UN High Commissioner for Human Rights and the African Union Commission and Inter-American Commission on Human Rights, respectively.

The joint dialogue held on 3 November 2015 in Banjul was firmly located within these frameworks. This timely dialogue enabled each institution to exchange information and experiences, to review approaches, challenges and good practices within each system, and to reaffirm our common resolve to address the serious human rights violations based on sexual orientation and gender identity that take place in all regions.

This report and the accompanying background papers capture the content and outcomes of the joint dialogue. We hope that it can provide a basis for further collaboration in future and that States and other stakeholders will find it useful to inform their efforts to combat violence, discrimination and other human rights violations based on sexual orientation and gender identity.



Pansy Tlakula  
President  
African Commission on Human and  
Peoples' Rights



James Cavallaro  
President  
Inter-American Commission on  
Human Rights



Christof Heyns  
UN Special Rapporteur on Extrajudicial,  
Summary or Arbitrary Executions





# Final report: Joint thematic dialogue on sexual orientation and gender identity\*

## SUMMARY

On 3 November 2015, a joint dialogue on sexual orientation and gender identity was held between the African Commission on Human and Peoples' Rights (African Commission or ACHPR), Inter-American Commission on Human Rights (Inter-American Commission or IACHR), and United Nations (UN) human rights mechanisms in Banjul, The Gambia, ahead of the 57th ordinary session of the African Commission. The dialogue hosted by the African Commission was supported and organised by the Office of the High Commissioner for Human Rights (OHCHR) and the Joint United Nations Programme on HIV/AIDS (UNAIDS). It built on recent developments in the African, Inter-American and UN human rights systems in relation to sexual orientation and gender identity. The dialogue allowed for interactive discussions among the three human rights systems on substantive issues relating to sexual orientation and gender identity including:

- Rights to life, integrity, freedom from torture, prohibition of violence and related rights;
- Right to liberty, freedom of association and assembly, freedom of expression, human rights defenders and related rights; and
- Right to health and other economic social and cultural rights.

Critical areas of exchanges and agreement during the meeting, as well as emerging avenues for future actions and collaboration were related to:

## Application of international and regional human rights treaties

Participants emphasised the full applicability of existing fundamental human rights standards enshrined in international human rights law to the rights of LGBTI persons, including regional and international human rights treaties adopted and ratified by member states, and the jurisprudence and interpretation of these norms by regional and international human rights mechanisms.

\* The final report on the dialogue was adopted by the ACHPR at its 19th Extraordinary Session and was also approved by the IACHR and UN participants in the dialogue.

## Range and gravity of human rights violations documented by the mechanisms

Participants discussed the range and emphasised the gravity of violations of fundamental human rights based on sexual orientation or gender identity. LGBTI people face different sets of human rights violations, including killings, torture, violence including sexual violence, arbitrary detention, criminalisation, discriminatory laws and practices, arbitrary restrictions on freedoms of assembly, association and expression and multiple forms of discrimination based on other factors such as sex, race and age. Participants also discussed the serious health impact of human rights violations against LGBT and intersex persons, including the impact of legal and structural barriers on their vulnerability and access to HIV and other health services.

## Experience and approaches in the three systems

These approaches include incorporating relevant questions, observations and recommendations during country reviews, general comments, country visits, thematic reports, recommendations and precautionary measures on individual cases and letters of allegation emanating from the mechanisms. These approaches also involve adopting resolutions, public statements, holding consultations, engaging with and building relations with LGBT and intersex civil society organisations and human rights defenders, public hearings, expert meetings and public and private advocacy with States on implementation of recommendations.

## The pertinence of the mainstreaming approach

Participants discussed strategies that incorporate LGBTI issues within the relevant norms, principles and thematic, country and other mandates of each mechanism. Discussions highlighted the importance of an incremental and pragmatic approach within a given context to advance the effective protection of the human rights of all persons regardless of their sexual orientation and gender identity.

## 2016 as an opportunity for promoting tolerance and respect for the human rights of everyone in Africa

The African Year of Human Rights provides opportunities for the African Commission and other regional stakeholders in Africa to advance an agenda for greater understanding about and appreciation for diversity, including diversity in sexual orientation and gender identity, and for embracing and respect for LGBTI persons on the continent.

## Collaboration between human rights mechanisms

Participants welcomed the thematic dialogue as a positive example of collaboration between regional and international mechanisms, building on existing frameworks of cooperation between human rights system. They agreed to building on this dialogue, by exploring further possibilities for collaboration, including collaboration between thematic mandate holders from the three systems on specific human rights violations faced by LGBTI persons.



Participants at the Joint thematic dialogue on sexual orientation and gender identity  
African Commission on Human and Peoples' Rights, Inter-American Commission on  
Human Rights, and United Nations

3 November 2015

Kairaba Hotel, Banjul, The Gambia

## INTRODUCTION

- 1 On 3 November 2015, a joint dialogue on sexual orientation and gender identity was held between the African Commission on Human and Peoples' Rights (African Commission or ACHPR), Inter-American Commission on Human Rights (Inter-American Commission or IACHR), and United Nations (UN) human rights mechanisms in Banjul, The Gambia, ahead of the 57th ordinary session of the African Commission.
- 2 The dialogue was hosted by the African Commission, and was supported and organised by the Office of the High Commissioner for Human Rights (OHCHR) and the Joint United Nations Programme on HIV/AIDS (UNAIDS). The dialogue was attended by ten members of the African Commission and chaired by its Chairperson, Commissioner Zainabo Sylvie Kayitesi. The Inter-American Commission was represented by its Chairperson, Commissioner Rose-Marie Belle Antoine, the Rapporteur on the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, Commissioner Tracy Robinson and the Deputy Executive Secretary, Ms Elizabeth Abi-Mershed. The UN human rights system was represented by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Professor Christof Heyns, and the Rapporteur of the UN Committee against Torture, Professor Satyabhoosun Gupt Domah. In addition, representatives of UNAIDS, OHCHR and the United Nations Development Programme (UNDP) attended the dialogue as observers. The dialogue was facilitated by the director of the Centre for Human Rights at the University of Pretoria, Professor Frans Viljoen. The full list of participants is attached in **Annex 1**. The agenda is attached as **Annex 2**.

## Context, justification and structure of joint dialogue

- 3 At its 55th Ordinary Session in 2014, the African Commission adopted 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'.<sup>1</sup> Resolution 275 is attached in **Annex 3**. This resolution builds on previous work by the ACHPR on the issue, including by the Special Rapporteur on Human Rights Defenders, the Special Rapporteur on the Rights of Women, the Special Rapporteur on Freedom of Expression and Access to Information, the Committee for the Prevention of Torture in Africa, the Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV (HIV Committee), and the Working Group on Economic, Social and Cultural Rights. For instance, 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'. Furthermore, in a number of promotional visits, Commissioners raised issues relating to the protection of the human rights of LGBT people.<sup>2</sup>
- 4 Starting in 2008, the Inter-American Commission on Human Rights (IACHR) has increasingly been addressing

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

2 See, for instance, Report of the Promotional Mission to the State of Namibia, 2 – 6 July 2001, DOC/OS(XXX)/244, page 7; and 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.



violence and discrimination faced by persons in the Americas, because of their perceived or actual sexual orientation, gender identity, and/or gender expression, or because their bodies differ from what is commonly considered standard for female or male. Since then, the General Assembly of the Organisation of American States (OAS) has adopted resolutions every year condemning all forms of discrimination and violence against persons on the basis of their sexual orientation, gender identity and expression and encouraging states to promote public policies that protect LGBTI persons. In November 2011, the IACHR created a specialised Unit within its Executive Secretariat on the rights of LGBTI persons. In November 2013, the IACHR turned this Unit into a Rapporteurship on the rights of LGBTI persons and appointed a Rapporteur, effective on 1 February 2014.

5 Since the early 1990s, the United Nations (UN) human rights treaty bodies<sup>3</sup> and special procedures<sup>4</sup> have repeatedly expressed concerns in relation to the extent and severity of discrimination and violence against individuals on the basis of their sexual orientation and gender identity. The UN High Commissioner for Human Rights, the UN Secretary-General and several UN entities, including UNAIDS, have also repeatedly made recommendations to member States to take measures to prevent and address such human rights violations. The UN Human Rights

Council has adopted two resolutions expressing grave concern at such acts of violence and discrimination committed in all regions of the world (A/HRC/RES/17/19 and A/HRC/RES/27/32) and which, among others, requested the UN High Commissioner for Human Rights to report on the subject. The two reports submitted thus far by the High Commissioner on this issue (A/HRC/19/41 and A/HRC/29/23) have found evidence of a pattern of widespread human rights violations, perpetrated against persons on the basis of their sexual orientation and gender identity, too often with impunity.

6 Building on ACHPR resolution 275, resolutions by the OAS and UN Human Rights Council, as well as other work of the ACHPR, IACHR and UN human rights systems on addressing human rights violations committed on the basis of sexual orientation and gender identity, there is an opportunity to exchange information and share experiences and lessons learned in this area. To support this, a dialogue on sexual orientation and gender identity was agreed between the ACHPR, IACHR and UN human rights systems, with the support of OHCHR and UNAIDS.

7 The dialogue was held 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 (MoU) between the OAS and the African Union (AU), the 2012 Addis Ababa Roadmap between the ACHPR and UN Special Rapporteurs and the 2014 Joint Declaration between OHCHR and the IACHR. The dialogue aimed to facilitate the exchange and sharing of information and experiences between the three human rights systems on human rights violations based on sexual

3 Inter alia, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination Against Women, the Committee Against Torture and the Committee on the Rights of the Child.

4 Inter alia, the Special Rapporteurs on extrajudicial, summary or arbitrary executions, extreme poverty, peaceful assembly and of association, opinion and expression, health, human rights defenders, torture, violence against women, and the Working Group on arbitrary detention.

orientation and gender identity. It also discussed the evolution in the approach that each system has taken to address this thematic issue, linkages between this thematic issue and other thematic issues in the context of the protection and promotion of human rights, as well as good practices and challenges.

8 The one-day dialogue was structured around three key substantive sessions and a closing session on opportunities for continued dialogue and collaboration. The substantive issues discussed during the dialogue were:

- Rights to life, integrity, freedom from torture, prohibition of violence and related rights;
- Right to liberty, freedom of association and assembly, freedom of expression, human rights defenders and related rights; and
- Right to health and other economic social and cultural rights.

9 Each session was initiated by a brief introduction followed by reflections and perspectives by each mechanism and then a general discussion involving all participants.

10 To support the sharing of experiences and discussions at the dialogue, five background papers were developed and provided to participants ahead of the meeting on the following:

- Key concepts and notions relating to sexual orientation and gender identity;
- Norms, case law and practice relevant to sexual orientation and gender identity in the UN human rights system;

- Norms, case law and practice relevant to sexual orientation and gender identity in the Inter-American human rights system;
- Norms, case law and practice relevant to sexual orientation and gender identity in the African human rights system; and
- HIV, human rights and sexual orientation and gender identity.

## Key issues discussed and opportunities for future collaboration

11 Below is a summary of the issues discussed during the joint dialogue, with a focus on critical areas of exchanges and agreement, as well as emerging avenues for future actions and collaboration.

## Application of international and regional human rights treaties

12 Participants from the three systems emphasised the applicability to LGBTI persons of existing fundamental human rights standards enshrined in international human rights law, including regional and international human rights treaties adopted and ratified by member states, and the jurisprudence and interpretation and elaboration of these norms by the African Commission, the Inter-American Commission and UN human rights mechanisms.

- 13 These include the rights to life, physical integrity, freedom from torture and cruel, inhuman or degrading treatment or punishment, the right to liberty and not to be subjected to arbitrary arrest or detention, freedom of association and assembly, freedom of expression, the right to health, employment, education, housing and other economic, social and cultural rights, as well as standards relating to the protection of human rights defenders.
- 14 Participants highlighted that no 'new' or specific rights were being advanced in any of the three systems in relation to LGBTI persons, but rather the application and elaboration of existing fundamental human rights standards in relation to a specific group. This approach is in line with what has been done in relation to other groups – not referred to in name in the relevant instruments – that face particular sets of human rights violations. All three mechanisms had interpreted the principle of non-discrimination as extending to all persons, including LGBT persons and other groups that face discrimination.
- 15 Participants emphasised that the principles and notions of human dignity and personhood, universality, non-discrimination and equality before the law are common foundational and cross-cutting principles in all three systems. As such these common values and principles were highlighted multiple times throughout the joint dialogue.
- 16 Participants further discussed the range of State obligations under international and regional human rights law. This includes the obligation to respect, to protect and to fulfil human rights, and the obligation to exercise due diligence including in preventing human rights violations, in investigating, prosecuting
- and providing remedy for human rights violations, and in creating an enabling environment for the effective enjoyment of all human rights and the work of human rights defenders, without discrimination.



## Range and gravity of human rights violations documented by the mechanisms

- 17 Participants discussed the range of violations of fundamental human rights that individuals face on the basis of their sexual orientation or gender identity. These include killings, the application of the death penalty, violence including mob attacks, rape and other forms of sexual violence, torture and cruel, inhuman or degrading treatment or punishment both in detention and medical settings, the criminalisation of consensual same-sex conduct between adults, the criminalisation of cross-dressing, and other discriminatory laws that are used to harass, detain and punish people on the basis of their sexual orientation, their gender identity or their gender expression. These violations also include arbitrary interference with the privacy of individuals, arbitrary and discriminatory restrictions on the freedoms of assembly, association and expression of LGBT persons, discrimination and denial of care in health settings and the discriminatory treatment of LGBT persons including in health, education, employment and housing. Incitement to hatred and violence against LGBT persons by the media and other stakeholders was also highlighted as a common concern. Participants also highlighted the dissemination of negative stereotypes and stigmatising language with regards to persons based on their sexual orientation and gender identity, as contributing to human rights violations that they face in all contexts.
- 18 It was stressed that LGBT people face many different sets of human rights violations, including multiple forms of discrimination based on other factors such as sex, race and age. Some populations are specifically vulnerable to some violations: for example, lesbian and transgender women face a high incidence of rape and other sexual violence including so-called 'corrective' rape. Transgender women are specifically targeted for killings and abuse by both State and non-State actors, including in detention. Human rights defenders working on the protection of the human rights of LGBT persons have been identified as a group particularly vulnerable to human rights violations.
- 19 Several participants highlighted specific aspects of human rights violations against persons on the basis of their sexual orientation and gender identity, including clear patterns of killings, the particular cruelty and brutality of many killings and acts of violence against LGBT persons, the participation or complicity of State actors in many of the violations, lack of investigation of human rights violations against LGBT persons and of prosecution of the alleged perpetrators, high levels of impunity, obstacles in accessing the judiciary and of obtaining effective remedy for violations.

