

jurisdiction. Article  
All human beings are  
born free and equal  
dignity and rights.  
are endowed with  
reason and conscience  
and should act towards  
one another in a spirit  
of brotherhood. Article  
Everyone is entitled

# Sexual Orientation, Gender Identity and International Human Rights Law

**Practitioners Guide No. 4**



INTERNATIONAL  
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Everywhere in the world, whatever the political, cultural or religious environment, human rights violations are perpetrated on the grounds of people's real or perceived sexual orientation or gender identity. Many countries have discriminatory laws and practices, as well as laws that criminalise expressions of sexual orientation and gender identity. All human beings are equal persons before the law regardless of their sexual orientation or gender identity, and are entitled to rights and freedoms deriving from the inherent dignity of the human person, as well as to the equal protection of the law without discrimination. Judges and lawyers, as protectors and guarantors of human rights, have an essential role to protect the rights and freedoms of all persons irrespective of their sexual orientation or gender identity.

International law provides the judiciary and legal profession with a powerful tool for protection of rights denied on the basis of sexual orientation and gender identity. This Guide explains how international law and standards can and should be used to provide victims of human rights violations, on the grounds of sexual orientation or gender identity, the protection to which they are entitled. The Guide explains how to apply the recently adopted Yogyakarta Principles and contains selected excerpts of primary texts from regional courts and tribunals.



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Practitioners Guide No. 4

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® Sexual Orientation, Gender Identity and International Human Rights Law – Practitioners Guide No. 4

ISBN: 978-92-9037-137-4

Geneva, 2009

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INTERNATIONAL  
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This Practitioners Guide was elaborated with the contribution of Philip Dayle and David Brown. Federico Andreu-Guzmán provided legal review. Priyamvada Yarnell edited and coordinated its production, Erin Brechtelsbauer assisted.



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*“Neither the existence of national laws, nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killings that gay, lesbian, bisexual, and transgender persons are subjected to because of who they are or are perceived to be. Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights.”*

— Louise Arbour, Former UN High Commissioner for Human Rights<sup>1</sup>

## Introduction

Everywhere in the world, whatever the cultural or religious environment, human rights violations are perpetrated on the grounds of people’s real or perceived sexual orientation or gender identity, including some of the most egregious such as arbitrary detention, torture and extrajudicial executions. Many countries have discriminatory national legislation and practices, as well as laws that criminalise expressions of sexual orientation and gender identity. This often tends to ‘legitimise’ human rights violations against gay, lesbian, bisexual and transgendered persons. This situation is an object of concern in several judicial and legal professions around the world. The Constitutional Court of Colombia has aptly described this:

*“For a long time, homosexuals have been subject to intense forms of marginalization and social and political exclusion, not only in our country but also in many other societies. Not only have homosexual behaviours been and continue to be criminalized by various legal provisions but, in addition, in the daily life, people with this sexual preference have been excluded from multiple social benefits and have had to [endure] social stigmatization, which have amounted to, in the most extreme cases, campaigns of extermination against these populations. [...] This situation of homosexuals has been justified via conceptions according to which these people, because they present/display a sexual orientation different from the majority of the population, had been considered abnormal, ill or immoral. [...] These old conceptions against homosexuality contradict essential values of contempo-*

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1. Presentation by the United Nations High Commissioner for Human Rights, Ms. Louise Arbour at the International Conference on LGBT (Lesbian, Gays, Bisexual and Transgender) Human Rights, Montreal, 26 July 2006.

*rary public law, based on pluralism and recognition of autonomy and equal dignity of people and different walks of life.”<sup>2</sup>*

In many countries, persons with different sexual orientation or gender identity, vis-à-vis the of model of sexuality socially or morally accepted or imposed, constitute a vulnerable social group and are often victims of persecution, discrimination and gross human rights violations. Courts of several countries have demonstrated these situations. For example, Justice Albie Sachs of the South African Constitutional Court wrote:

*“[i]n the case of gays, history and experience teach us that the scarring [biz] comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group. This special vulnerability of gays and lesbians as a minority group whose behaviour deviates from the official norm stems from the fact that [...] gays constitute a distinct though invisible section of the community that has been treated not only with disrespect or condescension but with disapproval and revulsion; they are not generally obvious as a group, pressurized by society and the law to remain invisible their identifying characteristic combines all the anxieties produced by sexuality with all the alienating effects resulting from difference; and they are seen as especially contagious or prone to corrupting others. None of these factors appl[y] to other groups traditionally subject to discrimination, such as people of colour or women, each of who, of course, have had to suffer their own specific forms of oppression”.<sup>3</sup>*

The traditional arguments – from religious and moral perspectives as well as from ‘scientific’ perspectives – have been challenged and/or rejected not only by developments in science but by international jurisprudence and in numerous courts throughout the world.<sup>4</sup>

All human beings are persons before the law regardless of their sexual orientation or gender identity, and are entitled to rights and freedoms deriving from the inherent dignity of the human person as well as to the equal protection of the law without discrimination. Judges and lawyers, as protectors and guarantors of human rights for

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2. Constitutional Court of Colombia, Judgment No. C-481/98 of 9 September 1998, paras. 10, 11 and 12 (Original in Spanish, unofficial translation).
  3. Constitutional Court of South Africa, Judgment of 9 October 1998, Case of *National Coalition of Gay & Lesbian Equality and Another v. Minister of Justice and others*, Case CCT11/98, paras. 127 and 128.
  4. See for example, Constitutional Court of South Africa, Judgment of 9 October 1998, Case of *National Coalition of Gay & Lesbian Equality and Another v. Minister of Justice and others*; Court of Final Appeal of the Hong Kong Special Administrative Region, Judgment of 17 July 2007, Case of *Secretary for Justice v. Yau Yuk Lung Zigo and Lee Kam Chuen*; Constitutional Court of Colombia, Judgment No. C-481/98 of 9 September 1998; Constitutional Tribunal of Ecuador, Judgment No. 111-97-TC of 27 November 1997.

all persons, have an essential role to protect the rights and freedoms of persons with different sexual orientation or gender identity. Indeed, as pointed out by the Court of Final Appeal of Hong Kong, in a case in which the judiciary declared unconstitutional a legal provision allowing criminalisation of homosexuality:

*“The courts have the duty of enforcing the constitutional guarantee of equality before the law and of ensuring protection against discriminatory law.”<sup>5</sup>*

Although it is true that the issue of sexual orientation and gender identity has been neglected by international law in the last decades, the issues have nevertheless attracted the concern and attention from human rights courts and bodies. Human rights violations on the grounds of sexual orientation and gender identity appear at various levels within the work of the UN treaty bodies and special procedures of the former Commission on Human Rights and its successor, the UN Human Rights Council. Regional Courts and bodies have made an important contribution towards the protection of rights of persons with different sexual orientation or gender identity as well as developing legal arguments based in international law. In recent years, the issue of sexual orientation and gender identity has been taken into account and incorporated in new legal instruments and legal standards, both universal and regional. Political bodies of intergovernmental organisations, both United Nations and regional, have adopted resolutions raising the question of human rights violations committed on the basis of sexual orientation and gender identity.

Sexual orientation and gender identity raise classic legal issues of international human rights law, such as non-discrimination, equality before the law and the right to private life, amongst others. However, the question of sexual orientation and gender identity are not restricted to these legal issues. Indeed, the question of sexual orientation and gender identity could be raised in relation to all human rights and fundamental freedoms. Experience teaches us that in certain contexts, persons with different sexual orientation were not fully recognised as persons under the law, a universal and fundamental right. In many countries, persons face multiple obstacles impairing, because their sexual orientation or gender identity, the right to work, to social protection, education, and/or adequate housing. Although in the last decade the question of sexual orientation and gender identity has raised more attention and found more legal answers from international human rights law and jurisprudence, certain aspects remain under-developed.

The ICJ works to increase the legal protection of victims whose human rights are violated because of their real or perceived sexual orientation and/or gender identity and to develop international law in order to provide, from a holistic perspective,

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5. Court of Final Appeal of the Hong Kong Special Administrative Region, Judgment of 17 July 2007, Case of *Secretary for Justice v. Yau Yuk Lung Zigo and Lee Kam Chuen*, Final Appeal No. 12 of 2006 (Criminal), para. 29.

better recognition and protection of human rights for persons with different sexual orientation and gender identity.

As a first contribution, the International Commission of Jurists (ICJ), jointly with the International Service for Human Rights, sponsored a meeting of legal experts on these issues. The meeting took place in November 2006, in Yogyakarta (Indonesia), with the participation of twenty-nine international human rights law experts and jurists, who agreed a statement of *Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (Yogyakarta Principles)*, which were officially launched in Geneva in March 2007. The principles are an authoritative interpretation of international human rights law on the subject and include statements of rights as well as obligations of States.

Following the adoption of the *Yogyakarta Principles*, the ICJ decided to initiate a series of studies with the aim of contributing to the clarification of the nature and scope of existing State obligations in relation to human rights and sexual orientation and gender identity, and to develop the legal argument that international human rights law does and should protect against abuses based on these grounds. Following this, the ICJ has produced a **Practitioners Guide on Sexual Orientation, Gender Identity and International Human Rights Law**. This Guide addresses questions of sexual orientation and gender identity in relation to certain human rights and fundamental freedoms. The aim is to clarify the existing international legal framework to deal with abuses of certain rights on the grounds of sexual orientation and gender identity and illustrate how the legal arguments for human rights protection are properly developed and sustained. Other rights and freedoms – such as the rights to be person under the law, to family, to work, to social protection, to education or to adequate housing, are not addressed in this Guide.

Inspired by the *Yogyakarta Principles*, this Guide draws on many sources of international law and jurisprudence as well as some comparative national law and practice. For international human rights jurisprudence, the main sources are UN human rights treaty bodies, UN special procedures, the Inter-American Court of Human Rights, Inter-American Commission on Human Rights, the European Court of Human Rights and the African Commission on Human and Peoples' Rights. Following a simple structure, it reviews the international law and jurisprudence as well as comparative law on the addressed subjects.

The present Guide first introduces the subject by putting the treatment of sexual orientation and gender identity in an historical context, Chapters I and II provide the foundations in international and comparative public law for human rights claims based on sexual orientation and gender identity. In particular, these Chapters explore how arguments of equality before the law and non-discrimination are used to sustain this claim. Chapter III looks at the right to private life. Chapter IV deals with arbitrary deprivation of liberty. The right to life is addressed in Chapter V. Torture and ill-treatment are discussed in Chapter VI. Chapter VII deals with freedom of expression and the rights to assembly and association. Chapter VIII examines asylum rights.



*“To penalize someone because of their sexual orientation is like what used to happen to us; to be penalized for something which we could do nothing about our ethnicity, our race. [...] I would find it quite unacceptable to condemn, persecute a minority that has already been persecuted.”*

—Archbishop Desmond Tutu, Nobel Peace Prize Laureate and Anglican archbishop<sup>6</sup>

## I. General Considerations

Historically, persons with different sexual orientation or gender identity vis-à-vis the of model of sexuality socially or morally accepted or imposed, have been subject to persecution and discrimination. A diversity of ‘arguments’ – religious, moral, ‘scientific’, and ‘cultural’ – have been used in an attempt to justify repression of homosexuality and denegation of rights for persons of different sexual orientation or gender identity. However, it is also true that not all societies and systems of religious or moral values were opposed to homosexuality and same-sex eroticism.

### 1. Religious and moral discourses

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Societies’ values and notions of propriety have often been based on religious ideologies of morality. Religious and moral discourses have shaped attitudes and laws in respect of sex and gender. It is unsurprising therefore, that ideas and law-making concerning sexual orientation and gender identity are strongly embedded within societal perceptions that reflect these beliefs. Among all the Abrahamic religions,<sup>7</sup> there has been a variety of oppression and tolerance of same-sex eroticism at different times, places and among different branches of these religions.

Jewish law originally condemned all non-procreative sexual practices as part of God’s mandate to Adam and Eve to populate the Earth.<sup>8</sup> There was also a strong emphasis on purity. Consistent with violation of purity laws, the penalty for homosexual practices was death.<sup>9</sup> Other contemporary cultures did not condemn sodomy, and it was variously practiced as part of ritual or healing ceremonies, for money, or as part of the practice of educating youth.<sup>10</sup> This changed with the advent of Christianity.

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6. World Social Forum, 19 March 2007, Nairobi, Kenya.

7. This is a term used to describe religions with a historic-theological link with Abraham, mainly Judaism, Christianity and Islam. See <http://lisar.lss.wisc.edu/welcome/abrahamic.html>

8. The Bible, Genesis 1:28.

9. The Bible, Leviticus 18:22, 20:13.

10. *Ibid.*

Christians did adopt the prohibition of sodomy. With the adoption of Christianity as the State religion of the Roman Empire in the fourth century, the law began to reflect this point of view. For the Christian Theology, sexual activity outside a procreative function was absolutely against the religion. The Catholic Church ruled that same-sex practices among men and women were crimes “against nature” (*crimen contra naturam* and *crimen nefandum*).<sup>11</sup> These prohibitions were used to combat paganism and to impose a model of social order and discipline.

Islam has historically been the most tolerant of the Abrahamic religions toward same-sex eroticism. In contrast to the Jewish and Christian view of same-sex attraction, which portrayed homosexuality as “against nature”, Islamic tradition viewed it as surrendering to a natural temptation.<sup>12</sup> The Islamic response to sodomy was consequently more ambivalent. The *Hadith* reports that Muhammad’s son-in-law and his chief lieutenant executed people “for doing what Lot’s people did.”<sup>13</sup> Conversely, the Koran states that Muslim martyrs in Paradise will be surrounded by boys like “scattered pearls”.<sup>14</sup>

The *Hadith* also states that Muhammad recommended tolerance toward *mukhan-nathun* (gender variant people, often entertainers), allowing them to enter Mecca and Medina with some restrictions, but without fear of persecution as long as they practiced Islam.<sup>15</sup> Therefore, Muslim disapproval of homosexual practices as sins tended to focus on the irreverence of the practices rather than on the act of sodomy itself.<sup>16</sup> Throughout history, many Muslim States maintained simultaneous policies of tolerance and discipline toward certain forms of homosexual eroticism. In the contemporary world, this tension can be seen in the contrasting examples of Afghanistan, where the custom of keeping *bacha* (dancing boys) still thrives amongst the landowning class, whilst its neighbour Iran, administers the death penalty for men convicted of sodomy.<sup>17</sup>

At the same time as the advance of Islam ended the Christian persecutions of homosexuals in the Middle East and much of the Mediterranean world, Christian Europe also entered a period of tolerance. With the exception of the Visigoths, whose kingdom was ultimately annexed by the Muslim Caliphate, no other Christian

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11. See *inter alia*, Jacques Chiffolleau, « Contra naturam. Pour une approche casuistique et procédurale de la nature médiévale », in *Micrologus*, IV, 1996, pp. 265-312; Mark Jordan, *The Invention of Sodomy in Christian Theology*, University of Chicago Press, Chicago, 1997; and Carla Casagrande and Silvana Vecchio, « Pêché », in Jacques Le GOFF and Jean-Claude SCHMITT, *Le dictionnaire raisonné de l'Occident médiéval*, Paris, Fayard, 1999, pp. 877-878.

12. Michael Goodich, *The Unmentionable Vice: Homosexuality in the Later Medieval Period*, Ross-Erikson Publishers, 1979, p. 111.

13. Mishkat, vol. 1, p. 765, *Prescribed Punishments*.

14. Sura 76:19.

15. Sunan Abu-Dawud, *Book 41: General Behavior (Kitab Al-Adab)*.

16. Naphy, *op. cit.*, p. 160.

17. Reuters, “Afghan boy dancers sexually abused by former warlords”, 18 November 2007; Human Rights Watch, “Iran: Two More Executions for Homosexual Conduct”, 22 November 2005.

kingdom outside the Roman Empire criminalised sodomy.<sup>18</sup> Beginning in the tenth century, ecclesiastical writers began to call for renewed persecution of sodomy, but these calls generally went unheeded.<sup>19</sup> Instead, Church law focused on individual penance, with periods of fasting and repentance for “sins of impurity”, while civil law remained altogether silent on the issue.<sup>20</sup>

Only in the twelfth century did the church return to persecutions. Beginning first with the Crusader Council of Nablus in 1120 and continuing in the more mainstream Lateran Council of 1139, the Catholic Church began to equate sodomy with heresy, asserting that sex for procreation was the “natural order” and rebellion against it was a rebellion *contra naturam* (against nature).<sup>21</sup> The Cathars, members of a heretical sect of Christianity repressed by crusaders in the late twelfth and early thirteenth centuries, were often accused of practicing non-procreative sex. It was felt that one act of heresy would logically lead to the other. The origin of the Cathar heresy in Bulgaria, pronounced *Bougres* in the French of the day, gave us the word “buggery”.<sup>22</sup> Once sodomy had been firmly entrenched in church law as a heretical act, European civil lawmakers began criminalising it as well. By the thirteenth century, sodomy was a capital offence throughout Europe. It would remain as such for over half a millennium, carrying over through the Protestant Reformation and, with the advent of European imperialism, into Europe’s overseas colonies as well.<sup>23</sup>

Outside of the world of the monotheistic religions, religious teaching has been generally less repressive of same-sex eroticism. There has also been less division between “religious” and “secular”, with institutions and customs blending elements of both. For example, Buddhism has very little to say about homosexuality, as the teachings of the Buddha are completely silent on same-sex attraction and on procreative sex alike. In the Theravada tradition of Buddhism, practiced by the majority of the populations of Sri Lanka, Thailand, Burma, Cambodia and Laos, punishments for monks engaging in sexual acts with each other is actually lighter than for monks engaging in sex with lay women – an extremely rare example of illicit homosexual activity being considered less serious than heterosexual.<sup>24</sup> In China, Confucian teachings about hierarchy did not condemn same-sex attraction. Two well-known stories from the Han dynasty (206 BC–220 AD) illustrate bonds of hierarchical loyalty cemented by sexual attraction. In one, Duke Ling of Wei’s young subordinate Mizi Xia bit into

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18. Goodich, *op. cit.*, p. 73-4; Percy, *op. cit.*, p. 688.

19. Percy, *op. cit.*, p. 686; “Decretals”, *Encyclopedia Britannica*, 1911.

20. Goodich, *op. cit.*, p. 25.

21. Naphy, *op. cit.*, p. 89.

22. *Ibid.*, p. 77.

23. Goodich at 87.

24. Percy, *op. cit.*, p. 169; Peter Jackson, “Performative Genders, Perverse Desires: A Bio-History of Thailand’s Same-sex and Transgender Cultures”, in *Intersections: Gender, History and Culture in the Asian Context*, No. 9, August 2003, p. 54.

a peach and finding it sweet gave it to the Duke to finish. In the other, Emperor Ai's male concubine Dongxian fell asleep on the Emperor's sleeve, and the Emperor, having to depart, cut the sleeve off rather than wake his lover. In the contemporary Chinese language, same-sex attraction is still known as "cut sleeve" or "shared peach".<sup>25</sup>

Indian scripture and religious law also lack broad condemnations of homosexual activity, especially before the arrival of Islam in the thirteenth century. The treatise Arthashastra, attributed to the imperial advisor Kautilya around 300 BC, condemns non-procreative sex in mild terms, imposing a small fine and ritual baths for the act.<sup>26</sup> The Manusmriti legal code, written between 200 BC and 200 AD, condemns homosexual practices only if they cause loss of caste or female virginity.<sup>27</sup>

It should be noted that anthropological literature is rife with descriptions of homosexual sexual practices in cultures worldwide that practice trance and possession as part of their religious or healing traditions, or which recognise a "third sex" that is often related to unique spiritual or shamanistic powers.<sup>28</sup>

Concerning religious discourses against sexual orientation and gender identity, it is relevant to underline what the High Court of South Africa stated:

*"There is still a substantial body of theological thought which holds that the basic purpose of the sexual relationship is procreation and for that reason also proscribes contraception. There is an equally strong body of theological thought that no longer holds the view. Societal attitudes to contraception and marriages which are deliberately childless are also changing. These changing attitudes must inevitably cause a change in attitudes to homosexuality."*<sup>29</sup>

## 2. "Scientific" discourses

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Repression of sexual orientations and gender identities has also been conducted via 'scientific' approaches. Historically, and especially during the nineteenth and the first half of the twentieth century, scientific discourse has had a fluid connection with the moral and religious discourse. Ideas of normalcy, deviance and social danger have often been constructed and enforced, repressing those with different sexual orientation and gender identity.

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25. Percy, *op. cit.*, p. 216-217; Chou Wah-Shan, "Homosexuality and the Cultural Politics of Tongzhi in Chinese Societies", in *The Journal of Homosexuality*, Harrington Park Press, Vol. 40, No. 3/4, 2001, p. 29.

26. Arthashastra 4.13.236.

27. Manu Smriti 8:369-370, 11:68 and 11:175.

28. See for example, Percy, *op. cit.*, p. 64.

29. Judgment of 1995, Case of *S. v. H.*, para. 125A-B, cited in Constitutional Court of South Africa, Judgment of 9 October 1998, *National Coalition of Gay & Lesbian Equality and Another v. Minister of Justice and others*, Case CCT11/98, para. 38.

The introduction of notions of sexual orientations and gender identity in scientific discourse arose in the field of medicine. Medical texts and natural histories considered the issue from time to time throughout the pre-modern era. Caraka, a famous Indian physician of the third century BC who helped codify the “Ayurveda” system of Indian medicine, described gender “abnormalities” in his treatise *Charakasamhita*. These included various forms of inter-sex conditions and sterility, along with male and female homosexuality.<sup>30</sup> South Asian Buddhist medical writers of the same era also described same-sex desire, sometimes grouping it with various forms of male impotence.<sup>31</sup> In the Arab world, early Muslim physicians described same-sex desire alternatively as a form of pathology or as congenital condition, the product of a person’s horoscope at birth.<sup>32</sup> In Europe, the Greek philosopher Aristotle offered explanations for homosexual desire in men rooted in epilepsy and the improper flow of semen within the body, but later in Europe, Christian physicians generally avoided the issue, seeing homosexual practices as sinful choices rather than as products of disease.<sup>33</sup>

The nineteenth and twentieth centuries saw the emergence of science as a forum to repress homosexuality. From biological, medical, criminological and sociological approaches several theories emerged to justify, ‘scientifically’, the repression of homosexuality. The theories of Westphal and Lombroso are examples. In 1860, the German psychiatrist Karl Westphal invented the diagnosis of the mental disorder of “contrary sexual feeling”, which would later come to be called “inversion” in the English-speaking world. In Italy, Cesare Lombroso, formulated, from the criminal anthropology and biology perspective, his theory of the born criminal (“innate criminal offender”), whose weakened nervous system predisposed him to engage in degenerate behaviour, which included homosexuality.<sup>34</sup> In 1876 Austrian psychologist Richard von Kraft-Ebbing published his book *Psychopathia Sexualis*. The work proclaimed that “every expression of the sex drive that does not correspond to the purposes of nature”, i.e., reproduction, was “perverse”. The book also popularised Westphal’s concept of inversion, and led to the first efforts to treat homosexuality as a disease. Darwin’s theory of natural selection also indirectly reinforced the view that homosexuality as an illness, as same-sex intercourse failed to produce off-spring.<sup>35</sup>

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30. William Naphy, *op. cit.*, p. 76.

31. *Ibid.*, pp. 598-99.

32. Naphy, *op. cit.*, p. 101; Warren Johannson, “Medical Theories of Homosexuality”, in William Percy, *op. cit.*, pp. 790-91.

33. Pickett, Brent, “*Homosexuality*”, The Stanford Encyclopedia of Philosophy (Winter 2006 Edition), Edward N. Zalta (ed.), p. 791.

34. *L’Uome delinquente* (The Criminal Man), Italy, 1876. Cesare Lombroso was considered one of the founders of the criminology (see *inter alia*, G. Stefani, G. Levasseur and R Jambu-Merlin, *Criminologie et science pénitentiaire*, Col. Précis Dalloz Ed. Dalloz, Paris, 1983).

35. Pieter R. Adriaens and Andreas De Block, “The Evolution of a Social Construction”, in *Perspectives in Biology and Medicine*, 49.4 (2006), p. 570-585.

Some criminological theories which emerged in the early twentieth century inspired by the ‘scientific’ discourse on the biological and/or social determinism, addressed the question of homosexuality as a form of “genetic degeneracy”, “inherited character trait”, “social deviance” or a “behaviour of social dangerousness”. These criminological theories found translation in criminal law in several countries. A number of countries began to create laws for “habitual criminals”, “vagrants” and other social outcasts to be removed from society, often through detention without trial. As gay men and lesbians were perceived as “innate criminal offenders”, “sexual inverts” or “perverts”, they were frequently subject to such laws. A typical example is of Spain in 1933. There, laws declared “ruffians, procurers, professional beggars, and those who live from others’ begging” to be “in a state of social dangerousness” and condemned them to “internment in a work establishment or agricultural colony”.<sup>36</sup> This law was modified in 1954 to explicitly include “homosexuals”, who were sentenced in addition to “absolute segregation from the others”.<sup>37</sup> Their detention combined religious education, hard physical labour and torture in an effort to cure the presumed delinquency and also protect society from any harm that might have been caused.<sup>38</sup> The sentence could last until the prisoner’s “cure or, failing that, the cessation of the state of social dangerousness”.<sup>39</sup>

In Germany, although the law against homosexual conduct had existed for many years prior to the Reich Criminal Code<sup>40</sup>, the Nazi regime took these laws further. A 1934 reform to the German Penal Code allowed for the indefinite “preventative custody” of “habitual delinquents;” this was supplemented by the 1939 *Law about Aliens to the Community*, which provided for the sterilization of such persons, including “asocial persons, vagrants, and homosexuals”.<sup>41</sup> Homosexuals were interned in concentration camps and branded with a pink-triangle. Tens of thousands perished in these camps.<sup>42</sup>

Some States in the United States of America also passed laws around the same time legislating the sterilization of “habitual criminals”, although the US Supreme Court

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36. Article 6 (2) of the *Law of Vagrants and Miscreants (Ley de Vagos y Maleantes)*, of 4 August 1933 (Original in Spanish, unofficial translation).

37. Amendment of 15 July 1954 (Original in Spanish, unofficial translation).

38. Arturo Arnalte, *Redada de violetas – La homosexualidad en el franquismo*, Ed. La Esfera de los Libros, Madrid, 2003.

39. Article 5 of the *Law of Vagrants and Miscreants (Ley de Vagos y Maleantes)*.

40. This provision dated from 1871.

41. Francisco Muñoz Conde, “El proyecto nacionalsocialista sobre el tratamiento de los ‘extraños a la comunidad’”, in *Revista Cenipec*, No. 20, Madrid, 1 January 2001, p. 2.

42. See *inter alia*: Johansson, Warren, “Pink Triangles”, in *Encyclopedia of Homosexuality*, *op. cit.*; and Johansson, Warren, and Percy, William A. “Homosexuals in Nazi Germany”, in Henry Friedlander (Ed.), *Simon Wiesenthal Center Annual: Volume 7*, New York, Allied Books, Ltd., 1990; Lively, Scott, “Homosexuality and the Nazi Party”, in George A. Rekers (Editor), *The Journal of Human Sexuality*, Lewis & Stanley Publishers, USA, 1996.

invalidated these laws.<sup>43</sup> Even in societies where punishments for social disorders were slighter, such as in northern Europe and the more urban States of the United States of America, misdemeanour statutes against vagrancy, disorderly conduct and the like were frequently deployed to harass gay men and lesbians, and subject them to short-term detention.<sup>44</sup>

During the nineteenth century, approaches emerged different from scientific discipline countering the theories which attempted to justify, on a 'scientific' basis the repression of homosexuality. For example, in the 1860s, German jurists Karl Heinrich Ulrichs and Károly Kertbenkya proposed the existence of a third gender, composed of people with souls or natures of the opposite sex.<sup>45</sup> Ulrichs called these people "Uranians" and Kertbenkya invented the term "homosexual" to describe them. Both men asserted their belief on the naturalness and innateness of homosexuality and advocated for the anti-sodomy laws to be repealed.

Further research into same-sex attraction by doctors and psychiatrists such as Magnus Hirschfeld and Sigmund Freud, and even a change of heart by von Kraft-Ebbing himself shortly before his death, disputed the conclusion that same-sex desire was in fact a disease, but to little effect.<sup>46</sup> Science was fully engaged in the task of seeking explanations and treatments for the 'disease' of homosexuality. The most commonly accepted explanation was that homosexuality was an "arrested development" of sexuality caused by anxiety induced in childhood.<sup>47</sup> New York psychiatrists such as Albert Ellis, and Charles Socarides developed "reparative therapies", in which patients were told they were sick but could recover through making insights into the subconscious source of their sexual compulsions and their psychopathological parents. One practitioner claimed a 27% success rate, while another claimed as high as one third.<sup>48</sup> Columbia University psychiatrist Sandor Rado developed an "aversion therapy" this could involve a mix of psychoanalysis with sessions showing the patient homoerotic images while administering electric shocks or drugs to induce nausea. In 1962, this therapy resulted in the death of a British soldier convicted of homosexuality.<sup>49</sup> Sex changes, usually compulsory, were

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43. US Supreme Court, Judgment of 1 June 1942, Case of *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

44. William N. Eskridge, Jr, "Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961", in *Florida State University Law Review*, No. 24, 1997; Shannon Minter, "Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity", in *Cornell International Law Journal*, No. 26, 1993, p. 804.

45. Manfred Herzer, "Kertbenkya, Roly María", in Percy, *op. cit.*, p. 659; Hubert Kennedy, "Ulrichs, Karl Heinrich", in Percy, *op. cit.*, p. 1339.

46. *Ibid.*; Warren Johansson, "Magnus Hirschfeld", "Freud, Sigmund" and "Freudian Concepts" in Percy, *op. cit.*, 430-437 and 535-539.

47. Arvind Narrain and Tarunabh Khaitan, "Medicalisation of Homosexuality", in *Combat Law*, Volume 1, No. 1 (March – April 2002).

48. Jack Drescher, "I'm Your Handyman", in *Journal of Homosexuality*, Volume 36(1) 1998, p. 27; Charles W. Socarides, "How America Went Gay", Leadership U, [www.leaderu.com/jhs/socarides.html](http://www.leaderu.com/jhs/socarides.html).

49. Beverley D'Silva, "When Gay Meant Mad", in *The Independent*, London, 4 August 1996.

another treatment. In 1953, famed British computer scientist and mathematician Alan Turing was convicted of gross indecency, sentenced to oestrogen injections and died shortly thereafter.<sup>50</sup> In South Africa nearly 900 compulsory sex changes were performed on soldiers during the apartheid era.<sup>51</sup>

As the scientific community grew to adopt the view that “sexual inversion” was a mental illness,<sup>52</sup> punishment for the crime of homosexuality shifted toward compulsory medical treatment. In 1970’s Spain the Law of Vagrants and Miscreants was repealed and replaced with the Law about Social Dangerousness and Rehabilitation.<sup>53</sup> Under this law, “those who commit homosexual acts”, as well as “insolent, brutal or cynical” people, the “morally perverted” and “the mentally deficient”,<sup>54</sup> could be sentenced to a wide range of punishments, including, for homosexuals and prostitutes, “confinement in a re-education establishment”.<sup>55</sup> In the United States of America, a number of jurisdictions enacted so-called “sexual psychopath” laws allowing a court to sentence repeat sexual offenders, including those whose convictions were for consensual homosexual sex, to involuntary confinement and treatment in mental hospitals.<sup>56</sup> The United Kingdom allowed some men convicted of homosexuality to choose between prison and sex reassignment treatment.<sup>57</sup> Although in most countries, involuntary medical treatment laws have now been repealed, and in fact forced medical treatment is recognised as valid grounds for claiming asylum,<sup>58</sup> involuntary treatment continues to be practised in some countries, such as the United Arab Emirates and some former Soviet States.<sup>59</sup>

At the same time, the research of US investigators such as Alfred Kinsey and Evelyn Hooker demonstrated that there was no scientific basis for asserting that heterosexuality is “normal” while other forms of sexual orientation are “deviant”, or that same-sex attraction was pathological. These researchers did not focus, as prior psychiatrists had, on convicted criminals or patients seeking treatment, and showed that homosexuals exhibited the same frequency of psychological well-being and

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50. Paul Gray, “Alan Turing”, Time, 29 March 1999.

51. Ana Simo, “South Africa”, The Gully, 25 August 2000.

52. For example, the American Psychiatric Association first classified “homosexuality” as a disease in 1952. American Psychiatric Association, Diagnostic and Statistical Manual: Mental Disorders (DSM-I) (1952), 38-39.

53. Law 16/1970 (ley Sobre Peligrosidad y Rehabilitacion Social) of 4 August 1970, BOE No. 187.

54. *Ibid.*, Article 20.

55. *Ibid.*, Article 30.

56. Eskridge, *doc. cit.*, pp. 712-716.

57. See for example, Andrew Hodges, *Alan Turing: the Enigma*, Vintage, Random House, London 1992.

58. For example, United States Court of Appeals for the Ninth Circuit, Decision of 24 June 1997, Case of *Pitcherskaia v. INS*.