20 Participants also discussed the serious health impact of human rights violations against LGBT persons. In particular, it was noted that high HIV incidence and prevalence among LGBT people in many regions of the world are caused, among others, by structural factors, such as stigma, discrimination, violence and other human rights violations that LGBT people face. These human rights violations contribute to making members of these populations – particularly transgender people, gay men and other men who have sex with men – vulnerable to HIV while at the same time hindering their access to and uptake of HIV prevention, testing and treatment services. 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.<sup>5</sup> In addition, several studies and reports from across the world have shown that sexual violence against LGBT people has serious negative health and other social consequences for this population.<sup>6</sup> The meeting noted that most state parties already include concern for gay men and other men

that have sex with men (MSM) in their HIV prevention programmes, thus, at least by implication, accepting the actual occurrence of sex between men within their jurisdictions and the need for a health sector response that is not punitive but rather positively addresses the specific health concerns that they have.

21 Participants noted that the pattern of human rights violations faced by LGBT persons contrasts with the universally applicable international and regional human rights standards that each mechanism is mandated to uphold. This gap between human rights standards and their effective application to LGBT persons was of concern to all participants, and further reflected the need for this dialogue.

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## Experience and approaches in the three systems

21 The meeting discussed approaches taken by mechanisms in each system in relation to human rights violations based on sexual orientation and gender identity. These approaches include incorporating relevant questions, observations and recommendations during country reviews, general comments, country visits, thematic reports, recommendations and

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5 TGM Sandfort *et al* 'Forced sexual experiences as risk factor for self-reported HIV infection among Southern African lesbian and bisexual women' (2013) *PLoS ONE* 8(1): e53552, and also T Sandfort *et al* 'Histories of forced sex and health outcomes among Southern African lesbian and bisexual women: a cross-sectional study' *BMC Women's Health* 2015, 15:22 doi:10.1186/s12905-015-0181-6.

6 UNAIDS (2014) *The gap report*, available at [http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/unaidspublication/2014/UNAIDS\\_Gap\\_report\\_en.pdf](http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/unaidspublication/2014/UNAIDS_Gap_report_en.pdf).

precautionary measures on individual cases and letters of allegation emanating from the mechanisms. Actions and approaches also include adopting resolutions, public statements (including joint statements between mechanisms), as well as holding consultations, engaging with and building relations with LGBT and intersex civil society organisations and human rights defenders, public hearings, expert meetings and public and private advocacy with States on implementation of recommendations. Further approaches include integrating the issue within the work of different thematic mandates and studies, establishing a register of cases of killings and violence, inquiries, awareness raising activities, dialogue with state parties and multiple stakeholders. In the Inter-American system, actions and approaches were catalysed by the creation of a specific unit within the secretariat of the Inter-American Commission, and later the establishing of a specific Rapporteur on the issue.

- 22 The meeting highlighted many common approaches that had been successful and had led to positive change, including focusing on the overarching goals of ending violence and discrimination against persons based on their sexual orientation and gender identity. Resolutions focusing on these overarching goals have been adopted in all three systems.
- 23 Participants also highlighted that the past decades have seen positive developments in Africa, the Americas and at the United Nations, with an increasing number of States repealing laws that criminalise consensual same-sex relations, establishing protective legislation that prohibits discrimination, including on the grounds of sexual orientation or gender identity and implementing policies to safeguard the

rights of LGBT and intersex persons. The meeting therefore stressed the importance of recognising and further publicising positive developments in this thematic area. In the Americas, this includes the OAS resolutions, the work of the IACHR Rapporteurship on the rights of LGBTI persons and the many positive policy and legal developments at national level, throughout the region, to effectively protect these rights. At the UN level, this includes the General Assembly and Human Rights Council resolutions, the recommendations of UN treaty bodies and special procedures and of the Universal Periodic Review (UPR) process, and the work of the UN system as a whole, including by the Secretary-General, OHCHR and UNAIDS. In Africa, participants highlighted the work of the African Commission including through its resolution 275 as well as the work of its thematic mandates, the absence of criminal sanctions in many States on the continent and the recent removal of criminal provisions in others, the legal prohibition of discrimination in employment, positive judgments by several national courts in the region to uphold the right of LGBT persons and human rights defenders working on these issues, the work of national human rights institutions to protect LGBT persons, and the acceptance of UPR recommendations on this issue by several African States.

- 24 At the same time, participants discussed common challenges in addressing human rights violations based on sexual orientation and gender identity, including lack of understanding and opposition from some member states to references to human rights violations based on sexual orientation and gender identity, as well as legislative and other efforts to increase or broaden the scope of discriminatory laws that criminalise LGBT persons. High levels of criminalisation, stigmatisation and

prejudice were highlighted as common challenges in the Caribbean and Africa.

25 The importance of ensuring an enabling environment and democratic space for human rights defenders and civil society organisations working for the protection of the human rights of LGBT and intersex persons is seen as critical to ensuring that they carry out their work safely and effectively without facing violence, threats and persecution. Ensuring that these defenders are able to access human rights mechanisms was seen as essential.

26 Participants discussed the importance of finding and strengthening avenues for partnership, alliances and dialogue between all stakeholders on this issue, including between human rights institutions and political, development and peace and security institutions. Such dialogues should include member states, expert human rights bodies, courts, civil society organisations, national human rights institutions and regional and international organisations. In the African context, engagement and dialogue between the African Commission and AU organs and strategic allies would be critical to forging greater understanding, collaboration and support on the issue. This dialogue should involve AU human rights bodies such as the African Court on Human and Peoples' Rights, the African Commission and the African Committee of Experts on the Rights and Welfare of the Child as well as other political AU organs such as the Permanent Representatives Committee, the Pan-African Parliament and the AU's Economic, Social and Cultural Council (ECOSOCC). Independent African experts could contribute to these exchanges and dialogues as resource persons, as appropriate. The potential role of the African Commission in a continental dialogue involving state

parties and other stakeholders to follow up on UN Human Rights Council resolutions 17/19 and 27/32 and resolution 275 of the African Commission, could also be explored.

27 Participants reflected on parallels between the struggle for the protection of the human rights of LGBT people and intersex persons, and the struggles against human rights violations against women including combatting sexual violence, domestic partner violence, female genital mutilation, as well as racist violence and discrimination, human rights violations against persons with disabilities, and other human rights violations that have been at one time justified on the basis of some traditional values, religious beliefs or culture. Participants highlighted that culture, religion and tradition are neither static nor monolithic, and that through time many have changed to reject practices that constitute human rights violations. Key principles relating to the pre-eminence of human rights norms and principles in the interpretation and application of cultural and traditional values were highlighted as relevant in the context of sexual orientation and gender identity, as was done in relation to combatting human rights violations against women and against persons on the basis of skin colour, disability, etc. Moreover, many traditional, cultural and religious values, including in Africa and the Americas, are based on the same principles that underpin human rights, including love, respect for others and for their human dignity.

28 The collection of data and documentation of evidence was seen by participants as a powerful tool to be able to identify the nature and range of human rights violations and trends in the level of (reporting on) violations. While participants stressed that the State has a duty to monitor human rights



violations in order to design an appropriate public policy response, only a handful actually collect data on human rights violations against LGBT and intersex persons – in the rest the burden falls on civil society organisations and other stakeholders to try to collect and systematise evidence of such violations. Data and evidence is critical to understand the extent and gravity of violations and to advocate for the adoption of measures to prevent, address and redress human rights violations faced by LGBT and intersex persons. Nonetheless, participants also highlighted the difficulties in collecting information in contexts where LGBT persons face high levels of violence, criminal sanctions and discrimination based on their sexual orientation or gender identity. It was stressed that not all persons who face human rights violations on the basis of their sexual orientation, conduct or gender identity, identify with the terms lesbian, gay, bisexual or transgender, and that limited availability of statistics should not detract from the need to implement binding human rights norms.

- 29 Proposed avenues for making violations and threats to LGBT and intersex persons more visible include the setting up of a registry to systematically record ongoing violations of this nature, as was done by the Inter-American Commission during a period of fifteen months (between January 2013 and March 2014). However, the limited human resources at the level of the African Commission and its Secretariat may be an obstacle to achieving such an

ambitious undertaking. To overcome this difficulty, the Commission may identify partners (such as civil society networks, scientific bodies, or academic institutions) with which it could collaborate to keep an updated record of violations. Drawing from the Inter-American Commission's experience and practice, the African Commission may also consider, on the basis of submitted evidence, to conduct public hearings on pertinent issues related to discrimination and violence against LGBT and intersex persons.

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## The pertinence of the mainstreaming approach

- 30 Participants discussed strategies that incorporate an approach anchored in regional and international norms and principles with an incremental and pragmatic approach within a given context to advance the effective protection of the human rights of all persons regardless of their sexual orientation and gender identity. This includes mainstreaming attention to human rights violations based on sexual orientation and gender identity across the full range of thematic work in each system. For instance, more than ten UN Special Procedures thematic mandates and more than five of the UN human rights treaty bodies have addressed the rights of LGBT persons through their mandated work. Such mainstreaming approaches are already been

- implemented by the African and Inter-American systems, and could be further expanded.
- 31 Participants discussed possible approaches for the African Commission to build on its Resolution 275 on the 'Protection against Violence and Other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity'. The AU political organs have called on AU member states to implement the decisions and recommendations of the African Commission, which includes resolution 275. The resolution therefore provides a fundamental normative and political anchor to the work of the African Commission and member states on this thematic issue.
- 32 A series of suggestions were made regarding the implementation of a mainstreaming approach to sexual orientation and gender identity in the practice and work of all three systems:
- (a) the inclusion of questions about violence and discrimination on the grounds of real or perceived sexual orientation or gender identity to State delegations;
  - (b) the adoption of Concluding Observations and recommendations related to sexual orientation and gender identity, where relevant;
  - (c) raising relevant aspects related to this issue, and arising from relevant resolutions, during visits to State Parties;
  - (d) drafting a thematic report on the subject of human rights violations on the basis of sexual orientation and gender identity, including those highlighted in relevant resolutions;
  - (e) the inclusion of issues related to sexual orientation or gender identity in the exercise of the mandates of thematic mechanisms.
- 33 The joint dialogue highlighted that all three systems had already incorporated some of these.
- 34 In the case of the African Commission, this was also the case, and resolution 275 and the current dialogue provide an opportunity to continue to consistently do so in future, including through the work of the Commission as a whole and the ongoing work of the thematic mechanisms as highlighted in point (e) above. In particular, this includes the work of the following thematic mandates which are particularly relevant to implementation of resolution 275: the Special Rapporteur on Human Rights Defenders, the Special Rapporteur on the Rights of Women in Africa, the Special Rapporteur on Freedom of Expression and Access to Information in Africa, the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa, the Committee for the Prevention of Torture in Africa, the Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa, the HIV Committee, the Working Group on Economic, Social and Cultural Rights and the Working Group on Communications.
- 35 Moreover, the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter adopted in 2011 by the African Commission include a definition of the 'vulnerable and disadvantaged groups' that explicitly comprises 'lesbian, gay, bisexual, transgendered and intersex people'.
- 36 Strengthening a common understanding and internal capacity building around the issue within each system was also viewed as critical, to ensure improved coherence in approach, including with external stakeholders. The briefing documents for the dialogue on terms and concepts, norms, case law and practices related to sexual orientation and gender identity in the three human rights systems can provide a basis for this effort.

- 37 In addition, changing mind sets and public attitudes was also seen as critical to the respect for the human rights of LGBT persons. Participants highlighted the importance of education and raising awareness among the broader public as well as public officials, including through human rights education. OHCHR's Free & Equal campaign, campaigns and advocacy efforts by UNAIDS, and work on social media by IACHR and UN mandate holders were highlighted as positive examples of reaching out to broader audiences.
- 38 The recent adoption of the Sustainable Development Goals (SDGs) that incorporate strong principles of human rights and of 'leaving no-one behind' provides an important opportunity to address human rights concerns within the development agenda, and was seen as an opportunity to engage with member states and other stakeholders on human rights issues including the rights of LGBTI persons.

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## 2016 as an opportunity for promoting tolerance and respect for the human rights of everyone in Africa

- 39 The year 2016 will be celebrated as the African Year of Human Rights with a special focus on the rights of women. It was suggested that the African Commission could use this opportunity to advance an agenda for greater understanding about and appreciation for diversity in African States, including diversity in sexual orientation and gender identity and embracing and respecting LGBT and intersex persons on the continent.

- 40 African States are almost all characterised by great diversity in their populations, with ethnic, religious and cultural diversity being the common denominator. In line with article 28 of the Charter, which calls on every individual to 'respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance', the Commission may advocate for the respect of the rights of all persons, including LGBT and intersex persons. In this respect, it can build on positive examples of State action in Africa and elsewhere to respect diversity and protect the human rights of all persons, irrespective of sexual orientation and gender identity. Participants noted that at least nineteen African states do not criminalise consensual same-sex relations between adults in their legal systems, that Mozambique in 2014 removed criminal sanctions for such conduct, that Rwanda and other States have resisted recent attempts to introduce such laws into their legal system; that seven States prohibit discrimination in employment on the basis of sexual orientation; that courts in Botswana and Kenya, among others, recently declared the refusal to register LGBT associations to be unconstitutional; and that a number of national human rights institutions (including in Kenya, Uganda and South Africa) have expressed themselves against human rights violations based on sexual orientation or gender identity.



## Avenues for future collaboration between human rights mechanisms and next steps

- 41 Participants welcomed the thematic dialogue as a positive example of collaboration between regional and international mechanisms, building on existing frameworks of cooperation between human rights systems. Participants noted that this thematic dialogue was a good practice that could be replicated and extended to other thematic areas, such as the rights of persons with disabilities.
- 42 Participants from the African Commission valued the dialogue as an opportunity to strengthen the internal capacity of the Commission and further elaborate on possible approaches to address human rights violations on the basis of sexual orientation and gender identity from the perspective of the African Charter. This will help strengthen the Commission's exercise of its mandate and its engagement with all stakeholders. It was suggested that the papers prepared for the dialogue can also support this process.
- 43 Participants agreed that the meeting was productive, informative and thought-provoking. In particular, the Chairpersons of both the African Commission and Inter-American Commission and UN mandate holders expressed satisfaction that the dialogue was useful and beneficial in informing their future activities and approaches, particularly those of the African and Inter-American Commission, as two similarly placed institutions.
- 44 It was agreed that, ideally, such dialogues should continue, at least on an annual basis, coinciding with a session of either of the two Commissions. The possibility was also raised of future dialogues alternating between the seats of the two Commissions.
- 45 It was further suggested that, building on this dialogue, further possibilities for collaboration should be explored. These possibilities include collaboration between thematic mandate holders from the three systems on specific human rights violations faced by LGBT and intersex persons, including through joint statements, joint country visits, the exchange of staff, such as a legal officer of the African Commission spending some time with the Inter-American Commission to observe the activities of and obtain practical experience about the functioning of the Inter-American Commission's Special Rapporteur on the rights of LGBTI persons. An immediately achievable possibility is the exchange of relevant information between all three sets of mechanisms. To this end, focal points could be designated at the level of each of the Commissions and their Secretariats and within the UN human rights mechanisms.
- 46 Similarly, collaboration should also be strengthened between regional systems and UN human rights mechanisms as well as UN agencies, which are increasing their work to uphold the equal rights of LGBT and intersex persons. Entry points in this regard are recommendations by UN treaty bodies and Special Procedures to member states in each region, as well as the UPR process of the UN Human Rights Council. It was noted that some 13 African States have between them accepted 36 UPR recommendations on upholding the rights of LGBT persons, thus opening the possibility for the African Commission drawing on the UPR experience in its engagement with African States, together with follow up

on the implementation of recommendations by treaty bodies and special procedures.