59. United States Department of State, Press Release, Forced Medical Treatment of UAE Homosexuals, 28 Nov 2005, available at [www.state.gov/r/pa/prs/ps/2005/57390.htm](http://www.state.gov/r/pa/prs/ps/2005/57390.htm); Amnesty International, *Crimes of hate, conspiracy of silence: Torture and ill-treatment based on sexual identity*, ACT 40/016/2001, Chapter 4 (2001).



disorder as do heterosexuals.<sup>60</sup> These conclusions gained acceptance among scientists and health professionals in the US throughout the 1960s, culminating in the abandonment of the diagnosis of homosexuality as a mental illness by the American Psychological Association in 1973. Subsequently, the American Psychological, Psychiatric, and Medical Associations have all stated the position that reparative therapy, based on the flawed assumption that a patient should change his or her sexual orientation, is ineffective and is likely to cause harm.<sup>61</sup>

Elsewhere, the recognition that variant sexual orientation is not a disease evolved more slowly. The American Psychological Association has opposed the classification of homosexuality as a disorder since 1987<sup>62</sup> whilst the psychiatric bodies of Japan, Russia and China did not do so until 1995, 1999 and 2001, respectively. The World Health Organization removed homosexuality from the *International Classification of Diseases and Related Health Problems (ICD-10)* in 1992.<sup>63</sup>

In this context, the conclusion of the Constitutional Court of Colombia is apt. They took into account the scientific investigations made since the middle of twentieth century and reports from the World Health Organization:

*“homosexuality is not a disease, nor a harmful conduct, it represents a variation of human sexual orientation. Therefore, the traditional visions of homosexuality as a disease or an abnormality that must be cured medically are not acceptable in contemporary pluralistic societies”.*<sup>64</sup>

### 3. Political and ideological discourses

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In addition to the religious, moral and “scientific” arguments used, the question of homosexuality has also been utilised for political persecutions and targeting political opponents. History is, lamentably, rich in with illustrations. The Stalinist purges and McCarthyism are just two of the many examples. In Imperial Russia, unlike western Europe, medical discourse on homosexuality had relatively little influence in the late nineteenth century. Homosexuality was criminalised in 1835, but in fact the Tsarist authorities had a relatively indulgent attitude towards same-sex practices. The Bolshevik revolution abrogated the criminal legislation of the Tsarist regime, including the laws relating to same-sex relations between consenting adults. The Soviet criminal code of 1922 did not include homosexuality as an offence.

60. Evelyn Hooker, “The Adjustment of the Male Overt Homosexual”, in *Journal of Projective Techniques*, vol. 21 (1957), p. 29; A.C. Kinsey, W.B. Pomeroy, C.E. Martin, *Sexual Behavior in the Human Male*, W.B. Saunders Ed., Philadelphia, 1948.

61. See Karolyn Ann Hicks, “Reparative Therapy: Whether parental attempts to change a child’s sexual orientation can legally constitute child abuse”, in *American University Law Review*, Vol. 49, May 2000.

62. Fox, R.E. (1988), Proceedings of the American Psychological Association, Incorporated, for the year 1987: Minutes of the Annual meeting of the Council of Representatives, *American Psychologist*, 43, 508-531.

63. WHO, “ICD-10”, [www.who.int/classifications/apps/icd/icd10online](http://www.who.int/classifications/apps/icd/icd10online).

64. Constitutional Court of Colombia, Judgment No. C-481/98 of 9 September 1998, para. 11 (Original in Spanish, unofficial translation).

However, the Stalinist regime associated homosexuality with fascism and denounced “pederasts” as agents of corruption and subversion of capitalism. Homosexuality was re-criminalised in 1934,<sup>65</sup> using medical language to provide scientific justification for the deportation of homosexuals to the Gulag or internment in psychiatric establishments.<sup>66</sup> The Stalinist regime didn’t hesitate to use the new legislation for political repression and purges. The statement of Maxim Gorki “Destroy the homosexuals and fascism will disappear” reflected this political instrumentalisation.<sup>67</sup> Ironically, in the United States, the argument against homosexuality was used during the McCarthy Era as part of the anti-communist crusade. Homosexuals were portrayed as a threat to national security and/or as communist agents.<sup>68</sup> In this context, President Dwight D. Eisenhower signed Executive Order 10450 “*Security Requirements for Government Employment*”, 27 April 1953, which declared homosexuals to be “security risks” and mandated firing all federal employees who were deemed to be guilty of “sexual perversion.”

The sense of nationhood and cultural relativism are often used to object to decriminalising homosexuality, arguing that it is alien to national identity, culture and values. Countries invoke “nation”, “national traditions” and “cultural specificity” as the criterion for the unacceptability of homosexuality. In the now-overruled 1987 US Supreme Court decision *Bowers v. Hardwick*,<sup>69</sup> the majority deployed reasoning that mirrored the rhetoric used in many Southern countries to retain sodomy laws. One justice pronounced that the federal constitution did not confer a “fundamental right upon homosexuals to engage in sodomy”, finding the prohibition of sodomy “deeply rooted in this Nation’s history and tradition”. Similarly, in a dissenting judgment in *Dudgeon v. The United Kingdom*, a Cypriot judge on the European Court of Human Rights noted that “all civilized countries until recent years penalized sodomy”, and foretold “public outcry and turmoil” if such laws were repealed in either Cyprus or Northern Ireland, since “both countries are religious minded and adhere to moral standards which are centuries old”.<sup>70</sup>

If international human rights law and jurisprudence rejects the argument of cultural relativism, that domestic moral values justify the denial or impairment of an individuals sexual orientation, the UN Human Rights Committee generally rejects the

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65. The 1934 law was revoked in 1993.

66. See: Healey, Dan, *Homosexual Desire in Revolutionary Russia: The Regulation of Sexual and Gender Dissent*, University of Chicago Press, 2001; Gorsuch, Anne E., “Homosexual Desire in Revolutionary Russia: The Regulation of Sexual and Gender Dissent”, in *Journal of the History of Sexuality*, Volume 11, No. 4, October 2002; and Gert Hekma, Harry Oosterhuis and James Steakley (Editor), *Gay Men and the Sexual History of the Political Left*, Harrington Park Press, 1995.

67. Healey, Dan, *op. cit.*, p. 227.

68. David K. Johnson, *The Lavender Scare – The Cold War Persecution of Gays and Lesbians in the Federal Government*, University of Chicago Press, 2004.

69. US Supreme Court, Judgment of 30 June 1986 [*Bowers v. Hardwick*, 478 US 186 (1986)].

70. Both Northern Ireland and Cyprus remained intact after *Dudgeon v. UK* (1981) and *Modinos v. Cyprus* (1993).

criminalisation of homosexuality on the basis of the right to privacy, including consensual adult sexual activity.<sup>71</sup>

#### 4. Decriminalisation and continued criminalisation

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The European world of the Enlightenment had inherited the criminal laws rooted in Biblical passages and centuries of Christian tradition that mandated the death penalty for non-procreative sex.<sup>72</sup>

The French Revolution broke with this European custom by abolishing moral crimes, including sodomy, under a new Penal Code, promulgated in 1791. Updated by Napoleon, and spread by his military conquests, the Code was adopted throughout Continental Europe. After the fall of Napoleon, most countries repealed their Napoleonic Codes, but a few – notably France, Belgium, Spain and the Netherlands – did not re-criminalise sodomy.<sup>73</sup> Italy in 1889 (the Kingdom of Two Sicilies and later the Kingdom of Naples) decriminalised consensual same-sex acts between adults, as did Portugal in 1852 (but the crime was reintroduced in 1912). Subsequently, some of the new States created in Europe between the mid-nineteenth and early twentieth centuries, such as Italy and Poland, never instituted a criminal prohibition of sodomy, or enacted a variant of the Napoleonic Code shortly after their independence.<sup>74</sup> In other regions, few other countries decriminalised homosexual relationships: for example, in Japan, in 1883, the government reversed its decision adopted in 1873 making consensual sex between men illegal.

The modern decriminalisation movement began in the mid-twentieth century. The arguments were rooted in the social sciences, notably the field of psychology. Denmark became the first nation of the twentieth century to repeal its sodomy law, in 1933, followed by Switzerland in 1941 and Sweden in 1944.<sup>75</sup> After the Second World War, the British Wolfenden Report of 1957 and the American Model Penal Code, first drafted in 1959, recommended that the crime of sodomy be abolished.<sup>76</sup> The American State of Illinois became the first to adopt this recommendation in 1961. By 1983, half of the states of the United States of America had followed the lead of Illinois.<sup>77</sup> In Europe countries followed a roughly similar but slightly more

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71. Human Rights Committee, Views of 31 March 1994, Case of *Nicholas Toonen v. Australia*, Communication No. 488/1992, para. 8.4.

72. See for example, Leviticus 18:22.

73. Stephanie Coontz, *Marriage, A History: From Obedience to Intimacy, or How Love Conquered Marriage*, Ed. Penguin Group, New York, 2005, Chapter 9.

74. Robert Wintemute, “International Trends in Legal Recognition of Same-Sex Partnerships”, in *Quinnipiac Law Review*, Quinnipiac University School of Law, USA, Volume 23, 2004.

75. *Ibid.*, and Hubert Kennedy, “Chapter 1: Beginnings” in *Journal of Homosexuality*, Volume 38, No. 1/2, 1999, pp. 7, 14.

76. William Eskridge, “Challenging The Apartheid Of The Closet: establishing conditions for lesbian and gay intimacy, norms, and citizenship, 1961-1981” in *Hofstra Law Review*, Volume 25, 1996.

77. Melinda Kane, “Social Movement Policy Success: Decriminalizing State Sodomy Laws, 1969–1998”, in *Mobilization: An International Quarterly*, Volume 8, Number 3, October 2003, pp. 313 and 315.

rapid trajectory. Czechoslovakia and Hungary were the first of this group to abolish their sodomy laws, also in 1961.<sup>78</sup> By 1983, most of Europe on both sides of the Iron Curtain had decriminalised sodomy, with only five countries, the British Crown Dependencies, and certain parts of Yugoslavia retaining their anti-sodomy laws.<sup>79</sup>

It should be noted that several countries in Latin America and East Asia either never had an explicit legal prohibition of sodomy or, as was the case in Japan, Mexico and Brazil, enacted a version of the Napoleonic Code during the nineteenth century.<sup>80</sup> Notable exceptions, in addition to those countries mentioned in the previous paragraph, include China, which did not repeal its anti-sodomy statute until 1993, and the former British colonies of Southeast Asia, which retain their anti-sodomy laws today.<sup>81</sup>

Most former British colonies of Africa, the Caribbean and South Asia have also retained their anti-sodomy laws, as have all Middle Eastern and North African nations, save Israel.<sup>82</sup> Regarding the former British colonies in the Caribbean, many include in their constitution “savings law” clauses<sup>83</sup>, which maintain old colonial laws and Victorian laws, including the 1861 provisions of the UK’s *Offences against the Persons Act* and the 1885 Criminal law amendment, proscribing buggery and gross indecency. The United Kingdom repealed Victorian laws against homosexuality through its own tumultuous interrogation of them: beginning with the law and morality debates that led to the Wolfenden Report, followed by the legislative changes in the 1960s and human rights interventions resulting from its engagement with the European Human Rights system.

## 5. Movement towards recognition

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The year 1961 also saw the creation of the Mattachine Society of Washington in the United States of America, whose mission to work publicly “to equalize the status and position of the homosexual” made a sharp break with older “homophile” organisations, which had eschewed publicity.<sup>84</sup> Similar organisations grew rapidly elsewhere around the world, re-characterising the effort to repeal anti-sodomy laws as a part

78. Eskeridge, *doc. cit.*, p. 855; Michael Jose Torra, “Gay Rights after the Iron Curtain”, in *Fletcher Forum of World Affairs*, Volume 22:2, Summer 1998, pp. 73 and 76.

79. *Ibid.*, and Pratima Narayan, “Somewhere Over the Rainbow: International Human Rights Protection for Sexual Minorities in the New Millennium”, in *Boston University International Law Journal*, 2006, No.24, pp. 313 and 317.

80. Charles P. Sherman, “The Debt of Modern Japanese Law to French Law”, in *California Law Review*, Vol. 6, No. 3, March 1918, p. 198; Wayne Percy, *op. cit.*, p. 806; Daniel Ottosson, *LGBT world legal wrap up survey*, Ed. International Lesbian and Gay Association, 2006.

81. Daniel Ottosson, *LGBT world legal wrap up survey, doc. cit.*

82. *Ibid.*, and Indiana University, Office of Overseas Study, “GLBT Resources in the Middle East”, [www.indiana.edu/~overseas/lesbigay/middleeast.html](http://www.indiana.edu/~overseas/lesbigay/middleeast.html).

83. See Constitutions of Barbados, s 26, Jamaica, s 26(8); Trinidad retained its saving clause even after it became a republic.

84. Eskeridge, *doc. cit.*, pp. 821-822.

of a broader human rights struggle. As early as 1969 some activists were describing their efforts as a “gay liberation”.

Early on, the European human rights system was friendly to sexual-orientation-based claims. In 1981, the European Court of Human Rights declared the offences of buggery and gross indecency in Northern Ireland to violate the right to privacy under Article 8 of the European Convention on Human Rights (ECHR). This decision arose from a challenge to the law by a gay man who argued that the existence of the offences in Northern Ireland made him liable to criminal prosecution and infringed on his right to privacy. The court ruled in this landmark case of *Dudgeon v. The United Kingdom* that the “maintenance in force of the impugned legislation constitutes a continuing interference with the applicant’s right to respect for his private life (which includes his sexual life)”.<sup>85</sup>

The European Court decided similarly in 1988 and 1993 in *Norris v. Ireland*<sup>86</sup> and *Modinos v. Cyprus*<sup>87</sup> respectively. Both States in question cited strong feelings against homosexuality based on religion and claimed that there was a legitimate aim in the “protection of morals” for maintaining the laws. The European Court did not defer to the margin of appreciation or the individual State practice in either case and instead cited the overwhelming practice in other member States of the European human rights system that had long decriminalized consensual sex between adults of the same sex. The Court found no “pressing social need” for the maintenance of the legislation in either situation. In performing its proportionality test, the European Court found that the harm resulting from the anti-homosexual laws through the violation of the right to a private life outweighed the “legitimate aims” pursued by the law in question.

The European Court was however unwilling to examine a broader scope for sexual-orientation rights beyond striking down penal laws through the right to privacy provision.<sup>88</sup> It was not until 1999 that the European Court expressed a broader role for the right to privacy, in the cases of *Lustig Praen and Beckett v. The United Kingdom*<sup>89</sup> and *Smith and Grady v. United Kingdom*.<sup>90</sup> Using Article 8 of the ECHR, the Court felled laws that excluded gays and lesbians from the military and opened up an interpretation of privacy that envisaged gay and lesbian life reaching beyond closed doors and into the public realm. Also importantly in 1999, the European Court expressly affirmed “sexual orientation” as a prohibited category of discrimination,

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85. European Court of Human Rights, Judgment of 22 October 1981, Application No. 7525/76, para. 41.

86. Judgment of 26 October 1988, Case of *Norris v. Ireland*, Application No. 10581/83.

87. Judgment of 22 April 1993, Case of *Modinos v. Cyprus*, Application No. 15070/89.

88. The European Court of Human Rights consistently refused to pronounce on arguments of discrimination based on different ages of consent between homosexuals and heterosexuals in the cases of *Dudgeon*, *Norris*, and *Modinos*.

89. Judgment of 27 September 1999, Applications No. 31417/96 and 32377/96.

90. Judgment of 27 September 1999, Applications No. 33985/96 and 33986/96.

striking down a Portuguese court decision that dispossessed a father of his custody rights because he was gay.<sup>91</sup>

To date six countries have enacted legislation allowing same-sex marriage: the Netherlands,<sup>92</sup> Belgium,<sup>93</sup> Spain,<sup>94</sup> Canada,<sup>95</sup> Norway<sup>96</sup> and South Africa.<sup>97</sup> Two of these States did so by order of their respective supreme courts.<sup>98</sup> An additional 18 countries<sup>99</sup> and federal States of others five countries<sup>100</sup> recognise under different legal figures (Civil Union, registered partnership, civil partnership, civil solidarity pact, etcetera) same-sex partnerships that fall short of all the rights and duties of marriage. The right of same-sex couples to adopt children, or to be free of discrimination in the decision to place an adopted child, remains unsettled. The European Court of Human Rights has ruled that a State that allows adoption by single persons may not take that person's sexual orientation into account arbitrarily when considering their petition for adoption.<sup>101</sup> However, this case left two questions unanswered: whether it would be possible for a State to produce a justifiable reason to deny a petition to adopt on the grounds of sexual orientation and whether States may effectively discriminate against gays and lesbians by restricting eligibility for adoption to married couples, while not granting the right to marriage to same-sex couples.<sup>102</sup> Elsewhere, most States of the United States of America allow for gay and lesbian

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91. Judgment of 21 December 1999, Case of *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96.

92. Civil Code, Article 30, Book I, reform of 2001.

93. Civil Code, Article 143, Book I, Title V, Chapter I, reform of 13 February 2003, *Moniteur Belge*, 28 February 2003, pp. 9880-83.

94. Civil Code, Article 44, reformed by Law 13/2005, 30 June 2005, *Boletín del Estado*, 2 July 2005.

95. Civil Marriage Act of 20 July 2005.

96. The *Storting* (Norwegian Parliament) approved equal marriage in June 2008 with the new laws taking effect from 1 January 2009. The legislation repeals the *Registered Partnership Act* and provides previously registered partners the option of converting their partnerships to marriage.

97. Civil Union Act [No. 17 of 2006], 30 Nov 2006.

98. *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698, 2004 SCC 79 (Canada); *Fourie and Bonthuys v. Minister of Home Affairs*, Case CCT 25/03 (South Africa).

99. Andorra; Colombia; Croatia; Czech Republic; Denmark; Finland; France; Germany; Hungary; Iceland; Israel; Luxembourg; New Zealand; Slovenia; Sweden; Switzerland; United Kingdom and Uruguay.

100. Argentina (Autonomous City of Buenos Aires ; the Province of Río Negro and the city of Villa Carlos Paz), Australia (Australian Capital Territory, Tasmania and Victoria), Brazil (Rio de Janeiro), Mexico (Coahuila, Mexico D.F.) and United States of America (Connecticut, Hawaii, New Hampshire, New Jersey, Vermont, District of Columbia, Maine, Oregon and Washington).

101. Judgment of 22 January 2008, Case of *E.B. v. France*, Application No. 43546/02.

102. This is the case, for example, in the American state of Utah, which prohibits unmarried couples from adopting, and also prohibits same-sex marriage. Utah Code Title 30 Chapter 1 Section 2 and Title 78B Chapter 6 Section 117.

adoption by single persons or couples,<sup>103</sup> and such adoptions are allowed in South Africa,<sup>104</sup> Israel, Spain and in most parts of Canada and of Australia.<sup>105</sup>

Progress in human rights based on sexual orientation and gender identity has not been limited to North America and Europe. In the 1970s and 1980s, local movements to vindicate the rights of gays and lesbians were formed around the world. Colombia's *Movimiento por la Liberación Homosexual* concluded a successful campaign to decriminalise sodomy in 1981. Other successful campaigns were waged by local organisations in New Zealand, Israel and Australia.

The gay and lesbian movement was not merely focused on repealing anti-sodomy laws, it included other human rights issues, such as non-discrimination and recognition. The end of the Cold War brought new opportunities for human rights activism. In the decade after 1991, the growth of local civil society and the expansion of the Council of Europe helped bring down the sodomy laws of 19 countries in Eastern Europe and of the former Soviet Union. Over the past decade, the lesbian, gay, bisexual, and transgender (LGBT) rights movement, as it is now known, has combined local and transnational efforts to repeal the sodomy laws of Chile, Cape Verde, Fiji, the Marshall Islands, Mongolia, Nicaragua and the remainder of the United States of America.<sup>106</sup> In the Americas, beginning in 1994, several countries enacted prohibitions on sexual-orientation discrimination, by a constitutional amendment in Ecuador,<sup>107</sup> by legislation in Mexico,<sup>108</sup> by a Supreme Court ruling in Canada,<sup>109</sup> by a series of Constitutional Court rulings in Colombia<sup>110</sup> and by an executive order in Venezuela.<sup>111</sup> In this context, the adoption, in June 2008, by the General Assembly of the Organization of American States, by consensus, of its first Resolution on "Human Rights, Sexual Orientation and Gender Identity" is particularly relevant.<sup>112</sup>

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103. Gary J. Gates, M.V. Lee Badgett, Jennifer Ehrle Macomber and Kate Chambers, *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, Ed. The Williams Institute (UCLA School of Law) / The Urban Institute – Washington, DC, March 2007, p. 3.

104. Constitutional Court of South Africa, Judgment of 10 September 2002, Case of *Du Toit and de Vos v. Minister for Welfare and Population Development*, Case CCT 40/01.

105. Adoption Act of 1994, part 3, division 6, section 39, *Western Australia Consolidated Acts*.

106. Daniel Ottoson, *State Sponsored Homophobia*, Ed. International Lesbian and Gay Association, April 2007, 3 ([http://www.ilga.org/statehomophobia/State\\_sponsored\\_homophobia\\_ILGA\\_07.pdf](http://www.ilga.org/statehomophobia/State_sponsored_homophobia_ILGA_07.pdf)).

107. Constitution of Ecuador, Article 23, para. 3.

108. Federal Law to Prevent and Eliminate Discrimination (*Ley Federal para Prevenir y Eliminar la Discriminación*) of 11 June 2003.

109. *Egan v. Canada*, [1995] 2 S.C.R. 513.

110. See for example, Constitutional Court of Colombia: Judgments No. T-097/94, T-101/98, C-481/98, C-507/99, T-268/00, C-373/02 and T-301/04.

111. Regulation of the Statutory law of the Work (*Reglamento de la Ley Orgánica del Trabajo*), in the official journal (*Gaceta Oficial*) No. 5.292 of 25 January 1999.

112. AG/RES. 2435 (XXXVIII-O/08), "Human Rights, Sexual Orientation and Gender Identity", adopted the 3 June 2008.

Elsewhere in the world, anti-discrimination laws or constitutional provisions exist in South Africa,<sup>113</sup> Israel,<sup>114</sup> Taiwan<sup>115</sup> and Fiji.<sup>116</sup>

## 6. Some Definitions

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In addressing the issue of sexual orientation and gender identity it is necessary to clarify certain terms and notions. Frequently people use the terms “gay”, “lesbian”, “transgendered”, “transexual” in describing one’s sexual orientation. The *Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (Yogyakarta Principles)* provide useful definitions.

According to the preamble of the Yogyakarta Principles, *sexual orientation*:

*“refer[s] to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.”*

The status of one’s sexual orientation establishes the gender of the object of one’s sexual attraction or experiences. The sexual orientation of a person is often divided in terms of a) homosexual, describing same-gender attraction, b) heterosexual, describing opposite-gender attraction and c) bisexual, describing both opposite and same-sex attraction. These descriptions have their roots in medical interest in issues of sexuality and sometimes sit uneasily with some advocates because they have their origins in a period in medical history when homosexuality was identified and treated as a pathological illness.<sup>117</sup>

The origins of words such as lesbian, gay and straight, and their involvement in debates about cultural relativism, have created anxieties about their standard deployment in United Nations or some legal rights contexts. These concerns have given rise to creation of the term “men who have sex with men”, or MSM, to describe men who engage in same-sex behaviours.<sup>118</sup> This is an attempt to create a category that avoids the subjective claim to a sexual identity or, at least, the political connotations of some labels. Instead, MSM addresses the need for classification of behaviours for public health initiatives. MSMs have been declared a vulnerable group for HIV/AIDS prevention.

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113. Constitution of South Africa, Article 9, para. 3.

114. *Equal Employment Opportunity Act (1992)*; *Danilowitz v. El Al*, Supreme Court of Israel, 1995.

115. [www.state.gov/g/drl/rls/hrrpt/2007/100517.htm](http://www.state.gov/g/drl/rls/hrrpt/2007/100517.htm).

116. Constitution of Fiji, Article 38, section 2(a).

117. See generally, Miller, Alice, “*Sexual rights words and their meanings: The gateway to effective human rights work on sexual and gender diversity*”, paper submitted for the Yogyakarta meeting, November 2006.

118. See UNAIDS, “men who have sex with men” (<http://www.unaids.org/en/PolicyAndPractice/KeyPopulations/MenSexMen/>).



For the purpose of human rights protection, gender expression is also important to acknowledge and identify. The notion of what properly constitutes male or female norms has been a source of human rights abuses against individuals who do not fit or conform to the stereotypical models of masculine or feminine. Personal deportment, mode of dress, mannerisms, speech patterns, social behaviour and interactions, economic independence of women and the absence of an opposite-sex partner are all features that may subvert gender expectations.

According to the preamble of the Yogyakarta Principles, *gender identity*:

*“refer[s] to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”*

A transgender person is someone whose deeply held sense of gender is different from their physical characteristics at the time of birth. A person may be a female-to-male transgender (FTM) in that he has a gender identity that is predominantly male, even though he was born with a female body. Similarly, a person may be male-to-female transgender (MTF) in that she has a gender identity that is predominantly female, even though she was born with a male body or physical characteristics.

A transsexual person is one who has undergone physical or hormonal alterations by surgery or therapy, in order to assume new physical gender characteristics. Transgender and transsexual people can have any sexual orientation: it is important to distinguish the gender from the sexual activity. It will be later examined, that the advances in “gender identity” from the jurisprudence of the European Court of Human Rights are hugely premised on assuming new gender through complete alignment of the physical body by surgery, hormonal alterations and the potential for heterosexual performance (transsexualism). The jurisprudential foundation for this position was rooted in UK national jurisprudence. In his dissenting judgment<sup>119</sup> in the British case of *Corbett v. Corbett*, Lord Justice Thorpe said:

*“[t]o make the chromosomal factor conclusive, or even dominant, seems to me particularly questionable in the context of marriage. For it is an invisible feature of an individual, incapable of perception or registration other than by scientific test. It makes no contribution to the physiological or psychological self. Indeed in the context of the institution of marriage as it is today it seems to me right as a matter of principle and logic to give predominance to psychological factors just as it seem right to carry out the essential*

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119. Judgment of 2 February 1970, Case of *Corbett v. Corbett* (otherwise called *Ashley*), para. 155, cited in European Court of Human Rights, Judgment of 11 July 2002, Case of *I. v. The United Kingdom*, Application No. 25680/94, para. 36.

*assessment of gender at or shortly before the time of marriage rather than at the time of birth.”<sup>120</sup>*

In the Australian case of *Re Kevin*, a case of validity of marriage of transsexual, Mr. Justice Chisholm held:

*“[b]ecause the words ‘man’ and ‘woman’ have their ordinary contemporary meaning, there is no formulaic solution to determining the sex of an individual for the purpose of the law of marriage. That is, it cannot be said as a matter of law that the question in a particular case will be determined by applying a single criterion, or limited list of criteria. Thus it is wrong to say that a person’s sex depends on any single factor, such as chromosomes or genital sex; or some limited range of factors, such as the state of the person’s gonads, chromosomes or genitals (whether at birth or at some other time). Similarly, it would be wrong in law to say that the question can be resolved by reference solely to the person’s psychological state, or by identifying the person’s ‘brain sex’.*

*To determine a person’s sex for the law of marriage, all relevant matters need to be considered. I do not seek to state a complete list or suggest that any factors necessarily have more importance than others. However the relevant matters include, in my opinion, the person’s biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person’s life experiences, including the sex in which he or she was brought up and the person’s attitude to it; the person’s self-perception as a man or a woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex re-assignment treatments the person has undergone, and the consequences of such treatment; and the person’s biological, psychological and physical characteristics at the time of the marriage”.*<sup>121</sup>

LGBT is an acronym for “lesbian, gay, bisexual and transgender” people. It combines the sexual orientation-based identities of lesbian, gay and bisexual with a non-sexual orientation created category, transgender. The United Nations treatment of the issues of sexual orientation, gender identity and gender expression have also lumped all these questions for treatment under the banner of sexual minorities. Professor Alice Miller opines that though this umbrella term has been used by UN experts and mechanisms to deal with issues of discrimination, exclusion and

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120. Judgment of 2 February 1970.

121. Judgment of 12 October 2001, Family Court of Australia – At Sidney, File No. SY8136 OF 1999, [2001] Fam CA 1074, para. 328.

stigmatisation, it is unclear what groups are included as sexual minorities and how the status is determined.<sup>122</sup> She notes that though this categorisation is helpful for giving prominence to the issues, it may be a troublesome “shorthand” in terms of delineating categories of human rights abuses concerning sexuality and gender.

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122. Alice Miller further notes: “First, it is unclear exactly who is covered by the term and contests and competitions immediately arise over who fits under the umbrella (with sex workers elbowing lesbians and gays for inclusion), as well as who has most entitlement to “minority” status. Second, the clubbing together of the disparate groups makes it appear that they all suffer from the same kind of discrimination or abuse--and therefore that the same kind of remedies will suffice for all. The omnium-gatherum effect thus leaves it unclear what specific aspects of the laws or policies are under review for their abusive or discriminatory effect... Challenging criminalization of sex work or reform of prostitution laws is a very different response than enacting non-discrimination protections for discrimination based on gender identity or expression” (Alice Miller, “Sexual rights words and their meanings:....”, *doc. cit.*).



*“There is an inseparable connection to respect and guarantee human rights and the principle of equality and non-discrimination. States are obliged to respect and guarantee the full and free exercise of rights and freedoms without any discrimination. Non-compliance by the State with the general obligation to respect and guarantee human rights, owing to any discriminatory treatment, gives rise to its international responsibility”.*

— Inter-American Court of Human Rights<sup>123</sup>

## II. Foundations in International and Comparative Public Law

All human beings are persons before the law, regardless of their sexual orientation or gender identity, entitled to freedoms deriving from the inherent dignity of the human person: equality before the law, non-discrimination and equal protection of the law.

### 1. Relationship between non-discrimination and the right to be equal before the law

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The principle of non-discrimination<sup>124</sup> and the right to be equal before the law<sup>125</sup> are universally recognised and protected under international law. The UN Human Rights Committee declares that:

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123. Advisory Opinion OC-18/03, *Juridical Condition and Rights of the Undocumented Migrants*, of 17 September 2003, Series A No. 18, para. 85.

124. Articles 1 (3) and 55 of the United Nations Charter; Article 7 of the Universal Declaration of Human Rights; Articles 2, 4 (1) and 26 of the International Covenant on Civil and Political Rights (ICCPR); Article 2 of the International Covenant on Economic, Social and Cultural Rights; Article 2 of the Convention of the Rights of the Child; Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 3 of the Convention on the Rights of Persons with Disabilities; Article 14 of the European Convention on Human Rights; Protocol No. 12 of the European Convention on Human Rights; Article 2 of the African Charter on Human and Peoples' Rights; Article 3 of the African Charter on the Rights and Welfare of the Child; Article II of the American Declaration of the Rights and Duties of Man; Article 1 of the American Convention on Human Rights; Articles 3 and 11 of the Arab Charter on Human Rights; and Article 21 of the Charter of Fundamental Rights of the European Union.

125. Article 7 of the Universal Declaration of Human Rights; Article 26 of the ICCPR; Article 3 of the African Charter on Human and Peoples' Rights; Article II of the American Declaration of the Rights and Duties of Man; Article 24 of the American Convention on Human Rights; Protocol No. 12 of the European Convention on Human Rights; Article 11 of the Arab Charter on Human Rights; and Article 20 of the Charter of Fundamental Rights of the European Union.

*“Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”<sup>126</sup>*

The close and interdependent relationship between the principle of non-discrimination and the right to equality before the law is evidenced by Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR), which states that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. [...] [T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.”<sup>127</sup>

## **2. Scope and reach of the principle of non-discrimination and the right to be equal before the law**

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The principle of non-discrimination and the right to be equal before the law requires that the State not only protect people from discrimination from State agents but also from private entities and persons. According to the Human Rights Committee, non-discrimination implies the prohibition of “discrimination in law or in fact in any field regulated and protected by public authorities”.<sup>128</sup>

To give effect to the principle of non-discrimination and the right to be equal before the law, the Human Rights Committee has pointed out that “the term ‘discrimination’ [...] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”.<sup>129</sup> The African Commission on Human and People’s Rights<sup>130</sup> and the European Court of Human Rights<sup>131</sup> have adopted a similar approach. The Inter-American Court of Human Rights, for its part, has stated that “[i]n the ambit of the International Law of Human Rights, [...] which permeates its whole *corpus juris*, is [...] the principle of equality and non-discrimination. [...] [D]iscrimination is defined, essentially as any distinction, exclusion, restriction or limitation, or privilege, to the detriment of the human rights enshrined therein. The prohibition of discrimination comprises both

126. Human Rights Committee, *General Comment No.18, Non-discrimination*, para. 1.

127. ICCPR, Article 26.

128. Human Rights Committee, *General Comment No.18, Non-discrimination*, para. 12.

129. *Ibid.*, para. 7.

130. See *inter alia*: *Legal Resources Foundation v. Zambia*, Communication 211/98 (7 May 2000), paras. 63, 70 and fn. 3.

131. See *inter alia*: Judgment of 23 July 1968, *Case of Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, Application No 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64.

the totality of those rights, at substantive level, as well as the conditions of their exercise, at procedural level.”<sup>132</sup>

Non-discrimination and equality before the law also entails positive obligations as underlined by the Human Rights Committee:

*“the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State [...] There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3.”*<sup>133</sup>

Concerning the question of non-discrimination and minorities, the Human Rights Committee has outlined that the entitlement to enjoy the rights protected by the ICCPR (Article 2.1) without discrimination “applies to all individuals within the territory or under the jurisdiction of the State whether or not those persons belong to a minority. In addition, there is a distinct right provided under Article 26 for equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed by the States. It governs the exercise of all rights, whether protected under the Covenant or not, which the State party confers by law on individuals within its territory or under its jurisdiction, irrespective of whether they belong to the minorities specified in Article 27 or not.”<sup>134</sup>

The Human Rights Committee has considered that, although the rights to non-discrimination and to be equal before the law (Article 26 of the ICCPR) have not been listed among the non-derogable provisions in Article 4 (2) of the ICCPR, “there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances”.<sup>135</sup> The Inter-American Court of Human Rights goes further, concluding that, “the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable. Discriminatory treatment of any person, owing to gender, race, colour, language, religion or belief, political or

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132. Advisory Opinion No. OC-18/03, *doc. cit.*, para. 59.

133. Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 8.

134. Human Rights Committee, *General Comment No. 23, Rights of minorities, (Article 27)*, para. 4.

135. Human Rights Committee, *General Comment No. 29, States of Emergency, (Article 4)*, para. 8.

other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable.

### **3. Non-discrimination and the right of equality before the law**

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The principle of non-discrimination and the right of equality before the law does not preclude differential treatment and distinctions for certain categories of individuals, vis-à-vis certain rights and freedom, such as minors, the indigenous, aliens, non-citizens etcetera.<sup>136</sup> As the Human Rights Committee has pointed out, “[t]he right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory”<sup>137</sup> and “[t]he enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance”.<sup>138</sup> At the same time differential treatment is only acceptable if it is founded on reasonable and objective criteria.<sup>139</sup> It must have a legitimate purpose.<sup>140</sup>

The Inter-American Court has described its formula for discerning what it has opined amenable to protection: “[t]here may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position [...] It follows that there would be no discrimination in differences in treatment of individuals by a State when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review.”<sup>141</sup> The Inter-American Court has emphasised that a “distinction that lacks objective and reasonable justification is discriminatory”<sup>142</sup> and has pointed out that, when it is necessary to restrict a right, the restriction should be proportionate to this purpose.<sup>143</sup>

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136. See for example Articles 10 (3), 13, 25 of the ICCPR.

137. Views of 9 April 1987, Case of *S. W. M. Brooks v. the Netherlands*, Communication No. 172/1984, para. 13, in UN document Supp. No. 40 (A/42/40), annex VIII.B.. See also, among others, Views of 9 April 1987, Case of *Zwaan-de-Vries v. The Netherlands*, Communication No. 182/1984; Views of 3 April 1989, Case of *Ibrahimia Gueye and others v. France*, Communication No. 196/1985; and Views of 19 July 1995, Case of *Alina Simunek v. The Czech Republic*, Communication No. 516/1992.

138. Human Rights Committee, *General Comment No. 18, Non-discrimination*, para. 8.

139. *Ibid.*, para. 13.

140. *Ibid.*

141. Advisory Opinion OC-4/84, *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, of 19 January 1984, Series A No. 4, paras. 56-57.

142. Judgment of 23 June 2005, Case of *Yatama v. Nicaragua*, Series C No. 127, para. 185.

143. *Ibid.*, para. 206.



#### 4. Non-discrimination, equality before the law and sexual orientation and gender identity

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There is a radical positivist assertion that no protection of “sexual orientation” or “gender identity” exists in international human rights law, since these categories are not specifically enumerated in the core international human rights treaties. However, international instruments were not meant to be exhaustive in their enumeration of status and the reference to “or other status” is the clearest indication of the intention to encompass protection for unnamed categories. The acceptance of a non-discrimination norm in international law therefore admits an inherent openness to categories of protection that were unnamed and the genera of “sexual orientation” and “gender identity”, have found categories for claims.

Regarding Article 26 of the ICCPR, on equality before the law and right to be free from discrimination, the absence of “sexual orientation” and “gender identity” as expressly stated categories of non-discrimination, does not exclude them from the intended protection of this article. The inclusion of an “other status” category by the drafters, clearly contemplated grounds of discrimination that were either not listed or that would evolve in society. General Comment 18 of the Human Rights Committee explains that Article 26 of the ICCPR is free standing and is premised on ensuring equality before the law.<sup>144</sup>

In order to ensure protection it is an emerging trend in new human rights instruments and standards to incorporate “sexual orientation” or “gender identity” in the prohibited grounds of discrimination. Indeed, the UN General Assembly have urged all States to ensure the effective protection of the right to life and to investigate promptly and thoroughly all killings committed for any discriminatory reason, including sexual orientation.<sup>145</sup> The Parliamentary Assembly of the Council of Europe has adopted several resolutions on the question of discrimination on sexual orientation and gender identity (SOGI) grounds.<sup>146</sup> Recently, the General Assembly of the Organization of American States have adopted its first resolution on Human Rights, Sexual Orientation and Gender Identity.<sup>147</sup> In addition, new international instruments

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144. Human Rights Committee, *General Comment No. 18, Non-discrimination*, para. 12.

145. See Resolutions on “Extrajudicial, summary or arbitrary executions” No. 61/173 of 19 December 2006, No. 59/197 of 20 December 2004 and No. 57/214 of 18 December 2002.

146. See *inter alia*: Recommendation 924 (1981) 1, on *discrimination against homosexuals*, adopted the 1 October 1981; Recommendation 1470 (2000) of the Parliamentary Assembly on *situation of gays and lesbians and their partners in respect of asylum and immigration in the member States of the Council of Europe*; Recommendation 1474 (2000) of the Parliamentary Assembly on *situation of lesbians and gays in Council of Europe member States*; Recommendation 1635 (2003) of the Parliamentary Assembly on *lesbians and gays in sport*.

147. Resolution AG/RES. 2435 (XXXVIII-O/08) of 3 June 2008.

have explicitly integrated sexual orientation and gender identity in the list of prohibited grounds of discrimination.<sup>148</sup>

Legislative work within the European Union has taken a number of legislative steps to combat discrimination based on sexual orientation. Article 13 of the 1997 *Treaty of Amsterdam* empowered Member States of the European Community to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.<sup>149</sup> This led to the Employment Directive of 2000<sup>150</sup> that obliged all member States to introduce legislation banning discrimination in employment on a number of grounds, including sexual orientation, by December 2003. Directive 2004/58/EC of the European Parliament<sup>151</sup> listed sexual orientation among the prohibited grounds for discrimination. Staff Regulations of officials for the European Communities provides: “[o]fficials shall be entitled to equal treatment under these Staff Regulations without reference, direct or indirect, to [...] sex or sexual orientation, without prejudice to the relevant provisions requiring a specific marital status”.<sup>152</sup> The *European Arrest Warrant*<sup>153</sup> preamble states, “[t]his Framework Decision respects fundamental rights and observes the principles recognized by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her [...] sexual orientation”.<sup>154</sup> In the *Charter of Fundamental Rights of the European Union*,<sup>155</sup> Article 21 (1) on “Non-discrimination” states that, “discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national

148. See *inter alia*: the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Inter-American Commission on Human Rights in 2008; the Ibero-American Convention on Young People’s Rights (entered into force in 2008); Charter of Fundamental Rights of the European Union (Article 21.1); and the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, adopted by the Council of the European Union on 13 June 2002.

149. See <http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html#0001010001>

150. Council Directive 2000/78/EC of 27 November 2000 *establishing a general framework for equal treatment in employment and occupation*. See [http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l\\_303/l\\_30320001202en00160022.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_303/l_30320001202en00160022.pdf)

151. Directive 2004/58/EC of the European Parliament and of the Council, of 29 April 2004, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*.

152. Council Regulation (EC, ECSC, Euratom) No 781/98 of 7 April 1998 (O) 1998 L 113, p. 4; ‘the Staff Regulations,’ Article 1a (1)).

153. *Council Framework Decision on the European arrest warrant and the surrender procedures between Member States*, adopted by the Council of the European Union on 13 June 2002.

154. Preamble, para. 12.

155. As signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000.

minority, property, birth, disability, age or sexual orientation shall be prohibited". These instruments cement the norms set fourth in the *European Convention on Human Rights* and mandates States wishing to join the European Union to introduce legislation banning discrimination in employment based on sexual orientation. In addition, it overwhelmingly reinforces anti-discrimination based on sexual orientation within the European human rights system.

There is also progressive legislation in the Inter-American human rights system. The *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, adopted by the Inter-American Commission on Human Rights in March 2008, states, "[u]nder no circumstances shall persons deprived of liberty be discriminated against for reasons of [...] sexual orientation".<sup>156</sup> The *Andean Charter for the Promotion and Protection of Human Rights*<sup>157</sup> includes sexual orientation on the list of prohibited grounds for discrimination. The *Ibero-American Convention on Young People's Rights*, adopted in 2005 and entered into force in 2008, includes sexual orientation in the prohibited grounds of discrimination and protects the right of the young people to have their own identity and personality, including their sexual orientation.<sup>158</sup> During the preparatory process for the *World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (Durban, 2001), the American States adopted a Declaration and Plan of Action on 5–7 December 2000 in Santiago, Chile, which reaffirmed the prohibition of discrimination based on sexual orientation grounds and urged States "to give priority to promoting and protecting the full and equal enjoyment by women and men of all human rights and fundamental freedoms without distinction of any kind [such as] sexual orientation".<sup>159</sup>

The evolution of international refugee law on has been illustrative in constructing "sexual orientation" as a protected category in international law. Sexual orientation has been increasingly used as a basis to find a "particular social group" permissible for protection under refugee law.<sup>160</sup> Professor James C. Hathaway has proposed the inter-relationship between the five recognised grounds of persecution and the notion of civil and political rights, and the rationale for discerning categories of protection:

*"The modern refugee definition gave voice to this premise by moving away from protection on the basis of named, marginalized groups, and toward a more generic formulation of the membership principle. Given the prevailing primacy of the civil and political paradigm of human rights, it was*

156. Principle II *Equality and non-discrimination*.

157. Article 10 of the Andean Community (integrated by Bolivia, Colombia, Ecuador, Peru and Venezuela) have adopted on 26 July 2002 the Andean Charter for the promotion and Protection of Human Rights (signed by the Presidents of Bolivia, Colombia, Ecuador, Peru and Venezuela).

158. Articles 5 ("Principle of non-discrimination") and 14 (1) ("Right to the identity and personality") respectively of the *Ibero-American Convention on Young People's Rights*.

159. See UN Document WCR/RCONF/SANT/2000/L.1/Rev.4 of 20 December 2000, para. 143.

160. See generally, Chapter VIII on Asylum and Refuge.

*contextually logical that marginalization should be defined by reference to norms of non-discrimination: a refugee was defined as a person at risk of serious harm for reasons of race, religion, nationality, membership of a particular social group, or political opinion. The rationale for this limitation was not that other persons were less at risk, but was rather that, at least in the context of the historical moment, persons affected by these forms of fundamental socio-political disfranchisement were less likely to be in a position to seek effective redress from within the State”.*<sup>161</sup>

#### **4.1 The UN Human Rights Treaty Bodies and UN Special Procedures on Human Rights**

The UN Human Rights Treaty Bodies have discerned sexual orientation as a category for protection against discrimination and equality before the law.

The Human Rights Committee has affirmed that the reference to “equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” in Article 26 of the ICCPR includes discrimination on grounds of sexual orientation.<sup>162</sup>

The Committee on Economic, Social and Cultural Rights had stated that, “[b]y virtue of article 2.2 and article 3 [the International Covenant on Economic, Social and Cultural Rights] proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of [...] health status (including HIV/AIDS), sexual orientation [...] which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health”.<sup>163</sup>

The Committee Against Torture has considered that the sexual orientation is one of the prohibited grounds included in the principle of non-discrimination.<sup>164</sup> The Committee on the Rights of the Child has listed sexual orientation among the prohibited grounds of discrimination in its General Comments regarding adolescent health, HIV/AIDS and the rights of the child.<sup>165</sup>

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161. James C Hathaway, *The Law of Refugee Status*, Butterworth’s, Toronto, 1991, p. 136.

162. Human Rights Committee: Views of 31 March 1994, Case of *Nicholas Toonen v. Australia*, Communication No. 488/1992, paras. 8.2-8.7. See also: Views of 6 August 2003, Case of *Edward Young v. Australia*, Communication No. 941/2000, para. 10.4; and Views of 30 March 2007, Case of *X v. Colombia*, Communication No. 1361/2005, para. 7.2.

163. Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Article 12)*, para. 18. See also, Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The right to water*, para. 13.

164. Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States parties*, paras. 21 & 22.

165. Committee on the Rights of the Child, *General Comment No. 4: Adolescent Health*, para. 6 and *General Comment No. 3, HIV/AIDS and the rights of the child.*, para. 8.

Jurisprudence of the Human Rights Committee has progressively become more open to using discrimination, based on sexual orientation, under Article 26 of the ICCPR as ‘other status’. Previously it had refrained from using Article 26, when it could rule on discrimination under Article 2.1 under enjoyment of rights without discrimination. In the 1994 case of *Toonen v. Australia*,<sup>166</sup> the Human Rights Committee held that laws criminalising homosexuality constituted an unlawful interference with the right to privacy, protected and guaranteed by Article 17 of the ICCPR, and the guarantee to enjoy the right under Article 2.1. Toonen was a gay Australian citizen, resident in the State of Tasmania. He argued that sections 122<sup>167</sup> and 123<sup>168</sup> of the Tasmania Criminal Code charging unnatural sexual intercourse and indecent practice between males violated his rights: not to be discriminated (Article 2(1) of the ICCPR), to privacy (Article 17 of the ICCPR) and to equal protection under the law without any discrimination (Article 26 of the ICCPR). The Committee found a violation of Article 2(1) and 17(1) but did not consider it necessary to consider a violation of the non-discrimination provision of Article 26. The Committee decided that the enjoyment of the right to privacy was guaranteed under Article 2(1) of the ICCPR and interpreted “sex” in Article 2(1) to include “sexual orientation”. On the question of whether there was discrimination, the Committee concluded:

*“[t]he State party has sought the Committee’s guidance as to whether sexual orientation may be considered an ‘other status’ for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation”.*<sup>169</sup>

In assessing the reasonableness of the retention of the laws, the Committee rejected the Australian arguments that moral issues were purely a matter of domestic concern. The Committee noted the fact that Tasmania was the only Australian State that retained buggery laws and that the State Party had conceded both that a reasonable level of tolerance existed towards homosexuality throughout the rest of Australia and the lack of “reasonable and objective criteria” of the contended provisions of the Tasmania criminal code.

It has been argued that the use of the “other status” provision under Articles 2(1) and 26 of the ICCPR would have been more satisfying, instead of an interpretation that

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166. Views of 31 March 1994, Communication No. 488/1992, Case of *Nicholas Toonen v. Australia*, UN Doc. CCPR/C/50/D/488/1992 of 4 April 1994.

167. Section 122 stated that: “Any person who: a) has sexual intercourse with any person against the order of nature [...] c) consents to a male person having sexual intercourse with him or her against the order of nature is guilty of a crime”.

168. Section 123 stated that: “Any male person who, either in public or private, commits any indecent assault upon or other act of gross indecency with another male person, or procures another male person to commit any act of gross indecency upon himself or any other male person is guilty of a crime”.

169. Views of 31 March 1994, Case of *Nicholas Toonen v. Australia*, *doc. cit.*, para. 8.7.

includes “sexual orientation” in the definition of “sex”.<sup>170</sup> The Committee’s formulation might have given undiluted prominence to the nuance of homosexuality and the particular concerns that it presents for protection under the ICCPR. The distinctly separate treatment of “sex” and “sexual orientation” in other instruments<sup>171</sup> indicates that the categories of “sex” and “sexual orientation” have enjoyed distinctly separate meanings in international law. It may be noteworthy that the Committee did not proceed to find discrimination under Article 26 of the Covenant, which may have further affirmed the genus of “sexual orientation” as amenable to protection from discrimination.

The subsequent jurisprudence relating to sexual orientation in the United Nations has progressed away from the *Toonen* formulation in claiming protection for the category of sexual orientation in international human rights law under ‘sex’ rather than ‘other status’. In *Young v. Australia*,<sup>172</sup> Mr. Young applied for a war veteran’s dependant pension. The Federal Department of Veteran Affairs refused to consider his application because his partner of 38 years was also male. The relevant law stated that to be a “member of a couple” the persons must be “of the opposite sex”. Mr. Young complained that he was being discriminated on the grounds of his sexual orientation. The Human Rights Committee found that the State Party had violated Article 26 of the ICCPR by denying the author a pension on the basis of his sex or sexual orientation.<sup>173</sup> The Committee recalled its earlier jurisprudence that the prohibition against discrimination under Article 26 also comprised discrimination based on sexual orientation. While noting that not every distinction amounted to prohibited discrimination under the ICCPR, the Committee observed that the State Party had provided no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual

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170. See Sarah Joseph, “Gay Rights under the ICCPR-Commentary on *Toonen v. Australia*”, in *University of Tasmania Law Review*, Vol. 13, No. 2, 1994; Anna Funder, “The *Toonen* Case”, in *Public Law Review*, Vol. 5, 1994; Wayne Morgan, “Identifying Evil for What it is: Tasmania, Sexual Perversity and the United Nations”, in *Melbourne University Law Review*, Vol. 19, 1994.

171. Explanatory Report of the Steering Committee for Human Rights (CDDH) of Article 1 Protocol 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms which speaks about “sexual orientation” as a prohibited category at <http://www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm>. See para. 20 of the Explanatory Report: “*The list of non-discrimination grounds in Article 1 is identical to that in Article 14 of the Convention. This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today’s societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included. It is recalled that the European Court of Human Rights has already applied Article 14 in relation to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in the case of Salgueiro da Silva Mouta v. Portugal)*”. This discussion takes place distinctly apart from under the rubric of “sex,” which also exists as a separate category in the ECHR.

172. View of 6 August 2003, Case of *Edward Young v. Australia*, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000, 18 September, 2003.

173. *Ibid.*, para. 10.4.

partners, who are granted such benefits, was reasonable and objective, Nor had it provided evidence which would point to the existence of factors justifying such a distinction. Consequently, the Committee found that the State Party had violated Article 26 of the ICCPR by denying the author a pension on the basis of his sex or sexual orientation.

The Human Rights Committee decided similarly in the case of *X v. Colombia*.<sup>174</sup> The Committee pointed out that, “the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation, [and that] differences in benefit entitlements between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry or not, with all the ensuing consequences”.<sup>175</sup> The Committee has concluded that “the victim of a violation of article 26, is entitled to an effective remedy, including reconsideration of his request for a pension without discrimination on grounds of sex or sexual orientation”.<sup>176</sup>

The UN Special Procedures on Human Rights have pronounced on the question of rights of non-discrimination and to be equal before the law in relation to discrimination in relation to sexual orientation and gender identity. The UN Working Group on Arbitrary Detention, in expressing its views on homosexuals who are detained or given prison sentences solely because of their sexual orientation opined that “detention [is] arbitrary because it violate[s] articles 2 (1) and 26 of the [ICCPR] which guarantee[s] equality before the law and the right to equal legal protection against all forms of discrimination, including that based on sex”.<sup>177</sup> The Working Group based this opinion on the UN Human Rights Committee’s statement that the “reference to ‘sex’ in articles 2, paragraph 1 and 26 is to be taken as including sexual orientation”.<sup>178</sup> In a decision concerning 55 persons arrested on the grounds of their sexual orientation, the Working Group on Arbitrary Detention has considered that the “detention of [...] persons prosecuted on the grounds that, by their sexual orientation, they incited ‘social dissention’ constitutes an arbitrary deprivation of liberty, being in contravention of the provisions of article 2, paragraph 1, of the Universal Declaration of Human Rights, and articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights”.<sup>179</sup> In a later decision concerning 11 persons

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174. Views of 13 January 2001, Case of *X v. Colombia*, Communication No. 1361/2005, UN Doc. CCPR/C/89/D/1361/2005 of 14 May 2007.

175. *Ibid.*, para. 7.2.

176. *Ibid.*, para. 9.

177. Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2004/3, of 15 December 2003, para. 73.

178. *Ibid.* See also Working Group on Arbitrary Detention, Opinion No 7/2002 (Egypt), para. 27, in UN Doc. E/CN.4/2003/8/Add.1.

179. Working Group on Arbitrary Detention, Opinion No 7/2002 (Egypt) of 21 June 2002, para. 28, in UN Doc. E/CN.4/2003/8/Add.1.

detained for their sexual orientation and prosecuted under an anti-sodomy law, the Working Group on Arbitrary Detention has stated that:

*“Ever since the Human Rights Committee adopted its View in Toonen v. Australia and itself adopted its Opinion 7/2002 (Egypt), the Working Group has followed the line taken in those cases. That means that the existence of laws criminalizing homosexual behaviour between consenting adults in private and the application of criminal penalties against persons accused of such behaviour violate the rights to privacy and freedom from discrimination set forth in the International Covenant on Civil and Political Rights. Consequently, the Working Group considers ... the criminalization of homosexuality in Cameroonian law incompatible with articles 17 and 26 of the International Covenant on Civil and Political Rights, which instrument Cameroon has ratified.”<sup>180</sup>*

## 4.2 The European Court of Human Rights and non-discrimination

In the period around the *Dudgeon* case<sup>181</sup>, the European Court of Human Rights seemed unwilling to formulate a broader scope for gay rights beyond challenging penal laws with the use of the right to privacy provision.<sup>182</sup> It was in 1999 that the European Court expressed a broader role for the right to privacy and non-discrimination, in the twin cases of *Lustig-Prean and Beckett v. United Kingdom*<sup>183</sup> and *Smith and Grady v. The United Kingdom*.<sup>184</sup> In *Smith and Grady*, the European Court opined, that “the question for the Court is whether the above-noted negative attitudes constitute sufficient justification for the interferences at issue. The Court observes from the Report of the HPAT [*Homosexual Policy Assessment Team*] that these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants’ rights outlined above any more than “similar negative attitudes towards those of a different race, origin or colour”.<sup>185</sup> Using Article 8 of the *European Convention on Human Rights*, the Court struck down laws that excluded gays and

180. Opinion No 22/2006 (Cameroon) of 31 August 2006, para. 19, in UN Doc. A/HRC/4/40/Add.1.

181. See section 5, The movement towards recognition, Chapter I.

182. The European Court of Human Rights consistently refused to pronounce on arguments of discrimination based on different ages of consent between homosexuals and heterosexuals in the cases of *Dudgeon v. United Kingdom* (1983), *Norris v. Ireland* (1988), and *Modinos v. Cyprus* (1993).

183. Judgment of 27 September 1999 (Final 27 December 1999), Case of *Lustig-Prean and Beckett v. United Kingdom*, Applications No. 31417/96 and 32377/96.

184. Judgment of 27 September 1999, Case of *Smith and Grady v. The United Kingdom*, Applications No. 33985/96 and 33986/96.

185. *Ibid.*, para. 97.



lesbians from the military and opened up an interpretation of privacy that envisaged the public manifestations of the gay experience. The Court framed its reasoning as follows:

*“[t]he Court considers that, in the circumstances of the present case, the applicants’ complaints that they were discriminated against on grounds of their sexual orientation by reason of the existence and application of the policy of the Ministry of Defence, amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 8 of the Convention”.*<sup>186</sup>

The European Court in *Salgueiro da Silva Mouta v. Portugal* expressly affirmed “sexual orientation” as a prohibited category of discrimination, striking down a decision of a Portuguese court that dispossessed a father of his custody rights because he was gay.<sup>187</sup> The European Court decided that “the applicant’s homosexuality was a factor which was decisive in the final decision. That conclusion is supported by the fact that the Court of Appeal, when ruling on the applicant’s right to contact, warned him not to adopt conduct which might make the child realize that her father was living with another man ‘in conditions resembling those of man and wife’”.<sup>188</sup> The European Court concluded that that:

*“there was a difference of treatment [...] based on the applicant’s sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words ‘any ground such as’ (in French ‘notamment’)”.*<sup>189</sup>

In the case of *S.L. v. Austria* before the European Court, the applicant alleged that the maintenance of Article 209 of the Austrian Criminal Code, which penalised homosexual acts of adult men with consenting adolescents between fourteen and eighteen years of age, violated his right to respect for his private life and was discriminatory. The European Court noted that Parliament, in its consideration of scientific evidence in favour of equal age of consent for both heterosexuals and homosexuals, had rejected the notion that “male adolescents were ‘recruited’ into homosexuality”. The Court reasoned that:

*“[t]o the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment*

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186. *Lustig-Prean and Beckett v. The United Kingdom*, doc. cit., para. 108.

187. Judgment of 21 December 1999 (final 21 March 2000), Case of *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96.

188. *Ibid.*, para. 35.

189. *Ibid.*, para. 28.

*any more than similar negative attitudes towards those of a different race, origin or colour*".<sup>190</sup>

In the case of *Goodwin v. United Kingdom*, the Court has significantly advanced questions of gender identity. The applicant alleged violations of Articles 8 (right to privacy), 12 (right to marry), 13 (right to remedy) and 14 (non-discrimination) of the *European Convention on Human Rights* in respect of the legal status of transsexuals in the United Kingdom and particularly their treatment in the sphere of employment, social security, pensions and marriage. After finding violations of Articles 8 and 12, the Court concluded that no separate issue arose under Article 14.<sup>191</sup>

Similarly, in the case of *Van Kück v. Germany*,<sup>192</sup> the Court declined to consider a violation of Articles 6 and 8 in conjunction with 14, in respect of an invasive court inquiry of whether the applicant genuinely required gender reassignment surgery that justified reimbursement claims. The Court decided that the issues were adequately dealt with by Article 8 of the Convention.

### 4.3 The Inter-American System of Human Rights

Like other international human rights instruments, there are no explicit references to "sexual orientation" or "gender identity" in the human rights instruments of the Inter-American system,<sup>193</sup> with the exception of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*. However, in its *Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants*, the Inter-American Court of Human Rights has pointed out that "[i]t is perfectly possible, besides being desirable, to turn attentions to all the areas of discriminatory human behaviour, including those which have so far been ignored or neglected at international level (e.g., *inter alia*, social status, income, medical state, age, sexual orientation, among others)".<sup>194</sup>

The Inter-American Commission on Human Rights has started to address this issue. In the first case on human rights and sexual orientation in the Inter-American system, *Marta Lucía Álvarez Giraldo v. Colombia*, a petition concerning an inmate at a women's prison who was denied the right to intimate visits with her same-sex partner, the Inter-American Commission decided to admit the petition because it found that, "in principle, the claim of the petitioner refers to facts that could involve, *inter alia*, a violation of Article 11(2) of the American Convention in so far as they

190. Judgment of 9 January 2003 (final 9 April 2003), Case of *S.L v. Austria*, Application No. 45330/99, para. 44.

191. Judgment of 11 July 2002, Case of *Christine Goodwin v. United Kingdom*, Application No. 28957/95.

192. Judgment of 12 June 2003, Case of *Van Kück v. Germany*, Application No. 35968/97.

193. See *inter alia*, Article II of the American Declaration on the Rights and Duties of Man; Articles 1(1) and 24 of the American Convention on Human Rights; Article 9 of the Inter-American Democratic Charter; Principle 2 of the Declaration of Principles on Freedom of Expression.

194. Advisory Opinion OC-18/03, *Juridical Condition and Rights of the Undocumented Migrants*, of 17 September 2003, Series A No. 18, para. 63.

could constitute an arbitrary or abusive interference with her private life”.<sup>195</sup> The Inter-American Commission has pointed out that the criminalization of homosexuality and deprivation of liberty simply because of sexual preference is a practice “contrary to the provisions of various articles of the American Convention and must therefore be corrected”.<sup>196</sup> Based on the principle of equality and non-discrimination, and taking into account that “[s]exual preference is included as a category as it is encompassed by the very concept of sex”, the Special Rapporteurship on Migrant Workers and their Families of the Inter-American Commission on Human Rights has considered that migration policy cannot discriminate for reasons of “sexual preference” (sexual orientation).<sup>197</sup>

#### 4.4 The Court of Justice of the European Communities

The Court of Justice of the European Communities (the European Court of Justice) has also addressed the question of sexual orientation and gender identity. In its Judgment of the *Commission of the European Communities v. Federal Republic of Germany*,<sup>198</sup> the Court declared that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, as far as concerns discrimination based on religion or belief, disability and sexual orientation, the Federal Republic of Germany had failed to fulfil its obligations under that directive.

In the case of *P. v. S. and Cornwall County Council*, the European Court of Justice<sup>199</sup> held that discrimination arising from gender reassignment constituted discrimination on grounds of sex<sup>200</sup> and prevented the dismissal of a transsexual for a reason related to a gender reassignment. The applicant had been employed as the general manager of an educational establishment, operated by the County Council, and respondent *S* was the head of the establishment. *P* was taken on as a male employee but later informed *S* that she was planning to have gender reassignment in order to live as a woman. The applicant later wrote to *S* confirming that she was to undergo an operation for gender reassignment. The governors of the establishment were informed and during that summer *P* took sick leave for initial surgical treatment. Consequently, she was soon after given three months’ notice of dismissal and not permitted to return from sick leave in her female gender role. The final surgical

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195. Case number 11.656, Report No. 71/99 (Admissibility) of 4 May 1999, para. 21.

196. Inter-American Commission on Human Rights, Press release No. 24/1994.

197. *Second Progress report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere*, OEA/Ser.L/V/II.111, Doc. 20 rev., 16 April 2001.

198. Court (Fourth Chamber), Judgment of 23 February 2006, *Commission of the European Communities v. Federal Republic of Germany*, Case C-43-05.

199. Judgment of 30 April 1996, *P. v. S. and Cornwall County Council*, Case C-13/94.

200. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (Equal Treatment Directive).

operation took place before the notice of dismissal had expired. *P* complained, and the Court agreed, that she had been discriminated against on grounds of sex. The European Court of Justice held that:

*“where a person is dismissed on the ground that he or she intends to undergo or has undergone gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard”.*<sup>201</sup>

In the case of *Sarah Margaret Richards v. Secretary of State for Work and Pensions*,<sup>202</sup> the applicant was born on 28 February 1942 and her birth certificate registered her gender as male. Having been diagnosed as suffering from gender dysphoria, she underwent gender reassignment surgery on 3 May 2001. On 14 February 2002 she applied to the Secretary of State for Work and Pensions for a retirement pension to be paid from 28 February 2002, the date on which she turned 60, the age at which, under national law, a woman born before 6 April 1950 is eligible to receive a retirement pension. By decision of 12 March 2002, the application was refused on the ground that “the claim was made more than 4 years before the claimant reaches age 65”, which is the retirement age for men in the United Kingdom. The Court considered whether Council Directive 79/7/EEC<sup>203</sup> prohibited the refusal of a retirement pension to a male-to-female transsexual until she reached the age of 65, though she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.

The Court cited *P. v. S. and Cornwall County Council* and noted that the right not to be discriminated against on grounds of sex is one of the fundamental human rights that the Court had to ensure.<sup>204</sup> In determining the scope of Council Directive 79/7/EEC, the Court considered that it could not be confined to simply construe discrimination based on the fact that a person is of one or other sex. The scope of that directive was also found to be discriminatory, arising from the gender reassignment of the person concerned.

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201. Judgment of 30 April 1996, *P v S and Cornwall County Council*, Case C-13/94, paras. 21-22. The Sexual Discrimination (Gender Re-assignment) Regulations UK 1999 were issued to comply with the ruling of the European Court of Justice in *P. v. S. and Cornwall County Council*. This provides generally that transsexual persons should not be treated less favourably in employment because they are transsexual (whether pre- or post-operative).

202. Judgment of 27 April 2006, *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, Case C-423/04.

203. Council Directive 79/7/EEC of 19 December 1978 on the *progressive implementation of the principle of equal treatment for men and women in matters of social security* (See Articles 4,1 and 7,1).

204. Case C-13/94, *doc. cit.*, para. 19.

The European Court of Justice also decided that the unequal treatment at issue in the case was Sarah Margaret Richards' inability to have her new gender, acquired following surgery, recognised and consequently obtain a pension under the *Pensions Act of 1995*. By not recognising her gender, when she reached the retirement age of 60, unlike women whose gender was not the result of gender reassignment surgery, Richards was not considered eligible for a pension. The Court considered the unequal treatment, to which Richards was subject, as discriminatory and prohibited by Article 4(1) of Council Directive 79/7/EEC.<sup>205</sup>

The Court also noted that Article 4(1) of Directive 79/7/EEC is to be interpreted as precluding legislation which denies a person who has lawfully undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.

It is evident from these cases that the issue of "gender identity" have been pressed significantly within the European Court of Justice system and notably, under the rubric of discrimination based on "sex".

#### 4.5 The African Commission on Human and Peoples' Rights

The *African Charter on Human and Peoples' Rights (ACHPR)* observes a scheme of equality before the law and equal protection of the law in the same vein as the *Universal Declaration of Human Rights* and the ICCPR.<sup>206</sup> The framing of Article 28 of the ACHPR is slightly different from the aforementioned instruments as it invokes a language of each individual's duty in relation to other individuals, rather than a general "right" of non-discrimination. Nevertheless, the basis of all these instruments remains the commitment to equality before the law and non-discrimination.

The scope of the "right" of non-discrimination in the ACHPR is arguably free standing, as it is in the ICCPR, and does not only contemplate the non-discriminatory application of rights that are provided for in the African Charter, but confers a free-standing

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205. Case C-423/04, *doc. cit.*; see also the case of *K.B v. NHS Agency* at: <http://www.pfc.org.uk/node/361>. The British Professor Stephen Whittle has pointed out that: "*The case of Richards confirms the previous case of K.B v. NHS Pensions Agency but with much more clarity and therefore certainty.*" Both cases concerned pensions and they confirm that any national legislation, or workplace practice, which affords pay related benefits based upon sex or marital status, that results in a transsexual person who is permanently living in their new gender role being denied benefits is, in principle, incompatible with the requirements of Article 141 EC. Article 141 states that "*Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied*". This is regardless of whether a person is employed in the public or private sector, and the word "pay" is broadly defined, to include any consideration whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer." (<http://www.pfc.org.uk/files/richards-analysis.pdf>)

206. Article 3 of the ACHPR states that each individual shall be "*equal before the law*" and is entitled to "*equal protection of the law*," while Article 28 prescribes that "*every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance*".

and independent right against discrimination. The ordinary and grammatical meaning of the discrimination provision in Article 28 envisages categories such as “sexual orientation” and “gender identity” that are not otherwise specifically enumerated in the ACHPR. Article 3 of the ACHPR – which confers equality before the law and equal protection of the law – contemplates protection for all, regardless of sexual orientation. In addition, Article 2 of the ACHPR ensures protection for “sexual orientation”, either by the category of “other status” or in the definition of “sex”.

It must also be noted that even if the ACHPR acknowledges a right to non-discrimination based on sexual orientation and gender identity, the assertion of any such rights may be met with the corresponding argument that this right is limited by Article 27 (2). This provision stipulates that rights must be exercised “with due regard to the rights of others, collective security, morality and common interest”. Having raised a *prima facie* violation, the onus would then be on the State to demonstrate that such a right is limited or restricted in terms of Article 27 (2). The African Commission has applied a proportionality test which requires that such limitations are “strictly proportionate with and absolutely necessary for the advantages that are to be obtained” and may not interpret the right in a manner that renders it meaningless.<sup>207</sup> Murray and Viljoen, in their seminal article on non-discrimination based on sexual orientation and the African Commission, cited arguments of African values, majority morality and HIV prevention that may be invoked as limitations on any construction of a right to non-discrimination within the ACHPR, and offered reasoning on how these arguments may be met, given the aforementioned standards of proportionality.<sup>208</sup>

In addition, the ACHPR lays a clear foundation for the juridical construction of rights that could conceivably reference treatment in other human rights systems. Article 60 of the ACHPR stipulates that:

*“[t]he Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the Parties to the present Charter are members.”*

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207. *Media Rights and Another v. Nigeria*, Communication 105/93, 128/94, 130/94 and 152/96 69-70(1998).

208. See generally, Rachel Murray and Frans 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”, in *Human Rights Quarterly*, Vol. 29, 2007, pp. 86-111.

In addition Article 61 of the ACHPR states:

*“[t]he Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by Member States of the Organization of African Unity, African practices consistent with international norms on Human and People’s Rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.”*

## **5. Potential use of discriminatory impact in protection of sexual orientation and gender identity**

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The question of whether an outwardly neutral policy disproportionately disadvantaging a specific group constitutes impermissible discrimination is unsettled. This is an important area to human rights concerning SOGI. Often, vague morality provisions are used against sexual minorities, and statutes such as the buggery laws, though they implicate anal sex between a man and a woman, are used disproportionately against gay men.

The traditional view is well expressed in the European Court of Human Rights’ *Abdulaziz, Cabales and Balkandali v. United Kingdom*<sup>209</sup> opinion, applying the reasoning in the *Belgian Linguistic Case*<sup>210</sup>. The Court there did not find that the laws in question violated Article 14 on the grounds of race and national origin, as the mere fact that the laws disproportionately affected Blacks and Asians was “not a sufficient reason to consider them as racist in character: it is an effect which derives [...] from the fact that, among those wishing to immigrate, some ethnic groups outnumbered others”.<sup>211</sup> The Court also found that the impacts did not “transgress the principle of proportionality”.<sup>212</sup>

The same logic was used by the Human Rights Committee in a case in which a Sikh sought to use the prohibition of religious discrimination under Article 18 of the ICCPR to obtain relief from a Canadian law requiring the use of hardhats in construction sites. The Committee concluded that the, “legislation which, on the face of it, is neutral in that it applies to all persons without distinction [...] is justified by reference to the grounds laid down in Article 18, paragraph 3, and [is] to be regarded as reasonable and directed towards objective purposes that are compatible with the

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209. Judgment of 28 May 1985, Case of *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Application No. 9214/80, 9473/81 and 9474/81.

210. Judgment of 23 July 1968, Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64.

211. *Abdulaziz, Cabales and Balkandali v. United Kingdom*, *doc. cit.*, para. 85.

212. *Ibid.*, para. 88.

Covenant”<sup>213</sup>, despite the law operating in a way that “is said to [...] discriminate [...] against persons of the Sikh religion”<sup>214</sup> under Article 26.

European jurisprudence began to diverge from the traditional view beginning with a series of employment discrimination cases. As early as 1986, the European Court of Justice, in *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*, found that “[A]rticle 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex”.<sup>215</sup> This view was codified by the EU parliament in a pair of Council Directives, 97/80/EC in December 1997 and 2000/43/EC in June 2000. The first of these Directives, on the burden of proof in sex discrimination complaints before member States of the European Union, defined “indirect discrimination” as “an apparently neutral provision, criterion or practice [that] disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex”.<sup>216</sup> The latter provide for EU member States to implement legislative prohibitions on racial discrimination in employment to “provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence”.<sup>217</sup>

By contrast, the European Court of Human Rights has been reluctant to apply EU standards on indirect discrimination, especially outside of employment. For example, in the case of *Nachova and Others v. Bulgaria*, the European Court of Human Rights took note of the existence of Council Directive 2000/43/EC but declined to apply it to a case in which a Roma widow alleged that the military police shooting her AWOL (absent without leave) husband, in the wider context of anti-Roma discrimination by law enforcement, was an act of racially motivated violence in violation of Article 14 of the *European Convention on Human Rights*.<sup>218</sup> Instead, the Court ruled that given the facts of the case a demonstration of racist intent would be required, despite presentation of evidence of bias on the part of the shooter, the coroner and the investigative authorities.<sup>219</sup>

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213. Human Rights Committee, Views of 9 November 1989, Case of *Karnel Singh Bhinder v. Canada*, Communication Nos. 208/1986, para. 6.1, in UN Doc. CCPR/C/37/D/208/1986.

214. *Ibid.*, para. 6.2.

215. Judgment of 13 May 1986, Case 170/84, para. 31.

216. Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, Celex no. 31997L0080, Article 2 § 2.

217. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Celex no. 02000L0043, preamble, para. 15.

218. Judgment of 6 July 2005, Case of *Nachova and Others v. Bulgaria*, Application No. 43577/98 and 43579/98, paras. 80, 144-159.

219. *Ibid.*, para. 157.



In a recent case, the European Court of Human Rights' Grand Chamber, however, in what will likely prove to be a seminal case, issued an opinion, *D.H. and Others v. the Czech Republic*, in favour of a party alleging indirect discrimination.<sup>220</sup> This opinion suggests that the Court is willing to concede the principle while exercising conservatism in its application. The Court ruled that an outwardly neutral Czech special education law that resulted in Roma children being assigned to special education schools at thirty times the rate of non-Roma children was discriminatory, noting that “[w]here it has been shown that legislation produces such a discriminatory effect, the Grand Chamber considers that, as with cases concerning employment or the provision of services, it is not necessary in cases in the educational sphere [...] to prove any discriminatory intent on the part of the relevant authorities”.<sup>221</sup> However, *D.H. and Others* is also important for its limitations as well as its decision. Notably, the Court, without explanation, limited its recognition of the disparate impact of discrimination to the fields of education, employment and provision of services. Also, the facts of the case were rare in their extremity – a thirty-fold difference in impact between Roma and non-Roma children. In future cases with smaller differentials, the Court could continue to rely on its more conservative prior jurisprudence if it wishes to do so.

The Human Rights Committee's view on disparate impact discrimination has also changed in recent years. In its General Comment No. 18, the Committee noted that “discrimination in fact” can occur even in an absence of “discrimination in law”, and that the authorities were prohibited from engaging in either.<sup>222</sup> This left the door open for a view or opinion finding that a State has violated the ICCPR through discrimination in fact.

In contrast to the approach used in Europe and by UN treaty bodies, the Inter-American Court has recognised the discriminatory impact of facially neutral laws as impermissible discrimination. In the case of *Yatama v. Nicaragua*, the Court ordered the repeal of a law requiring candidates for parliament to have a political party affiliation, because political parties are “a form of organization that is not characteristic of the indigenous communities of the Atlantic Coast”.<sup>223</sup> The Court went out of its way to note that the “circumstances of the instant case, [...] are not necessarily comparable to the circumstances of all political groups that may be present in other national societies or sectors of a national society”.<sup>224</sup>

Therefore, its holding was not that such a law *per se* violates the *American Convention on Human Rights*, but rather that the impact it has in Nicaragua, given that country's unique ethno-cultural makeup, renders it in violation.

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220. Judgment of 13 November 2007, Case of *D.H. and Others v. the Czech Republic*, Application No. 57325/00.

221. *Ibid.*, para. 194.

222. Human Rights Committee, *General Comment No. 18, doc. cit.*, paras. 9 and 12.

223. Judgment of 23 June 2005, Case of *Yatama v. Nicaragua*, Series C No. 127, para. 214.

224. *Ibid.*, para. 219.

## Summary

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- The principle of non-discrimination and the right to be equal before the law are interdependent and universally recognised and protected under international law. Both derive from the notion of inherent human dignity;
- The list of prohibited categories of discrimination in international human rights instruments is not exhaustive and the inclusion of the “other status” category by the drafters contemplates grounds such as “sexual orientation” and “gender identity”. The human rights jurisprudence, both universal and regional, as well as a few new international instruments have recognised and reaffirmed that “sexual orientation” and “gender identity” are part of the prohibited grounds of discrimination;
- The principle of non-discrimination and the right to be equal before the law require that the State not only protect people from discrimination from State agents but also by private entities and persons. The duty of the State is to ensure that all human beings enjoy rights equally and without discrimination. Prohibitions against racial discrimination are a peremptory norm of international law (*jus cogens*) from which no derogation is permitted;
- The principles of equality before the law and non-discrimination authorise differential treatment, and distinctions for certain categories of individuals, vis-à-vis certain rights and freedoms, such as minors, the indigenous, aliens, non-citizens etc. Differential treatment is only permissible where it is founded on reasonable and objective criteria and must have a legitimate purpose. Differential treatment or distinction that lacks objective and reasonable justification or does not have a legitimate purpose is discriminatory.

“[S]exual orientation [...] is an essentially private manifestation of human personality”.

— European Court of Human Rights<sup>225</sup>

### III. The Right to Private Life

#### 1. Legal nature and scope

The “right to private life” is protected by many international human rights instruments.<sup>226</sup> The right is violated if an individual’s privacy is interfered with either unlawfully or lawfully but arbitrarily. The *International Covenant on Civil and Political Rights* (ICCPR) prohibits “arbitrary or unlawful interference with [a person’s] privacy, family, home or correspondence” and grants “the right to the protection of the law against such interference”.<sup>227</sup> This standard is repeated in the *Convention on the Rights of the Child*, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, the *Convention on the Rights of Persons with Disabilities*, the *European Convention on Human Rights*, the *American Convention on Human Rights*, the *Arab Charter on Human Rights*, and the *African Charter on the Rights and Welfare of the Child*.<sup>228</sup> The *African Charter on Human and Peoples’ Rights* is the only regional instrument that says nothing about privacy or freedom from State interference in the family.<sup>229</sup>

The right to private life is a broad umbrella covering *inter alia* integrity of the home, body and family, the determination and development of one’s own personality, personal identity and inter-personal relationships. The Inter-American Commission

225. Judgment of 27 September 1999, Case of *Smith and Grady v. the United Kingdom*, Application No. 33985/96 and 33986/96, para. 127.

226. In addition to the instruments cited above, this right is found in the Universal Declaration of Human Rights (Article 12); Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (Article 5); United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (Rule 3.11); United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Rules 32, 35, 60 and 87); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) (Rule 8); United Nations Principles for Older Persons (Principle 14); Principles for the protection of persons with mental illness and the improvement of mental health care (Principle 13); American Declaration on the Rights and Duties of Man (Article VI); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Principle N (h)); European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Article 1); Charter of Fundamental Rights of the European Union (Article 7); and the Cairo Declaration on Human Rights in Islam (Article 18.b).

227. ICCPR, Article 17.

228. Convention on the Rights of the Child, Article 16; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 14; Convention on the Rights of Persons with Disabilities, Article 22 (which also requires the protection of “the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others”); American Convention on Human Rights, Article 11; Arab Charter on Human Rights, Article 21; and African Charter on the Rights and Welfare of the Child, Article 10.

229. African Charter on Human and Peoples’ Rights, Articles 18, 27, and 28.

on Human Rights has stated that, “the right to privacy guarantees that each individual has a sphere into which no one can intrude, a zone of activity which is wholly one’s own. In this sense, various guarantees throughout the [American] Convention which protect the sanctity of the person create zones of privacy”.<sup>230</sup> An exhaustive definition of the notion of “private life” is impossible to achieve, as the European Court of Human Rights has observed:

*“it would be too restrictive to limit the notion to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings”.*<sup>231</sup>

The European Court has also pointed out that the right to privacy “can sometimes embrace aspects of an individual’s physical and social identity. [...] [F]or example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 [of the European Convention on Human Rights]”.<sup>232</sup>

Additional outlines of the scope of the right to private life have been drawn by the Human Rights Committee, which has pointed out that “the notion of privacy refers to the sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationship with others or alone”.<sup>233</sup>

Treaty bodies and international courts have found violations of the right to privacy in a great variety of situations, including arbitrary or unlawful entry into private homes by law enforcement,<sup>234</sup> State interference with women’s reproductive freedom,<sup>235</sup> non-consensual or coercive unnecessary testing for HIV,<sup>236</sup> failure to protect women against rape,<sup>237</sup> undue interference with prisoners’ correspondence,<sup>238</sup> arbitrary refusal to grant name changes,<sup>239</sup> permitting the construction of tourist develop-

230. Report No. 38/96 of 15 October 1996, Case No. 10.506, *X e Y (Argentina)*, para. 91.

231. Judgment of 16 December 1992, Case of *Niemitz v. Germany*, Application No. 13710/88, para. 29.

232. Judgment of 29 April 2002, Case of *Pretty v. The United Kingdom*, Application No. 2346/02, para. 61.

233. Human Rights Committee, Views of 31 October 1994, Case of *A.R. Coeriel and M.A.R. Aurik v. The Netherlands*, Communication No. 453/1991, para. 10.2.

234. Human Rights Committee, Views of 24 October 2002, Case of *Coronel et al. v. Colombia*, Communication No. 778/1997 in UN Doc. CCPR/C/76/D/778/1997.

235. Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Article 3)*, para. 20.

236. European Court of Justice, Judgment of 5 October 1994, Case of *X v. Commission of the European Communities*, ECJ Case C-404/92-P, paras. 19-21 and 23.

237. Human Rights Committee, *General Comment No. 28, (Article 3)*, para. 20.

238. Human Rights Committee, Views of 23 March 1983, Case of *Miguel Angel Estrella v. Uruguay*, Communication No. 74/1980, para. 9.2.

239. Human Rights Committee, Case of *A.R. Coeriel and M.A.R. Aurik v. The Netherlands*, *doc. cit.*, paras. 10.2-10.5.

ments on indigenous peoples' ancestral burial grounds,<sup>240</sup> customs regulations prohibiting the importation of properly prescribed drugs for personal use,<sup>241</sup> and the unwarranted destruction of homes during military operations,<sup>242</sup> among many others.

## 2. States' obligation to protect the right to private life

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The State's competent legislative, administrative and judicial authorities are obliged to guarantee the right to private life. The Human Rights Committee has observed that the "obligations imposed by [...] article [17 of the ICCPR] require the State to adopt legislative and other measures to give effect to the prohibition against [arbitrary or unlawful] interferences and attacks as well as to the protection of this right".<sup>243</sup> These obligations require States to "address the activities of private persons or entities, [including] the privacy-related guarantees of article 17, [which] must be protected by law".<sup>244</sup> Further, "[p]rovision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible".<sup>245</sup>

International human rights bodies and courts have held on a number of occasions that, in addition to the primary obligation of refraining from arbitrary interference in private life, respect for privacy may also entail positive obligations. The Inter-American Commission on Human Rights has observed:

*"[a]rticles 1 and 2 of the Convention establish an obligation to ensure the rights protected by the Convention, and require that the State Parties adopt such legislative or other measures as may be necessary to give effect to those rights (recognized in the Convention) or freedoms [...]. Accordingly, all the States Parties to the Convention have an obligation to ensure that these rights are adequately and effectively protected by their domestic legal systems [...]. Under the Convention the State [...] has a positive obligation to protect persons within its jurisdiction from violations of the right to privacy and, whenever that right is breached, to provide remedies that are prompt,*

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240. Human Rights Committee, Views of 29 December of 1997, Case of *Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, para. 10.3.

241. European Court of Justice, Judgment of 8 April 1992, Case of *Commission of the European Communities v. Federal Republic of Germany*, Case C-62/90.

242. European Court of Human Rights, Judgment of 24 April 1998, Case of *Selçuk and Asker v. Turkey*, Application No. 12/1997/796/998-999 paras. 86-87; Inter-American Court of Human Rights, Judgment of 1 July 2006, Case of *Ituango Massacres v. Colombia*, paras. 192-197.

243. Human Rights Committee, *General Comment No. 16, (Article 17), The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, para. 1.

244. Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties*, para. 8.

245. Human Rights Committee, *General Comment No. 16*, para. 11.

*effective and adequate to redress any injury caused by a violation of that right”.*<sup>246</sup>

The European Court of Human Rights maintains a similar view. The Court has:

*“held on a number of occasions that, although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective respect for private life, albeit subject to the State’s margin of appreciation, [...]. In determining whether or not such an obligation exists, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual”.*<sup>247</sup>

Courts and treaty bodies sometimes seem reluctant to concede a violation of the right to privacy when a violation of a different right in the same instrument has also been breached. For example, in the case of *Maritza Urrutia v. Guatemala*, the petitioner and her family suffered from surveillance and police harassment before she became a political prisoner. Subsequently, when imprisoned she then suffered violations of her correspondence and was forced to make false public confessions. The Inter-American Court of Human Rights found that those actions all violated the provisions of the treaty granting the right to humane treatment while in detention, and declined to discuss the issue of privacy.<sup>248</sup> Similarly, after the European Court of Human Rights ruled that the deportation of an HIV-positive prisoner to St. Kitts would amount to cruel and inhuman treatment under Article 3, due to lack of medical facilities available and absence of family support, the Court found that his privacy right to “bodily integrity” also at risk, “raised no separate issue” and did not consider it.<sup>249</sup>

The UN Human Rights Committee may have attempted a delineation of the outer contours of the right to privacy when it observed that, “as all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual’s private life [when] the knowledge of which is essential in the interests of society as understood under the Covenant”.<sup>250</sup>

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246. Report No. 11/96 of 2 May 1996, Case 11.2330 (Chile), paras. 66 and 67.

247. Judgment of 17 October 1986, Case of *Rees v. the United Kingdom*, Application no. 9532/81, paras. 35, 37.

248. Judgment of 27 November 2003, Case of *Maritza Urrutia v. Guatemala*.

249. Judgment of 2 May 1997, Case of *D. v. The United Kingdom*, Application No. 146/1996/767/964, para. 64.

250. Human Rights Committee, *General Comment No. 16, doc. cit.*, para. 7.

### 3. Arbitrary or unlawful restrictions on or interference with the right to private life

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Under international human rights law, the right to privacy is a non-absolute right which can be restricted in times of normality, as well as in times of emergency. However, human rights that are subject to lawful limitation (including in times of emergency) can never be deemed to have disappeared: derogation does not mean obliteration.<sup>251</sup>

In times of normality any restrictions or interference must be subject to law and not arbitrary. The Human Rights Committee has deemed that an interference or restriction may be permitted only if essential to the interests of society, and if national legislation specifies in detail the precise circumstances in which such interference or restriction is to occur.<sup>252</sup> Furthermore, interference must “be in accordance with the provisions, aims and objectives of the [ICCPR] and be reasonable in the particular circumstances of the case”.<sup>253</sup>

The Human Rights Committee has considered that “arbitrary interference” with the right to privacy can include interference provided for under the law. The Committee has stated that the monitoring or censorship of communications should be subject to satisfactory legal safeguards against their arbitrary application, including judicial oversight. Searches of a person’s home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. In the case of personal or body searches, States must take effective measures to ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Monitoring of phone, email and fax communications of individuals, both within and outside a State, without any judicial or other independent oversight, raises serious questions about their compatibility with the right to an effective remedy and the right to privacy (Articles 2(3) and 17 of the ICCPR).<sup>254</sup>

The European Court of Human Rights has said that a State has a duty not to interfere with its subjects’ privacy except in strictly limited circumstances prescribed by law that are in the public interest, have a legitimate aim and are necessary in

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251. Nicole Questiaux, Special Rapporteur of the former UN Sub-Commission, *Study for the implications for human rights of recent developments concerning situations known as states of siege or emergency*, UN Doc E/CN.4/Sub.2/1982/15, para. 192.

252. Human Rights Committee, *General Comment No. 16, doc. cit.*, para. 8.

253. Human Rights Committee, views of 1 November 2004, *Case of Antonius Cornelis Van Hulst v. The Netherlands*, Communication No. 903/1999, para. 7.3. See also: Human Rights Committee, Views of 3 April 2001, *Case of Rafael Armando Rojas García v. Colombia*, Communication 687/1996, and Human Rights Committee, Views of 3 April 1997, *Case of Giosue Canepa v. Canada*, Communication No. 558/1993, para. 11.4.

254. *Concluding Observations of the Human Rights Committee: United States of America, doc. cit.*, para. 21.

a democratic society.<sup>255</sup> The European Commission on Human Rights goes further by outlining that a State may interfere with private life only when “the individual himself brings his private life into contact with public life or into close connection with other protected interests”.<sup>256</sup> The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights consider that in cases of rights, such as the right to privacy, for which the *American Convention on Human Rights* does not provide rules establishing or limiting States’ ability to restrict them, then the rights are subject to restriction under the Article 32 (2) of the Convention, which states that “the rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare in a democratic society”. The Inter-American Court of Human Rights has pointed out that restrictions on the rights protected in the Convention “must meet certain substantive conditions which depend upon the legitimacy of the ends that such restrictions are designed to accomplish”.<sup>257</sup> In the same vein, the Inter-American Commission on Human Rights has pointed out that:

*“[a]rticle 11.2 [of the American Convention] specifically prohibits ‘arbitrary or abusive’ interference with this right. This provision indicates that in addition to the condition of legality, which should always be observed when a restriction is imposed on the rights of the Convention, the state has a special obligation to prevent ‘arbitrary or abusive’ interferences. The notion of ‘arbitrary interference’ refers to elements of injustice, unpredictability and unreasonableness”.*<sup>258</sup>

#### **4. Sexual Orientation and Gender Identity and the right to privacy**

The scope of privacy may be organised as decisional, relational and zonal.<sup>259</sup> Decisional privacy refers to intimate and personal choices in an individual’s life that are central to personal dignity and autonomy. Relational privacy speaks to the connections made through family, marriage or procreation, while zonal privacy relates to activities that occur within the home. The UN Human Rights Committee, in the case of *Toonen v. Australia*, articulated a decisional theory of privacy, encompassing an adult’s intimate and private decision whether to engage in sexual conduct with a same-sex partner. The Committee ruled that “[i]n as far as article 17 [of the

255. See for example, Judgment of 24 April 1990, Case of *Huvig v. France*; Judgment of 28 June 1984, Case of *Campbell and Fell v. The United Kingdom*; Judgment of 29 April 2002, Case of *Pretty v. The United Kingdom*, Application No. 2346/02; and Judgment of 17 April 2003, Case of *Yilmaz v. Germany*, Application No. 52853/99.

256. European Commission on Human Rights Report, 1977; *Bruggemann and Scheuten v. the Federal Republic of Germany*.

257. Advisory Opinion OC-5/85, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles. 13 and 29 American Convention on Human Rights)*, 13 of November 1985, Series A No. 5, para. 37.

258. Report No. 38/96 of 15 October 1996, Case 10.506, *Ms X v. Y (Argentina)*, para. 92.

259. See Mary Robinson amicus brief in *Lawrence v. Texas* at: <http://hrw.org/press/2003/07/amicusbrief.pdf>



ICCPR] is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy’.<sup>260</sup> The Human Rights Committee reasoned that the criminalisation of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS and dismissed the argument that the matters considered were “moral issues” that were exclusively of “domestic concerns”.<sup>261</sup> This decision has formed the basis for protection of SOGI within the jurisprudence and doctrine of the UN human rights system and especially in respect of decriminalisation of laws criminalising homosexuality.<sup>262</sup> The *Toonen* case did not however, address all aspects of decisional privacy. A broader scope of decisional privacy was examined in *A.R. Coeriel and M.A.R. Aurik v. The Netherlands* when the Human Rights Committee observed that:

*“the notion of privacy refers to the sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone. The Committee is of the view that a person’s surname constitutes an important component of one’s identity and that the protection against arbitrary or unlawful interference with one’s privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one’s own name”.*<sup>263</sup>

Domestic courts have also developed notions of decisional privacy. The Constitutional Court of Colombia, considering both the ICCPR and the Colombian Constitution, arrived at a decisional theory of privacy as regards sexual orientation, holding that:

*“[s]exuality, whether heterosexual or homosexual, is an essential element of humans and their psyche and, therefore, is included in the broader framework of sociability. The full constitutional protection of the individual, in the form of the rights to personality, and its free development (Colombian Constitution, Articles 14 and 16) includes in its essential core the process of autonomous assumption and decision regarding one’s own sexuality. It would be senseless if sexual self-determination were to remain outside the limits of the rights to personality, and its free development, given that identity and sexual conduct occupy in the development of the person and*

260. Views of 31 March 1994, Case of *Nicholas Toonen v. Australia*, Communication No. 488/1992, para. 8.2, in UN Doc. CCPR/C/50/D/488/1992 of 4 April 1994.

261. *Ibid.*, para. 8.4.

262. See International Commission of Jurists, *International Human Rights References to Human Rights Violations on the Grounds of Sexual Orientation and Gender Identity* at [http://www.icj.org/news.php3?id\\_article=3687&lang=en](http://www.icj.org/news.php3?id_article=3687&lang=en). See in particular: See Country observations of the Human Rights Committee (ICJ Compilation 3rd ed) (Concluding observations on: Greece, CCPR/CO/83/GRC, 31 March 2005, para. 19; Kenya, CCPR/CO/83/KEN, 28 March 2005, para. 27; Namibia, CCPR/CO/81/NAM, 30 July 2004, para. 22; Egypt, CCPR/CO/76/EGY, 28 November 2002, para. 19; United Kingdom of Great Britain and Northern Ireland, CCPR/C/79/Add.119, 27 March 2000, para. 14; Poland CCPR/C/79/Add.110, 29 July 1999, para. 23; Romania CCPR/C/79/Add.111, 28 July 1999, para. 16; and Chile, CCPR/C/79/Add.104, 30 March 1999, para. 20).

263. Views of 31 October 1994, Case of *A.R. Coeriel and M.A.R. Aurik v. The Netherlands*, Communication No. 453/1991, para. 10.2.

*in the unfolding of his liberty and autonomy such a central and decisive place”.*<sup>264</sup>

The South African Constitutional Court has arrived at a theory of privacy in sexuality that includes both decisional and relational elements. It states:

*“[p]rivacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy”.*<sup>265</sup>

The Inter-American system has not, as yet, been used to press any issue of decisional privacy in relation to sexual orientation. However, the Inter-American Commission on Human Rights did declare admissible a case that, while ultimately not moving forward, declared that a law prohibiting same-sex partners from intimate prison visits, while allowing heterosexual ones, “could involve, *inter alia*, a violation of Article 11(2) of the American Convention in so far as they could constitute an arbitrary or abusive interference with [a lesbian petitioner’s] private life”.<sup>266</sup> The Inter-American Commission has developed a broad view of the right to private life, noting that:

*“[t]he requirements of Article 11 [of the American Convention on Human Rights] encompass a range of factors pertaining to the dignity of the individual, including, for example, the ability to pursue the development of one’s personality and aspirations, determine one’s identity, and define one’s personal relationships”.*<sup>267</sup>

The European Court of Human Rights is the most developed human rights body on the issue of sexual orientation and gender identity vis-à-vis of the right to privacy.<sup>268</sup> The European Court has utilised several opportunities to reaffirm that “[t]here can be

264. Judgment No. C-098/96 of 7 March 1996 (Original in Spanish, free translation). The judgment is available at <http://www.unilibrebaq.edu.co/html/providencias/C-098-96.htm>

265. Judgment of 9 October 1998, *National Coalition of Gay & Lesbian Equality and Another v. Minister of Justice and others*, Case CCT11/98, para. 32.

266. Report No. 71/99 (Admissibility) of 4 May 1999, Case 11.656, *Marta Lucia Álvarez Giraldo (Colombia)*, para. 21.

267. Report No. 4/01 of 19 January 2001, case 11.625, *María Eugenia Morales de Sierra (Guatemala)*, para. 46.

268. See *inter alia*: Judgment of 22 October 1981, Case of *Dudgeon v. the United Kingdom*, Application No. 7525/76; Judgment of 26 October 1988, Case of *Norris v. Ireland*, Application No. 10581/83; Judgment of 22 April 1993, Case of *Modinos v. Cyprus*, Application No. 15070/89; Judgment of 9 January 2003, Case of *S.L. v. Austria*, Application No. 45330/99; Judgment of 27 September 1999, Case of *Lustig-Prean and Beckett v. the United Kingdom*, Application No. 31417/96 and 3277/96; Judgment of 19 February 1997, Case of *Laskey, Jaggard and Brown v. United Kingdom*, Application No. 1627/93, 21826/93 and 21974/93; Judgment on 11 June 2002, Case of *Christine Goodwin v. the United Kingdom*, Application No. 28957/95; Judgment of 12 June of 2003, Case of *Van Kück v. Germany*, Application No. 35968/97; and Judgment of 16 December 1992, Case of *Niemietz v. Germany*, Application No. 13710/88.

no doubt that sexual orientation and activity concern an intimate aspect of private life”.<sup>269</sup> The case of *Dudgeon v. The United Kingdom* typifies the approach of the European Court of Human Rights in its cases dealing with privacy and sexual orientation. Dudgeon was a 35-year-old gay man who lived in Northern Ireland. The police visited his home on a drugs investigation concerning a third party and seized gay literature and paraphernalia belonging to him. Liable to prosecution under existing buggery laws in Northern Ireland he challenged the laws. The European Court held under Article 8 of the *European Convention on Human Rights* that the buggery laws constituted an interference with a “most intimate part of private life”. In the Dudgeon case, the Court reasoned that:

*“the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant’s right to respect for his private life (which includes his sexual life) within the meaning of Article 8. [...] [T]he very existence of this legislation continuously and directly affects [Dudgeon’s] private life: either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution”.*<sup>270</sup>

The Court accordingly found a breach of Article 8. The reasoning in *Dudgeon* was affirmed by the European Court in the later cases of *Norris v. Ireland*<sup>271</sup> and *Modinos v. Cyprus*.<sup>272</sup> The European Court also found that there was a violation of the right to privacy in conjunction with the right against discrimination in *S.L. v. Austria*,<sup>273</sup> where the Court considered the question of criminal sanctions and a higher age of consent for male homosexuals.

The European Court’s conception of the normative scope of privacy at first seemed hard-pressed to do more than trump buggery laws and incorporate protection of the public manifestations of private life. The case of *Lustig-Prean and Beckett v. the United Kingdom*<sup>274</sup> (18 years after *Dudgeon*), concerning the right of gay persons to serve in the military, marked a significant development in the use of the privacy concept to protect the sexual orientation of persons in not merely the inner circle of their private life but in professional or business aspects of life and relationships. Using Article 8 of the *European Convention on Human Rights*, the Court felled laws that excluded gays and lesbians from the military and opened an interpretation of

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269. Judgment of 22 October 1981, Case of *Dudgeon v. the United Kingdom*, Application No. 7525/76, para. 52. See also, Judgment of 19 February 1997, Case of *Laskey, Jaggard and Brown v. United Kingdom*, Application No. 1627/93, 21826/93 and 21974/93, para. 36.

270. Judgment of 22 October 1981, Case of *Dudgeon v. the United Kingdom*, Application No. 7525/76, para. 41.

271. Judgment of 26 October 1988, Case of *Norris v. Ireland*, Application No. 10581/83.

272. Judgment of 22 April 1993, Case of *Modinos v. Cyprus*, Application No. 15070/89.

273. Judgment of 9 January 2003, Case of *S L v. Austria*, Application No. 45330/99, para. 36.

274. Judgment of 27 September 1999, Case of *Lustig-Prean and Beckett v. the United Kingdom*, Application No. 31417/96 and 3277/96.

privacy that envisaged gay life behind closed doors and into the public reaches of the gay experience. It may be said that the Court was slow in developing a comprehensive normative framework for the development of gay rights – and the scope of privacy – beyond the decriminalisation of buggery.

In relation to gender identity, the European Commission on Human Rights ruled in the case of *D. Van Oosterwijk v. Belgium*, a case concerning a transsexual who wanted to have birth certificate altered, that the right to respect for ‘private life’ is the right to privacy, the right to live as far as one wishes, protected from publicity. It also comprises, to a certain degree, the right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfilment of one’s own personality.<sup>275</sup> The Commission found that the refusal of Belgium to enable the registers of civil status to reflect lawful sex changes violated the right to respect for private life in Article 8 of the ECHR.<sup>276</sup> This heralded the European Court of Human Rights’ approach in the *Dudgeon*, *Norris* and *Modinos* cases, which concretized the scope of decisional privacy under the *European Convention on Human Rights*.