- 47 OHCHR and UNAIDS pledged to support future collaboration on issues raised during the thematic dialogue and UNAIDS expressed its commitment to continue to support the HIV Committee in its endeavours. The summary of the key points discussed during the dialogue contained in this report are published, together with the final agenda, participant list and four briefing documents prepared for the meeting on the norms, case law and practices related to human rights, sexual orientation and gender identity in the African ([Annex 4](#)), Inter-American ([Annex 5](#)) and United Nations human rights system ([Annex 6](#)) and the briefing paper on HIV, human rights, and sexual orientation and gender identity ([Annex 7](#)).

# Annexes

## Annex 1: List of participants

Name	Function and institution
Rose-Marie Belle Antoine	Chairperson, IACHR
Tracy Robinson	Commissioner, IACHR
Elizabeth Abi-Mershed	Deputy Executive Secretary, IACHR
Satyabhoosun Gupt Domah	Rapporteur, UN Committee Against Torture
Christof Heyns	UN Special Rapporteur on extrajudicial, summary or arbitrary executions
Zainabo Sylvie Kayitesi	Chairperson, ACHPR
Faith Pansy Tlakula	Commissioner, ACHPR
Lawrence Mute	Commissioner, ACHPR
Reine Alapini-Gansou	Commissioner, ACHPR
Lucy Asuagbor	Commissioner, ACHPR
Med S.K. Kaggwa	Commissioner, ACHPR
Soyata Maiga	Commissioner, ACHPR
Yeung Kam John Yeung Sik Yuen	Commissioner, ACHPR
Solomon Dersso	Commissioner-elect, ACHPR
L King Jamesina Essie	Commissioner-elect, ACHPR
Mary Maboreke	Executive Secretary, ACHPR
Anita Bagona	Secretariat, ACHPR
Abiola Idowu-Ojo	Secretariat, ACHPR
Eva Mera	Secretariat, ACHPR
Paul Ogendi	Secretariat, ACHPR
Albab Tesfaye	Secretariat, ACHPR
Elisabeth K Kyalo	Assistant to Commissioner Mute
Frans Viljoen	Director, Centre for Human Rights, University of Pretoria
Rosemary Museminali	Representative to AU and UNECA, UNAIDS
Luisa Cabal	Chief, Human Rights and Law Division, UNAIDS
Patrick Eba	Senior Human rights and law adviser, UNAIDS
Bechir Ndaw	Senior Human rights and law adviser, Eastern and Southern Africa, UNAIDS
Mahamane Cisse-Gouro	Chief, Africa Branch, OHCHR
Federica Donati	Coordinator, Equality, Non-Discrimination and Participation Unit, Special Procedures Branch, OHCHR
Michael van Gelderen	Human Rights Officer, Women's Human Rights and Gender Section, OHCHR
Maria Vivar Aguirre	Human Rights Officer, Civil Society Unit, OHCHR
Thomas Probert	Research Consultant, OHCHR
Christian Tshimbalanga	Consultant, HIV, Health and Development, Regional Service Centre for Africa, UNDP

## Annex 2: Agenda of joint dialogue, 3 November 2015

### 8:30 – 9:45 Session 1: Welcome, introductions and preliminary comments

- Welcome by Commissioner Zainabo Kayitesi, Chairperson, ACHPR
- Remarks by Commissioner Rose-Marie Belle Antoine, Chairperson, IACHR and Professor Christof Heyns, UN Special rapporteur on extrajudicial, summary or arbitrary executions
- Expectations and preliminary comments by Commissioner Lawrence Mute, ACHPR
- Introduction of all participants
- Introduction to key concepts, issues and briefing papers by facilitator, Professor Frans Viljoen, Centre for Human Rights, University of Pretoria

### 9:45 – 11:30 Session 2: Right to life, integrity, freedom from torture and related rights

- Introduction – Key points from briefing papers
- Initial reflections by Professor Christof Heyns, UN Special rapporteur on extrajudicial, summary or arbitrary executions; Commissioner Tracy Robinson, Rapporteur on the rights of LGBTI persons, IACHR; and Commissioner Lawrence Mute, Committee for the prevention of torture in Africa, ACHPR
- General discussion

### 11:45 – 13:00 Session 3: Right to liberty, freedom of association and assembly, freedom of expression, human rights defenders and related rights

- Introduction – Key points from briefing papers
- Initial reflections by Commissioner Pansy Tlakula, Special Rapporteur on Freedom of Expression and Access to Information,

ACHPR and Maina Kiai, UN Special rapporteur on the rights to freedom of peaceful assembly and of association (by video)

- General discussion

### 14:15 – 15:30 Session 4: Right to health and other economic social and cultural rights

- Introduction – Key points from briefing papers
- Initial reflections by Commissioner Soyata Maiga, ACHPR; Commissioner Rose-Marie Belle Antoine, Chairperson, IACHR and Ms Elizabeth Abi-Mershed, Deputy Executive Secretary, IACHR
- General discussion

### 15:30 – 16:30 Session 5: Exploring opportunities for continued dialogue and collaboration

- General discussion
- Closing remarks by Commissioner Zainabo Kayitesi, Chairperson, ACHPR; Commissioner Rose-Marie Belle Antoine, Chairperson, IACHR; and Professor SG Domah, Rapporteur, UN Committee Against Torture



## Annex 3: 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

*The African Commission on Human and Peoples' Rights (the African Commission), meeting at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014:*

**Recalling** that Article 2 of the African Charter on Human and Peoples' Rights (the African Charter) prohibits discrimination of the individual on the basis of distinctions of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status;

**Further recalling** that Article 3 of the African Charter entitles every individual to equal protection of the law;

**Noting** that Articles 4 and 5 of the African Charter entitle every individual to respect of their life and the integrity of their person, and prohibit torture and other cruel, inhuman and degrading treatment or punishment;

**Alarmed** that acts of violence, discrimination and other human rights violations continue to be committed on individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity;

**Noting** that such violence includes 'corrective' rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings and executions, forced disappearances, extortion and blackmail;

**Further alarmed** at the incidence of violence and human rights violations and abuses by State and non-State actors targeting human rights defenders and civil society organisations working on issues of sexual orientation or gender identity in Africa;

**Deeply disturbed** by the failure of law enforcement agencies to diligently investigate and prosecute perpetrators of violence and other human rights violations targeting persons on the basis of their imputed or real sexual orientation or gender identity;

- (1) **Condemns** the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity;
- (2) **Specifically condemns** the situation of systematic attacks by State and non-

state actors against persons on the basis of their imputed or real sexual orientation or gender identity;

- (3) **Calls on** State Parties to ensure that human rights defenders 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; and
  
- (4) **Strongly urges** States to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.

**Adopted at the 55th Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, 28 April to 12 May 2014.**

## Annex 4: Norms, case law and practices of sexual orientation and gender identity in the African human rights system

### INTRODUCTION

1 Until recently issues related to sexual orientation and gender identity have not featured prominently in the African human rights system. 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. Even so, the African Commission and its Secretariat have historically paid limited attention to this thematic concern. 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 South Sudan. Similarly to the other regional and United Nations (UN) human rights treaties, the African Charter does not contain any explicit reference to sexual orientation or gender identity.

#### A Non-discrimination on basis of sexual orientation and gender identity

3 As with the other treaties, the African Charter's provisions strongly support the conclusion that every person enjoys the Charter rights irrespective of her or his sexual orientation or gender identity. In fact, 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),<sup>1</sup> departs from the

<sup>1</sup> Adopted at the 55th Ordinary Session of the African Commission in Luanda, Angola, 28 April – 12 May 2014.

premise that sexual orientation and gender identity are grounds for non-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.<sup>2</sup> 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,<sup>3</sup> 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 or gender identity.

**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*'.<sup>4</sup> 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,<sup>5</sup> 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 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

2 Arts 2, 3, 5, 6, 7, 9, 10, 11, 12, 15, 16 and 17.

3 In art 2, 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'.

4 (Emphasis added) art 2 is akin to art 14 of the European Convention, art 1(1) of the American Convention.

5 241/2001, *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) paras 50, 52-54.

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"'.<sup>6</sup> 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*,<sup>7</sup> 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.<sup>8</sup>

**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

6 245/02, *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) (21st Activity Report of the ACHPR) para 169.

7 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.'

8 Para 4.

grounds of non-discrimination under article 2 of ICCPR includes sexual orientation.<sup>9</sup> 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'.<sup>10</sup>

**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 and gender identity**

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*,<sup>11</sup> which was launched in the presence on a number of members of the African Commission during the NGO Forum preceding the 54th session of the African Commission,

9 CCPR/C/50/D/488/1992.

10 Art 1(k) (emphasis added).

11 <http://www.chr.up.ac.za/images/files/publications/other/sogj/English%20SOGI%20booklet%20for%20web.pdf>.

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.<sup>12</sup>

### C Freedom of expression, association and assembly

- 11 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, it has emphasised that freedom of expression implies the obligation on authorities to 'promote diversity' and to take into

12 See eg Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, adopted in 2007.

account the interests of 'vulnerable or marginalised groups'.<sup>13</sup>

### D Limitation and to Charter rights and their potential justification

- 12 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'<sup>14</sup> and most importantly, 'may not erode a right such that the right itself becomes illusory.'<sup>15</sup> 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.
- 13 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.

13 Declaration of Principles on Freedom of Expression in Africa, adopted by the Commission in 2002, para 3.

14 *Interights and Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004) para 78.

15 *Constitutional Rights Project*, (2000) AHRLR 227 (ACHPR 1999) para 42; *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 69 & 70.

**'African value system' and 'African family values'**

14 At first glance, some may claim that the Charter's emphasis on 'values of African civilisation'<sup>16</sup> and the family as 'custodian of morals and traditional values recognised by the community'<sup>17</sup> 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 civilisation, 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 societies<sup>18</sup> 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 civilisations 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'<sup>19</sup> and has recognised that contact with one's family is essential for an individual's dignity.<sup>20</sup>

15 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 tolerant accommodation of divergence and of minorities and the protection of their fundamental rights should be of paramount importance to the African Commission and state parties to the Charter.<sup>21</sup>

**Majority morality**

16 Linked to the argument based on (African) morality is the contention that

16 Preamble to the African Charter.

17 Art 18(2) of the African Charter.

18 See eg M Epprecht, *Hungochani: The History of a Dissident Sexuality in Southern Africa* (McGill-Queen's University Press, Montréal, 2004); EE Evans-Pritchard, *Witchcraft, Oracles and Magic among the Azande* (Clarendon, Oxford, 1976); R Morgan & S Wierenga, *Tommy Boys, Lesbian Men and Ancestral Wives* (Jacana Media, Gauteng, 2005) and S Murray & W Roscoe, *Boy-wives and female husbands: studies of African homosexualities* (1998)

19 Guidelines for National Periodic Reports, Second Annual Report of the African Commission on Human and Peoples' Rights, para II.A.28.

20 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.

21 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"').

discrimination against sexual minorities reflects the moral views of the majority. Although scant scientific evidence exists about public opinion, it could be assumed that this contention is 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 marginalisation 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 ... cannot be derived solely from popular will, as this cannot be used to limit the responsibilities of states parties in terms of the Charter.’<sup>22</sup>

## II INSTITUTIONS AND PRACTICES RELEVANT TO SEXUAL ORIENTATION AND GENDER IDENTITY

17 The Commission’s mandate may be divided into its ‘protective’ and ‘promotional’ aspects.<sup>23</sup> The first relates

to ‘communications’; 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

18 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*,<sup>24</sup> 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.

22 (2001) AHRLR 84 (ACHPR 2001).

23 Arts 45 and 55 of the African Charter.

24 136/94, *William Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995) (8th Annual Activity Report of the ACHPR).





This photo shows the fingers of Ousmane Diallo, holding a picture of his son Madiaye Diallo, whose body was exhumed by an angry mob because they believed him to be gay. (AP Photo/Ricci Shryock)

## B State reporting

19 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 problems have over the years beset this process. Some States have never submitted a report, and most States have reports overdue. The Commission's failure to consistently and without delay make public its concluding observation has 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 or gender identity. 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 mostly well-informed and incisive, and often rely on supplementary 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.

20 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.<sup>25</sup>

21 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.<sup>26</sup> He then asked what the position in South Africa is, referring to article 18(3) 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.

22 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

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25 See generally R Murray & F Viljoen '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.

26 Authors' personal notes taken during the African Commission's thirty-eighth session.

NGOs, several Commissioners raised concerns about the treatment of gay persons in the Cameroonian legal and penal system.<sup>27</sup> 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'.<sup>28</sup>

- 23 This trend subsequently continued, with issues related to sexual orientation featuring in the Concluding Observations adopted in respect of Mauritius, Cameroon, and Uganda. 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'.<sup>29</sup> 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'.<sup>30</sup> 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'.<sup>31</sup> 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, the activist for the rights of LGBT persons.<sup>32</sup>

## C Special mechanisms

- 24 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.
- 25 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

27 Notes of Judith Oder, Lawyer, Africa Programme, *Interights*, who attended the session (on file with author).

28 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](http://www.achpr.org/english/other/Con_Observations/Cameroon/2nd_COs%20Cameroon.pdf).

29 <http://www.achpr.org/states/mauritius/reports/2nd-5th-2008/>, para 15.

30 Adopted at 15th Extraordinary Session, 17-14 March 2014, Banjul, The Gambia, para 82.

31 Para xxxvi.

32 Para 11(xiii).

attention to persons belonging to vulnerable groups, including women, children, sex workers, migrants, men having sex with men, intravenous drugs users and prisoners'.<sup>33</sup>

- 26 A number of special mechanisms have made occasional reference to sexual orientation and gender identity, and the rights of LGBT and intersex persons. The 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, issues a press statement,<sup>34</sup> 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).<sup>35</sup> 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'.

- 27 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.<sup>36</sup> 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.<sup>37</sup>

33 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.

34 <http://www.achpr.org/press/2014/03/d196/>.

35 Statement on the Occasion of the International Day in Support of Victims of Torture – 26 June 2014.

36 [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/057.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/057.asp).

37 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=E>.

## D Standard-setting (resolutions; guidelines)

- 28 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'.<sup>38</sup> The Commission adopted its first resolution devoted to sexual orientation and gender identity in 2014,<sup>39</sup> 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 Organisation of American States (OAS) resolutions of 2008 to 2012.<sup>40</sup>

## E Promotional visits

- 29 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

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38 Para 1(e).

39 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.

40 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'.

on the grounds of sexual orientation and gender identity. For example, during its promotional visit to Namibia, in 2001, the Commission delegation interrogated the criminalisation of same-sex sexual relations, as reflected in the mission report.<sup>41</sup> In its promotional mission to Uganda, 25-30 August 2013, the Commission delegation (comprising four Commissioners: Tlakula, Asuagbor, Kaggwa, 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.'<sup>42</sup> Most importantly, it recommended that the government should 'expand access to ARVs to all key populations, including homosexuals'.<sup>43</sup>

## F Relationship with civil society: Observer status to NGOs

- 30 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'. 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. Up to

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41 Report of the Promotional Mission to the State of Namibia, 2 - 6 July 2001, DOC/OS(XXX)/244, p 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'.