The issues of gender identity have been best advanced in the jurisprudence of the European Court under Article 8 (the right to respect for private and family life) of the European Convention. The existing jurisprudence reflects the Court’s assessment of a “continuing international trend” in favour of gender identity recognition. Indeed, the Court has pointed out that it, “attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals”.<sup>277</sup> As a result, the leading cases of *Christine Goodwin v. the United Kingdom* and *Van Kück v. Germany* represent important advances in the application of the right to privacy in the area of gender identity and expression. Importantly, both cases follow the decisional privacy trend in *Dudgeon*, deferring to notions of “intimate parts of private life” and utilising language that speaks to personality development and “gender identity”. However, the requirement that an applicant must manifest

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275. European Commission on Human Rights, Case of *D. Van Oosterwijk v. Belgium*, Application No 7654/76, 1979.

276. See also Judgment of 16 December 1992, Case of *Niemietz v. Germany*, Application No. 13710/88, in which the Court noted that respect for private life includes right to “establish and develop relationships”, both personal and professional, para. 29.

277. Judgment on 11 July 2002, Case of *Christine Goodwin v. the United Kingdom*, Application No. 28957/95, para. 84.

“gender identity” as a medical concern in order to prove its authenticity,<sup>278</sup> as well as to demonstrate the capacity for heterosexual performance in order to prove a successful gender transition, remains troublesome.<sup>279</sup>

In the case of *Christine Goodwin v. the United Kingdom*, the applicant was a UK citizen and a post-operative male-to-female transsexual.<sup>280</sup> She had married a woman and had four children, but remained with the conviction that her “brain sex” did not fit her body. She underwent gender reassignment surgery at a National Health Service hospital, provided for and paid by the National Health Service. The applicant divorced from her wife but continued to have a good relationship with her children.

Almost immediately, she began to experience a variety of personal and bureaucratic challenges as a result of her gender reassignment. She claimed that between 1990 and 1992 she was sexually harassed by colleagues at work and was subsequently dismissed from her employment for reasons connected with her health, but alleged that the real reason was that she was a transsexual. She found a new job but, as the *Department of Social Security (DSS)* declined to issue her a new National Insurance number, her employer was able to use the old number to trace her old identity, and she began to experience problems at work. Colleagues stopped speaking to her and she was the victim of malicious gossip. In addition, the DSS Contributions Agency informed the applicant that she would be ineligible for a State pension at the age of 60, the age of entitlement for women in the United Kingdom. She was informed that her pension contributions would have to be continued until the date at which she reached the age of 65, being the age of entitlement for men. Her files at the DSS were marked “sensitive” to ensure that only an employee of a particular grade had access to her files, requiring her to make in-person appointments to address even the most trivial matters, and DSS correspondence continued to use her old name. She also had to forego opportunities conditional upon her producing her birth certificate, including a loan conditional upon life insurance, a re-mortgage offer and an entitlement to a winter fuel allowance from the DSS. She remained obliged to pay the higher motor insurance premiums applicable to men. She also did not report a theft to the police for fear that the investigation would require her to reveal her prior identity.

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278. On this issue, the European Court has considered that “[i]t is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals[...]. The Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals.” (Judgment of 11 July 2002, Case of *Christine Goodwin v. the United Kingdom*, doc. cit., para. 81.)

279. For development of the idea of that heterosexuality goes hand-in-hand with the right to recognition in [a] new gender in the jurisprudence of the European Court, see Susan Marks and Andrew Clapham, *International Human Rights Lexicon*, op. cit., p. 343.

280. Judgment of 11 July 2002, Case of *Christine Goodwin v. the United Kingdom*, Application No. 28957/95.

Describing the nature of the interference to private life, the Court said:

*“[t]he stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognize the change of gender cannot, in the Court’s view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.*

*“Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings [...]. In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved”.*<sup>281</sup>

In the case of *Van Kück v. Germany*,<sup>282</sup> the applicant was a male-to-female transsexual whose insurance company had denied coverage of medical expenses related to sex reassignment. German courts considered the applicant’s life history – including a period of military service, marriage to a woman and an absence of transgender identification during her youth – and concluded that the applicant herself had caused her transsexuality and therefore the denial of coverage was legitimate.<sup>283</sup> The Court’s decision also expressed doubts about the medical validity and necessity of sex reassignment.<sup>284</sup> Citing *Goodwin* among other cases, the European Court of Human Rights found that “the very essence of the Convention being respect for human dignity and human freedom, [obliges that] protection is given to the right of transsexuals to personal development and to physical and moral security”.<sup>285</sup> The Court went on to find that this entails a positive obligation in addition to the obligation to refrain from interfering in privacy.<sup>286</sup> The Court concluded that “the impact of the court decisions on the applicant’s right to respect for her sexual self-determination as one of the aspects of her right to respect for her private life” amounted to a “fail[ure] to discharge the State’s positive obligations [and the] burden placed on a person to prove the medical necessity of treatment, including irreversible surgery, in one of

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281. Judgment of 11 July 2002, Case of *Christine Goodwin v. the United Kingdom*, *doc. cit.*, paras. 77 and 90.

282. Judgment of 12 June of 2003, Case of *Van Kück v. Germany*, Application No. 35968/97.

283. *Ibid.*, para. 45.

284. *Ibid.*, para. 53.

285. *Ibid.*, para. 69.

286. *Ibid.*, para. 70.

the most intimate areas of private life, appears disproportionate.”<sup>287</sup> Consequently it ruled a violation of Article 8 of the European Convention.

The Court has reaffirmed that the very essence of the European Convention was respect for human dignity and freedom and that protection is given to the right of transsexuals to personal development and to physical and moral security. In this field, the Court noted that the concept of “private life” is a broad term not susceptible to exhaustive definition and that it covers the physical and psychological integrity of a person.<sup>288</sup> This can also entail aspects of an individual’s physical and social identity,<sup>289</sup> such as gender identification.

#### 4.1 Comparative public law and the right to privacy

Justice Blackmun, in his dissent in the now-overruled case of *Bowers v. Hardwick*<sup>290</sup> before the US Supreme Court, opined that the “right to be left alone” should be seen not simply as a negative right to occupy a private space free from government intrusion (or zonal privacy), but as a right to get on with one’s life, express personality and make fundamental decisions about one’s intimate relationships without penalisation. In discussing this notion of privacy in *National Coalition of Gay and Lesbian Equality v. Minister of Justice*,<sup>291</sup> Justices in the South African Constitutional Court explained that “there is no good reason why the concept of privacy should, (as was suggested), be restricted simply to sealing off from State control what happens in the bedroom, with the doleful sub-text that you may behave as bizarrely or shamefully as you like, on the understanding that you do so in private”.<sup>292</sup> Instead, the Court explained that the scope of privacy recognises that we all have a right to a sphere of private intimacy and autonomy that allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality, the Court reasoned, is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of the right to privacy.

Justice Blackmun also noted the contention that the concept of privacy did not contemplate a comprehensive normative framework that addresses discrimination against gays in both the private and public component of the lived experience. The South African Constitutional Court however reasoned that these concerns were based on an unnecessary and artificially constructed contest between privacy and

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287. *Ibid.*, paras. 75, 78 and 82.

288. Judgment of 26 March 1985, Case of *X and Y v. the Netherlands*, Application No. 8978/80, para. 22.

289. Judgment of 7 February 2002, Case of *Mikulic v. Croatia*, Application No. 53176/99, para. 53.

290. US Supreme Court, Judgment of 30 June 1986 [*Bowers v. Hardwick*, 478 US 186 (1986)].

291. Judgment of 9 October 1998, *National Coalition of Gay & Lesbian Equality and Another v. Minister of Justice and others*, Case CCT11/98.

292. *Ibid.*, para. 116.

the equality/non-discrimination norm and a lack of appreciation of the normative scope of privacy.

Firstly, the South African Constitutional Court addressed the matter by observing that equality and privacy were being violated simultaneously by the anti-sodomy laws. The right to equality was infringed because of the intrusion into private life based on disrespect for a person of homosexual orientation, resulting in dispensing unequal treatment. Secondly, the Court adopted the expansive construction of privacy reminiscent of the dissenting opinion in *Bowers v. Hardwick*,<sup>293</sup> that did not merely imagine the individual in isolation but in the entirety of his lived experience, both public and private and the protection of his life choices against the conflicting whim of the majority.

Thirdly, the South African Constitutional Court was of the view that the equality principle was engaged by the injury to his dignity occasioned by anti-sodomy laws of the class of persons called gays based on their sexual orientation. The Constitutional Court found that gays were a permanent minority who constituted a “distinct though invisible” section of the community and whose identifying characteristics combined “all the anxieties produced by sexuality with all the alienating effects resulting from difference”. The injury to dignity wrought by the anti-sodomy laws resulted from the disenfranchisement from “full moral citizenship” and was evidenced by the tainting of the homosexual desire and the attribution of perversity and shame to spontaneous physical affection among persons of homosexual orientation.

This integrated notion of equality affirms the variability of human beings and rejects the argument that the majority sentiment is the measure for what is legally normative on the question of individual freedoms and potential conflict with social control. Violations of the right to privacy, alongside claims of injury to the dignity of homosexual men, make privacy claims stronger and also strengthen arguments for non-discrimination and equality before the law.

A variety of supreme courts have found criminal penalties for homosexuality to violate both constitutional and international law guarantees of privacy and the right to the universal enjoyment of fundamental human rights. The following is a brief summary of a few of these decisions.

**Ecuador:** 1997 – Constitutional Court ruling that Article 516 of the Criminal Code (on “homosexuality”) violated constitutional and international law guarantees of the equal enjoyment of fundamental right by all persons.

**Colombia:** 1994 – Constitutional Court ruling that homosexuality between adults is protected by the law; homosexuals are protected by the fundamental rule of equal protection by the law and they have the same fundamental rights that heterosexuals have; nothing authorises the discrimination of homosexuals for their sexual

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293. US Supreme Court, Judgment of 30 June 1986 [*Bowers v. Hardwick*, 478 US 186 (1986)].



orientation (Judgment No. T-539-94 of 30 November 1994, see also No. T-42370 and T-42955).

**Peru:** 2004 – Constitutional Tribunal ruling granting gays in the military the freedom to have sex, declaring that a rule which had deemed such relations illegal was unconstitutional (Judgment of 9 June 2004, Case No. 0023-2003-AI/TC).

**China – Hong Kong:** 2006 – the Court of Appeal upheld a High Court ruling against a law providing that men younger than 21 who engage in sodomy would be jailed for life. The panel of three Court of Appeal judges upheld the original decision issued by the lower court in August 2005. The laws were first challenged by William Roy Leung, a then 20-year-old gay man who argued that he should be able to have a sexual relationship without the fear of imprisonment. In the August ruling, High Court Judge Michael Hartmann sided with Mr. Leung, saying the laws against sodomy infringed on the rights of privacy and equality for gay men. While gay men caught engaging in sodomy when either was under 21 faced life imprisonment, heterosexual couples could legally have sex at age 16. In this decision, of 20 September, the Court of Appeal dismissed the government’s appeal.

**Nepal:** December 2007, the Supreme Court ordered the government to scrap laws that discriminated against homosexuals. The court also ordered that sexual minorities should be guaranteed the same rights as other citizens. In their ruling, two Supreme Court judges said: “The government of Nepal should formulate new laws and amend existing laws in order to safeguard the rights of these people. Lesbian, gay, bisexual, transsexual and intersex are natural persons irrespective of their masculine and feminine gender and they have the right to exercise their rights and live an independent life in society.”

**Fiji:** 2005 – Dhirendra Nadan, 23, and Thomas McCosker, 55, had been sentenced to two years imprisonment in April 2005 for “offences against nature” and “gross indecency”. The pair were unrepresented at their original trial and pleaded guilty, but they appealed against the sentence. Deciding on their appeal, High Court judge Justice Gerard Winter said their convictions were invalid because they were inconsistent with the 1997 Constitution’s protection of privacy and equality. Article 38 of the Fijian Constitution prohibits discrimination based on any “actual or supposed personal characteristics or circumstances, including [...] sexual orientation” and Article 37 of the Constitution also protects the “right to personal privacy”.

**Uganda:** December 2008, the High Court of Uganda at Kampala (civil Division) ruled that Ugandan constitutional rights apply to lesbians, gays, bisexuals and transgendered, regardless of their sexual orientation.

## **5. Interference with and restriction of the enjoyment of the right to privacy in the area of sexual orientation and gender identity**

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The duty to protect the right to privacy in relation to sexual orientation raises the question of the unlawfulness and arbitrariness of interference. The Human Rights Committee in *Toonen v. Australia* recalled that the:

*“introduction of the concept of arbitrariness is intended to guarantee that every interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances. [...] [T]he requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.”*<sup>294</sup>

Here the Human Rights Committee has concluded that the criminalisation of homosexual practices was both arbitrary and disproportionate. Criminalisation constitutes an arbitrary interference with the right to privacy, which includes adult consensual sexual activity in private.<sup>295</sup> The Committee noted that “the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV”<sup>296</sup>, especially when “no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.”<sup>297</sup>

The current view regarding interference and restriction of the right to privacy in the area of sexual orientation and gender identity was fundamentally developed by the European Court of Human Rights, which has dealt with several cases during the last decades. As early as 1976, the European Court declared in its *Handyside* judgment<sup>298</sup> that, in investigating whether the protection of morals necessitated the various measures taken, it had to make an “assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context” and stated that “every ‘restriction’ imposed in this sphere must be proportionate to the legiti-

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294. Views of 31 March 1994, Case of *Nicholas Toonen v. Australia*, Communication No. 488/1992, para. 8.3.

295. *Ibid.*, para. 8.2. In the same line, see *inter alia*, Concluding observations of the Human Rights Committee on: Chile, CCPR/C/79/Add.104 of 30 March 1999, para. 20; Jamaica, CCPR/CO/83/KEN of 29 April 2005, para. 27; Poland, CCPR/C/79/Add.110 of 29 July 1999, para. 23; and Romania, CCPR/C/79/Add.111 of 28 July 1999 para. 16.

296. *Ibid.*, para. 8.5.

297. *Ibid.*

298. Judgment of 7 December of 1976, Case of *Handyside v. The United Kingdom*, Application No. 5493/72, paras. 46, 48 and 49.

mate aim pursued”. It confirmed this approach in the case of *Dudgeon*,<sup>299</sup> in which the Court was of the opinion that since the case concerned a most intimate aspect of private life, there had to be particularly serious reasons before interferences on the part of the public could be legitimate for the purposes of paragraph 2 of Article 8 of the *European Convention on Human Rights*. The Court cited that principles of tolerance and broadmindedness underpinned the definition of a Convention right and reasoned that the notion of what was “necessary in a democratic society” was only consistent with a Convention right when it was proportionate to the legitimate aim pursued. It further cited that, notwithstanding the margin of appreciation left to the national authorities, it fell to the Court to determine whether the interference complained of was proportionate to the social need claimed for it.

The Court also noted an increased tolerance of homosexual behaviour in the great majority of the Member States of the Council of Europe and noted that it was no longer considered to be necessary or appropriate to criminalise consensual homosexual practices. On the issue of proportionality, the Court considered that the justifications for retaining the law in force un-amended was outweighed by the detrimental effects that the very existence of the legislative provisions in question could have had on the life of a person of homosexual orientation like the applicant. The Court has pointed out that, “[t]here can be no denial that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as ‘necessary in a democratic society’. The overall function served by the criminal law in this field is [...] ‘to preserve public order and decency [and] to protect the citizen from what is offensive or injurious’. Furthermore, this necessity for some degree of control may even extend to consensual acts committed in private, notably where there is call [...] to provide sufficient safeguards against exploitation and corruption of others”.<sup>300</sup> However, the Court has underlined that, “although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved”.<sup>301</sup>

In the case of *Christine Goodwin*, the Court in its assessment noted that it had ruled in an opposite manner in similar cases,<sup>302</sup> but cited the fact that the Court must have regard to the changing conditions within the respondent State and within Contracting States generally. It also acknowledged the need to respond to any evolving conver-

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299. Judgment of 22 October 1981, Case of *Dudgeon v. The United Kingdom*, Application No. 7525/76, paras. 48 *et seq.*

300. *Ibid.*, para. 49.

301. *Ibid.*, para. 60.

302. See Judgment of 17 October 1986, Case of *Rees v. the United Kingdom*, Application No. 9532/81; Judgment of 27 September 1999, Case of *Cossey v. the United Kingdom* judgment, Application No. 10843/84; Judgment of 22 April 1997, Case of *X., Y. and Z. v. the United Kingdom*, Application No. 75/1995/581/667; Judgment of 30 July 1998, Case of *Sheffield and Horsham v. the United Kingdom*, Application No. 31–32/1997/815–816/1018–1019; Judgment of 25 March 1992, Case of *B v. France*, Application No. 13343/87.

gence as to the standards to be achieved and recognised the serious interference with private life that can arise where the state of domestic law conflicts with an important aspect of personal identity.<sup>303</sup> The Court considered it most significant that “transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief. For example, the *Diagnostic and Statistical Manual*- fourth edition (DSM-IV) replaced the diagnosis of transsexualism with ‘gender identity disorder’; see also the *International Classification of Diseases*, tenth edition (ICD-10)”.<sup>304</sup>

The case of *Müller and Others v. Switzerland* demonstrates that, in the context of the protection of morals, the Court continues to apply the same tests for determining what is “necessary in a democratic society”.<sup>305</sup> In that case, the Court, in reaching its decision, examined whether the contested measures, which pursued the legitimate aim of protecting morals, both answered a pressing social need and complied with the principle of proportionality.<sup>306</sup>

The reference to a predominant standard of tolerance towards homosexuality in Europe in the case of *Dudgeon*, for example, arguably alienates the judgment in its applicability to some other forums. The use of Europe as a standard of reasonable conduct in the circumstances is extremely problematic given the strong nationalist sentiments that prevail in some parts of the world, as well as in Europe itself. A corresponding lack of tolerance at the site in question may be raised to argue the intention to retain laws prohibiting buggery. Though the judgment weighs heavily in the context of Europe, it remains unassailable that its force emanates from arguments concerning the injury to that “most intimate part of private life” and a favourable construction of the proportionality test. It is also noteworthy that the force of the privacy argument in decriminalising buggery laws proved satisfactory for those purposes in Europe, as it overcame the strong social (religious) resistance of Northern Ireland in *Dudgeon*, Ireland in *Norris* and Cyprus in *Modinos*.

## 5.1 Comparative public law and interference and restriction of the right to privacy

The reasoning offered by the majority of the US Supreme Court in the now over-ruled case of *Bowers v. Hardwick* typifies the rhetoric employed in the many countries which retain anti-homosexual laws on the strength of majority sentiment. In denying the applicant’s constitutional challenge of the Georgia sodomy laws, Justice Bryan of the majority pronounced that the Federal Constitution did not confer a fundamental right upon homosexuals to engage in sodomy. He cited the historical origins of the

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303. See *Dudgeon v. the United Kingdom*, *doc. cit.*, para. 41.

304. Judgment of 11 July 2002, Case of *Christine Goodwin v. The United Kingdom*, Application No. 28957/95, para. 81.

305. Judgment of 24 May 1988, Case of *Müller and Others v. Switzerland*, Application No. 10737/84, paras. 31-37 and 40-44.

306. *Ibid.*, paras. 32, 40 and 43.

sodomy laws and found that its prohibition was “deeply rooted in this Nation’s history and tradition”. He predicated the rational basis for sodomy laws on notions of morality and the presumed belief of the majority of the electorate in Georgia that homosexual sodomy was immoral and unacceptable. The Court did not reject previous case law that had interpreted the Constitution in ways that protected private relationships in marriage and family, but nevertheless refused to extend this protection to homosexual relationships between consenting adults.

Justice Blackmun, in his vigorous dissent saw the issue as the Constitutional “right to be let alone”. He argued that:

*“[o]nly the most wilful blindness should obscure the fact that sexual intimacy is a sensitive key relationship of human existence [...]. The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many ‘right’ ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.”<sup>307</sup>*

Justice Blackmun flayed the recourse to the antiquity of the laws of the majority and declared that the age of laws did not render them inscrutable, especially when the grounds on which they were established had now vanished. His construction of the right to privacy was not merely spatial, but was expansive enough to protect the right to express personality and develop intimate associations without interference by the State.

The gulf in the majority and dissenting views of *Bowers v. Hardwick* reflected the different concepts of “Nation” – or State obligation – among the judges. The majority view constructed the State in monolithic terms that speak via the majority sentiment while the dissent saw the Nation as a plural entity that must have regard for the individual even where the majority stands in opposition. Privacy is envisioned as the buffer between State and individual. Professor Sheldon Leader argues that the point of the Convention and the Constitution is to test legislation against the respective standards of both instruments.<sup>308</sup> Where decisions are made wholly on account of the fact that they represent the majority view of the community, as was the case with the majority in *Bowers v. Hardwick*, the judge has abdicated their role to adjudicate and made the community a judge in its own cause.

The US Supreme Court in *Lawrence v. Texas* – which over-ruled *Bowers v. Hardwick* – stated that despite powerful voices that have condemned homosexuality as immoral in the past, the Court’s role was to define liberty for all and not mandate

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307. US Supreme Court, Judgment of 30 June 1986 [*Bowers v. Hardwick*, 478 US 186 (1986)]. Justice Brennan, Justice Marshall and Justice Stevens joint the dissenting of Justice Blackmun.

308. Sheldon Leader, “The Right to Privacy, the Enforcement of Morals, and the Judicial Function: An Argument”, in *Current Legal Problems*, editors: Roger Rideout & Bob Hepple, Sweet & Maxwell/Stevens/Stevens, 1990.

its own moral code.<sup>309</sup> The majority reasoned that laws and traditions of the past half-century show “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”.<sup>310</sup> Crucially, the Court noted that to the extent that the *Bowers v. Hardwick* decision relied on shared values with the wider civilization, the case’s reasoning had since been rejected by the European Human Rights System, and that other nations had taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate consensual conduct. Furthermore, the Court found that there was no urgent or legitimate governmental interest in circumscribing this area of personal choice. The majority accepted the dissent in *Bowers v. Hardwick* which argued that: (1) the fact that a State’s governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice, and (2) individual decisions concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of “liberty” protected by due process. As the case involved consent between adults, and there was no evidence of injury or coercion, the Court decided that no legitimate governmental interest had been engaged to circumscribe the privacy of the individual.

The normative scope of the “right to privacy”, acknowledges a governmental interest geared towards “protection”. These limitations are the usual public interest considerations and the balancing test or public policy interests are well stated. Some have argued that there are three limiting principles that may be discerned within the jurisprudence of the European Court of Human Rights that apply to sex:<sup>311</sup> (a) the harm principle,<sup>312</sup> (b) restriction to acts among consenting adults<sup>313</sup> and c) withholding the protection from commercial sexual conduct, even if it occurs at home. A similar governmental interest was noted in South Africa in the case of *National Coalition of Gay and Lesbian Equality v. Minister of Justice* and was expressed as follows:

*“[t]his governmental interest is engaged because of a perceived harm. In private relations, persons may be penalized for inter-generational, intra-familial and cross species sex in public or private. Sex involving violence,*

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309. US Supreme Court, Judgment of 26 June 2003 [*Lawrence et al. v. Texas* (02-102) 539 U.S. 558 (2003)].

310. *Ibid.*

311. Mary Robinson amicus brief in *Lawrence v. Texas* (<http://hrw.org/press/2003/07/amicusbrief.pdf>) at p. 16.

312. In its Judgment of 19 February 1997, in the case of *Laskey, Jaggard and Brown v. United Kingdom, doc. cit.*, the Court emphasised the harm principle in declining to extend *Dudgeon* to protect consensual, sado-masochistic sexual activity in the home. The Court stressed “*that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8*”, para. 36.

313. In *Dudgeon* itself, the Court acknowledged that “*some degree of regulation of male homosexual conduct*” by the criminal law was justified, even with respect to consensual acts committed in private, “*to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence*”.

*deception, voyeurism, intrusion or harassment is sometimes punishable or made actionable, wherever they take place*".<sup>314</sup>

## Summary

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- Sexual orientation and gender identity are an essentially private manifestation of human personality and the right to private life. It is undisputed that adult consensual sexual activity, conducted in private, is covered by the concept of 'privacy' and that gender identity, sexual orientation and activity concern an intimate aspect of private life;
- The right to private life is a broad umbrella covering *inter alia* integrity of the home, body and family, and determination and development of one's own personality, personal identity and inter-personal relationships. The right is violated if an individual's privacy is interfered with either unlawfully or lawfully but arbitrarily;
- States have the international obligation to guarantee the right to private life. This includes the duty of non-interference with private life and the obligation to prevent attacks by third parties on private life. The obligation entails both positive and negative duties;
- The right to privacy is a non-absolute right and it can be derogated in times of emergency. Derogation does not mean obliteration of the right;
- In normal times, the right to privacy may be subject to restrictions or interference, which must be subject to law and must be not arbitrary. Interference or restriction may be permitted, but only if they:
  - are essential in the interests of society and are necessary in a democratic society;
  - have legitimate aim and purpose;
  - are reasonable in the particular circumstances of the case;
  - are provided for by law, which specifies in detail the precise circumstances in which such interference or restriction is to occur; and
  - compatible and consistent with international human rights law;
- Permissible limitations on the right to privacy are the usual public interest considerations, balancing tests and public policy concerns. Some of these include the protection of the individual from harm, restriction of acts to

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314. Constitutional Court of South Africa, Judgment of 9 October 1998, *National Coalition of Gay & Lesbian Equality and Another v. Minister of Justice and others*, Case CCT11/98.

consenting adults and withholding protection from commercial sexual conduct, even if it occurs at home. The principles of tolerance and broadmindedness are important considerations in balancing competing considerations concerning privacy of the individual.



*“The detention of [...] persons prosecuted on the grounds that, by their sexual orientation, they incited ‘social dissention’ constitutes an arbitrary deprivation of liberty, being in contravention of the provisions of article 2, paragraph 1, of the Universal Declaration of Human Rights, and articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights.”*

—UN Working Group on Arbitrary Detention<sup>315</sup>

## IV. Arbitrary Deprivation of Liberty

### 1. Legal Nature and Scope

International law recognises and protects the right to liberty and the right not to be arbitrarily deprived of liberty.<sup>316</sup> The concept of deprivation of liberty assumes different forms, including arrest<sup>317</sup> and detention.<sup>318</sup> It also covers any kind of deprivation of liberty: pre-trial detention, administrative detention, policy custody, internment and house arrest, amongst others. The “right to liberty” is closely connected with the “right to security of person”<sup>319</sup>, protected by Article 3 of the *Universal Declaration of Human Rights*. Furthermore the Human Rights Committee has pointed out that “Article 9(1) of the [ICCPR] protects the right to security of person also outside the context of formal deprivation of liberty. An interpretation of

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315. Working Group on Arbitrary Detention, Opinion No. 7/2002 (Egypt), of 21 of June 2002, para. 28, UN Doc. E/CN.4/2003/8/Add.1.
316. Universal Declaration of Human Rights (Articles 3 and 9), International Covenant on Civil and Political Rights (ICCPR) (Article 9), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 16), Convention on the Rights of the Child (Article 37), International Convention for the Protection of All Persons from Enforced Disappearance (Article 17), Declaration on the human rights of individuals who are not nationals of the country in which they live (Article 5.1), African Charter on Human and Peoples’ Rights (Article 6), Principles and Guidelines on the right to a fair trial and legal assistance in Africa (Principle M), American Declaration of the Rights and Duties of Man (Articles I and XXV), American Convention on Human Rights (Article 7), Arab Charter on Human Rights (Article 14) and European Convention on Human Rights (Article 5).
317. The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides the following definition of ‘arrest’: “the act of apprehending a person for the alleged commission of an offence or by the action of an authority”.
318. ‘Detention’ means the condition of persons deprived of personal liberty except as a result of conviction for an offence (UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, “Use of Terms”).
319. See Human Rights Committee: Views of 25 October 2000, Case *Rodger Chongwe v. Zambia*, Communication No. 821/1998, CCPR/C/70/D/821/1998; Views of 20 March 2000, Case *Carlos Dias v. Angola*, Communication No. 711/1996, CCPR/C/68/D/711/1996; and Views of 12 July 1990, Case *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, CCPR/C/39/D/195/1985. See also the European Court of Human Rights, Judgments of 12 March 2003 and 5 May 2005 (Grand Chamber), Case of *Öcalan v. Turkey*, Application No. 46221/99. Article 3 of the Universal Declaration of Human Rights refers to the right to life, the right to liberty and the right to security of the person.

Article 9 which would allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction would render totally ineffective the guarantees of the Covenant”.<sup>320</sup> States have the obligation to adopt and put in place legislative or other measures to ensure the right to liberty and to prevent arbitrary detention. To protect the right to liberty, international law has established numerous guarantees that seek to protect people from unlawful or arbitrary detention or arrest.

According to applicable international human rights treaties,<sup>321</sup> the right to liberty may be the subject of derogation in times of emergency. However, such derogations must be consistent with other obligations under international law, including international customary law, in particular peremptory norms of international law that extend beyond the express list of non-derogable provisions established in human rights treaties,<sup>322</sup> and cannot deprive detainees of the safeguards designed to protect non-derogable rights. In this connection, the Human Rights Committee has pointed out that a state of emergency or state of war cannot be invoked as a justification for unacknowledged detention, arbitrarily depriving people of their liberty, or denying anyone deprived of their liberty the right to be treated with humanity and respect for the inherent dignity of the human person.<sup>323</sup>

## 2. Defining arbitrary deprivation of liberty

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In the *Universal Declaration of Human Rights*, Article 9 states that “[n]o one shall be subjected to arbitrary arrest, detention or exile”. The Declaration does not define “arbitrary”. It should be noted that the jurisprudence of arrest and detention are overlapping but separate. While the jurisprudence on arrest is concerned with the reasons advanced for detaining an individual, the jurisprudence on detention is also concerned with additional issues related to keeping an individual detained over time. The UN Human Rights Committee has underlined that “for an arrest to be in compliance with Article 9, paragraph 1, [of the ICCPR] it must not only be lawful, but also reasonable and necessary in all the circumstances”.<sup>324</sup> It has also stated that “[p]re-trial detention should be an exception and as short as possible”.<sup>325</sup>

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320. Views of 12 July 1990, Case of *William Eduardo Delgado Páez v. Colombia*, *doc. cit.*, para. 8.3.

321. The ICCPR (Article 4), American Convention on Human Rights (Article 27) and European Convention on Human Rights (Article 15).

322. Human Rights Committee, *General Comment No. 29, States of emergency, Article 4*, para. 11.

323. *Ibid.*, paras. 11 and 13.

324. Views of 5 November 1999, Case *Aage Spakmo v. Norway*, Communication No 631/1995, para. 6.3, in UN Doc. C/67/D/631/1995, 11 November 1999.

325. Human Rights Committee, *General Comment No. 8, Right to liberty and security of persons, Article 9*, para. 3. See also, *Concluding observations of the Human Rights Committee: Argentina*, UN Doc. C/CO/70/ARG, 3 November 2000, para. 10.

The Human Rights Committee has considered, in the framework of a temporary or pre-trial detention of a judicial nature, that:

*“[t]he drafting history of article 9, paragraph 1 [of the ICCPR], confirms that ‘arbitrariness’ is not to be equated with ‘against the law,’ but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances, [...] for example, to prevent flight, interference with evidence or the recurrence of crime”.*<sup>326</sup>

Several general criteria of arbitrariness can be identified from the Human Rights Committee’s jurisprudence, although every kind of deprivation of liberty may require additional or specific criteria. These include legality, legitimacy, necessity, proportionality and preservation of other human rights, including *inter alia* the right to a remedy and to security of person.

The European Court of Human Rights<sup>327</sup>, the Inter-American Commission on Human Rights<sup>328</sup> and the African Commission on Human and Peoples’ Rights<sup>329</sup> all follow this rational: to avoid arbitrariness detention must be prescribed by law and that domestic law be in conformity with regional and international law.

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326. Views of 23 July 1990, *Case Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, para. 5.8, CCPR/C/39/D/305/1988 of 15 August 1990. See also Views of 5 November 1999, *Case Aage v. Norway*, Communication No. 631/1995, para. 6.3 (CCPR/C/67/D/631/1995) ; Views of 21 July 1994, *Case Albert Womah Mukong v. Cameroon*, Communication No. 458/1991, para. 9(8), (CCPR/C/51/D/458/1991); Views of 3 April 1997, *Case A(name deleted) v. Australia*, Communication No 560/1993, para. 9.2 (CCPR/C/59/D/560/1993).

327. The European Court of Human Rights specifies that deprivation of liberty must protect individuals from arbitrariness in consistency with Article 5 of the Convention, see Judgment of 15 November 1996, *Case of Chahal v. The United Kingdom*, para. 118; Judgment of 12 March 2003, *Case of Öcalan v. Turkey*, para. 86; Judgment of 18 December 1986, *Case of Bozano v. France*, para. 54; and Judgment of 27 September 1990, *Case of Wassink v. the Netherlands*, para. 24. Along the same vein see also the Inter-American Commission on Human Rights Report on Terrorism and Human Rights, *op. cit.*, para. 121.

328. The Inter-American Commission on Human Rights has stated that although an arrest may be made in accordance with procedure – if it is without reasonable purpose then it is arbitrary, see Report No.43/96, *Case 11.430, General José Francisco Gallardo Rodríguez (Mexico)*, paras. 65-70. It has also stated that domestic law must confirm to the fundamental purposes underlying Article XXV, protecting individuals from arbitrary deprivations of liberty; see Report No. 51/01, *Case 9903, Rafael Ferrer-Mazorra et al (United States)*, para. 211.

329. The African Commission has outlined that, “*Therefore, any domestic law that purports to violate this right should conform to internationally laid down norms and standards. [...] Article 6 of the African Charter further states that no one may be arbitrarily arrested or detained. Prohibition against arbitrariness requires among other things that deprivation of liberty shall be under the authority and supervision of persons procedurally and substantively competent to certify it*”, Communication No. 241/2001, *Case of Purohit and Moore /The Gambia*, para. 64-65.