42 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.

43 Ibid, para 245.

date, the Commission has granted observer status to close to 500 NGOs.

- 31 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.<sup>44</sup> 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 recognise the rights to non-discrimination on sexual orientation or gender identity, or the rights of LGBTI persons.<sup>45</sup>
- 32 After some time, CAL re-applied. On 25 April 2015, the African Commission voted in favour of granting the 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

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44 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.

45 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 organised by the Centre for Human Rights, University of Pretoria, in July 2011, celebrating 30 years since the entry into force of the African Charter.

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.<sup>46</sup> This decision provoked reaction from the AU political organs (see below, III.A).

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

- 33 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) and the Executive Council. 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.

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46 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)).

## A AU Assembly and Executive Council

- 34 The AU has largely been silent on sexual orientation. Like the OAU before it, the AU has as yet not pronounced itself officially on sexual orientation, as such. It has however on three occasions shed some – somewhat contradictory – light on its position.
- 35 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).<sup>47</sup> 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’.<sup>48</sup> A subsequent AU Assembly session was organised 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.<sup>49</sup>
- 36 The third and most recent came in June 2015.<sup>50</sup> In the exercise of its mandate,

47 African Union, ‘Africa’s common position on to the UN General Assembly special session on AIDS’, June 2006.

48 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.

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

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

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’.<sup>51</sup> 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, has been directed to the African Court on Human and Peoples’ Rights.<sup>52</sup>

## B The African Peer Review Mechanism (APRM)

- 37 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 organisations such as the UN, the Democracy and Governance Declaration accords ‘an importance and

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

52 Request for Advisory Opinion 2/2015, Centre for Human Rights and Coalition of African Lesbians.

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.

## 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/>

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  
<http://www.achpr.org/sessions/47th/resolutions/163/>

Rudman, A 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1-27  
<http://dx.doi.org/10.17159/1996-2096/2015/v15n1a1>  
<http://www.ahrlj.up.ac.za/rudman-a>

Oloka-Onyango, J 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 *African Human Rights Law Journal* 28-57  
<http://dx.doi.org/10.17159/1996-2096/2015/v15n1a2>

Ndashe, S 'Seeking the protection of LGBT rights at the African Commission on Human and Peoples' Rights' 15 *Feminist Africa* 17-38  
[http://agi.ac.za/sites/agi.ac.za/files/2\\_case\\_study\\_sibongile\\_ndashe.pdf](http://agi.ac.za/sites/agi.ac.za/files/2_case_study_sibongile_ndashe.pdf)

Nana, J 'If not, why not?' (506) *Pambazuka News*  
<http://www.pambazuka.org/en/category/features/68956>



## Annex 5: Norms, cases and practices relevant to sexual orientation and gender identity 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. 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 and gender identity (SOGI) within the framework of the American Convention on Human Rights (American Convention, Convention or ACHR).
- 2 For the purposes of this paper, the author used the following sources: petitions and cases decided by the IACHR and IACtHR; thematic and country reports by the IACHR; precautionary measures granted by the IACHR; press releases by the IACHR; resolutions of the Organization of American States (OAS); and other documents produced by the inter-American system. The cornerstone of these protections is found in the case of

*Atala Riffo y Niñas v Chile*<sup>1</sup> (*Atala v Chile* or *Atala* case) by the Court, which established the baseline for protection of sexual orientation and gender identity under the American Convention.

- 3 This paper is divided into three sections. Section I refers to the norms and case law related to the rights of LGBTI persons. This section analyses the protection of SOGI under the Convention as framed in the *Atala v Chile* case, as well as other relevant cases decided by the IACHR. It also summarises the actions of the IACHR in relation to violence and discrimination, including making reference to: laws that criminalise SOGI; restrictions on the freedom of expression and association; economic, social and cultural rights (health, education, and employment); and the right to family life. 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. These institutional changes include the creation of the LGBTI Unit of the IACHR, which later became a Rapporteurship.

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1 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](http://www.corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf).

Section III describes the role of the OAS Assembly 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: The *Atala v Chile* case

- 4 The American Convention does not include a direct reference to SOGI. The IACHR and the IACtHR have developed SOGI-related standards based on the cases presented for review, according to their institutional functions. Since the late nineties, cases and reports concerning SOGI have been presented to the Commission and the Court. However, only in the last ten years have specific protections been developed, especially in the wake of the *Atala 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* 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 centred on the result of an internal judicial process against Karen Atala that stripped her of the custody and care of her daughters. The 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, the rights of children, and judicial guarantees of due process. This was the first judicial decision of the Inter-American system regarding SOGI. The Court had to define the sphere of protection with regard to SOGI, especially given the State's argument that there was no international consensus about the

protection of these categories under the Convention.

- 6 The Court determined that sexual orientation and gender identity are included within 'any other social condition' and therefore constitute protected grounds under article 1(1) of the Convention, which establishes 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. According to the Court, States have both the duty to respect the rights of persons by not discriminating against them – whether *de jure* or *de facto* – and to protect them against discriminatory conduct by other persons. The IACtHR considered that sexual orientation and gender identity should be included as protected categories due to the evolving nature of the interpretation of treaties, based on article 29 of the American Convention on Human Rights. In bolstering its analysis of the evolution of interpretation of the American Convention on this particular issue, the Court took into account OAS General Assembly resolutions, which since 2008 have called for the effective protection from violence and discrimination of LGBTI persons. In addition, the Court took into account decisions of the European Court of Human Rights and UN human rights bodies, which have found that non-discrimination based on SOGI is protected under their respective human rights treaties. 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.<sup>2</sup>

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

7 The Americas 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. Through its various decisions on cases of violence committed by state and non-state actors, the Court has established that under the American Convention, the rights to life (article 4), physical integrity (article 5), and personal freedom (article 7) must be respected and guaranteed according to article 1(1) of the ACHR, which includes the duty to apply due diligence in the effective investigation of all acts of violence, and the obligation to avoid impunity.<sup>3</sup> In particular, the Court has considered that certain forms of violence can be construed as discrimination, as it did in the case of the mass killings of women

in Ciudad Juarez, Mexico.<sup>4</sup> 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 been historically discriminated against.

8 In its 2015 *Report on Violence against LGBTI persons* the IACHR incorporated the concept of violence based on prejudice, which had been developed by academia, 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.'<sup>5</sup> Further the

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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 21 July 1989 (Reparations and Costs) available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_07\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_07_ing.pdf).

2 Ibid. Para 91.

3 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,

4 See I/A Court HR, case of *González et al ('Cotton Field') v Mexico*, Judgment of 16 November 2009. Series C No 205. Available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_205\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf); see also I/A Court HR, case of *the Miguel Castro-Castro Prison v Peru*. Judgment of 25 November 2006. Series C No 160. Available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_160\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_160_ing.pdf).

5 IACHR, Report on Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, 12 November 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.

Commission found that violence based on prejudice requires context and social complicity<sup>6</sup> and has a symbolic impact sending a message to the whole LGBT community.<sup>7</sup> As such, the IACHR concluded that violence against LGBT persons<sup>8</sup> constitutes a contextualised social violence in which the perpetrators' motivation needs to be understood as complex and multi-faceted, and not only as an individual act.<sup>9</sup> 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 bodies.<sup>10</sup>

- 9 For many years, the Commission has systematically analysed violence based on sexual orientation and gender identity in the region. For instance, 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'.<sup>11</sup> Throughout the years the IACHR has continued following-up on this issue. For example,

6 IACHR, Report on Violence (n 5 above) para 44, citing Gómez, María Mercedes Ch 2 'Prejudice-based Violence' in Motta, Cristina & 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.

7 IACHR, Report on Violence (n 5 above) para 44, citing Information presented to the IACHR by civil society organisations at a public hearing on discrimination on the basis of gender, race and sexual orientation in the Americas, 133 Period of Sessions, 23 October 2008. Video and audio available at [www.iachr.org](http://www.iachr.org).

8 Following the IACHR, this paper uses the LGBTI acronym when referring to lesbian, gay, bisexual, trans and intersex persons, and the LGBT acronym, when referring to violence only experienced by lesbian, gay, bisexual, and trans persons. See IACHR, Report on Violence (n 5 above).

9 IACHR, Report on Violence (n 5 above) para 47.

10 IACHR, Report on Violence (n 5 above) para 47.

11 See IACHR Press Release No 7/92 [http://www.cidh.org/Comunicados/English/1992-1993/1-12.htm#N%C2%BA\\_7/92](http://www.cidh.org/Comunicados/English/1992-1993/1-12.htm#N%C2%BA_7/92).

in the 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.<sup>12</sup> 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.<sup>13</sup>

- 10 Starting in 2008, but more specifically since 2012 the Commission, through the Unit on the Rights of LGBTI Persons<sup>14</sup> – which later became the Rapporteurship on the Rights of LGBTI Persons<sup>15</sup> – has conducted a thorough monitoring of the violence against LGBTI persons in the Americas through its press releases and country reports. In a December 2014 press release, the Commission launched the results of its Registry of Violence, a monitoring tool that reviewed the media and reports from civil society organisations 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

12 See Colombia Report 2013: Truth, Justice and Reparation <http://www.oas.org/en/iachr/reports/pdfs/Colombia-Truth-Justice-Reparation.pdf>.

13 Ibid.

14 See IACHR Press Release No 94/13, 'The IACHR creates Rapporteurship to address issues of Sexual Orientation, Gender Identity, Gender Expression, and Body Diversity', 25 November 2013. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/094.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/094.asp).

15 Ibid.

violence against them could be seen as exacerbated by their exclusion, poverty, and social marginalisation. In relation to non-lethal violence, the Commission has pointed out that in many cases it is accompanied by verbal violence. 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 family members. Concerning states' obligations in this respect, the Commission expressed serious concern about the lack of official data produced and collected by States.<sup>16</sup>

11 In certain cases the IACHR has expressed concern about mob attacks and collective acts of prejudice-based violence committed in countries in the Americas. For example, in June 2013, the Inter-American Commission condemned the wave of violence (47 attacks in two weeks) against LGBT persons in Haiti, presumably related to the march against homosexuality led by the Coalition of Moral and Religious Organizations,<sup>17</sup> and repudiated the level of cruelty and brutality these cases displayed.

12 Through this monitoring work, the IACHR has recognised that some groups of the population are particularly

vulnerable to violence, such as transwomen. In August 2012, for example, the Commission learned of 20 killings of trans women in Brazil,<sup>18</sup> the United States,<sup>19</sup> Colombia,<sup>20</sup> and Honduras.<sup>21</sup> In October and November of the same year, it expressed concern over the killings of 34 trans persons in eight countries in the region.<sup>22</sup> These extremely high levels of violence against trans persons provoked an energetic condemnation by the Commission, which issued an urgent call to the States of the region to undertake measures to effectively prevent and respond to violence against trans persons.

13 In its monitoring of violence based on prejudice against LGBTI persons in the region, the IACHR has found general trends regarding this violence. For example, the Commission has found

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16 See IACHR Press Release No 153/14 'IACHR Expresses Concern over Pervasiveness of Violence against LGBTI Persons and Lack of Data Collection by OAS Member States' 17 December 2014. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/153.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/153.asp).

17 See IACHR Press Release No 54/13 'IACHR Condemns Recent Wave of Violence against LGTBI Persons in Haiti' 30 July 2013. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/054.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/054.asp).

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18 See IACHR Press Release No 113/12 'IACHR Condemns Murder of Trans Women in Brazil' 5 September 2012. Available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/113.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/113.asp).

19 Press Release No 111/12 'IACHR Condemns the Murder of Trans Persons in the United States' 31 August 2012. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/111.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/111.asp).

20 Press Release No 110/12 'IACHR Condemns Murder of Trans Women in Colombia' 30 August 2012. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/110.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/110.asp).

21 Press Release No 109/12 'IACHR Condemns the Murder of a Trans Woman in Honduras' 28 August 2012. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/109.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/109.asp); see also, IACHR Press Release No 4/11 'IACHR Deeply Concerned about Murders of Members of Transgender Community in Honduras' 20 January 2011. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2011/004.asp](http://www.oas.org/en/iachr/media_center/PReleases/2011/004.asp).

22 See IACHR Press Release No 146/12 'IACHR expresses concern regarding homicides and acts of violence against LGBTI persons in the Americas' 12 December 2012. Available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/146.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/146.asp).

that violence against LGBTI persons is pervasive throughout the Americas; that violence based on prejudice towards non-normative sexual orientations and gender identities is particularly cruel and generally depict high levels of brutality; 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.<sup>23</sup> Also, according to the Commission certain types of violence are more invisible than others for different reasons. For example, the IACHR highlights the invisibility of everyday violence against LGBTI persons; violence occurring in private settings; violence against trans men, bisexual persons and intersex persons, among others.<sup>24</sup>

or gender targeting persons who defy traditional gender norms because of their sexual orientation, gender identity or expression.<sup>26</sup> The Commission has also indicated that it has received information regarding stigma faced by gay men who are victims of sexual violence,<sup>27</sup> and reports of acts of sexual violence against intersex persons committed with the intention to 'cure intersex bodies'.<sup>28</sup>

- 14 The IACHR has also documented instances of sexual violence against LGBTI persons. The Commission has noted having 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.<sup>25</sup> Regarding this type of violence, the IACHR indicates that it is used to punish nonconforming sexuality

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23 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, Chapter 4. See also, IACHR, Annex to Press Release No.153, available at <http://www.oas.org/es/cidh/prensa/Comunicados/2014/153A.asp>.

24 IACHR, Report on Violence (n 5 above) Ch 4.

25 IACHR, Report on Violence (n 5 above) Executive Summary.

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26 As above.

27 IACHR, Report on Violence (n 5 above) Ch 4 citing *The Advocate* 'Gay Male Sexual Assault Survivors Speak Out' 27 January 2015.

28 IACHR, Report on Violence (n 5 above) Ch 4 citing IACHR, Public Hearing on the Human Rights of Intersex Persons, March 2013.



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

15 In many circumstances, the perpetrators of violence are law enforcement agents. 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.<sup>29</sup> Acts of violence and abuse committed by law enforcement and the police are rarely denounced and there are high levels of impunity with regard to these violations. The situation of incarcerated LGBT persons has also been a subject followed by the IACHR, both through its LGBTI Rapporteurship and its Rapporteurship on Persons Deprived of Liberty. The Commission has on various occasions made statements about this issue, manifesting its concern about the conditions of detention, particularly of trans persons.<sup>30</sup> In many cases, these conditions do not comply with the differential focus that would guarantee their fundamental rights and dignity due to overcrowding, ill-treatment, discrimination, and barriers to access basic services.<sup>31</sup> In 2015, for example, it rejected confinement and isolation measures for LGBT persons that were considered to constitute segregation practices.<sup>32</sup> It has also recognised advances in countries such as Argentina, which allowed the transfer of transgender women to women's prisons,

and Brazil, which established safe spaces for LGBT persons in its prisons.<sup>33</sup>

16 In its 2011 *Report on the Human Rights of Persons Deprived of Liberty in the Americas*,<sup>34</sup> 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.<sup>35</sup> Also, it recommended that all OAS member states regulate intimate visits 'without distinctions based on considerations of gender or sexual orientation'.<sup>36</sup> In this trend, in 1999 it is worth noting that the IACHR issued an admissibility report (following a *prima facie* or preliminary analysis) regarding a petition filed on behalf of Martha Lucía Álvarez Giraldo,<sup>37</sup> 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.