Early in 1962, a UN Committee conducted a “Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile”<sup>330</sup> and concluded that “an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person”.<sup>331</sup> In considering those criteria, the UN Working Group on Arbitrary Detention has developed three categories of arbitrary detention:

- when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (Category I);
- when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by the Articles of the *Universal Declaration of Human Rights*, such as freedom of expression and freedom of conscience (Category II); and
- when the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (Category III).<sup>332</sup>

### 3. Basic criteria for lawful deprivation of liberty

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Any deprivation of liberty must meet the following criteria to avoid being arbitrary: procedural and substantive legality, legitimacy of purpose, necessary, proportional and human rights guaranteed.<sup>333</sup>

The European Court of Human Rights has considered that “judicial control of interferences by the executive with the individual’s right to liberty provided for by article 5 [of the European Convention on Human Rights] is implied by one of the fundamental

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330. The Committee was set up by the former UN Commission on Human Rights in 1956 with the purpose of carrying out several studies. Its mandate to carry out the study on the right of everyone to be free from arbitrary arrest, detention and exile was endorsed in resolution 624 B (XXII) of the Economic and Social Council.

331. *Study of the right of everyone to be free from arbitrary arrest, detention and exile*, UN Doc. E/CN.4/826/Rev.1, p. 7, para. 27 (1964).

332. See *Fact Sheet No. 26: The Working Group on Arbitrary Detention*, Annex IV “Revised Methods of Work”, para. 8 (<http://www2.ohchr.org/english/about/publications/docs/fs26.htm>).

333. See, among others, the Inter-American Court of Human Rights (Judgment of 21 January 1994, *Gangaram Panday*, paras. 46-47; Judgment of 8 July 2004, *Gómez Paquiyauri v. Peru*, para. 83; Judgment of 23 November 2003, *Maritza Urrutia v. Guatemala*, para. 65; Judgment of 18 September 2003, *Bulacio v. Argentina*, para. 125; and Judgment of 7 June 2003, *Juan Humberto Sánchez v. Honduras*, para. 78) and the European Court of Human Rights (Judgment of 26 May 1993, *Brannigan and McBride v. The United Kingdom*, para. 48; Judgment of 29 November 1988, *Brogan and others v. The United Kingdom*, para. 32; Judgment of 27 September 2001, *Günay and others v. Turkey*, para. 22; Judgment of 26 November 1997, *Murat Sakik and others v. Turkey*, para. 44; and Judgment of 15 November 1996, *Chahal v. The United Kingdom*, para. 118).

principles of a democratic society, namely the rule of law”.<sup>334</sup> They have further declared that “the list of exceptions to the right to liberty secured in Article 5.1 [of the European Convention] is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty”.<sup>335</sup>

The *European Convention on Human Rights* also requires that in addition to being reasonably justifiable with reference to Article 5.1, an arrest must be a measure proportional to the situation it purports to remedy. The European Court considered that although Article 5.1 of the Convention allows for the detention of persons “for the prevention of the spreading of infectious diseases”, the arrest and detention of an HIV-positive man for just that purpose was arbitrary because “less severe measures had not been considered and found to be insufficient to safeguard the public interest”.<sup>336</sup> The Court reached its decision despite noting that the subject of the arrest order was often non-cooperative with hospital staff and had a sexual preference for teenage boys. Here the Court conducted a proportionality test: weighing the risks of the spread of HIV against the severity of the circumstances the arrest and detention are intended to remedy.<sup>337</sup>

The Inter-American Court of Human Rights has clarified that as well as adhering to the procedures prescribed by law and ensuring those laws are in accordance with the principles established in the Convention, to ensure a detention is not arbitrary it must not be “unreasonable, unforeseeable or lacking in proportionality.”<sup>338</sup>

### 3.1 Legality

All the major human rights treaties require that arrests or detention be made according to a procedure established by law. The ICCPR says, “[n]o one shall be deprived of his liberty except [...] in accordance with such procedure as are established by law”,<sup>339</sup> the *American Convention on Human Rights* prohibits arrests “except [...] under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto”,<sup>340</sup> the *African*

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334. Judgment of 26 May 1993, Case of *Brannigan and McBride v. United Kingdom*, para. 48. See also judgment of 29 November 1988, case *Brogan and others v. United Kingdom*, para. 32; Judgment of 27 September 2001, case *Günay and others v. Turkey*, para. 22; and Judgment of 26 November 1997, Case of *Murat Sakik and others v. Turkey*, para. 44.

335. Judgment of 6 April 2000, Case of *Labita v. Italy*, para. 170. In the same line, see judgment of 22 March 1995, Case of *Quinn v. France*, para. 42; and judgment of 25 May 1998, case *Kurt v. Turkey*, para. 122.

336. Judgment of 25 January 2005, Case of *Enhorn v. Sweden*, Application No. 56529/00, para. 55.

337. *Ibid.*, para. 48.

338. Judgment of 21 January 1994, Case of *Gangaram Panday*, paras. 46-47. See Also: Judgment of 8 July 2004, Case of *Gómez Paquiyauri v. Peru*, para. 83; Judgment of 23 November 2003, Case of *Maritza Urrutia v. Guatemala*, para. 65; Judgment of 18 September 2003, Case of *Bulacio v. Argentina*, para. 125; and Judgment of 7 June 2003, Case of *Juan Humberto Sánchez v. Honduras*, para. 78.

339. International Covenant on Civil and Political Rights, Article 9.1.

340. American Convention on Human Rights, Article 7.2.

*Charter on Human and Peoples' Rights* requires arrests to be made only “for [...] conditions previously laid down by law”,<sup>341</sup> the *European Convention on Human Rights* requires that arrests be made “in accordance with a procedure prescribed by law”,<sup>342</sup> and the *Arab Charter on Human Rights* stipulates that “no one shall be arrested, held in custody or detained without a legal warrant and without being brought promptly before a judge”.<sup>343</sup> Deprivation of liberty that does not meet these procedural requirements is arbitrary.

Procedural arbitrary detentions fall into two broad categories: those where no procedure is followed, and those where the procedure is incorrectly followed. The first form, “when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty” and consequently no procedure applies, is the easiest to recognise. For example, when the European Court of Human Rights found in the case of *Denizci and Others v. Cyprus* where the police arrested nine people and expelled them from the country, “that no reason was given for their arrest, that no court order or judgment was served on them and that there was no judicial warrant authorising their arrest”, it was quickly able to conclude that the arrest was arbitrary.<sup>344</sup>

The other type of procedural arbitrary arrest occurs when the arresting authorities fail to follow the legal procedure established for arrest under national law. In the case of *Gusinskiy v. Russia*, the businessman Gusinskiy had been arrested and detained for questioning in the course of a criminal investigation into fraud he was alleged to have committed.<sup>345</sup> Gusinskiy was the holder of State decoration; a few weeks before Gusinskiy’s arrest, the Russian parliament had passed a law granting to all holders of such decorations an amnesty from imprisonment of any duration and from being the subject of criminal investigations. The European Court of Human Rights reasoned that, since “failure to comply with domestic law entails a breach of the [European] Convention”, the police’s failure to follow the amnesty law made Gusinskiy’s arrest arbitrary. Another type of procedural invalidity can occur when the authority ordering the deprivation of liberty is not competent to do so.<sup>346</sup> The Inter-American Court of Human Rights considered the case of an Ecuadorian arrested subsequent to the issue of an order by the national police.<sup>347</sup> As Ecuadorian law provides that only a court may issue a valid arrest warrant the police order was legally insufficient to authorize the arrest. Consequently, the Court considered the arrest illegal and therefore arbitrary.<sup>348</sup>

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341. African Charter on Human and Peoples’ Rights, Article 6.

342. European Convention on Human Rights, Article 5.1.

343. Arab Charter on Human Rights, Article 14.

344. Judgment of 23 May 2001, Case of *Denizci and Others v. Cyprus*, Application No. 25316-25321/94 and 27207/95, paras. 389-393.

345. Judgment of 11 October 2004, Case of *Gusinskiy v. Russia*, Application No. 70276/01.

346. See for example, Inter-American Commission on Human Rights, Report No. 73/00, Case 11.784, *Marcelino Henríquez et al. (Argentina)*.

347. Judgment of 12 November 1997, Case of *Suárez Rosero* para. 34.

348. *Ibid.*, paras. 44-45.

### 3.2 Legitimate Purpose

Even where an arrest is made in proper compliance with legal procedure, it is arbitrary if it is not made for a legitimate purpose. Beyond compliance with domestic law, courts must also look to international human rights law, customary international law and general principles of international law to determine whether the stated purpose of an arrest is legitimate.

The UN Working Group on Arbitrary Detention considers arbitrary any deprivation of liberty resulting from the exercise of the rights or freedoms guaranteed by the articles of the *Universal Declaration of Human Rights*. For example, the Working Group has considered arbitrary the detention of persons “for having peacefully exercised their right to freedom of opinion and expression, as guaranteed under Articles 18, 19 and 20 of the *Universal Declaration of Human Rights* and Articles 18, 19, 21 and 22 of the *International Covenant on Civil and Political Rights*”.<sup>349</sup> Similarly, the Human Rights Committee has determined that, while Article 19.3 of the ICCPR allows for pursuing the “legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances, [it] cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights”.<sup>350</sup> The African Commission on Human and Peoples’ Rights and the Inter-American Commission on Human Rights have also considered that when the law is used for an illegitimate purpose, such as prosecuting the political opposition or silencing human rights advocates, any deprivation of liberty under such laws would be arbitrary.<sup>351</sup>

## 4. Deprivation of liberty on grounds of Sexual Orientation and Gender Identity

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Frequently, LGBT persons are deprived of their liberty solely on the grounds of their sexual orientation or gender identity. This kind of deprivation of liberty can include judicial prosecution and trial, administrative detention, deprivation of liberty on medical grounds and arrest for the purposes of harassment, among others. It has already been shown that since sexual orientation and gender identity are part of the right to private life and grounds of non-discrimination, the deprivation of liberty on

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349. Working Group on Arbitrary Detention: Opinion No. 30/2001 (Islamic Republic of Iran), of 4 December 2001, para. 11, in UN Doc. E/CN.4/2003/8/Add.1.

350. Views of 21 July 1994, Case of *Albert Womah Mukong v. Cameroon*, Communication No. 458/1991, para. 9.7, in UN Doc. CCPR/C/51/D/458/1991.

351. See *inter alia*: African Commission on Human and Peoples’ Rights, Communications No. 140/94, 141/94 and 145/95, Case of *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria*; African Commission on Human and Peoples’ Rights, Communication No. 241/2001, Case of *Purohit and Moore /The Gambia*; Inter-American Commission on Human Rights, Report No.43/96, Case 11.430, *General José Francisco Gallardo Rodríguez (Mexico)*; Inter-American Commission on Human Rights, Resolution No. 33/82, Case 7824 (Bolivia).

sexual orientation or gender identity grounds can amount to an arbitrary deprivation of liberty.

The existence of laws criminalising certain manifestations of sexual orientation or gender identity, even in circumstances where these laws are not actively enforced, will reduce the scope of liberty for persons of homosexual orientation or transgender identity.<sup>352</sup> States consequently have an obligation to eliminate these laws, for reason that they necessarily lead to arbitrary deprivation of liberty. For example, buggery laws, even though technically implicating all consenting adults engaging in anal intercourse, are primarily associated with male homosexuality; their application therefore disproportionately affects gay men. The targets of these laws are frequently men of homosexual orientation, regardless of whether they have committed the physical act of buggery itself. The State-sponsored imposition of an aura of criminality on homosexual men through these laws marks the entire community with a badge of perversity.<sup>353</sup> In accordance with this view, Justice Sachs of the Constitutional Court of South Africa notes in *National Coalition of Gay and Lesbian Equality v. Minister of Justice*:

*“[i]t is important to start the analysis by asking what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? Outside of regulatory control, conduct that deviates from some publicly established norm is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm. If proof were necessary, it is established by the fact that consensual anal penetration of a female is not criminalized. Thus, it is not the act of sodomy that is denounced by the law, but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony”.*<sup>354</sup>

Legal provisions that cause loss of liberty because of sexual orientation or gender identity may occur more indirectly. Detention or prosecution may be ostensibly based on reasons other than one's identity or status, but these reasons may merely be a pretext for taking action against one's sexual orientation or gender identity. Detentions made under laws which deem consensual homosexual sex or expressions of gender identity to be mental illnesses requiring compulsory hospitalization

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352. Ryan Goodman, “Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics”, in *California Law Review*, No. 89, 2001, p. 643.

353. See K Thomas “Beyond the Privacy Principle” in *After Identity*; editors, D Danielson and K Engle, Routledge, New York, 1995.

354. Judgment of 9 October 1998, *National Coalition of Gay & Lesbian Equality and Another v. Minister of Justice and others*, Case CCT11/98, para. 108.



are arbitrary.<sup>355</sup> Vague morality codes and laws circumscribing public health, morality and public decency are often also deployed to affect arbitrary detentions on the grounds of sexual orientation, or gender identity or expression.

The question of arbitrary deprivation of liberty and sexual orientation was first brought before the UN Working Group on Arbitrary Detention (WGAD) in an opinion concerning the arrest of 55 men in Cairo, Egypt, during a police raid on a discotheque in 2001.<sup>356</sup> The WGAD considered information charging that police targeted men who appeared to them to have been homosexuals or who were not accompanied by women. In its defence, the Egyptian government argued that Egyptian law did not provide for the prosecution of a person on account of his or her sexual orientation. Rather, other criminal charges had been levied, including “contempt of religion” and “habitually engaging in immoral acts with men”. The Government argued that the criminal offence of each detainee was his perpetration of immoral acts and offences against public decency, and that gender or sexual orientation were not elements of the offences.

In the light of the above information, the WGAD considered the case in two stages. First, it considered whether the alleged prosecution or conviction of the persons accused on grounds of sexual orientation was justified and, if so, whether those grounds constituted discrimination under Article 2, paragraph 1, of both the *Universal Declaration of Human Rights* and the ICCPR, which would confer an arbitrary character on their detention. This inquiry sought to ascertain whether there had been a Category II deprivation of liberty.

The WGAD concluded that the men were in fact prosecuted on charges of homosexuality. The Working Group reasoned that the legal examination ordered by the Procurator’s Office, including an “anal examination”, was in fact an inquiry into sexual orientation, to determine whether the arrestees were homosexuals, and therefore liable for having committed the offence of “social dissensions” under Article 98, paragraph 1, of the Egyptian Penal Code.

The WGAD then considered whether discrimination on the grounds of sexual orientation was covered by the ICCPR, to which Egypt is a party, and thus prohibited under applicable international law. Specifically, the WGAD considered whether the reference to “sex” in the ICCPR could be regarded as covering “sexual orientation or affiliation”. If so, the detention of the defendants could be considered arbitrary on the grounds that it was ordered on the basis of a domestic legislation provision, namely Article 98, paragraph 1, of the Egyptian Penal Code, not in accordance with the international standards set forth in Article 2, paragraph 1, of the *Universal*

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355. In its *General Comment No. 8, Right to liberty and security of persons (Article 9)*, the Human Rights Committee “points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.” (para. 1).

356. Opinion No 7/2002 (Egypt), of 21 June 2002, in UN Doc. E/CN.4/2003/8/Add.1.

*Declaration of Human Rights* and Articles 2, paragraph 1, and 26 of the ICCPR. The WGAD decided that the approach adopted by UN Human Rights Treaty Bodies<sup>357</sup> and the Office of the United Nations High Commissioner for Refugees<sup>358</sup> with regard to this question would argue in favour of an affirmative answer. The WGAD found that the detention of the men prosecuted for inciting “social dissension” constituted an arbitrary deprivation of liberty. This was considered to be a prosecution and detention on the basis of sexual orientation, which was in contravention of the provisions of Article 2, paragraph 1, of the *Universal Declaration of Human Rights*, and Articles 2, paragraph 1, and 26 of the ICCPR.<sup>359</sup>

In a later case involving Cameroon,<sup>360</sup> the WGAD applied a line of reasoning similar to its earlier opinion concerning Egypt. One notable difference was that the right to privacy in Article 17 of the ICCPR was presented as a Category II arbitrary detention using the Working Group’s formulation. Though the WGAD also based the case for discrimination under Article 26 of the ICCPR, the extension of the scope of Category II to include the right to privacy is noteworthy.

In the Cameroon case, 11 men had been arrested in a bar reputed to be a meeting place for homosexuals. The men were accused of violating Article 347 (Bis) of the Criminal Code prescribing a punishment of detention from 6 months to 5 years and a fine for whoever has sexual relations with someone of the same sex.

The WGAD reasoned that the existence of laws criminalising private homosexual relationships between consenting adults, as well as the application of penalties against these persons, violates the protection of private life and the right of non-discrimination established by the ICCPR. As a consequence, it was considered that the criminalisation of homosexuality established in the Cameroonian penal legislation was incompatible with Articles 17 and 26 of the ICCPR. The WGAD concluded that the deprivation of liberty applied in the case was arbitrary.<sup>361</sup>

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357. The WGAD refers to the Human Rights Committee (Views of 31 March 1994, Case of *Nicholas Toonen v. Australia*, Communication No. 488/1992, para. 8.7- U.N. Doc CCPR/C/50/D/488/1992- and *Concluding Observations of the Human Rights Committee: Poland*, CCPR/C/79/Add.110, para. 23); the Committee on Economic, Social and Cultural Rights, *General Comment No. 14* (2000), para. 18; and the Committee on the Elimination of Discrimination against Women (Concluding observations on Kyrgyzstan (A/54/38), paras. 127 and 128).

358. The Office of the United Nations High Commissioner for Refugees, considering “persecution on account of one’s sexual orientation”, has stated: “[w]here homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalized, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where to protect effectively the claimant against such harm.” (Guidelines on International Protection: gender-related persecution within the context of Article 1 A (2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, para. 17, of 7 May 2002).

359. Opinion No. 7/2002, *doc. cit.*, para. 28.

360. Opinion No 22/2006 (Cameroon) of 31 August 2006, in UN Doc. A/HRC/4/40/Add.1.

361. *Ibid.*, para. 22.

Under Article 5 of the *European Convention on Human Rights* persons of “unsound mind” may lawfully be detained in accordance with law. Gays and lesbians have historically been subjected to forced “medical” treatment to change their sexual orientation with methods of electric shock, other forms of “aversion therapy” or the use of psychotropic drugs.<sup>362</sup> The continuing treatment of homosexual and transgender identities as mental illnesses raises serious questions about deprivations of liberty that are justified for reasons of mental health.

According to the established jurisprudence of the European Court of Human Rights, three minimum conditions must be satisfied for an individual to be considered of “unsound mind” and deprived of liberty:

*“[f]irstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder”.*<sup>363</sup>

The opportunity to investigate whether one’s sexual orientation or gender identity is the real basis for deprivation of liberty arises in an evidentiary inquiry of whether a person is in fact of unsound mind. The European Court of Human Rights has clarified that, “the very nature of what has to be established before the competent national authority – that is, a true mental disorder – calls for objective medical expertise”.<sup>364</sup> The overwhelming reliance on medical knowledge in establishing proof in these questions has historically been problematic. However, one notes the progressive advancements in ceasing to treat homosexual orientation and transgender identities as mental disorders.

The WGAD has also expressed concern for the situation of vulnerable persons such as the disabled, drug addicts and people suffering from AIDS who are held in detention on health grounds.<sup>365</sup> It recommended that, “with regard to persons deprived of their liberty on health grounds, the Working Group considers that in any event all persons affected by such measures must have judicial means of challenging their detention”.<sup>366</sup> This facility would avail itself to persons who are detained on account of their sexual orientation, gender identity or gender expression, though the formal reasons charged are “health” or “mental instability”. The WGAD has not

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362. Amnesty International, *Breaking the Silence: Human Rights Violations based on sexual orientation*, London, 1995; See generally, Goodman, Ryan, “The Incorporation of International Human Rights Standards into sexual orientation asylum claims: cases of involuntary “medical” intervention”, in *Yale Law Journal*, Vol. 105, 1995.

363. Judgment of 5 October 2000, Case of *Varbanov v. Bulgaria*, Application No. 31365/96, para. 45.

364. Judgment of 24 October 1979, Case of *Winterwerp v. the Netherlands*, Application No. 6301/73, para. 39.

365. *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2004/3, of 15 December 2003, para. 74.

366. *Ibid.*, para. 87.

dealt with this type of situation and opines<sup>367</sup> that each scenario would have to be dealt with on a “case by case basis” and not “in the abstract”. It has stated that in the consideration of individual communications under its mandate:

*“Decisions on psychiatric detentions should avoid automatically following the expert opinion of the institution where the patient is held or the report and recommendations of the attending psychiatrist. Genuine adversarial procedure shall be conducted, where the patient and/or his legal representative are given the opportunity to challenge the report of the psychiatrist; [and] psychiatric detention shall not be used to jeopardize someone’s freedom of expression nor to punish, deter or discredit him on account of his political, ideological, or religious views, convictions or activity”.*<sup>368</sup>

These select guidelines evince an appreciation of the public policy elements that are inherent in detention on grounds of mental health, while simultaneously being vigilant to protect those detained from any form of discrimination.

As is the situation where laws criminalising adult same-sex practice are found to give rise to arbitrary deprivation of liberty, it is also arguable that detentions premised on homosexual or transgender identities being “mental disorders” are “arbitrary” and a violation of the right to liberty. The basis of this assertion is that such laws or provisions are based on unjustifiable discrimination on the grounds of sexual orientation or gender identity.

## **5. Special concerns regarding LGBT persons lawfully deprived of their liberty**

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A detention based solely on sexual orientation or gender identity grounds can amount to an arbitrary detention, however LGBT persons can be lawfully deprived of their liberty, for example when they have committed a crime. In any case, deprivation of liberty must meet the following criteria to avoid being arbitrary: procedural and substantive legality, legitimacy of purpose, necessity, proportionality and human rights guaranteed. LGBT persons deprived of their liberty must have the same rights and guarantees of the other detainees, such as: the right to be informed of the reasons for the arrest and of any charges against him/her; the right to be informed about his/her rights and how to avail himself or herself of these rights; the right to a judicial remedy to challenge the lawfulness of his detention and order his release if the detention is not lawful; the right to be brought promptly before a judge or other

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367. *Deliberation No. 7 on issues related psychiatric detention*, in Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2005/6, of 1 December 2004.

368. *Ibid.*, para. 58.

judicial officer; the right to prompt access to a lawyer; the right to have access to the outside world; and the right to humane treatment during detention.<sup>369</sup>

Sexual orientation or gender identity shall not be invoked to deny or restrict these rights and safeguards. The prohibition of discrimination has been clearly expressed by the Inter-American Commission on Human Rights, in its *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*: “[u]nder no circumstances shall persons deprived of liberty be discriminated against for reasons of [...] sexual orientation [...]. Therefore, any distinction, exclusion, or restriction that is either designed to or has the effect of undermining or impeding the recognition, enjoyment, or exercise of the internationally recognised rights of persons deprived of liberty, shall be prohibited.”<sup>370</sup> The UN Human Rights Committee has also noted that states of emergency cannot be used to justify derogation from the principle of non-discrimination.<sup>371</sup>

LGBT persons detained, as well as every person deprived of his/her liberty, must “be treated with humanity and with respect for the inherent dignity of the human person”.<sup>372</sup> This right applies to any one deprived of liberty under the laws and authority of the State who is held in prisons, hospitals – particularly psychiatric hospitals – detention camps or correctional institutions or elsewhere.<sup>373</sup> The duty to protect and preserve this right imposes on States a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty.<sup>374</sup> States have the obligation to organise their system of detention and penitentiary services in order to protect detainees from any kind of threats and acts of torture, cruel, inhuman, or degrading treatment or punishment, sexual violence, corporal punishment, collective punishment, forced intervention or coercive treat-

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369. The Standard Minimum Rules for the Treatment of Prisoners (Rule 93), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principles 17 and 18), the UN Basic Principles on the Role of Lawyers (Principles 1, 5, 6, 7 and 8), the International Convention for the Protection of All Persons from Enforced Disappearance (Article 17), Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution (Principle 6) and the Principles and Guidelines on the right to a fair trial and legal assistance in Africa (Principle M.2). See also Human Rights Committee, *General Comment No. 20, op. cit.* 24, para. 11.

370. Principle II of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. These Principles was approved by the Inter-American Commission on Human Rights during its 131st regular period of sessions, held in March 2008.

371. Human Rights Committee, *General Comment No. 29, doc. cit.*, para. 8.

372. See Article 10 (1) of the ICCPR; Article 17 (1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 37 (c) of the Convention of the Rights of the Child; Article 5 (5) of the American Convention on Human Rights; Article 5 of the African Charter on Human and Peoples’ Rights; and Article 20 of the Arab Charter on Human Rights.

373. Human Rights Committee, *General Comment No. 21, Humane treatment of persons deprived of their liberty, Article 10*, para. 2.

374. *Ibid.*, para. 3; European Court of Human Rights, Judgment of 14 June 2002, Case of *Paul and Audrey Edwards v. the United Kingdom*, Application No. 46477/99; and Inter-American Court of Human Rights, Judgment of 2 September 2004, Case of *Juvenile Re-education Institute v. Paraguay*, para. 158.

ment, and from any method intended to obliterate their personality or to diminish their physical or mental capacities.<sup>375</sup>

The UN Human Rights Committee has pointed out that states of emergency cannot be used to justify derogation of the right to be treated with humanity during the deprivation of liberty.<sup>376</sup> In certain countries, LGBT detainees are held under a regime of prolonged total isolation. The Human Rights Committee has found the prolonged, total isolation of a detainee from his or her family to “constitute inhuman treatment within the meaning of Article 7 and [be] inconsistent with the standards of human treatment required under Article 10, paragraph 1, of the [ICCPR]”.<sup>377</sup> Two UN Special Rapporteurs on Torture have noted that “incommunicado detention should be made illegal and is the most important determining factor as to whether an individual is at risk of torture”.<sup>378</sup> The Human Rights Committee, the Committee against Torture and the Inter-American Court of Human Rights have all noted that the prolonged solitary confinement or incommunicado detention of a detained or imprisoned person may amount to prohibited acts such as torture or ill-treatment.<sup>379</sup>

Principle 7 of the UN *Basic Principles on the Role of Lawyers* stipulates that “all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention”. The Human Rights Committee stated that “all persons who are arrested must immediately have access to counsel”<sup>380</sup> and that “the use of prolonged detention without any access to a lawyer or other persons of the outside world violates articles of the Covenant (Articles 7, 9, 10 and 14, para. 3.b)”.<sup>381</sup> The Committee has recommended “that no one [be] held for more than 48 hours without access to a lawyer”<sup>382</sup> and that all detainees, including those being held in

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375. See *inter alia*: Human Rights Committee, *General Comment No. 21, doc. cit.*; Principle I of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas; Principle M (7) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Inter-American Court of Human Rights, Judgment of 2 September 2004, Case of *Juvenile Re-education Institute v. Paraguay*.

376. Human Rights Committee, *General Comment No. 29, doc. cit.*, para. 13(a). In the same line, see Principle I of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

377. Views of 6 November 1997, Communication No 577/1994, Case of *Víctor Alfredo Polay Campos v. Peru*, para. 8.6, CCPR/C/61/D/577/1994, 9 January 1998.

378. Reports of the Special Rapporteur A/57/173, 2 July 2002, para. 16, E/CN.4/2004/56, para. 37, and A/57/173, 2 July 2002, para. 16.

379. Human Rights Committee, *General Comment No. 20, Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, Article 7*, para. 6; Committee against Torture (Reports A/54/44, paras. 121 and 146; A/53/44, para. 135; and A/55/44, para. 182) and Inter-American Court of Human Rights, Judgment 29 July 1988, Case of *Velasquez Rodriguez* (para. 156) and Judgment of 12 November 1997, Case of *Suarez Rosero* (paras. 90-91).

380. *Concluding Observations of the Human Rights Committee: Georgia*, CCPR/C/79/Add.75, 5 May 1997, para. 27.

381. *Concluding Observations of the Human Rights Committee: Israel*, CCPR/CO/78/ISR, para. 13.

382. *Ibid.*

administrative detention, be granted prompt access to a lawyer.<sup>383</sup> The UN Special Rapporteur on Torture has pointed out that “in accordance with international law, and as confirmed by States’ practice, the following basic legal safeguards should remain in fact in any legislation relating to arrest and detention, including any type of anti-terrorist legislation: [...] the right to have access to a lawyer within 24 hours from the time of arrest”.<sup>384</sup> To facilitate access to lawyers, as to allow communication with family members and other persons, detainees must be held in official places of detention and the authorities must keep a record of their identities.<sup>385</sup> Disappearances are absolutely prohibited, as are prolonged incommunicado detention and prolonged solitary confinement.

The right to have prompt access to medical personnel and medical assistance is recognised universally.<sup>386</sup> The Inter-American Commission on Human Rights has made clear that this right is so fundamental for the protection of detainees that it cannot be suspended even in situations allowing emergency derogation.<sup>387</sup> The failure to provide adequate medical care can constitute a violation of a State’s obligation to refrain from torture or cruel, inhuman or degrading treatment.<sup>388</sup>

Experience demonstrates that, if LGBT persons are in a position of vulnerability in a society, when they become detainees their vulnerability dramatically increases. Indeed, detainees perceived to be gay, lesbian, bisexual, or transgendered are at greater risk for violence, rape and sexual assault than the general population in detention.<sup>389</sup> This is due to a variety of factors: hatred of and prejudice against such people, social stigma that renders them less able to form personal relationships

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383. *Concluding Observations of the Human Rights Committee on: Israel*, CCPR/CO/78/ISR, para. 13, and *Switzerland*, CCPR/C/79/Add.70, para. 26; and Views of 27 July 1993, Communication No 326/1988, *Case of Henry Kalenga v. Zambia*, CCPR/C/48/D/326/1988, para. 6.3.

384. Report of the Special Rapporteur, A/57/173, 2 July 2002, para. 18. See also: E/CN.4/2004/56, para. 32.

385. Article 10.1 of the Declaration on the Protection of All Persons from Enforced Disappearances, Article 17 of International Convention for the Protection of All Persons from Enforced Disappearance, Rule 7 of the Standard Minimum Rules for the Treatment of Prisoners, Principles 20 and 29 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 6 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution, Article XI of the Inter-American Convention on Forced Disappearance of Persons, Rules 7 and 8 of the European Prison Rules, and Principle M(6) of the Principles and guidelines on the right to a fair trial and legal assistance in Africa.

386. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 24), the Declaration on the Protection of all Persons from Enforced Disappearance (Article 10) and the Standard Minimum Rules for the Treatment of Prisoners (Rules 37 and 92).

387. *Report on Terrorism and Human Rights*, *op. cit.*, paras. 127 and 139 and Recommendation No. 7.

388. For example, Inter-American Court of Human Rights, Judgment of 7 September 2004, *Case of Tibi v. Ecuador*, para. 151; African Commission on Human and Peoples’ Rights, *Case of International Pen v. Nigeria*, Communications Nos. 137/94, 139/94, 154/96 and 161/97 (1998), para. 80; Inter-American Court of Human Rights, Judgment of 27 November 2003, *Case of Maritza Urrutia v. Guatemala*, paras. 77-78.

389. For example, European Committee for the Prevention of Torture, *Visit Report Germany 2005*, CPT/Inf (2007) 18, para. 109; *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, E/CN.4/2002/76/Add.1, 14 March 2002, para. 829; *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, interim report*, A/56/156, 3 July 2001.

that guard against such acts, and the perception – often made real by official and extra-official discrimination – that perpetrators of such violence will not face consequences.<sup>390</sup> Justice system officials are obliged to take measures to reduce the risk of this violence.<sup>391</sup>

The European Committee for the Prevention of Torture (CPT), after visiting a German prison in which “homosexuals appeared to be particularly at risk of being assaulted by other prisoners”, observed that the “prison authorities’ duty of care includes the responsibility to protect inmates from other inmates who might wish to cause them harm. This is all the more important where a group is particularly vulnerable”.<sup>392</sup> The US Supreme Court, considering the case of a male-to-female transsexual who was raped two weeks after being transferred to a high-security men’s prison, has ruled that prison officials’ duty to provide “humane conditions of confinement” includes taking reasonable measures to abate any substantial risk of rape or sexual assault that officials know inmates face.<sup>393</sup> Failure to take such preventative steps, which may be evidenced by indifference to a pattern of repeated rapes and sexual assaults in detention facilities, may violate several international human rights norms, including the prohibitions on torture and cruel, inhuman or degrading treatment, and slavery.<sup>394</sup>

## Summary

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- The right to personal liberty and the right not to be arbitrarily deprived of liberty are universally recognised and protected by international human rights law;
- LGBT persons deprived of their liberty have the same rights and guarantees of other detainees, such as: the right to be informed of the reasons for the arrest and of any charges against him/her; the right to be informed about his/her rights and how to avail himself or herself of these rights; the right to a judicial remedy to challenge the lawfulness of his detention and order his release if the detention is not lawful; the right to be brought promptly before a judge or other judicial officer, the right to prompt access to a lawyer;

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390. European Committee for the Prevention of Torture, *Visit Report Ukraine 2000*, CPT/Inf (2002) 23, para. 65; and *Concluding observations of the Committee against Torture: Brazil*, A/56/44, 16 May 2001, para. 119; *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, interim report*, A/56/156, 3 July 2001, para. 23.