17 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.<sup>38</sup> According to the IACHR, 'trans women are at a

29 IACHR, Report on Violence (n 5 above).

30 See IACHR Press Release No 53/15 'IACHR Expresses concern about violence and discrimination against LGBT persons deprived of liberty' 21 May 2015, [http://www.oas.org/en/iachr/media\\_center/PReleases/2015/053.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/053.asp).

31 See IACHR Press Release No 146/12 'IACHR expresses concern regarding homicides and acts of violence against LGBTI persons in the Americas' 12 December 2012. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/146.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/146.asp).

32 IACHR Press Release No 53/15 (n 30 above).

33 See IACHR Press Release No 89/13 'IACHR acknowledges recent steps taken by several OAS Member States to further equality for LGBTI persons' 21 November 2013. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/089.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/089.asp).

34 See IACHR Report on the Human Rights of Persons Deprived of Liberty in the Americas, 2011 <http://www.oas.org/en/iachr/pdl/docs/pdf/PPL2011eng.pdf>.

35 Ibid. Para 628.

36 Ibid. Para 604.6.

37 See IACHR Admissibility Report No 71/99. Case 11.656 *Martha Lucía Álvarez Giraldo v Colombia*, 4 May 1999. Available at <http://www.cidh.org/annualrep/99eng/Admissible/Colombia11656.htm>.

38 IACHR Press Release No 53/15 (n 30 above). See also IACHR, Report on Violence (n 5 above) Ch 4.



heightened risk of sexual violence because of their routine imprisonment in male facilities, without regard to the specificities of the person or the case'.<sup>39</sup> Also, the Commission has noted with concern that in some instances LGBT persons are segregated in detention centres, 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.'<sup>40</sup> 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'.<sup>41</sup> 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.<sup>42</sup>

#### D Discrimination related to laws which criminalise LGBT persons

18 In the Americas, eleven countries criminalise same-sex intimacy between consenting adults in private: Antigua and Barbuda, Barbados, Belize, 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 the English-speaking countries in the Caribbean to advance in an effective way towards the repeal of laws that criminalise consensual sexual relations between persons of the same sex.<sup>43</sup> 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.<sup>44</sup> Also, these laws hinder the work of human rights defenders. In November 2014, the IACHR noted that it had received 'troubling information on how the criminalization of same-sex intimacy in 11 countries impacts the defense of human rights, restricting access to justice and fueling intolerance. According to the information received by the Commission, those who defend

39 IACHR, Report on Violence (n 5 above) Ch 4.

40 See IACHR Press Release No 53/15 (n 30 above).

41 IACHR, Report on Violence (n 5 above) Ch 4, citing IACHR Press Release No 97/14 'Rapporteurship on the Rights of Persons Deprived of Liberty Wraps up Visit to Paraguay' 15 September 2014. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/097.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/097.asp).

42 IACHR, Report on Violence (n 5 above) recommendations section.

43 IACHR Press Release No 57/14 'May, 17 - International Day Against Homophobia and Transphobia (IDAHO-T)' 15 May 2014. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/057.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/057.asp).

44 See for example, IACHR Press Release No 79/13 'IACHR Expresses Concern about Mob Attacks, Police Abuse and other Forms of Violence against LGTBI Persons' 24 October 2013. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/079.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/079.asp). See also Press Release No 109/10, 'IACHR concludes its 140th period of sessions'. Available at <http://www.cidh.org/Comunicados/English/2010/109-10eng.htm>.

the rights of LGBTI persons in these countries are viewed as 'self-avowed criminals'.<sup>45</sup> In addition to the legislation that criminalises same sex intimacy, the Commission found that Guyana had legislation criminalising 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.<sup>46</sup>

- 19 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 which, while not directly criminalising same-sex activity or trans persons, are often construed and applied to criminalise LGBT persons.<sup>47</sup> For the Commission, the vaguely defined terms used in these legal provisions opened the door to arbitrary enforcement with respect to persons who are perceived to defy socially established and traditional gender norms, particularly trans persons.<sup>48</sup> 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'.<sup>49</sup>

- 20 The Commission has equally recognised the measures that have been adopted by other countries in the region to decriminalise conduct related to diverse aspects of sexual orientation and gender identity, including in Argentina<sup>50</sup> and Ecuador.<sup>51</sup> The IACHR has also praised statements by high government officials, including prime ministers from countries in the region that still criminalise same-sex intimacy, in favor of the rights of LGBT persons.<sup>52</sup> Also, the IACHR has expressed concern over the existence of laws that ban the entry of gay persons in Belize and Trinidad and Tobago.<sup>53</sup>
- 21 In its 2015 *Report on Violence against LGBTI Persons in the Americas*, the IACHR

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45 See IACHR Press Release No 131A/14 'Report on the 153rd Session of the IACHR' 29 December 2014. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/131A.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/131A.asp).

46 IACHR, Report on Violence (n 5 above) Ch 3.

47 IACHR, Report on Violence (n 5 above) Ch 3.

48 As above.

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49 As above.

50 See IACHR Press Release No 36/08 'IACHR praises repeal of Argentina's military justice code' 12 August 2008. Available at <http://www.cidh.org/Comunicados/English/2008/36.08eng.htm>.

51 Press Release No 24/9, 19 October 1994. Available at <http://www.cidh.org/Comunicados/English/1994/Press21-28.htm>.

52 See, for example, IACHR Press Release No 89/13 'IACHR acknowledges recent steps taken by several OAS Member States to further equality for LGBTI persons' 21 November 2013. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/089.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/089.asp); see also Jamaica Report - 2012 <http://www.oas.org/en/iachr/docs/pdf/Jamaica2012eng.pdf>.

53 See IACHR Press Release No 35A/14 'Report on the 150th Session of the IACHR' 29 December 2014. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/035A.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/035A.asp). See also IACHR Press Release No. 131A/14 'Report on the 153rd Session of the IACHR' 29 December 2014. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/131A.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/131A.asp).

makes reference to the existence of these laws, their impact on violence against LGBT persons and makes a series of recommendations in this regard. The Commission notes '[t]hese laws provide a social sanction for abuse, breed intolerance, and have been used to justify arbitrary detention, police abuse, and extortion and torture. As a result, LGBT persons are drawn into the criminal justice system and subjected to more violence. Once such persons are incarcerated or otherwise implicated in the justice system, this situation can in turn give rise to further incidents of discrimination and violence.'<sup>54</sup> In this regard, the Commission urged OAS member states in the region 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.'<sup>55</sup> Additionally, the Commission recommended member states to 'review legislative frameworks that criminalize and stigmatize sex workers.'<sup>56</sup>

## E Freedom of association and human rights defenders

- 22 The IACHR has on a consistent basis followed the work of human rights defenders protecting the LGBTI population. 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 this group are killings, threats, criminalisation of activities, high levels of impunity for acts that violate the freedom of association, and discrediting and stigmatisation of human rights defenders.<sup>57</sup> 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, and Belize.<sup>58</sup> 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.<sup>59</sup>

- 23 Also, the Commission found that in Honduras, the *coup d'Etat* perpetrated in 2010 meant an upsurge in the violence experienced by LGBT persons in that country, manifesting itself in an increase in the killings of leaders and defenders of the rights of this population. The Commission highlighted the case of

54 IACHR, Report on Violence (n 5 above) Executive Summary.

55 Ibid.

56 IACHR, Report on Violence (n 5 above) Ch 7.

57 See IACHR Second Report on the situation of Human Rights Defenders in the Americas, 2012, Para 330. <http://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>.

58 See Precautionary Measures (PM) 457/13 – Members of 'Asociación para un Vida Mejor de Honduras' APUVIMEH (Spanish) <http://www.oas.org/es/cidh/decisiones/pdf/2014/MC457-13ES.pdf>. PM 155/13 – Caleb Orozco, Belize, PM 153/11 – X and Z, Jamaica, PM 80/11 – Maurice Tomlinson, Jamaica, PM 222-09 – Agustín Humberto Estrada Negrete, Leticia Estrada Negrete, and Guadalupe Negrete Silva, Mexico, PM 18-10 – Indyra Mendoza Aguilar *et al*, Honduras, PM 196-09 Amplification of Precautionary Measures, Honduras, PM 196-09 Amplification of Precautionary Measures, Honduras, PM 210/08 Marlon Cardoza and other members of the CEPRES Association, PM 3-06 – Kevin Josué Alegría Robles and members of OASIS, Guatemala, PM 621-03 – Ellyn Johalby Suárez Mejía and Members of the Comunidad Gay Sampedrana, Honduras. More information available at <http://www.oas.org/en/iachr/lgtbi/protection/precautionary.asp>.

59 See IACHR Press Release No 37/13, 17 May 2013. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/037.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/037.asp).

Walter Trochez, a defender and activist for LGBT persons, who was assassinated after being accused of belonging to the resistance forces.<sup>60</sup> In 2015 the IACHR condemned the killings of Francela Méndez<sup>61</sup> and Diana Sacayán,<sup>62</sup> trans human rights defenders in El Salvador and Argentina, respectively. In its 2015 Report on Violence against LGBTI Persons in the Americas, the IACHR makes an in-depth analysis of the situation of human rights defenders and issues a series of recommendations to OAS member states to protect them from violence and discrimination.<sup>63</sup>

## F Freedom of expression

24 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). This differs from the International Covenant on Civil and Political Rights, which prohibits a concept that also includes incitement to discrimination: 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.<sup>64</sup> 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 defenders of their rights, which serve to accentuate the vulnerability of these groups, placing them at high risk of violence.<sup>65</sup>

25 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'.<sup>66</sup> 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'.<sup>67</sup> The IACHR and its Special Rapporteur on Freedom of Expression have also indicated that in their response to hate speech, States must adopt a 'comprehensive approach that goes beyond legal measures and includes preventive and educational measures'.<sup>68</sup> As such, they have indicated that 'States should implement

60 See Honduras – 2010 Preliminary Observations <http://www.cidh.org/countryrep/Honduras10eng/Honduras10.Situation.htm#E>.

61 See IACHR Press Release No 63/15 'IACHR Condemns killing of human rights defender of trans persons in El Salvador' 8 June 2015. Available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2015/063.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/063.asp).

62 See IACHR Press Release No 123/15 'IACHR Condemns killing of trans human rights defender in Argentina' 30 October 2015. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2015/123.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/123.asp).

63 IACHR, Report on Violence (n 5 above).

64 See IACHR Report for Freedom of Expression Chapter VIII 'Hate speech and the American Convention on Human Rights'. Available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=443&IID=1>.

65 See IACHR Press Release No 37/13 'The IACHR Calls Member States to Ensure Respect of the Rights of LGTBI Persons by Public Officials' 17 May 2013. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/037.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/037.asp); Colombia Report 2013: Truth, Justice and Reparation. Available at <http://www.oas.org/en/iachr/reports/pdfs/Colombia-Truth-Justice-Reparation.pdf>.

66 IACHR, Report on Violence (n 5 above) Executive Summary, para 13.

67 IACHR, Report on Violence (n 5 above) Executive Summary, para 14.

68 IACHR, Report on Violence (n 5 above) Executive Summary, para 14.

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.<sup>69</sup> 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.'<sup>70</sup> 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.'<sup>71</sup>

## G Economic, social and cultural rights

- 26 In relation to the economic, social, and cultural rights of LGBTI persons, the IACHR has monitored and highlighted the right to education, health, and employment, among others. 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.<sup>72</sup> To the IACHR, education is a fundamental tool to prevent and eliminate prejudice and stereotypes related to diverse sexual orientation and gender identity expressions.

- 27 Regarding the right to health, the IACHR has recognised that the stigmatisation 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 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. In this sense, the laws that criminalise same-sex intimacy between consenting

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69 As above.

70 As above.

71 As above.

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72 See IACHR Press Release No 049/15 'Discriminated and Made Vulnerable: Young LGBT and Intersex People Need Recognition and Protection of their Rights' 13 May 2015. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2015/049.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/049.asp); IACHR Press Release No 92/13 'The IACHR is concerned about violence and discrimination against LGBTI persons in the context of education and family settings' 22 November 2013. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/092.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/092.asp), see also IACHR Press Release No 68/13 'IACHR Holds Regional Meeting on Education, Culture, and Rights of LGBTI Persons' 19 September 2013. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/068.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/068.asp).

adults or gender identity of trans persons are an obstacle to reducing stigma and discrimination. For this reason, the IACHR has recognised that education is central to preventing discrimination and has recommended that the States establish positive measures to guarantee the rights of these persons.<sup>73</sup>

- 28 Also regarding the right to health, the Commission has expressed concern over the existence of centres which pretend to 'cure homosexuality' in Ecuador,<sup>74</sup> and other countries in the Americas,<sup>75</sup> 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.'<sup>76</sup> 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.

73 See IACHR Press Release No 019/15 'IACHR Calls on States to Combat Discrimination against All People Living with HIV' 27 February 2015. Available at <http://www.oas.org/es/cidh/prensa/comunicados/2015/019.asp>, IACHR Press Release No 147/12 'The IACHR, the CIM, UNAIDS and PAHO call on OAS Member States to eradicate stigma and discrimination surrounding HIV in the Americas' 17 December 2012. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/147.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/147.asp), IACHR Press Release No 95/12 'Organizations join efforts to fight discrimination and stigma related to HIV' 25 July 2012. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/095.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/095.asp).

74 See IACHR Press Release No 60/14 'The IACHR Welcomes Recent Developments in OAS Member States to Protect and Promote the Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons (LGBTI)' 20 May 2014. Available at <http://www.oas.org/es/cidh/prensa/comunicados/2014/060.asp>.

75 IACHR, Report on Violence (n 5 above) Ch 4.

76 IACHR, Report on Violence (n 5 above) Ch 1.

The prevalence in Latin America of informal and risky gender affirmation procedures causes a high number of (preventable) deaths of trans women.<sup>77</sup>

- 29 Regarding the rights of intersex persons,<sup>78</sup> the Commission has expressed concern about the information it received regarding systematic and generalised 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 infants and children are subjected to all types of 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 'more female' or 'more male.' These interventions, in the judgment of the IACHR, 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, sterilisation, and mental suffering, which is partly caused by the secrecy involving these procedures. 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.<sup>79</sup>

- 30 Regarding the right to work, the IACHR has examined discrimination at the

77 IACHR, Report on Violence (n 5 above) Ch 5, para 382.

78 Persons whose bodies differ from the 'standard' female and male bodies, because of differences in chromosomes, gonads, genitals or hormones.