391. European Committee for the Prevention of Torture, *Visit Report Germany 2005*, CPT/Inf (2007) 18, para. 112; European Committee for the Prevention of Torture, *Visit Report Ukraine 2000*, CPT/Inf (2002) 23, para. 65; *Farmer v. Brennan*, 511 U.S. Supreme Court, 825, 847 (1994).

392. European Committee for the Prevention of Torture, *Visit Report Germany 2005*, CPT/Inf (2007) 18, paras. 109, 12.

393. *Farmer v. Brennan*, 511 U.S. Supreme Court, 825, 847 (1994).

394. Inter-American Court of Human Rights, Judgment of 2 September 2004, Case of *Juvenile Reeducation Institute v. Paraguay*; European Court of Human Rights, Judgment of 14 June 2002, Case of *Paul and Audrey Edwards v. the United Kingdom*, Application No. 46477/99.



the right to have access to the outside world; the right to humane treatment during detention and the right to have prompt access to medical personnel and medical assistance. Sexual orientation or gender identity shall be not invoked to deny or restrict these rights and safeguards;

- Deprivation of liberty based only on sexual orientation or gender identity grounds can amount to an arbitrary detention. States have an obligation to eliminate laws and legal practices that criminalise certain manifestations of sexual orientation or gender identity, for reason that they necessarily lead to arbitrary deprivation of liberty. This includes the use of vague “morality” provisions and administrative practices that are ostensibly designed, including under definitions of mental health;
- The concept of deprivation of liberty assumes different forms, including arrest, detention, pre-trial detention, administrative detention, policy custody, internment, house arrest, amongst others;
- The right to liberty may be the subject of derogation in times of emergency. However, such derogations must be consistent with other obligations under international law;
- The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability;
- For a deprivation of liberty to avoid being arbitrary, it must observe the following criteria: procedural and substantive legality, legitimacy of purpose, necessity, proportionality and observance of human rights, in particular the right to a remedy and to security of person;
- LGBT persons can lawfully be deprived of their liberty, but their deprivation of liberty must meet the above criteria to avoid being arbitrary;
- A deprivation of liberty is arbitrary when:
  - it is clearly impossible to invoke any legal basis justifying the deprivation of liberty;
  - the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by the articles of the *Universal Declaration of Human Rights* and the ICCPR; or
  - the total or partial non-observance of the international norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty an arbitrary character;

- States have the legal duty to protect detainees from any kind of threats and acts of torture, ill-treatment or punishment, sexual violence, corporal punishment, and other inhuman acts.

“[t]he supreme right of the human being”.

— Human Rights Committee<sup>395</sup>

## v. The Right to Life

### 1. Legal nature and scope

The right to not be arbitrarily deprived of life is a universal right protected by several international instruments<sup>396</sup> and its exercise is essential for all other human rights. If it is not respected all other rights lack meaning.<sup>397</sup> All the international human rights instruments emphasise the fundamental nature of the right to life. The UN Human Rights Committee has pointed out that “[i]t is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation”.<sup>398</sup> The Inter-American Court of Human Rights, has further emphasised “[t]he fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence”.<sup>399</sup> The African Commission on Human and Peoples’ Rights considers the right to life as “the fulcrum of all other rights [and] the fountain through which other rights flow”.<sup>400</sup>

The right to life must always be interpreted in an expansive way and any of its limitations must be approached with a restrictive interpretation. The Inter-American Court stipulates that “[b]ecause of its inherent nature, any restrictive approach to this right is inadmissible”.<sup>401</sup> By referring to its limitations, the European Court of

395. Human Rights Committee, Views of 31 March 1982, Case of *Suarez de Guerrero v. Colombia*, Communication No. 45/1979, para. 13.1.

396. Article 3 of the Universal Declaration of Human Rights; Article 6 of the ICCPR; Article 9 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 6 of the Convention on the Rights of the Child; Article 10 of the Convention on the Rights of Persons with Disabilities; Principle 1 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Article 7 of the United Nations Declaration on the Rights of Indigenous Peoples; and Article 5 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live; Article 4 of the African Charter on Human and Peoples’ Rights; Article 5 of the African Charter on the Rights and Welfare of the Child; Article I of the American Declaration on the Rights and Duty of Man; Article 4 of the American Convention on Human Rights; Article 5 of the Arab Charter on Human Rights; Article 2 of the European Convention on Human Rights; Article 2 of the Charter of fundamental rights of the European Union.

397. Judgment of 19 November 1999, Case of the “*Street Children*” (*Villagrán-Morales et al.*) v. *Guatemala*, para. 144.

398. Human Rights Committee, *General Comment No. 6: The right to life (Article 6)*, para. 1 and *General Comment No. 14: Nuclear weapons and the right to life (Article 6)*, para. 1.

399. Judgment of 19 November 1999, Case of the “*Street Children*” (*Villagrán-Morales et al.*) v. *Guatemala*, para. 144.

400. Case of *Forum of Conscience v. Sierra Leone*, Communication No. 223/98 (2000), para. 19.

401. Judgment of 6 April 2006, Case of *Baldeon-Garcia v. Peru*, para. 82. See also, Case of the “*Street Children*” (*Villagrán-Morales et al.*) v. *Guatemala*, *doc. cit.*, para. 144.

Human Rights decided that they must be “strictly construed”.<sup>402</sup> According to the Human Rights Committee, “[t]he expression ‘inherent right to life’ cannot properly be understood in a restrictive manner”.<sup>403</sup>

## 2. States’ obligation to protect the right to life

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Under international human rights law, the obligation of protection in relation to the right to life is absolute and is included among the obligations from which a State cannot derogate under any circumstances.<sup>404</sup> Accordingly, a State may not, even in time of war, public danger or other emergency<sup>405</sup> that threatens its independence or security, take measures suspending the obligation to protect the right to life. The absolute protection of the right to life applies to every individual under the jurisdiction of the State and, accordingly, “the activities of the individual in question, however undesirable or dangerous cannot be a material consideration”.<sup>406</sup>

The right to life not only presumes that no person shall be deprived of their life arbitrarily (negative obligation), but also requires States to take all necessary measures to protect and preserve the right to life (positive obligation). The Inter-American Court of Human Rights has pointed out that the State must “adopt any and all necessary measures to protect and preserve the right to life of the individuals under their jurisdiction. [...] States must adopt all the necessary measures to create a legal framework that deters any possible threat to the right to life; to establish an effective legal system to investigate, punish, and redress deprivation of life by State officials and private individuals; and guarantee the right to unimpeded access to conditions for a dignified life”.<sup>407</sup>

The duty to protect the right to life implies the prohibition to return, deport, extradite, expel, transfer or otherwise send anyone to a country where he or she faces a real risk of arbitrary deprivation of life.<sup>408</sup> In particular, States that have already

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402. Judgment of 27 September 1995, Case of *McCann and Others v. The United Kingdom*, Application No. 17/1994/464/545, para. 147.

403. Human Rights Committee, *General Comment No. 6, The Right to Life (Article 6)*, doc. cit., para. 5.

404. Article 4 of the ICCPR; Article 15 of the European Convention on Human Rights; Article 27 of the American Convention on Human Rights; and Article 5 of the Arab Charter on Human Rights. The African Charter on Human and Peoples’ Rights does not contain any provision allowing for derogations in times of emergency. In the absence of such a clause all rights enshrined in the African Charter are considered non-derogable and limitations on those rights can never be justified by emergencies or special circumstances. See African Commission on Human and Peoples’ Rights, Case of *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communications No. 105/93, 128/94, 130/94 and 152/96), 1998, paras. 67-68.

405. European Court of Human Rights, *McCann and Other v. United Kingdom*, doc. cit., para. 147; and Judgment of 14 December 2000, Case of *Gül v. Turkey* Application No. 22676/93), para. 78. See also *Human Rights and the Fight against International Terrorism, The Council of Europe Guidelines*, March 2005, Guideline XV.

406. See, *mutatis mutandis*, Judgment of 25 October 1996, Case of *Chahal v. The United Kingdom*, Application No. 22414/93, para. 80.

407. Judgment of 6 April 2006, Case of *Baldeon-Garcia v. Peru*, paras. 82-85.

408. See *inter alia*: the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 5) and the American Convention on Human Rights (Article 22.8).

abolished the death penalty have an obligation both not to implement it and not “to expose a person to the real risk of its application”.<sup>409</sup>

The UN Human Rights Committee has stated that “[t]he protection against arbitrary deprivation of life, which is explicitly required by the third paragraph of Article 6.1 [of the ICCPR] is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities”.<sup>410</sup>

The right to life further requires that States take reasonable measures to protect their citizens from being arbitrarily deprived of life. These include, at the level of public policy, the obligation to combat violent crime, and at the level of action by security forces, the obligation to act to prevent specific foreseeable acts of violence.

An individual’s right to life is also violated in cases where “the authorities knew or ought to have known [...] of a real and immediate risk to the life of an identified individual [...] from the criminal acts of a third party and [...] failed to take measures [...] to avoid that risk”.<sup>411</sup> In a case in which a mentally ill prisoner, Christopher Edwards, was killed by his cell mate, Richard Linford, whom the prison authorities knew to be a violent paranoid schizophrenic, the Court did find a violation of the State’s obligation to protect Edwards’ life, since “information was available which identified [...] Linford as [...] a real and serious risk to [...] Christopher Edwards, when placed in his cell”.<sup>412</sup> The *Edwards* case also highlighted the State’s increased obligation to protect the right to life of people who are uniquely unable to defend the right themselves.<sup>413</sup> These include prisoners, the mentally ill and children. It is arguable whether this category could be extended to sexual minorities.

People in detention are uniquely dependent on the State to safeguard their rights; therefore the State has an enhanced obligation to protect them. The Inter-American Court has noted that the State has an obligation to “keep to an absolute minimum” “collateral” restrictions on human rights resulting from the lawful deprivation of

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409. Human Rights Committee, Views of 5 August 2003, Case of *Roger Judge v. Canada*, Communication No. 829/1998, para. 10.4, and Views of 28 July 1997, Case of *A.R.J. v Australia*, Communication No. 692/1996, para. 6.11, UN. Doc. CCPR/C760/D/692/1996.

410. Human Rights Committee, *General Comment No. 6, doc. cit.*, para. 3.

411. European Court of Human Rights, Judgment of 24 October 2002, Case of *Mastromatteo v. Italy*, Application No. 37703/97, para. 68. See also, European Court of Human Rights: Judgment of 28 October 1998, Case of *Osman v. the United Kingdom*, Application No. 23452/94, para. 116; Judgment of 14 June 2002, Case of *Paul and Audrey Edwards v. the United Kingdom*, Application No. 46477/99, para. 55, and Judgment of 23 November 1999, Case of *Bromiley v. the United Kingdom*, Application No. 33747/96.

412. Judgment of 14 June 2002, Case of *Paul and Audrey Edwards v. the United Kingdom*, Application No. 46477/99, para. 60.

413. *Ibid.*, para. 56.

liberty.<sup>414</sup> Thus, a State violated juvenile prisoners' right to life when they were kept in a prison lacking fire alarms, extinguishers and evacuation plans, and perished in a fire.<sup>415</sup>

### 3. Arbitrary deprivation of life and death threats

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Violations of the right not to be arbitrarily deprived of life can be grouped into three categories:

- summary executions: the basis of this concept is the application of death penalty in conditions prohibited by international law;
- arbitrary executions: these are those deprivations of life due to the excessive or illegal use of force by law enforcement officials, in conditions that are contrary to those prescribed by international law; and
- extrajudicial executions: they are related with the category of murder or intentional homicide in criminal law. For example, the political assassinations and the deaths caused by attacks or the killings perpetrated by State security forces, paramilitary groups, death squads or other private forces cooperating with the government or tolerated by it enter into this definition.

The prohibition of extrajudicial, arbitrary or summary execution is a peremptory norm of international law (*jus cogens*).<sup>416</sup>

#### 3.1 Extrajudicial execution

Extrajudicial executions are a gross human rights violation<sup>417</sup> and constitute a crime under international customary law.<sup>418</sup> Thus, a Guatemalan “social cleansing” operation in which street children were kidnapped and murdered by out-of-uniform police

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414. Inter-American Court of Human Rights, Judgment of 2 September 2004, Case of the “*Juvenile Reeducation Institute*” v. Paraguay, paras. 152 and 154.

415. *Ibid.*, para. 178.

416. Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders (1980), Resolution No. 5 on Extralegal Executions, paras. 2 and 5, UN document A/CONF.87/14/Rev.1 (1981); Inter-American Court of Human Rights, Judgment of 14 March 2001, Case of *Barrios Altos (Chumbipuma Aguirre et al. v. Peru)*; Inter-American Commission on Human Rights, *Recommendation on Asylum and International Crimes*, 20 October 2000; and Nigel Rodley, *The Treatment of Prisoners under International Law*, Clarendon Press, Oxford, 1999, Second Edition, p. 192.

417. See *inter alia*, Human Rights Committee: views of 29 March 1982, Communication No. 30/1978, Case of *Bleier Lewhoff y Valiño de Bleier v. Uruguay*; views of 31 March 1982, Communication No. 45/1979, Case *Pedro Pablo Carmargo v. Colombia*; and Final Observations on Burundi, of 3 August 1994, CCPR/C/79/Add.41, para. 9.

418. See *inter alia*: Definition “B. Serious crimes under international law” of the UN *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (in UN Doc.E/CN.4/2005/102/Add.1, 8 February 2005). The Updated Set of principles was recommended by the former UN Commission on Human Rights, resolution E/CN.4/RES/2005/81 of 21 April 2005) and Inter-American Commission on Human Rights, *Recommendation on asylum and international crimes*, of 20 October 2000. See also, Nigel Rodley, *The Treatment of Prisoners under International Law*, *op. cit.*, p. 192.

is a clear example of a violation of the right.<sup>419</sup> The prohibition of extrajudicial executions by the State also includes killings committed by non-State actors acting at the State's behest or acquiescence.<sup>420</sup> For example, the Inter-American Court has found that where Colombian paramilitaries engaged in killings of civilians with the "acquiescence or tolerance" of the State, even in the absence of direct orders or specific knowledge that the killings would occur, the Colombian government violated the right to life.<sup>421</sup>

### 3.2 Arbitrary execution

International human rights law permits implicitly or explicitly for the use of lethal force by law enforcement officials, though under imperative restrictions. The majority of treaties find the rationale in the prohibition of the "arbitrary" taking of lives. This is the reasoning used in the ICCPR, the *American Convention on Human Rights*, the *African Charter on Human and Peoples' Rights* and the *Arab Charter on Human Rights*. An exception is the *European Convention on Human Rights* that expressly states the cases in which force can be used only when "absolutely necessary": "(a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection".<sup>422</sup>

The UN *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* provide clear indication about the legitimate use of force and the criteria to establish when a deprivation of life can be arbitrary. In addition, the jurisprudence provides several criteria to assess the legitimacy of the use of force and the arbitrariness of deprivation of life. For example, the Human Rights Committee points out that the use of lethal force must be taken with preventive warning and by giving the victims the opportunity to surrender and it must be necessary for "their own defence or that of others or [...] to effect the arrest or prevent the escape of the persons concerned".<sup>423</sup> The European Court of Human Rights has upheld that the only permissible grounds of use of force are those envisaged by the Convention and that "a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is 'necessary to a democratic society'. [...] In particular, the force used must be strictly proportionate to the achievement of the aims"<sup>424</sup> set out in the European Convention.

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419. Judgment of 19 November 1999, Case of the "Street Children" (*Villagrán-Morales et al.*) v. *Guatemala*, paras. 137-147.

420. Judgment of 25 November 2003, Case of *Myrna Mack Chang v. Guatemala*, para. 139 and Judgment of 1 July 2006, Case of the *Ituango Massacres v. Colombia*, para. 132.

421. See Case of the *Ituango Massacres v. Colombia*, *doc. cit.*

422. European Convention on Human Rights, Article 2(2).

423. Views of 31 March 1982, Case of *Suarez de Guerrero v. Colombia*, Communication No. 45/1979, paras. 13.1 and 13.2, in UN Doc. CCPR/C/15/D/45/1979.

424. Case of *McCann and Others v. United Kingdom*, *doc. cit.*, paras. 148-149.

### 3.3 Summary execution and the death penalty

Even though international human rights law establishes the non-derogable nature of the right to be not arbitrarily deprived of the life, it admits the phenomenon of capital punishment under precise and restrictive conditions. The ICCPR and the *American Convention on Human Rights* both restrict the death penalty to “the most serious crimes”<sup>425</sup> and there is increasing agreement that this standard constitutes customary international law.<sup>426</sup> The UN *Safeguards guaranteeing protection of the rights of those facing the death penalty* stipulates that: “capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences”.<sup>427</sup> The Human Rights Committee has noted that crimes of an economic nature, of corruption, adultery, or crimes that do not result in loss of life, apostasy, committing a third homosexual act, and embezzlement by officials, among others, cannot be characterised as the “most serious crimes”.<sup>428</sup> The former UN Commission on Human Rights has stated that “the notion of “most serious crimes” does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults nor as a mandatory sentence”.<sup>429</sup> The imposition and execution of the death penalty for crimes, which are not the “most serious crimes”, can amount to a summary execution and violate the right to life.

The Human Rights Committee has pointed out that Article 6 of the ICCPR “also refers generally to abolition in terms which strongly suggest [...] that abolition is desirable. [...] [A]ll measures of abolition should be considered as progress in the enjoyment of the right to life”.<sup>430</sup> The Inter-American Court of Human Rights has stated that “the conventional rules concerning the death penalty should be interpreted as imposing restrictions designed to delimit strictly its application and scope, in order to reduce the application of the death penalty to bring about its gradual disappearance”.<sup>431</sup> The *Convention on the Rights of the Child* (Article 37 (a)) and the *African Charter on the Rights and Welfare of the Child* (Article 5.3) prohibit capital punishment for

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425. See Article 6 of the ICCPR and Article 4 of the American Convention on Human Rights. See also Arab Charter on Human Rights, Articles 5, 6 and 7.

426. See for example, UNOG, *Human Rights Council Discusses the Death Penalty, Institution Building and Other Issues*, Press Release, 29 March 2007 (remarks by Slovenia, the United States and Singapore); Frank Gaffney, *Right of Reply on the Death Penalty*, Statement by the U.S. Mission to the OSCE, 9 October 2003.

427. Article 1 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty.

428. See *inter alia.*, *Concluding Observations of the Human Rights Committee: Islamic Republic of Iran*, UN Doc. CCPR/C/79/Add.25, 3 August 1993, para. 8 and *Concluding observations of the Human Rights Committee: Sudan*, in UN Doc. CCPR/C/79/Add.85, 19 November 1997, para. 8.

429. Resolution No. 2005/59, *The question of the death penalty*, of 20 April 2005, para. 6.f.

430. Human Rights Committee, *General Comment No. 6*, *doc. cit.*, para. 6.

431. Judgment of 21 June 2002, *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, para. 99. See also, Advisory Opinion OC-3/83, *Restrictions to the Death Penalty (Articles 4(2) and 4(4) American Convention on Human Rights)*, of 8 September 1983, para. 57.



offences committed by persons below 18 years of age. Firmly established in the treaty systems at both universal<sup>432</sup> and regional<sup>433</sup> levels, prohibition of the death penalty is gradually becoming a part of general international law.

International standards and jurisprudence require that penalties can only be carried out pursuant to a final judgment rendered by an independent, impartial and competent tribunal after a fair trial with the observance of all the judicial guarantees, including the right to appeal. The Human Rights Committee has pointed out that “[t]he procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal”.<sup>434</sup> On the guarantees to be afforded to people facing the death penalty, the UN *Safeguards guaranteeing protection of the rights of those facing death penalty*<sup>435</sup> are an important guideline in declaratory law. In addition, certain categories of people are excluded from the application of the death penalty according to international law: persons who, at the time of the commission of the criminal offence were below 18 years of age, pregnant women, new mothers or the mentally insane.<sup>436</sup>

### 3.4 Death threats

Death threats not only undermine the right to life but also the right to security of persons provided by Article 9 of the ICCPR and Article 3 of the *Universal Declaration of Human Rights*. In relation to death threats, the UN Human Rights Committee has observed that:

*“Although in the Covenant the only reference to the right of security of person is to be found in article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty. [...] It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that he or she is not arrested or otherwise detained.*

432. Second Optional Protocol to the ICCPR and the Convention on the Right of the Child (Article 37).

433. Within the Council of Europe context, see Protocols 6 and 13 to the *European Convention on Human Rights*, and jurisprudence from the European Court of Human Rights (i.e: Judgment of 12 March 2003, Case of *Öcalan v. Turkey*, Application No. 46221/99). Within the EU context, see Article 2 of the Charter of Fundamental Rights of the European Union. As far as the Inter-American system is concerned, see the American Convention on Human Rights (Article 4.1) and the Protocol to the American Convention Abolishing the Death Penalty. Already back in 1969 when the American Convention on Human Rights was adopted, fourteen out of the nineteen delegations present declared their “firm hope of seeing the application of the death penalty eradicated” (OAS document OEA/Ser.K/XVI/1.2, p. 467 – The desirable state of affairs in the hemisphere).

434. Human Rights Committee, *General Comment No. 6, The Right to Life (Article 6)*, para. 7.

435. Safeguards guaranteeing protection of the rights of those facing death penalty, approved by Economic and Social Council Resolution 1984/50 of 25 May 1984.

436. See *inter alia*: ICCPR (Article 6.5); Convention on the Rights of the Child (Article 37.a); UN Safeguards guaranteeing protection of the rights of those facing death penalty (Article 3); American Convention on Human Rights (Article 4.5); African Charter on the Rights and Welfare of the Child (Article 5.3); and Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Article 4).

*States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant”.*<sup>437</sup>

The Human Rights Committee and the Inter-American Commission on Human Rights have concluded that the inaction of State vis-à-vis of death threats constitute a violation of the right to life.<sup>438</sup>

#### **4. Sexual Orientation and Gender Identity and the right to life**

It is axiomatic that the State should not deprive a person of life based on sexual orientation or gender identity grounds. The imposition of capital punishment for committing a third homosexual act or sexual relations between consenting adults or extrajudicial executions or killings for reasons of the sexual orientation or gender identity of the victim are a flagrant violation of the right to life.<sup>439</sup> The UN General Assembly has repeatedly reaffirmed the obligation of the States “to ensure the protection of the right to life of all persons under their jurisdiction” and has called all States “concerned to investigate promptly and thoroughly all cases of killings [...] committed for any discriminatory reason, including sexual orientation [...] and to bring those responsible to justice before a competent, independent and impartial judiciary and ensure that such killings, including killings committed by security forces, paramilitary groups or private forces, are neither condoned nor sanctioned by government officials or personnel.”<sup>440</sup>

437. UN Human Rights Committee, Views of July 12, 1990, Case of *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, para. 5.5 in UN. Doc. CCPR/C/39/D/195/1985. See also, Views of 20 March 2000, Case of *Carlos Dias v. Angola*, Communication No. 711/1996, para. 8.3, in UN Doc. CCPR/C/68/D/711/1996; Views of 25 October 2000, Case of *Rodger Chongwe v. Zambia*, Communication No. 821/1998, para. 5.3, in UN Doc. CCPR/C/70/D/821/1998; and Views of 25 March 2002, Case of *Luis Asdrúbal Jiménez Vaca v. Colombia*, Communication No. 859/1999, para. 7.1.

438. Human Rights Committee, Views of 25 March 2002, Case of *Luis Asdrúbal Jiménez Vaca v. Colombia*, Communication No. 859/1999, para. 7.3 and Inter-American Commission on Human Rights, Report No. 32/90, Case 10.222 (Peru).

439. See *inter alia*, Human Rights Committee, *Concluding observations of the Human Rights Committee: Sudan*, in UN Doc. CCPR/C/79/Add.85, 19 November 1997, para. 8; Former UN Commission on Human Rights, Resolution No. 2005/59, *The question of the death penalty*, of 20 April 2005, para. 6.f and Resolution 2003/67, *The question of the death penalty*, of 24 April 2003, para. 4.d; UN General Assembly, Resolutions on “Extrajudicial, summary or arbitrary executions” No. 61/173 of 19 December 2006, No. 59/197 of 20 December 2004 and No. 57/214 of 18 December 2002; *Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Mr. Philip Alston, Addendum: Mission to Nigeria*, in UN Doc, E/CN.4/2006/53/Add.4 of 7 January 2006; *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Philip Alston, Addendum: Mission to Guatemala*, A/HRC/4/20/Add.2, 19 February 2007; *Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions*, E/CN.4/2000/3, 25 January 2000, para. 116.

440. General Assembly, Resolution 57/214, *Extrajudicial, summary or arbitrary executions*, of 18 December 2002, para. 6. See also resolution 61/173, *Extrajudicial, summary or arbitrary executions*, 16 December 2006, para. 5(b).

It merits repeating that under Article 6 of the ICCPR and the *American Convention on Human Rights*, death sentences may only be imposed for the most serious crimes, a stipulation which excludes matters of sexual orientation. The Human Rights Committee has affirmed that homosexual acts cannot be characterised as the “most serious crimes”,<sup>441</sup> and the former UN Commission on Human Rights has stated that the death penalty should not be imposed for sexual relations between consenting adults.<sup>442</sup> The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has explicitly stated that imposition of the death sentence for a private sexual practice, such as sodomy, is a violation of international law.<sup>443</sup>

The right to life establishes a negative legal duty on the State to prevent actions by its agents that deprive a person of life based on his or her sexual orientation or gender identity. Equally, the legal duty is a positive one and obliges States to take all appropriate measures to deter, prevent and punish perpetrators as well as address any attitudes or conditions in society which encourage or facilitate such crimes from either agents of the State or third parties. This would include putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.<sup>444</sup>

This positive obligation should not be neglected as a large part of the violations of the right to life in relation to sexual orientation and gender identity occurs not just in the action of agents of the State, but also in their inaction or failure to take positive steps to secure life.

The Inter-American Court of Human Rights, has further defined that:

*“This active protection of the right to life by the State involves not only its legislators, but also all State institutions and those who should protect security, whether they are its police or its armed forces. Consequently, the State must adopt the necessary measures, not only at the legislative, administrative and judicial levels by the issue of penal norms and the establishment of a justice system to prevent, eliminate and punish the deprivation of life as a result of criminal acts, but also to prevent and protect individuals*

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441. See *inter alia*, *Concluding Observations of the Human Rights Committee: Islamic Republic of Iran*, UN Doc. CCRP/C/79/Add.25, 3 August 1993, para. 8 and *Concluding Observations of the Human Rights Committee: Sudan*, UN Doc. CCRP/C/79/Add.85, 19 November 1997, para. 8.

442. Resolution No. 2005/59, *The question of the death penalty*, of 20 April 2005, para. 6.f.

443. *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Philip Alston, Addendum: Mission to Nigeria*, UN Doc. E/CN.4/2006/53/Add.4 of 7 January 2006, para. 37.

444. European Court of Human Rights, Judgment of 26 July 2007, Case of *Angelova and Iliev v. Bulgaria*, Application No. 55523/00, para. 93; and Judgment of 28 October 1998, Case of *Osman v. The United Kingdom*, Application No. 87/1997/871/1083, para. 115. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

*from the criminal acts of other individuals, and investigate such situations effectively”.*<sup>445</sup>

There is also a requirement that this type of action should be pursued with promptness and reasonable expedition.<sup>446</sup> Addressing issues of the right to life in respect of sexual orientation and gender identity obliges States to embark on legislative, juridical and administrative measures accordingly. This also necessitates a political commitment to guarantee both the existence of these measures and their efficacy. In order to guarantee the right to life, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has pointed out that: “Acts of murder and death threats should be promptly and thoroughly investigated [by the authorities], regardless of the sexual orientation of the person or persons concerned. Measures should include policies and programmes geared towards overcoming hatred and prejudice against homosexuals, and sensitizing public officials and the general public to crimes and acts of violence directed against members of sexual minorities.”<sup>447</sup>

Prejudice against persons based on their sexual orientation and/or gender identity has been identified as a basis for social stigmatization.<sup>448</sup> LGBT persons and sexual minorities are more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity. The UN Special Rapporteur on extrajudicial, summary and arbitrary executions has noted that persons of homosexual orientation were classified as belonging to a category of victims who are particularly vulnerable, by virtue of their sexual orientation, of being directly targeted for extrajudicial execution or exposed to extrajudicial executions and death threats.<sup>449</sup> Sensationalist media coverage of issues concerning sexual orientation contributes to prejudice and creates an atmosphere of impunity and indifference about crimes committed against members of sexual minorities. Impunity could be the result of a weak and inadequate justice system, which is either reluctant or unable to investigate and prosecute cases of human rights violations, including violations of the right to life.<sup>450</sup>

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445. Inter American Court of Human Rights, Judgment of 1 July 2006, Case of *The Ituango Massacres v. Colombia*, para. 131.

446. Inter American Court of Human Rights, Judgment of 29 November 2006, Case of *La Cantuta v. Peru*.

447. *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, E/CN.4/2002/74, 9 January 2002, para. 148. See also *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, E/CN.4/2001/9, 11 January 2001, para. 118.

448. *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions*, E/CN.4/2001/9, 11 January 2001, para. 50.

449. *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions*, E/CN.4/2002/74, 9 January 2002.

450. *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions*, E/CN.4/2000/3, 25 January 2000, paras. 57, 89 and 116.

The UN Special Rapporteur on extrajudicial, summary and arbitrary executions has concluded that:

*“decriminalizing matters of sexual orientation would greatly contribute to overcoming the social stigmatization of members of sexual minorities, and thereby curb impunity for human rights violations directed against these persons. Matters of sexual orientation should under no circumstances be punishable by death.”*<sup>451</sup>

## Summary

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- A person must not be deprived of life for reasons of his/her sexual orientation or gender identity;
- The right to life and to not be arbitrary deprived of life is universally recognised and protected by international human rights law. The scope of protection of the right to life must be interpreted in an expansive way and its limitations approached with a restrictive interpretation;
- The imposition of capital punishment for committing a homosexual act or sexual relations between consenting adults is a flagrant violation of the right to life and can amount to a summary execution;
- States’ obligation to protect the individual’s right to not be arbitrarily deprived of life is absolute and is included among the obligations from which States cannot derogate under any circumstances;
- The right to life not only presumes that no person shall be deprived of their life arbitrarily (negative obligation), but also requires States to take all necessary measures to protect and preserve the right to life (positive obligation) including from acts by non-State actors;
- States have an obligation to take reasonable and appropriate steps to protect persons from death threats;
- The duty to protect the right to life implies the prohibition on returning, deporting, extraditing, expelling, transferring or otherwise sending anyone to a country where he or she faces a real risk of arbitrary deprivation of life, including when the deprivation of life is based on grounds of his/her sexual orientation or gender identity.

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451. *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions*, E/CN.4/2000/3, 25 January 2000, para. 116.



*“[T]he absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment [...] in no circumstances can be derogated from. Such treatments can never be justified on the basis of a balance to be found between society’s interest and the individual’s rights”.*

— Human Rights Committee<sup>452</sup>

## vi. Torture and Ill-Treatment

### 1. Nature and scope of the prohibition of torture and ill-treatment

The *Universal Declaration of Human Rights* states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. All human rights treaties, both international and regional, prohibit absolutely torture and cruel, inhuman or degrading treatment or punishment.<sup>453</sup> In addition, several international standards reiterate this prohibition.<sup>454</sup>

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452. *Concluding Observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 15.

453. International Covenant on Civil and Political Rights (Article 7), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child (Article 37a), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 10) the Convention on the Rights of Persons with Disabilities (Article 15.1), the European Convention on Human Rights (Article 3), the American Convention on Human Rights (Article 5), the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Prevention, Punishment and Eradication of Violence against Women (Article 4.c), the Arab Charter in Human Rights (Article 8), the African Charter on Human and Peoples’ Rights (Article 5), the African Charter on the Rights and Welfare of the Child (Article 16), and Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Article 4).

454. The UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 6); Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Code of Conduct for Law Enforcement Officials (Article 5); The Guidelines on the Role of Prosecutors (Guideline 16); the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (Article 6); the UN Guiding Principles on Internal Displacement (Principle 11); the Charter of Fundamental Rights of the European Union (Article 4); Principles and Guidelines on Guidelines on the right to a fair trial and legal assistance in Africa (Principle M.7) ; the Guidelines of the Committee of Ministers of the Council of Europe on Human rights and the fight against terrorism (Guideline IV); the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Principle 1); and the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines, 2002).

The prohibition of torture and cruel, inhuman or degrading treatment or punishment (ill-treatment) are absolute and must not be derogated from at any time.<sup>455</sup> The absolute nature of the prohibition on torture and ill-treatment, under treaty law and customary international law, is beyond all doubt.<sup>456</sup> The UN Committee Against Torture has stated that “[t]he obligations contained in articles 2 [of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*] (whereby ‘no exceptional circumstances whatsoever [...] may be invoked as a justification of torture’), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions and must be observed in all circumstances”.<sup>457</sup> The African Commission on Human and Peoples’ Rights has similarly stated that “the right to freedom from torture and cruel, inhuman and degrading treatment cannot be derogated from for any reason, in whatever circumstances”.<sup>458</sup> The prohibition of torture is a *jus cogens* norm,<sup>459</sup> as the Inter-American Court of Human Rights has underscored “[t]he absolute prohibi-

455. See *inter alia*: ICCPR (Article 4.2); Common Article 3 of the Geneva Conventions; European Convention on Human Rights (Article 15.2); American Convention on Human Rights (Article 27.2); and the Arab Charter on Human Rights (Article 8).