79 See IACHR Press Release No 23/13 'IACHR Wraps Up its 147th Session', 5 April 2013. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/023.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/023.asp).

workplace.<sup>80</sup> With regards to employment discrimination, the IACHR presented the case of *Homero Flor Freire v Ecuador* to the IACTHR in December 2014.<sup>81</sup> This case is about the alleged 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 Commission recommended that the State of Ecuador make full reparation to the victim and to publicly recognise that Homero Flor Freire was discharged from the Ecuadorian Army in a discriminatory manner. Further, the Commission 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.<sup>82</sup> The Commission also 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.'<sup>83</sup> 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.'<sup>84</sup>

31 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.<sup>85</sup> 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.'<sup>86</sup> As a result, trans women 'have to resort to occupations that place them at greater risk of suffering violence and becoming criminalised, which in turn means that they have even fewer possibilities for working in the formal sector.'<sup>87</sup> 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.'<sup>88</sup> 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

80 See IACHR Press Release No 125/12 'IACHR Holds Regional Meeting on the Right to Work of LGBTI Persons' 19 October 2012. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/125.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/125.asp)

81 See IACHR Report No 81/13, Case 12,743, *Homero Flor Freire v Ecuador*, 4 November 2013 <http://www.oas.org/en/iachr/decisions/court/12743FondoEn.pdf>.

82 See IACHR Press Release No 043/15 'IACHR Takes Case concerning Ecuador to the Inter-American Court' 30 April 2015. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2015/043.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/043.asp); see also IACHR Report No 81/13, Case 12,743, *Homero Flor Freire v Ecuador*. 4 November 2013 <http://www.oas.org/en/iachr/decisions/court/12743FondoEn.pdf>.

83 See IACHR Press Release No 122/15 'IACHR Congratulates Argentina for Passing Provincial Quota Job Law for Trans Persons' 30 October 2015. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2015/122.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/122.asp).

84 As above.

85 See IACHR Press Release No 037A/15 'Report on the 154th Session of the IACHR' 19 June 2015. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2015/037A.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/037A.asp).

86 As above.

87 As above.

88 IACHR Press Release No 137/15 'On the International Transgender Day of Remembrance, IACHR urges States to increase the life expectancy of trans persons in the Americas' 20 November 2015. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2015/137.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/137.asp).

health care.<sup>89</sup> The Commission has also noted the 'close link between exclusion, discrimination and the short life expectancy of trans persons'.<sup>90</sup> On the occasion of the 2015 International Transgender Day of Remembrance, the IACHR urged OAS member states to adopt measures to increase the life expectancy of trans persons in the Americas.<sup>91</sup>

## H Legal protection and recognition of gender identity

- 32 With regard to gender identity, in 2015 the IACHR praised the efforts of Colombia and Mexico City in allowing trans persons to change the sex marker on identity cards through simple administrative procedures, in accordance with the respect for their dignity.<sup>92</sup> Likewise, it welcomed the 2013 reform by the District of Columbia in the United States to ease the modification of gender identity on birth certificates of trans persons. The state of California in the United States allowed trans children to use school restrooms that they feel more comfortable using and Peru imposed sanctions on a bar that denied access to a transgender woman because of her gender identity.<sup>93</sup> In addition, the IACHR has consistently requested that States take into account the possibility that different acts of violence, killings, attacks, and other crimes against LGBTI persons might be motivated by the gender

identity or gender expression of the victims.

## I Protection of the family and definition of the family

- 33 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'.<sup>94</sup> Even though the case that the Court studied was related to the biological children of Karen Atala, the Court recognised that Atala, her partner, and her daughters were a family protected under article 17 of the Convention.<sup>95</sup>

- 34 Recently, the IACHR presented a case to the IACtHR against Colombia (*Ángel Alberto Duque*),<sup>96</sup> in which the protection of same-sex couples under the American Convention is discussed as a central issue. Mr Duque lived with his same-sex partner until the partner died. 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. The Colombian State based its denial on the protection of the family and the financial sustainability of the general pension system. For the

89 IACHR Press Release (n 85 above).

90 IACHR Press Release No 137/15 (n 88 above).

91 IACHR Press Release No 137/15 (n 88 above).

92 See IACHR Press Release No 075/15 'IACHR Congratulates Mexico and Colombia for Measures Recognizing Identity of Trans Persons' 1 July 2015. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2015/075.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/075.asp).

93 See IACHR Press Release No 89/13 'IACHR acknowledges recent steps taken by several OAS Member States to further equality for LGBTI persons' 21 November 2013. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/089.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/089.asp).

94 See IACHR Report No 81/13, Case 12,743, *Homero Flor Freire v Ecuador*, 4 November 2014. Available at <http://www.oas.org/en/iachr/decisions/court/12743FondoEn.pdf>.

95 n 94 above, para 176-177.

96 See IACHR Report No 5/14, Case 12,841, *Ángel Alberto Duque v Colombia*, 2 February 2014. Available at <http://www.oas.org/en/iachr/decisions/court/12841FondoEn.pdf>.



Inter-American Commission, the family is protected by the American Convention, and the differential treatment is not justified because the concept invoked by the State is limited and excludes the diverse family forms that exist, such as those made up of same-sex couples.<sup>97</sup>

## J Access to justice

35 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.<sup>98</sup> 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 LGBTI persons.'<sup>99</sup> 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',<sup>100</sup> and the 'acquittal or mitigated sentencing' of perpetrators due to the sexual orientation or gender identity of the victim.<sup>101</sup>

97 n 96 above, para 77-78.

98 IACHR, Report on Violence (n 5 above).

99 As above.

100 As above.

101 As above.

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

36 As examined above, the IACHR has been fundamental in the process of recognition and protection of the rights of LGBTI persons in the Americas. The mission of the Commission and Court is to promote and protect human rights in the region. The bodies of the Inter-American system consider that LGBTI persons are a group of persons who have been historically and systematically subjected to discrimination and violence. 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 elevating cases before the IACtHR that involve LGBTI persons as victims of human rights violations. Specifically, as of October 2015 the Commission has issued six reports on admissibility,<sup>102</sup> three

102 Report No 30/15, Petition 1263-08, Sandra Cecilia Pavez Pavez,, 21 July 2015; Report No 92/14, Petition 1196-03, Daniel Omar Camusso & son, 4 November 2014; Report No 99/14, Petition 446-09, Luis Alberto Rojas Marín, November 2014; Report No 150/11, Petition 123-05, Ángel Alberto Duque, Colombia, 2 November 2011; Report No 42/08, Petition 1271-04, Karen Atala and daughters, 23 July 2008; Report No 71/99, Case 11.656, Marta Lucía Álvarez Giraldo, Colombia, 4 May 1999.

decisions on merits,<sup>103</sup> three inadmissibility reports,<sup>104</sup> one friendly settlement<sup>105</sup> and sent three cases to the Court.<sup>106</sup> These cases refer to issues of discrimination in terms of employment and pension benefits and protection of families. The Commission has also included analysis on issues regarding sexual orientation and gender identity in its annual,<sup>107</sup> thematic reports in other areas,<sup>108</sup> and country reports.<sup>109</sup>

37 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. The Unit was conceived as part of the integrated perspective on the protection of human rights that has been considered before the Commission in favor of historically discriminated

groups.<sup>110</sup> The Unit was crucial in establishing the foundation of the work of the Commission in the protection and promotion of human rights of LGBTI persons in the Americas; it has denounced violations through press releases, conducted promotional activities, and held expert meetings, among other activities.

38 On 8 November 2013, the Inter-American Commission created the Rapporteurship on the Rights of LGBTI Persons with the purpose of giving specialised attention and continuing the work carried out by the former LGBTI Unit in the advancement and protection of their rights.<sup>111</sup> As of November 2014, the Commission, through the Rapporteurship, had received more than 50 petitions against 16 member states; granted 11 precautionary measures for the protection of rights; held 6 regional expert meetings;<sup>112</sup> prepared two sections on the rights of LGBTI persons for the country reports on Colombia and Jamaica; 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 30 public hearings, with the participation of 22 countries and more than 70 NGOs; and monitored more than 1500 news

103 Homero Flor Freire, Ecuador. Case 12.743 Merits Report. Ángel Alberto Duque, Colombia Case 12.841 Merits Report; Report No 139/09, Case 12.502, Karen Atala & daughters, Chile, 18 December 2009.

104 Report No 71/14, Petition 537-03, Mayra Espinoza Figueroa; Report No 11/13, Petition 157-06, Juan Fernando Vera Mejías, 20 March 2013; Report No 96/01, Petition 19-99, José Alberto Pérez Meza, Paraguay, 10 October 2001.

105 Report No 81/09, Petition 490-03, Friendly Settlement, X, Chile, 6 August 2009.

106 Homero Flor Freire, Ecuador. Case 12.743. Date of submission to the Court: 11 December 2014. Ángel Alberto Duque, Colombia. Case 12.841. Date of submission to the Court: 21 October 2014. Karen Atala & Daughters, Case 12.502 against the State of Chile, Date of submission to the Court: 17 September 2010.

107 IACHR, Rapporteurship on the Rights of LGBTI Persons, Annual Reports, available at <http://www.oas.org/en/iachr/lgtbi/reports/annual.asp>.

108 IACHR, Rapporteurship on the Rights of LGBTI Persons, Thematic Reports, available at <http://www.oas.org/en/iachr/lgtbi/reports/thematic.asp>.

109 IACHR, Rapporteurship on the Rights of LGBTI Persons, Country Reports, available at <http://www.oas.org/en/iachr/lgtbi/reports/country.asp>.

110 See IACHR Press Release No 115/11 'IACHR Creates Unit on the Rights of Lesbian, Gay, Bisexual, Trans, and Intersex Persons' 3 November 2011. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2011/115.asp](http://www.oas.org/en/iachr/media_center/PReleases/2011/115.asp).

111 See IACHR Press Release No 94/13 'The IACHR creates Rapporteurship to address issues of Sexual Orientation, Gender Identity, Gender Expression, and Body Diversity' 25 November 2013. Available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/094.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/094.asp).

112 IACHR, Rapporteurship on the Rights of LGBTI Persons, Experts Meetings, available at <http://www.oas.org/en/iachr/lgtbi/activities/meetings.asp>.

reports about violence against LGBTI persons.<sup>113</sup> 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, investigate, punish and provide reparations and redress concerning acts of violence against LGBTI persons.

- 39 Civil society organisations that promote and defend the rights of LGBTI persons have been key in this process of institutional change and the protection of their rights. Their main actions have been: denouncing situations and providing information about human rights violations to the IACHR; requesting audiences by subject and by country before the IACHR; presenting cases and requests for precautionary measures before the IACHR; preparing amicus briefs to provide judicial and factual elements for contentious cases at the IACHR and IACtHR; participating in the OAS General Assembly to promote the resolutions about human rights, sexual orientation, and gender identity; providing concepts to the Inter-American Judiciary Committee to develop the human rights conventions; and providing information to the IACHR during its onsite visits.

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113 See IACHR, Brochure on the work of the LGBTI Rapporteurship since its installation in February 2012 until November 2014, available at <http://www.oas.org/es/cidh/lgtbi/docs/Brochure-Rapporteurship-2014.pdf> (published in November 2014).

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

- 40 The OAS General Assembly has been an institution of fundamental importance to the promotion of the rights of LGBTI persons in the Americas through seven 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.'<sup>114</sup> 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.<sup>115</sup>
- 41 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

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114 See Resolution AG/RES. 2435 (XXXVIII-O/08) Human Rights, Sexual Orientation and Gender Identity, approved at the fourth plenary session, held on 3 June 2008. <http://www.oas.org/en/iachr/lgtbi/links/>.

115 See Resolution AG/RES. 2504 (XXXIX-O/09) Human Rights, Sexual Orientation and Gender Identity, approved at the fourth plenary session, held on 4 June 2009. <http://www.oas.org/en/iachr/lgtbi/links/>.

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 decriminalisation of homosexuality.

ratification by OAS member states, and as of February 2016 have yet to come into force.

42 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 decriminalisation of homosexuality and to avoid making changes that allow the recognition of the families of LGBTI persons. For example in the footnotes of the 2014 resolution, Jamaica and Saint Vincent and the Grenadines disagreed with the use of the terminology of 'gender expression' on grounds that it is ambiguous and that these words do not have consensus in international law. Other countries, such as Guatemala and Ecuador, considered that the non-recognition of same-sex marriage is not a discriminatory practice.

43 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;<sup>116</sup> and the Inter-American Convention on Protecting of the Human Rights of Older Persons.<sup>117</sup> These treaties are open for signature and

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116 See Inter-American convention against all forms of discrimination and intolerance [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-69\\_discrimination\\_intolerance.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance.asp)

117 See Inter-American convention on protecting the human rights of older persons [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-70\\_human\\_rights\\_older\\_persons.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp)

## FOR MORE INFORMATION

Report on Violence against LGBTI Persons in the Americas, November 12, 2015 (currently available in Spanish, English translation forthcoming), available at <http://www.oas.org/en/iachr/lgtbi/default.asp>

Multimedia site on the contents of the 2015 Report on Violence against LGBTI Persons (currently available in Spanish) [http://www.oas.org/es/cidh/multi media/2015/violencia-lgbti/violencia-lgbti.html](http://www.oas.org/es/cidh/multi%20media/2015/violencia-lgbti/violencia-lgbti.html)

Inter-American Commission on Human Rights. Rapporteurship on the Rights of LGBTI Persons. <http://www.oas.org/en/iachr/lgtbi/>

IACtHR, case of *Karen Atala Riffo & daughters v Chile*. Merits, Reparations and Costs. Judgment of 24 February 2012. Series C No 239. [http://corteidh.or.cr/docs/casos/articulos/seriec\\_239\\_ing.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf)

IACHR, *Homero Flor Freire v Ecuador*, Merits Report (sent to the IACtHR and pending a decision), Case 12.743. 4 November 2014, <http://www.oas.org/en/iachr/decisions/court/12743FondoEn.pdf>

IACHR, *Angel Alberto Duque v Colombia*, Merits Report (sent to the IACtHR and pending a decision), Case 12,841, 2 April 2014, <http://www.oas.org/en/iachr/decisions/court/12841FondoEn.pdf>

OAS General Assembly Resolutions on sexual orientation and gender identity <http://www.oas.org/en/iachr/lgtbi/links/>

Inter-American Commission on Human Rights. Rapporteurship on the Rights of LGBTI

Persons. Press releases [http://www.oas.org/en/iachr/lgtbi/press\\_releases/](http://www.oas.org/en/iachr/lgtbi/press_releases/)

Inter-American Commission on Human Rights. Hearings Specifically Focusing on the Human Rights Situation of LGBTI Persons [http://www.oas.org/es/cidh/audiencias/topic\\_slist.aspx?lang=en&topic=32](http://www.oas.org/es/cidh/audiencias/topic_slist.aspx?lang=en&topic=32)

## Annex 6: Norms, case law and practices relevant to sexual orientation, gender identity and intersex status in the United Nations 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.
- 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 intersex status, including killings, sexual violence, torture, attacks on human rights defenders, denial of free expression and assembly, arbitrary detention, discriminatory laws, and discrimination in access to education, health care, housing, and education.
- 3 While this paper focuses on human rights violations based on sexual orientation and gender identity against LGBT persons, it also has some

references to human rights violations against intersex persons based on their intersex traits or status.

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

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

#### I UN STANDARDS ON VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

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

- 5 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).<sup>1</sup> UN human rights mechanisms have affirmed that these rights apply to all persons, regardless of sexual orientation, gender identity or intersex status.

### **Death penalty**

- 6 The UN Special Procedures have repeatedly raised concern about the use of the death penalty as punishment for consensual same-sex relations between adults.<sup>2</sup> 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.'<sup>3</sup>

### **Killings**

- 7 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',<sup>4</sup> LGBT persons killed by police,<sup>5</sup> floggings, stonings and killings of women by communities aiming to restrict and regulate female sexuality,<sup>6</sup> brutal

murders of gay men,<sup>7</sup> lesbians,<sup>8</sup> transgender persons<sup>9</sup> and LGBT human rights defenders.<sup>10</sup> Sexual orientation and gender identity have been recognised as grounds for protection from extrajudicial, summary and arbitrary executions by the UN General Assembly.<sup>11</sup> 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.<sup>12</sup>

### **Torture and other cruel, inhuman or degrading treatment**

- 8 States are obliged under international law to prohibit, investigate, punish and provide redress for torture and other cruel, inhuman or degrading treatment.<sup>13</sup> 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'.<sup>14</sup>
- 9 Certain forms of abuses against LGBT and intersex persons may cross a

1 UDHR: articles 3, 5 & 12; ICCPR: articles 6, 9 & 17; CAT.  
 2 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).  
 3 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.  
 4 E/CN.4/1995/111.  
 5 E/CN.4/1998/68/Add.1.  
 6 E/CN.4/1997/47.

7 E/CN.4/2005/7/Add.1.  
 8 A/HRC/4/34/Add.1.  
 9 A/HRC/14/23/Add.1, E/CN.4/2001/9/Add.1. (2001): El Salvador, para 175.  
 10 (n 8 above) and <http://icj.wppengine.netdna-cdn.com/wp-content/uploads/2015/02/Correspondence-SR-Cameroon-3-2013-fra.pdf>.  
 11 A/RES/69/182.  
 12 Human Rights Committee, General Comments 6 & 31.  
 13 UDHR, art 5; ICCPR, art 7; CAT, art 2.  
 14 CAT/C/GC/2 (2008).

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 homosexual activities, invasive virginity examinations conducted by health-care providers, forced hormone therapy and genital-normalising surgeries on intersex children and unethical and harmful so-called ‘therapies’ to change sexual orientation.<sup>15</sup> The Committee on the Rights of the Child has noted that children who are lesbian, gay or transgender are particularly vulnerable to violence.<sup>16</sup> Lesbians and transgender women are also at particular risk because of gender inequality and power relations within families and wider society.<sup>17</sup>

#### **Arbitrary detention**

10 States have an obligation to protect the right not to be subjected to arbitrary arrest and detention.<sup>18</sup> 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.<sup>19</sup> States are obliged to refrain from arresting or detaining persons on discriminatory grounds, including sexual orientation and gender identity.<sup>20</sup>

15 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).

16 CRC/C/GC/13. (2009).

17 A/HRC/19/41 (2011). Para 21

18 UDHR, art 9; ICCPR, art9; CRC, arts 37(b) & (d).

19 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).

20 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.

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 and cross-dressing, and have rejected attempts to justify such laws on grounds of the protection of public health or morals.<sup>21</sup> 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.<sup>22</sup>

#### **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 criminalisation of consensual same-sex relations between adults in private violates the rights to privacy and to non-discrimination and constitutes a breach of international human rights law.<sup>23</sup> In addition, human

21 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.

22 UN 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.

23 See, for example, *Toonen v Australia*, Communication No 488/1992, UN 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.



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.<sup>24</sup>

### *Hate speech*

- 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 expressions of hatred against LGBT persons, including by politicians, the media, religious leaders and others, have been addressed by UN human rights mechanisms over the years.<sup>25</sup> International human rights law recognises that the right to freedom of expression can be restricted where it presents a serious danger for others and for their enjoyment of human rights.<sup>26</sup>

24 A/HRC/29/32.

25 See for example, A/67/357 (2012); A/HRC/23/40/Add.1 (2013); A/HRC/26/30 (2014); A/HRC/26/30 (2014); A/HRC/29/37/Add.2 (2015); CAT/C/NOR/CO6-/7 (2012); A/HRC/26/30/Add.2 (2014); Op-ed: High Commissioner for Human Rights Navi Pillay. 'Prejudice fuels the denial of rights for LGBT people' (2014).

26 ICCPR, art19(3).

### *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 intersex status.<sup>27</sup> 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.<sup>28</sup>

### **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.

### *Freedom of expression*

- 16 Everyone has the right to freedom of opinion and expression,<sup>29</sup> regardless of sexual orientation, gender identity or

27 UDHR, art 14(1); Convention relating to the Status of Refugees (1954).

28 UNHCR, Guidelines on international protection No. 9, HCR/GIP/12/09, 23 October 2012; CCPR/C/108/D/2149/2012; A/59/324 (2004); A/HRC/7/3/Add.1: France (2008); A/HRC/19/61/Add.4: United Kingdom (2012).

29 UDHR, art 19; ICERD, art 5(d)(viii); ICCPR, art 19; CRC, art 13.

intersex status.<sup>30</sup> 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.

- 17 The Human Rights Committee considered that the Russian Federation had violated the right to freedom of expression under article 19(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.<sup>31</sup>

#### ***Freedom association and assembly***

- 18 Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations,<sup>32</sup> regardless of sexual orientation or gender identity.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

#### **C Discrimination**

- 19 Everyone is entitled to enjoy all human rights without discrimination,<sup>36</sup> including discrimination on the basis of sexual orientation, gender identity or intersex status.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

30 See for example, E/CN.4/2005/64/Add.1: Saudi Arabia (2005); A/HRC/19/55/Add.2: Moldova (2011); A/HRC/23/50/Add.1: Moldova (2013); A/HRC/26/30/Add.1: Montenegro (2014); E/CN.4/2001/64: Kuwait (2001).  
31 CCPR/C/106/D/1932/2010.  
32 UDHR, art 20; ICCPR, arts 21 & 22; CRC, art 15; ICERD, art 5(d)(ix).  
33 A/HRC/4/37 (2007), para 96; A/HRC/4/37/Add.1 (2007), para 454; A/61/312 (2006), para 71.  
34 CCPR/C/109/D/1873/2009.

35 See, for example, A/HRC/26/29/Add.1, 10 June 2014: Botswana.  
36 UDHR, art 2; ICERD, art 5; ICCPR, art 2(1); ICESCR, art 2(2); CEDAW, art 3; CAT, art 1(1); CRC, art 2; ICRMW, art 1(1).  
37 See, for example: CCPR/C/89/D/1361/2005: *X v Colombia*. (2007); CCPR/C/78/D/941/2000: *Young v Australia* (2003); CCPR/C/50/D/488/1992: *Toonen v Australia* (1994); E/C.12/GC/20. (2009), para 32 & fn 25.  
38 UDHR, art 7; ICCPR, art 26.  
39 CEDAW/C/GC/28 (2010).

20 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**

21 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.<sup>40</sup> 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.<sup>41</sup> Concerns include breaches of confidentiality, stigma and violence.<sup>42</sup> 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,<sup>43</sup> 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.<sup>44</sup> Intersex children, who are born with atypical sex characteristics, are often subjected to discrimination and medically

unnecessary surgery, performed without their informed consent.

22 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.<sup>45</sup>

### **Education**

23 Everyone has the right to education, without discrimination on the basis of their sexual orientation, gender identity or intersex status.<sup>46</sup> 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.<sup>47</sup> LGBT and intersex youth frequently experience violence and harassment, including bullying, from classmates and teachers in school.<sup>48</sup> 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.<sup>49</sup>

40 UDHR, art 25; ICERD, art 5(e)(iv); ICESCR, art 12; CEDAW, art 12; CRC, art 24; CESCR General comment No 14 (E/C.12/2000/4), para 18.

41 CCPR/C/CMR/CO/4, para 12; A/HRC/14/20, paras 22-23.

42 A/HRC/14/20, para 21.

43 CEDAW/C/CRI/CO/5-6, para 40.

44 CEDAW/C/BEL/CO/7.

45 CAT/C/DEU/CO/5.

46 UDHR, art 26; ICERD, art 5(e)(v); ICESCR, art 13; CEDAW, art 10; CRC, art 28; E/CN.4/2001/52 (2001).

47 E/CN.4/2006/45, para 113.

48 See for example: E/CN.4/2001/52, para 75; E/CN.4/2006/45, para 113. See also: UNESCO. 'Education Sector Responses to Homophobic Bullying'. (2012).

49 E/C.12/PER/CO/2-4.

### *Right to recognition before the law*

24 Everyone has the right to recognition everywhere as a person before the law.<sup>50</sup> Transgender persons 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. No-one should be subjected to pressure to conceal, suppress or deny their sexual orientation, gender identity or intersex status.<sup>51</sup>

### *Access to justice*

25 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.<sup>52</sup>

50 UDHR, art 6; ICCPR, art 16; CEDAW, art 15; CRC, art 8.

51 See for example CCPR/C/IRL/CO/3. (2008): Ireland, para 8; CEDAW/C/BEL/CO/7 (2014); A/HRC/14/22/Add.2. (2010): Kyrgyzstan, para 92.

52 See OHCHR, A/HRC/29/23 (2015), para 24.

## II ADDRESSING HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

### A UN Special Procedures

26 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.<sup>53</sup> The Special Procedures have a number of tools at their disposal for addressing violations of the rights of LGBT and intersex persons.

27 Mandate holders have consistently raised these issues as part of their *country visits*.<sup>54</sup> 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,<sup>55</sup> and the Special Rapporteur on the right to health expressed concern about discrimination against transgender women in Malaysia.<sup>56</sup>

53 For more on the UN Special Procedures, visit [www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx](http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx).

54 See for example: E/CN.4/1995/111, 16 January 1995: Colombia; E/CN.4/2000/3/Add.3, 25 November 1999: Mexico; E/CN.4/2001/66/Add.2, March 30, 2001: Brazil; E/CN.4/2003/3/Add.2, June 14, 2002: Honduras; E/CN.4/2003/68/Add.2, February 3, 2003, Uzbekistan; A/HRC/7/3/Add.4, 22 November 2007: Nigeria; A/HRC/14/20/Add.3, 20 May 2010: Poland; A/HRC/17/25/Add.3, 21 March 2011: Syrian Arab Republic; A/HRC/20/15/Add.2, 4 June 2012: Viet Nam; A/HRC/29/37/Add.2, 11 May 2015: Gambia.

55 A/HRC/29/37/Add.2, 11 May 2015: Gambia.

56 A/HRC/29/33/Add.1, 1 May 2015: Malaysia.



- 28 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.<sup>57</sup>
- 29 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.<sup>58</sup> 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.<sup>59</sup>
- 30 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 organisation working on the rights of transgender people.<sup>60</sup> 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.<sup>61</sup>
- 31 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*.<sup>62</sup>
- 32 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.<sup>63</sup>

57 A/HRC/28/63/Add.1, 4 March 2015.

58 A/HRC/20/16/Add.4.

59 A/HRC/26/29.

60 A/HRC/4/34/Add.1, 19 March 2007: Argentina.

61 A/HRC/26/29/Add.1, 10 June 2014: Cameroon.

62 [http://yogyakartaprinciples.org/principles\\_en\\_about.htm](http://yogyakartaprinciples.org/principles_en_about.htm).

63 <http://arc-international.net/wp-content/uploads/2014/07/HRC26-report.pdf>.

33 Finally, 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.<sup>64</sup> 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.<sup>65</sup>

## B Treaty monitoring bodies

34 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.<sup>66</sup> The treaty bodies have increasingly addressed human rights issues relating to sexual orientation, gender identity and intersex status.

35 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.<sup>67</sup>

36 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.<sup>68</sup>

37 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

64 Joint Statement from the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on protection of the right to freedom of opinion, 1 March 2010: Uganda.

65 A/HRC/14/23/Add.2.

66 More on treaty bodies is available at [www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx](http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx).

67 CEDAW/C/RUS/Q/8.

68 Statement of OII Europe on Intersex, Disability and the UN Convention on the Rights of People with Disabilities, p 7, available at [oiieurope.org/wp-content/uploads/2015/05/CRPD\\_2015\\_Statement\\_OII\\_Europe.pdf](http://oiieurope.org/wp-content/uploads/2015/05/CRPD_2015_Statement_OII_Europe.pdf).

persons in prisons.<sup>69</sup> 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 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.<sup>70</sup>

38 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.<sup>71</sup>

39 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 criminalisation 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.'<sup>72</sup>

40 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.<sup>73</sup>

69 UNOG: Committee Against Torture Considers Report of Croatia. (14 November 2014).

70 E/C.12/UKR/CO/6 (2014).

71 CEDAW/C/GC/33. (2015).

72 *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994), <https://www1.umn.edu/humanrts/undocs/html/vws488.htm>.

73 CRC, UNSPs, IACHR, ACHPR, CoE: 'Discriminated and made vulnerable: Young LGBT and intersex people need recognition and protection of their rights International Day against Homophobia, Biphobia and Transphobia' (17 May 2015).



### III THE POSITION OF THE UN

#### A General Assembly and Human Rights Council

41 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.<sup>74</sup>

42 Since 2000, the UN General Assembly has included a reference to sexual orientation in its biennial resolutions on extrajudicial, summary and arbitrary executions,<sup>75</sup> as did the former Commission on Human Rights.<sup>76</sup> 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.<sup>77</sup> In recent years the General Assembly resolution on executions also covered gender identity as a ground for protection.<sup>78</sup>

43 In June 2011 the Human Rights Council adopted the first UN resolution on 'human rights, sexual orientation and gender identity.'<sup>79</sup> It adopted a follow up resolution on this theme in September 2014.<sup>80</sup> 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 Organisation 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

74 ARC International (2011). *LGBT Rights at the UN: A brief overview*. Geneva: ARC International. [arc-international.net/wp-content/uploads/2011/08/LG-BT-Rights-at-the-UN.pdf](http://arc-international.net/wp-content/uploads/2011/08/LG-BT-Rights-at-the-UN.pdf).

75 See, for example: A/RES/57/214; A/RES/59/197; A/RES/61/173; A/RES/63/182; A/RES/65/208; A/RES/67/168; A/RES/69/182.

76 E/CN.4/RES/2000/31; E/CN.4/RES/2002/36; E/CN.4/RES/2003/53; E/CN.4/RES/2004/37; E/CN.4/RES/2005/34.

77 E/CN.4/RES/2002/77; E/CN.4/RES/2003/67; E/CN.4/RES/2004/67; E/CN.4/RES/2005/59.

78 A/RES/69/182/.

79 A/HRC/RES/17/19. (2011).

80 A/HRC/RES/27/32. (2014).

81 **States supporting the resolution:** Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Guatemala, Hungary, Japan, Mauritius, Mexico, Norway, Poland, Republic of Korea, Slovakia, Spain, Switzerland, Thailand, Ukraine, UK, USA, Uruguay.

**States against the resolution:** Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Moldova, Russian Federation, Saudi Arabia, Senegal, Uganda.

**Abstentions:** Burkina Faso, China, Zambia.

**Co-Sponsors of the resolution:** Albania, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Honduras, Iceland, Ireland, Israel, Italy, Luxembourg, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania

adopted by a vote of 23 to 19, with 3 abstentions.<sup>81</sup>

- 44 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'.
- 45 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.<sup>82</sup>
- 46 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.

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Serbia, Slovenia, South Africa, Spain, Sweden, Switzerland, Timor-Leste, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Venezuela.

82 A/HRC/29/23. (2015).

## B UN agencies and entities

- 47 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 Organisation clarified that homosexuality was neither a disorder nor a disease when it removed sexual orientation from the International Classification of Diseases.<sup>83</sup> 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.<sup>84</sup> In 2014, UNDP released a discussion paper on transgender health and human rights,<sup>85</sup> and UNICEF published an issues paper on eliminating discrimination against children and parents based on sexual orientation and/or gender identity.<sup>86</sup> The OHCHR has dedicated efforts to produce an

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83 <http://www.who.int/classifications/icd/en/>.

84 ILO. 'Discrimination at work on the basis of sexual orientation and gender identity: Results of pilot research' (September 2013).

85 UNDP. Discussion paper on 'Transgender Health and Rights' (2014).

86 UNICEF. Current issues no 9 'Eliminating discrimination against children and parents based on sexual orientation and/or gender identity' (2014).

awareness-raising campaign, 'Free & Equal', and related materials, such as fact sheets and infographics, relating to the human rights of LGBT and intersex persons.<sup>87</sup>

- 48 In 2014, the OHCHR, UNDP, UNFPA, UNHCR, UNICEF, UN Women, ILO, UNESCO, WHO, the World Bank and UNAIDS issued a joint report providing a snapshot of the work of UN bodies in combating discrimination and violence based on sexual orientation and gender identity, and related work in support of LGBT and intersex communities around the world, 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.<sup>88</sup> Recently, 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.<sup>89</sup>

## C Universal Periodic Review

- 49 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 three input documents: a national report, a compilation of UN information, and a summary of stakeholder submissions.<sup>90</sup> National civil

society organisations 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.<sup>91</sup>

- 50 To date at least 36 UPR recommendations on SOGI issues have been accepted by African States, including by Cameroon, Cape Verde, Côte d'Ivoire, Equatorial Guinea, Ghana, Kenya, Mauritius, São Tomé and Príncipe, Seychelles, South Africa, Swaziland, Uganda and Zambia. Accepted recommendations on SOGI issues by African States include recommendations on investigating attacks and threats, protecting LGBT and intersex human rights defenders, launching awareness campaigns, fighting violence and discrimination based on SOGI, 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.<sup>92</sup>

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

88 UN agencies: 'The Role of the United Nations in Combating Discrimination and Violence against Individuals Based on Sexual Orientation and Gender Identity: A Programmatic Overview' (November 2014).

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

90 <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>.

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91 <http://arc-international.net/global-advocacy/universal-periodic-review/>.

92 <http://s.upr-info.org/1VHfwa>.

## FOR MORE INFORMATION

Joint UN statement on Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people  
[www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTStatement.aspx](http://www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTStatement.aspx)

Office of the High Commissioner for Human Rights – sexual orientation and gender identity  
[www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx](http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx)

International Commission of Jurists – database of UN references to sexual orientation and gender identity  
[www.icj.org/advanced-search-for-sogi-un-database/](http://www.icj.org/advanced-search-for-sogi-un-database/)

UPR Info – database including Universal Periodic Review references to sexual orientation and gender identity  
<http://s.upr-info.org/1xnZGfM>

Programmatic overview of UN entity work on sexual orientation and gender identity  
<http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNSystem.aspx>

Booklet, 'Born Free and Equal'  
[www.ohchr.org/EN/Issues/Discrimination/Pages/BornFreeEqualBooklet.aspx](http://www.ohchr.org/EN/Issues/Discrimination/Pages/BornFreeEqualBooklet.aspx)

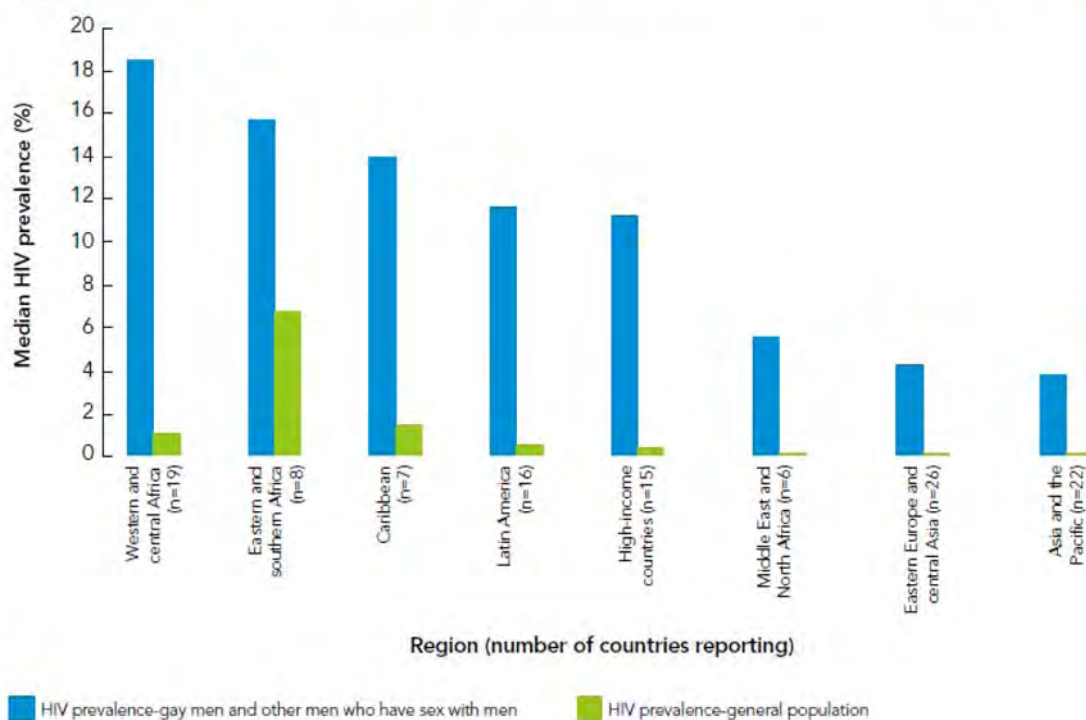
UN Free & Equal campaign  
[www.unfe.org/en](http://www.unfe.org/en)

## 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),<sup>1</sup> new HIV infections (HIV incidence) appear to be rising in several regions.<sup>2</sup>

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



Source: UNAIDS, *Gap report*, 2014, p 205

1 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](http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2118_terminology-guidelines_en.pdf) (accessed 27 October 2015).

2 UNAIDS *The gap report*, p 203.

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) people<sup>3</sup> face.<sup>4</sup> 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.<sup>5</sup> 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.

## I HUMAN RIGHTS VIOLATIONS BASED ON SOGI NEGATIVELY IMPACT HIV RESPONSES

Criminalisation, 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.<sup>6</sup>

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.<sup>7</sup>

In places where same-sex sexual relations are criminalised, 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.<sup>8</sup> 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

3 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.

4 See, eg, D Altman *et al* ‘Men who have sex with men: stigma and discrimination’, *The Lancet*, 2012, Volume 380, No 9839, pp 439-445; UNAIDS (n 2 above), pp 203-213.

5 As above.

6 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.

7 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.

8 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>

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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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

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.<sup>12</sup>

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.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> A study conducted in four

9 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.  
10 As above, p 2.  
11 Pan American Health Organisation, *Improving Access of Key Populations to Comprehensive HIV Health Services: Towards a Caribbean Consensus*, p 24.  
12 Fay *et al* (n 9 above) p 9

13 UNAIDS (n 2 above) p 224.  
14 'Transgender patients are dodging doctors' *Science Daily*, 24 April 2015, available at <http://www.sciencedaily.com/releases/2015/04/150424121116.htm> (accessed 25 October 2015).  
15 As above.  
16 JP de Santis, 'HIV infection risk factors among male-to-female transgender persons: A review of the literature', 20 *Journal of the Association of Nurses in AIDS Care* 362 (2009), and JH Herbst *et al.*, 'Estimating HIV prevalence and risk behaviors of transgender persons in the United States: a systematic review' 12 *AIDS Behaviour* 1 (2008).

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.<sup>17</sup> 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.<sup>18</sup>

In many settings, a significant proportion of young transgender women engage in selling sex.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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

In many contexts, including in Africa, legal barriers (such as criminalisation 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%.<sup>22</sup> An international review concluded that less than one in ten gay men and other MSM receive a basic package of HIV prevention interventions.<sup>23</sup> 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.<sup>24</sup> In Zambia, 73% of MSM had misinformation about HIV, thinking that anal sex was safer than vaginal sex.<sup>25</sup> 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.<sup>26</sup>

Overall, transgender people, gay men and other MSM are being left behind in the

17 TGM Sandfort *et al* 'Forced sexual experiences as risk factor for self-reported HIV infection among Southern African lesbian and bisexual women' (2013) *PLoS ONE* 8(1): e53552.

18 See among others, T Sandfort *et al* 'Histories of forced sex and health outcomes among Southern African lesbian and bisexual women: a cross-sectional study' *BMC Women's Health* 2015, 15:22 doi:10.1186/s12905-015-0181-6; T Rylan 'Effects of violence on transgender people' *Professional Psychology: Research and Practice*, Vol 43(5), October 2012, pp 452-459.

19 UNAIDS (n 2 above) p 217

20 As above.

21 UNAIDS (n 2 above) p 218.

22 UNAIDS (n 2 above) p 208.

23 P Wilson *et al* *Access to HIV prevention services and attitudes about emerging strategies: a global survey of men who have sex with men (MSM) and their health care providers*. Oakland: Global Forum on MSM and HIV; 2011.

24 Fay *et al* (n 9 above).

25 Fay *et al* (n 9 above) p 2.

26 RD Cranston 'Anal cancer prevention: how we are failing men who have sex with men' 2008 *Sexually Transmitted Infections* 84, pp 417-419; C Williamson 'Providing care to transgender persons: A clinical approach to primary care, hormones, and HIV management' 2010 *Journal of the Association of Nurses in AIDS Care*, Volume 21, Issue 3, pp 221-229.



global AIDS response. In 2010, MSM benefited from less than 2% of HIV prevention resources globally.<sup>27</sup> The vast majority of investments in HIV services for gay men and other MSM comes from international donors instead of national spending.<sup>28</sup> This is primarily because in countries where same sex relations are criminalised, 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.<sup>29</sup> 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.

## II 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 criminalisation 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.<sup>30</sup>

## C 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 criminalised and where stigma and discrimination have been reduced, MSM are more likely to take up HIV prevention, treatment, care and support services.<sup>31</sup> 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%.<sup>32</sup>

A number of global health institutions, including UNAIDS and the World Health Organisation, 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.<sup>33</sup>

27 J O'Malley *Introduction: global situation of human rights and MSM*, XVIII International AIDS Conference, Vienna, Austria, July 2010. TUAFO205. Slides available at <http://pag.aids2010.org/session.aspx?s=696>.

28 UNAIDS (n 2 above), p 210.

29 C Beyrer *et al* 'Global epidemiology of HIV infection in men who have sex with men' 2012 *The Lancet*, p 367.

30 UNAIDS and UNDP *UNAIDS Action Framework: Universal Access for Men who have Sex with Men and Transgender People*, 2009, pp 7-11, available at [http://data.unaids.org/pub/report/2009/jc1720\\_action\\_framework\\_msm\\_en.pdf](http://data.unaids.org/pub/report/2009/jc1720_action_framework_msm_en.pdf) (accessed 27 October 2015).

31 UNAIDS, *HIV and Sex between Men: Policy Brief*, 2006, p 2, available at [http://data.unaids.org/pub/BriefingNote/2006/20060801\\_policy\\_brief\\_msm\\_en.pdf](http://data.unaids.org/pub/BriefingNote/2006/20060801_policy_brief_msm_en.pdf) (accessed 27 October 2015).

32 C Beyrer *et al* *The global HIV epidemics among men who have sex with men*, 2011 available at <http://siteresources.worldbank.org/INTHIVAIDS/Resources/375798-1103037153392/MSMReport.pdf> (accessed 27 October 2015).

33 WHO, UNAIDS, GIZ, MSMGF and UNDP *Prevention and treatment of HIV and other sexually transmitted infections among men who have sex with men and transgender people: Recommendations for a public health approach*, 2011, p 12.

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

The involvement of community organisations has been critical to current global successes against the AIDS epidemic. Civil society and community organisations 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 organisations 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 organisations and health service providers to stop or reduce the scope of their activities owing to the fear of harassment and prosecution.<sup>34</sup> 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 organisations to advance the human rights and health of members of their communities. In some countries, legislation prohibits any organisation from supporting LGBT people. However, in a landmark 2014 judgement, the High court of Botswana held that the refusal by the government to register the organisation 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.<sup>35</sup> 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'.<sup>36</sup>

These limitations not only infringe on freedom of association; they also compromise the ability of LGBT people and individuals supporting them to organise 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.<sup>37</sup> UNAIDS therefore calls on all countries to create legal and social conditions to enable LGBT people and the organisations supporting them to fully participate in HIV and health responses.

## CONCLUSION

Laws that criminalise 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

34 V Bekiempis 'How anti-gay laws worsen diseases like AIDS and TB' *Newsweek* 24 June 2014, available at <http://www.newsweek.com/how-anti-gay-laws-worsen-diseases-aids-and-tb-256145> (accessed 27 October 2015).

35 High Court of Botswana *Thuto Rammoge & Others v The Attorney-General*, 14 November 2014, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/11/LEGABIBO-judgment-low-resolution.pdf> (accessed 27 October 2015).

This ruling was upheld by the Botswana Court of Appeal on 16 March 2016. See Court of Appeal of Botswana *The Attorney-General of Botswana v Thuto Rammoge & Others* <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2016/03/LEGABIBO-CoA-judgment.pdf> (accessed 16 March 2016).

36 High Court of Botswana *Thuto Rammoge & Others v The Attorney-General, Applicants heads of argument*, 2014, para 9, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/02/Heads-of-Argument-LEGABIBO.pdf> (accessed 27 October 2015).

37 WHO, UNAIDS, GIZ, MSMGF and UNDP (n 33 above) p 46.

and rights-based response.<sup>38</sup> UNAIDS, WHO and other global health organisations therefore call for urgent actions to end criminalisation, 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.



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<sup>38</sup> See UNAIDS (n 2 above); Beyrer *et al* (n 32 above); and also WHO, UNAIDS, GIZ, MSMGF and UNDP (n 33 above).