456. See *inter alia*: ICCPR (Article 4 and 7); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 2); Convention on the Rights of the Child (Article 37); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 10); Standard Minimum Rules for the Treatment of Prisoners (Rule 31); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 6); Declaration on the Elimination of Violence against Women (Article 3); Code of Conduct for Law Enforcement Officials (Article 5); Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (Article 6); Guidelines on the Role of Prosecutors (Principle 16); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5, 20 April 2006, para. 15; UN General Assembly Resolution A/RES/59/183; UN Commission on Human Rights Resolution E/CN.4/RES/2005/39; and the UN Special Rapporteur on Torture (UN document E/CN.4/1986/15, para. 3, 19 February 1986; E/CN.4/2002/137, 26 February 2002, para. 8). See also: African Charter on Human and Peoples’ Rights (Article 5); African Charter on the Rights and Welfare of the Child, (Article 16); American Convention on Human Rights (Articles 5 & 27); Inter-American Convention to Prevent and Punish Torture (Article 1 & 5); Inter-American Convention on the prevention, punishment and eradication of violence against women (Article 4); European Convention on Human Rights (Article 3) and Guidelines of the Committee of Ministers of the Council of Europe on Human rights and the fight against terrorism (IV). See also: Common Article 3 of the Geneva Conventions; III Geneva Convention (Articles 49, 52, 87(3), 89, 97); IV Geneva Convention (Articles 40, 51, 95, 96, 100, 119); Protocol I of the Geneva Conventions (Article 75) and Protocol II of the Geneva Convention (Article 4).

457. Declaration of the Committee Against Torture, adopted the 22 November 2001, UN Doc. CAT/C/XXVII/Misc.7. See also Committee against Torture, *General Comment No. 2, Implementation of Article 2 by States Parties*, para. 6.

458. Communication 275 / 2003, *Case of Article 19 v. The State of Eritrea*, para. 99.

459. Committee against Torture, *General Comment No. 2*, para. 1. See International Criminal Tribunal for the Former Yugoslavia: Judgment of 10 December 1998, *Case of The Prosecutor v. Anto Furundzija*, No. IT-95-17/1-T, para. 154; Judgment of 16 November 1998, *Case of The Prosecutor v. Delalic and others*, IT-96-21-T, para. 454; and Judgment of 22 February 2000, *Case of Prosecutor v. Kunarac, Kovac and Vukovic*, IT-96-23-T and IT-96-23/1-T. See also Inter-American Court of Human Rights (Judgment of 7 September 2004, *Tibi c. Ecuador*, para. 143; Judgment of 8 July 2004, *Hermanos Gómez Paquiyauri c. Perú*, para. 112; Judgment of 27 November 2003, *Maritza Urrutia c Guatemala*, para. 92; and Judgment of 18 August 2000, *Cantoral Benavides c. Perú*, paras. 102 and 103), UN Special Rapporteur on Torture (UN Doc. E/CN.4/2006/6, para. 17) and Inter-American Commission on Human Rights (*Report on Terrorism and Human Rights*, *doc. cit.*, para. 155).



tion of torture, both physical and mental, is currently part of the international *jus cogens*".<sup>460</sup>

## 2. Torture and ill-treatment

### 2.1 Torture: scope of definition and sexually motivated crimes

Under international law, different definitions of torture have been offered. Indeed, the UN *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>461</sup> the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>462</sup> the *Rome Statute of the International Criminal Court*<sup>463</sup> and the *Inter-American Convention to Prevent and Punish Torture*<sup>464</sup> provide different definitions of torture. At the same time, international humanitarian law prohibits torture but does not provide a definition of it.

The International Criminal Tribunal for the Former Yugoslavia (ICTY), in outlining its scope of jurisdiction examined torture, as a crime committed in a systematic way (crimes against humanity) and as a crime committed in an armed conflict (war crimes), within the "definition of torture under customary international law".<sup>465</sup> Primarily, the ICTY considered that the definition contained in the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* "reflects a consensus which the Trial Chamber considers to be representative of customary international law".<sup>466</sup> Later, the ICTY clarified their position that, under customary law, three elements characterize torture: a) the infliction, by act or omission, of severe pain or suffering, whether physical or mental; b) the act or omission must be intentional; and c) the act must be instrumental to another purpose, in the sense that the infliction of pain must be aimed at reaching a certain goal.<sup>467</sup> The ICTY further concluded that "[t]here is no requirement under customary international law that the conduct must be solely perpetrated for one of the prohibited purposes [under the UN Convention against Torture]. [...]the prohibited purpose must simply

460. Inter-American Court of Human Rights, Judgment of 11 March 2005, Case of *Caesar v. Trinidad and Tobago*, para. 271.

461. Article 1 (1). See also the Commentary of Article 5 of the *UN Code of Conduct for Law Enforcement Officials*.

462. Article 1 (1).

463. Article 7 (2, e).

464. Article 2.

465. Trial Chamber, Judgment of 22 February 2001, *Prosecutor v. Kunarac, Kovac and Vukovic*, Case IT-96-23-T & IT-96-23/1-T, para. 468. See also previous judgments: *Prosecutor v. Furundzija*, 10 December 1998, IT-95-17/1-T, and *Prosecutor v. Delalic and Others*, 16 November 1998, No. IT-96-21-T.

466. Judgment of 16 November 1998, Case of *Prosecutor v. Delalic and Others*, Case IT-96-21-T, para. 459. See also Judgment of 10 December 1998, Case of *Prosecutor v. Furundzija*, Case IT-95-17/1-T, paras. 160-161.

467. Judgment of 22 February 2001, *Prosecutor v. Kunarac, Kovac and Vukovic*, Case IT-96-23-T and IT-96-23/1-T, para. 483 and Appeals Chamber, Judgment of 12 June 2002, *Prosecutor v. Kunarac, Kovac and Vukovic*, Case IT-96-23-T and IT-96-23/1-T para. 148.

be part of the motivation behind the conduct and need not be the predominating or sole purpose.”<sup>468</sup>

In this legal context, the ICTY stated that “[s]exual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.”<sup>469</sup> The ICTY “holds that, even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.”<sup>470</sup> In response to the argument that the purpose of sexual gratification is not listed in the definition of torture, the ICTY concluded that “acts need not have been perpetrated solely for one of the purposes prohibited by international law. If one of the prohibited purposes is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial.”<sup>471</sup>

The European Court of Human Rights and Commission on Human Rights has also concluded that a rape can amount to torture.<sup>472</sup> The European Court noted that “rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim [in this case the rape of a 17-year-old girl]”.<sup>473</sup>

These considerations of the ICTY, the European Court and the Inter-American Commission are particularly relevant for sexual orientation and gender identity issues, taking into account that LGBT persons are frequently victims of rape and sexual violence, especially when they are deprived of their liberty, either by State officials or by third parties often due to inaction by the State.

The UN Convention against Torture describes “‘torture’ [as] any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted [...] for any

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468. Judgment of 22 February 2001, *Prosecutor v. Kunarac, Kovac and Vukovic*, Case IT-96-23-T and IT-96-23/1-T, para. 486. See also Judgment of 16 November 1998, *Case of Prosecutor v. Delalic and Others*, IT-96-21-T, para. 470.

469. Appeals Chamber, Judgment of 12 June 2002, *Prosecutor v. Kunarac, Kovac and Vukovic*, Case IT-96-23-T and IT-96-23/1-T para. 150.

470. *Ibid.*, para. 153.

471. *Ibid.*, para. 155.

472. European Court of Human Rights, Judgment of 25 September 1997, *Case of Aydın v. Turkey*, Application No. 57/1996/676/866 and Commission on Human Rights, Report No. 5/96 of 1 March 1996, Case No. 10.970, *Raquel Martín de Mejía v. Perú*.

473. *Case of Aydın v. Turkey*, *doc. cit.*, para. 81.

reason based on discrimination of any kind [...]”,<sup>474</sup> This aspect of the definition is relevant for sexual orientation and gender identity issues, and the UN Committee against Torture notes this possibility with respect to a draft of discrimination grounds, including sexual orientation.<sup>475</sup>

## 2.2 Cruel, inhuman or degrading treatment or punishment

Although no absolute definition exists the UN *Code of Conduct for Law Enforcement Officials* provides an important interpretation as follows: “[t]he term ‘cruel, inhuman or degrading treatment or punishment’ [...] should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental”.<sup>476</sup> In fact, ill-treatment seems fundamentally defined by negation in relation to torture. These manifests as acts which fall short of the definition of torture in the UN Convention Against Torture because of the absence of elements of intent or which are not carried out for the specific purposes outlined.<sup>477</sup> Acts that have been deemed as ill-treatment by international jurisprudence and/or international bodies include: prolonged incommunicado detention;<sup>478</sup> repeated solitary confinement; submission to cold; persistent relocation to a new cell;<sup>479</sup> women prisoners hanging naked from handcuffs<sup>480</sup> and certain “techniques” of interrogation.<sup>481</sup> The UN Special Rapporteur on Torture has considered that disproportionate exercise of police powers<sup>482</sup> and the powerlessness of the victim<sup>483</sup> are inherent elements of ill-treatment.

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474. Article 1.1 of the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

475. Committee Against Torture, *General Comment No. 2, doc. cit.* para. 22.

476. Commentary (para. c.) to the Article 5 of the *Code of Conduct of Law Enforcement Officials*.

477. UN Special Rapporteur on Torture, UN Doc. E/CN.4/2006/6, para. 35. In the same line, see Nigel Rodley, *The treatment of prisoners under international law*, Clarendon Press, Oxford, 2nd Edition, 1999, p. 98 and ft.123.

478. See *inter alia*, Human Rights Committee: *General Comment No. 20, doc. cit.*, para. 5 and 6; *Concluding Observations: United States of America*, CCPR/C/USA/CO/3/Rev.1 of 18 December 2006, para. 12; views of 4 July 2006, Case of *Ali Medjounne v. Algeria*, Communication No. 1297/2004; Views of 25 March 1996, Case of *Celis Laureano v. Peru* Communication No. 540/1993; Views of 24 July 1994, Case of *Mukong v. Cameroon* Communication 458/1991; Views of 23 March 1994, Case of *El-Megreisi v. Libyan Arab Jamahiriya*, Communication 440/1990. See also, UN former UN Human Rights Commission, Resolutions No. 1997/38 (para. 10) and No. 2005/39 (para. 9); Inter-American Court of Human Rights, judgment of 29 July 1988, Case of *Velasquez Rodriguez* (para. 156) and judgment of 12 November 1997, Case of *Suarez Rosero* (paras. 90 and 91).

479. Human Rights Committee: Views of 17 July 1985, Case of *Conteris v. Uruguay*, Communication No. 139/1983.

480. See Human Rights Committee: Views of 27 March 1981, Case of *Isoriano de Bouton v. Uruguay*, Communication No. 37/1978 and Views of 1 November 1985, Case of *Arzuaga Gilbao v. Uruguay*, Communication No. 147/1983.

481. For example, see *Concluding Observations of the Human Rights Committee: United States of America*, CCPR/C/USA/CO/3/Rev.1 of 18 December 2006, para. 13, and Inter-American on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr, paras. 211 and 213.

482. UN Doc E/CN.4/2006/6, para. 38.

483. *Ibid.*, para. 39.

The prohibition of cruel, inhuman or degrading treatment has been used to limit the application of the death penalty in a variety of circumstances. The European Court of Human Rights has ruled that exposing a prisoner to “death row phenomenon”<sup>484</sup> constitutes cruel, inhuman or degrading treatment, effectively prohibiting extraditions where a sentence of death upon conviction is possible.<sup>485</sup> The Human Rights Committee has ruled that repeated last-minute stays of execution constitute cruel and inhuman treatment.<sup>486</sup>

### 3. States’ obligations

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States have the obligation to prevent, investigate and punish torture and ill-treatment under international law. They have three positive obligations regarding both torture and ill-treatment: a) they must take steps such as training law enforcement personnel to ensure that the prohibitions against torture and ill-treatment are enforced; b) they must promptly and competently investigate any reasonable allegations that torture or ill-treatment have taken place in their territories, prosecute the alleged perpetrators, and, if found guilty by an independent, impartial and competent tribunal punish them with appropriate penalties taking into account their grave nature; and c) they must provide an effective remedy and reparation to the victims of such acts.<sup>487</sup> The Committee Against Torture has noted that this obligation extends to requiring “positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.”<sup>488</sup> While all forms of prohibited treatment require affirmative steps to prevent, punish, and remedy, the prohibition of torture requires States to fulfil two additional obligations: an *erga omnes* obligation to extradite or prosecute alleged torturers and the obligation of *non-refoulement*.

The absolute prohibition of torture and ill-treatment imposes the obligation on the State to not use methods of interrogation, conditions of detention or punishment, which can amount to these prohibited acts. Corporal punishment – physical punishment involving blows to the body or mutilation, such as flogging, canning,

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484. In essence, the degradation of mental well-being that results from indefinite detention ending in expected execution.

485. European Court of Human Rights, Judgment of 7 July 1989, Case of *Soering v. the United Kingdom*, Application No. 14038/88.

486. Views of 7 April 1989, Case of *Pratt and Morgan v. Jamaica*, Communications Nos. 210/1986 and 225/1987, para. 13.7.

487. See *inter alia*, Committee against Torture, *General Comment No. 2, Implementation of Article 2 by State Parties*, paras. 24 & 7; Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 16; and the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity* (E/CN.4/2005/102/Add.1, 8 February 2005), recommended by the Commission on Human Rights resolution 2005/81 of 21 April. For a more detailed explanation on these issues, see International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners Guide*, Practitioners Guide No. 2, ICJ Geneva, 2006.

488. Committee against Torture, *General Comment No. 2, doc. cit.*, para. 11.

whipping, amputation and branding – imposed by judicial order or as an administrative sanction is prohibited by international standards.<sup>489</sup> In several countries, laws punish consensual same-sex relationships and transgendered behaviour by corporal punishment.

Regarding the duty to prosecute the alleged perpetrators of ill-treatment, the Committee Against Torture, “emphasizes that it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present”.<sup>490</sup> The Committee against Torture has reiterated that in cases of ill-treatment, States have a duty to conduct a criminal investigation.<sup>491</sup> In the same vein, the Human Rights Committee has stated that “States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant.”<sup>492</sup>

States must not expose individuals to the danger of torture or ill-treatments upon return to another country by way of their extradition, expulsion or *refoulement*. The principle of *non-refoulement*, prohibiting States to return, deport, extradite, expel, transfer or otherwise send anyone to a country where he or she faces a real risk of gross human rights violations, including torture and ill-treatment, is one of the most fundamental principles of general international law. It has its origins in refugee law<sup>493</sup> and international regulations on extradition<sup>494</sup> and is now an integral part of human rights law, applicable to all individuals. It is firmly established in several universal and regional legal instruments<sup>495</sup> as well as in the international customary law that is binding on all States. Although the ICCPR contains no explicit provision on the subject, the Human Rights Committee considers the principle of *non-refoulement*

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489. See, *inter alia*, Resolution 2001/62 of 25 April 2001, para. 5, of the former UN Commission on Human Rights.

490. Committee against Torture, *General Comment No. 2, Implementation of Article 2 by States Parties*, UN doc. CAT/C/GC/2/CRP.1/Rev.4; para. 10.

491. Views of 14 May 1998, Case of *Encarnación Blanco Abad v. Spain*, Communication No. 59/1996; Views of 21 November 2002, Case of *Hajrizi Dzemajl et al. v. Yugoslavia*, Communication No. 161/2000.

492. Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, para. 18.

493. The 1951 Convention relating to the Status of Refugees (Article 33), the OAS Convention on Territorial Asylum (Article IV) and the Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa (Article II (3)).

494. See, among others, the International Convention against Taking Hostages (Article 9), European Convention on Extradition (Article 3), European Convention on the Suppression of Terrorism (Article 5), the Inter-American Convention on Extradition (Article 4) and the UN Model Treaty on Extradition (Article 3).

495. See, among others, the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (Article 3.1), the International Convention for the Protection of All Persons from Enforced Disappearance (Article 16), the Declaration on Territorial Asylum (Article 3.1), the Declaration on the Protection of All Persons from Enforced Disappearances (Article 8), the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 5), the American Convention on Human Rights (Article 22.8), the Inter-American Convention to Prevent and Punish Torture (Article 13.4), the Arab Charter on Human Rights (Article 28) and the European Convention of Human Rights (Article 3).

to be inherent in Article 7.<sup>496</sup> This has also been endorsed by various universal and regional human rights bodies.<sup>497</sup>

The Human Rights Committee has reminded States that “the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment [...] in no circumstances can be derogated from. No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment”.<sup>498</sup> The principle of *non-refoulement* is a *jus cogens* norm and is absolute in nature, and it cannot be subject to derogation or restriction under any circumstances.<sup>499</sup>

The difference between the various forms of prohibited treatment (torture and cruel, inhuman or degrading treatment) is not relevant here: given that the prohibition on all of them is absolute and non-derogable, the principle of *non-refoulement* applies to them all without distinction.<sup>500</sup> The Committee Against Torture has also pointed out that the risk of torture may come from non-State actors who are, *de facto*, exercising functions that normally belong to the authorities.<sup>501</sup>

The principle of *non-refoulement* applies whenever there is a risk of a serious violation of human rights. It is this risk which is the focus of attention, and the nature of the removal or the activities of the person concerned are not important. The principle covers any involuntary removal of an individual from one country to another, whatever form it takes or name it is given (deportation, expulsion, return, extradition, transfer, etc) and regardless of whether the proceedings followed were legal (i.e., *de facto* or *de jure*). The traditional distinction made in public international

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496. See the Human Rights Committee, *General Comment No. 20, doc. cit.*, para. 9. See also, *inter alia*, Views of the Human Rights Committee in the cases: *Chitat Ng v. Canada*, Communication 469/1991; *Mohammed Alzery v. Sweden*, Communication No. 1416/2005; *Cox v. Canada*, Communication 539/1993; and *G.T. v. Australia*, Communication 706/1996.

497. Committee against Torture, Views of 20 May 2005, Case of *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003, CAT/C/34/D/233/2003, *Khan v. Canada*, Communication No. 15/1994, U.N. Doc. A/50/44 at 46 (1994); European Court of Human Rights, Judgments in the cases *Soering v. The United Kingdom*, *Cruz Varas and others v. Sweden*, *Vilvarajah and others v. The United Kingdom*, *Alan v. Switzerland*, *Aemei v. Switzerland*, *Mutombo v. Switzerland*, *Tala v. Sweden*, *Falakaflaki v. Sweden*, *A v. Netherlands*, *Ayas v. Sweden*, *Haydin v. Sweden*, and *H.D. v. Switzerland*; and the African Commission on Human and Peoples' Rights, Communication No.97/93, *Modisse v. Botswana*.

498. *Concluding Observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 15.

499. See, among others, the *Report of the Special Rapporteur on torture, Mr. Theo van Boven*, UN document. E/CN.4/2002/137 of 26 February 2002, para. 14, and the Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights, 1984-1985*, OAS document OEA/Ser.L/V/II.66, Doc. 10 rev. 1, 1 October 1985.

500. See the Human Rights Committee, *General Comment No. 20, op. cit.* 12, in which the Human Rights Committee explicitly acknowledges the application of the principle in the case of “*torture or cruel, inhuman or degrading treatment or punishment*” (para. 9).

501. Decision of 14 May 1999, Case of *Sadiq Shek Elmic*, Australia, Communication No. 120/1998, CAT/C/22/D/120/1998, 25 May 1999, para. 6.5.

law between extradition, expulsion, return, etc, is not relevant here.<sup>502</sup> Unlike the *Convention relating to the Status of Refugees*, any balancing test that would allow application of the principle to be curtailed for reasons such as national security can never be used here.

## **4. Torture and ill-treatment on grounds of sexual orientation and gender identity**

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### **4.1 Torture and ill-treatment arising from prejudice and discrimination**

As a minority group, LGBT persons are placed in a position of vulnerability in society which in turn increases their susceptibility to torture. The UN Special Rapporteur on torture has noted that attitudes and beliefs stemming from myths and fears associated with gender, sexuality and HIV/AIDS, contributing to the stigma and discrimination against them. His report catalogues graphic manifestations of ill-treatment specifically arising from hostility towards a particular sexual orientation and gender identity, “male-to-female transsexual women have been beaten intentionally on their breasts and cheek-bones which had been enhanced by silicone implants, causing the implants to burst and as a result releasing toxic substances into their bodies. Ill-treatment against sexual minorities is believed to have also been used, *inter alia*, to force sex workers to leave certain areas, in so-called ‘social cleansing’ campaigns, or to discourage sexual minorities from meeting in certain places, including clubs and bars”.<sup>503</sup>

The UN Special Rapporteur on Torture has concluded that systemic discrimination against members of sexual minorities increases their vulnerability to torture. The Special Rapporteur noted that “[f]or some years [he] has received information regarding a number of cases in which the victims of torture and other cruel, inhuman or degrading treatment or punishment have been members of sexual minorities. He notes that a considerable proportion of the incidents of torture carried out against members of sexual minorities suggests that they are often subjected to violence of a sexual nature, such as rape or sexual assault in order to ‘punish’ them for

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502. See, among others, the Committee against Torture, Views of 5 June 2000, Case of *Josu Arkauz Arana v. France*, Communication No. 063/1997, and *Conclusions and Recommendations of the Committee Against Torture: United Kingdom*, UN document CAT/C/CR/33/3, 25 November 2004, para. 5(e). See also the *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN document A/59/324, 1 September 2004, para. 34.

503. *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, interim report*, UN Doc. A/56/156, 3 July 2001, para. 18.

transgressing gender barriers or for challenging predominant conceptions of gender role.”<sup>504</sup> The UN Special Rapporteur noted that:

*“members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations. Indeed, discrimination on grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place. [...] members of sexual minorities are a particularly vulnerable group with respect to torture in various contexts and [...] their status may also affect the consequences of their ill-treatment in terms of their access to complaint procedures or medical treatment in state hospitals, where they may fear further victimization, as well as in terms of legal consequences regarding the legal sanctions flowing from certain abuses.”*<sup>505</sup>

Concerning discrimination on grounds of sexual orientation or gender identity, the UN Special Rapporteur on Torture has pointed out that “discriminatory attitudes towards members of sexual minorities can mean that they are perceived as less credible by law enforcement agencies or not fully entitled to an equal standard of protection, including protection against violence carried out by non-State agents.”<sup>506</sup>

## **4.2 Torture and ill-treatment via ‘cures’ imposed on sexual minorities**

Medicine or the application of “cures” has sometimes been the basis for acts of torture or degrading treatment of LGBT persons. Professor Ryan Goodman has described “the curative pretext” that is used as a precursor to “social cleansing” or systematic ill-treatment of LGBT people. Professor Goodman cited “involuntary” medical intervention against LGBT persons such as electric shock, forms of “aversion therapy” and use of psychotropic drugs: “even if the practice of sexual orientation were not experimentation, a foreign State’s use of certain medical technology may already constitute experimentation in US courts. The experimental nature of the procedure itself may bridge the alleged gap between Nuremberg’s experimentation-specific laws and the sexual orientation ‘cures’. Thus adjudicators and practitioners should consider the specific technique rather than just the overall medical attempt to forcibly alter sexual orientation. The administration of antipsychotic drugs, for instance, may classify the practice as experimentation, because of the ‘exploratory’ nature of the use of such drugs for sexual orientation ‘therapy’ [...]. Thirdly, the

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504. *Ibid.*, para. 17, see also *Report of the Special Rapporteur*, UN Doc. E/CN.4/2004/56, 23 December 2003.

505. *Ibid.*, para. 19.

506. *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, E/CN.4/2002/76, 27 December 2001, Annex III, p. 11.



alleged distinction between cure and experimentation is untenable with regard to manipulation of sexual orientation”.<sup>507</sup>

The context for the development of a curative trope has been set through the pathologization of homosexual expressions and transgender identities. This approach remains throughout many countries in the world and has only recently been removed as “pathology” in medical circles.

The international and regional human rights systems have not yet dealt with an individual petition or communication specifically relating to issues of sexual orientation and gender identity in relation with the prohibition of torture and ill-treatments, and provisions prohibiting torture. However, all international norms and standards from international human rights jurisprudence on torture and ill-treatment, referred to in the previous section of this chapter, are applicable in relation to sexual orientation and gender identity. Indeed, everyone is entitled, without any kind of discrimination and regardless his or her sexual orientation or gender identity, to the absolute right to be free from torture and ill-treatment. The Committee Against Torture has recalled that “[t]he principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention. Non-discrimination is included within the definition of torture itself in Article 1, paragraph 1, of the Convention, which explicitly prohibits specified acts when carried out for ‘any reason based on discrimination of any kind ...’.”<sup>508</sup> The Committee pointed out that:

*“The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill treatment. 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[...]. States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above”.*<sup>509</sup>

On several occasions the Committee Against Torture has expressed its concerns for allegations of torture and ill-treatment of certain other vulnerable groups, including

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507. Ryan Goodman, “The Incorporation of International Human Rights Standards into sexual orientation asylum claims: cases of involuntary ‘medical’ intervention”, in *Yale Law Journal*, Vol. 105, October 1995, pp. 274-275.

508. Committee Against Torture, *General Comment No. 2, “Implementation of Article 2 by States parties”*, para. 20.

509. *Ibid.*, para. 21.

sexual minorities.<sup>510</sup> Concerning LGBT detainees, the Committee has also expressed its concerns about “discriminatory treatment of certain groups with regard to access to the already limited essential services, notably on the basis of social origin or sexual orientation”.<sup>511</sup> The Committee has recommended that States “[r]emove all ambiguity in legislation which might underpin the persecution of individuals because of their sexual orientation. Steps should also be taken to prevent all degrading treatment on the occasion of body searches”.<sup>512</sup> The Committee has reiterated the duty of States to ensure that reports of brutality and ill-treatment of members of vulnerable groups, including persons of different sexual orientation, by its law-enforcement personnel are independently, promptly and thoroughly investigated and that perpetrators are prosecuted, brought to trial and appropriately punished.<sup>513</sup> The Committee has recommended States build up and strengthen the system of public defenders to protect vulnerable groups, including sexual minorities.<sup>514</sup>

Finally, concerning the issue of *non-refoulement*, the UN Special Rapporteur on Torture has “draw[n] attention to factors and circumstances that stem from conditions that may prevail in a country and touch at the same time upon the vulnerability of persons whose removal to such a country is at stake. Reference is made here to persons belonging to any identifiable group or collectivity on [...] gender or other grounds, such as sexual orientation, and who for that reason are targeted by the authorities or, with the connivance of the authorities, risk being subjected to persecution or systematic discrimination amounting to torture or other cruel, inhuman or degrading treatment or punishment. These factors and circumstances also have to be taken into account in determining the *non-refoulement* issue”.<sup>515</sup>

## Summary

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- Everyone is entitled, without any kind of discrimination and regardless of his or her sexual orientation or gender identity, to the right to be free from torture and ill-treatment;

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510. See *inter alia*: *Concluding Observations of the Committee against Torture: Argentina*, CAT/C/CR/33/1, of 10 December 2004, para. 6; *Concluding Observations of the Committee against Torture: Egypt*, CAT/C/CR/29/4, of 23 December 2002; *Concluding Observations of the Committee against Torture: Brazil*, A/56/44, of 16 May 2001; *Concluding Observations of the Committee against Torture: Ecuador*, CAT/C/ECU/CO/3, of 8 February 2006; *Concluding Observations of the Committee against Torture: United States of America*, CAT/C/USA/CO/2, of 25 July 2006.

511. *Concluding Observations of the Committee against Torture: Brazil*, A/56/44, of 16 May 2001, para. 119.

512. *Concluding Observations of the Committee against Torture: Egypt*, CAT/C/CR/29/4, of 23 December 2002, para. 5.

513. *Concluding Observations of the Committee against Torture: United States of America*, CAT/C/USA/CO/2, of 25 July 2006, para. 37; *Concluding Observations of the Committee against Torture: Ecuador*, CAT/C/ECU/CO/3, of 8 February 2006, para. 17.

514. *Concluding Observations of the Committee against Torture: Ecuador*, CAT/C/ECU/CO/3, of 8 February 2006, para. 17.

515. *Interim report of the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/59/324, September 1, 2004, para. 39.

- The right to freedom from torture and ill-treatment is universally recognized and protected by international human rights law, both treaty and customary law;
- The right to freedom from torture and ill-treatment is an absolute right, which must not be derogated from at any time or circumstance. The absolute prohibition of torture and ill-treatment is a norm of *jus cogens*. Torture and ill-treatment are crimes under international law;
- Three elements which characterise torture are: (a) the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (b) the act or omission must be intentional; and c) the act must be instrumental to another purpose prohibited by international law, in the sense that the infliction of pain must be aimed at reaching a certain goal;
- Although international law does not provide a definition, ill-treatment should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental. International human rights jurisprudence provides a list of acts which constitute ill-treatment;
- States have the obligation to prevent, investigate and punish torture and ill-treatment and not to take recourse to methods of interrogation, condition of detention or punishment, which can amount to these prohibited acts;
- Nobody shall be expelled, returned, deported, surrendered, extradited or otherwise sent to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to *gross* human rights violations, *including torture and ill-treatment, for his or her sexual orientation or gender identity*.



*“[p]luralism is [...] built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.”*

— European Court of Human Rights<sup>516</sup>

## VII. Rights to Freedom of Expression, Assembly and Association

### 1. Scope and nature of the rights

The *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* (ICCPR), as well as all the major regional human rights treaties, safeguard the right of peaceful assembly, freedom of association and freedom of expression, which includes both receiving and expressing information and ideas.<sup>517</sup> Other human rights treaties and international instruments, both at the universal and regional levels, also ensure and protect these rights and freedoms.<sup>518</sup>

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516. Judgment of 17 February 2004, Case of *Gorzelik and Others v. Poland*, Application No. 44158/98, para. 92.
517. Universal Declaration of Human Rights Articles 19, 20; ICCPR Articles 19, 21, 22; African Charter on Human and Peoples' Rights. Articles 9, 10, 11; American Convention on Human Rights, Articles 3, 15, 16; European Convention on Human Rights. Articles 10, 11; and Arab Charter on Human Rights, Articles 24, 32.
518. See *inter alia*: International Covenant on Economic, Social and Cultural Rights (Article 8), Convention on the Rights of the Child (Articles 13 and 15), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Articles 13 and 24), International Convention for the Protection of All Persons from Enforced Disappearance (Article 24.7), Convention relating to the Status of Refugees (Article 15), Declaration on the human rights of individuals who are not nationals of the country in which they live (Article 5(2) and 8(1.b)), Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Articles 1, 5, 6, 7, 9 and 12), Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Article 2), Basic Principles on the Role of Lawyers (Principle 23), Basic Principles on the Independence of the Judiciary (Principles 8 and 9), Guidelines on the Role of Prosecutors (Guidelines 8 and 9), Declaration of Principles on Freedom of Expression in Africa, African Charter on the Rights and Welfare of the Child (Articles 7 and 8), American Declaration of the Rights and Duties of Man (Articles IV, XXI and XXII), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador (Article 8), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Article 4), OAS Declaration of Principles on Freedom of Expression, European Convention on Human Rights (Articles 9, 10 and 11), European Social Charter (Part 1, para. 5, Articles 5 and 6), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO), Indigenous and Tribal Peoples Convention, 1989 (No. 169) (Article 20.2) and ILO Convention No. 151 concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service. See also the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, which were endorsed by the UN Special Rapporteur on the right to freedom of opinion and expression (UN.Doc. E/CN.4/1996/39, appendix) and the former UN Commission on Human Rights referred to these principles in several resolutions (see resolution 2000/38 of 20 April 2000) as well the Inter-American Commission on Human Rights.

## 1.1 Freedom of expression

Freedom of expression is a cornerstone of a democratic society. Freedom of expression is indispensable for the development of public opinion. It is also a *conditio sine qua non* for the advancement of political parties, trade unions, scientific and cultural societies and, in general, those who wish to communicate *en mass* with the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.<sup>519</sup> The Inter-American Court of Human Rights has underlined that the freedom of expression has also a social dimension and implies a collective right to receive any information whatsoever and to have access to thoughts expressed by others.<sup>520</sup>

The protection of freedom of expression must encompass not only the flow of “information” or “ideas” that are received favourably or without offence, but also expressions that “offend, shock or disturb”; such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”.<sup>521</sup> The dissemination of political ideas that do not conform to the views of a ruling elite and are not incompatible themselves with the principles of democracy cannot be considered themselves as jeopardizing the integrity or the national security of a country. The State is the ultimate guarantor of the principle of pluralism.<sup>522</sup>

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519. See *inter alia*: Inter-American Court of Human Rights, Judgment of 2 July 2004, Case of *Herrera-Ulloa v. Costa Rica*; African Commission on Human and Peoples' Rights, Communication No. 242/2001, Case of *Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme v. Islamic Republic of Mauritania*, Communication No. 212/98, Case of *Amnesty c/Zambia*.

520. Judgment of 2 July 2004, Case of *Herrera-Ulloa v. Costa Rica*, para. 108; Judgment of 6 February 2001, Case of *Ivcher-Bronstein v. Peru*, para. 146; Judgment of 5 February 2001, Case of “*The Last Temptation of Christ*” (*Olmedo Bustos et al. v. Chile*), para. 64; and Advisory Opinion OC-5/85 of 13 November 1985, *doc. cit.*, para. 30.

521. European Court of Human Rights: Judgment of 7 December 1976, Case of *Handyside v. United Kingdom*; Judgment of 8 July 1999, Case of *Süreker and Özdemir v. Turkey*, Applications No. 23927/94 and 24277/94; Judgment of 26 September 1995, Case of *Vogt v. Germany*; Judgment of 30 January 1998, Application No. 133/1996/752/951, Case of *United Communist Party of Turkey and Others v. Turkey*; Judgment of 12 July 2005, Case of *Güneri and Others v. Turkey*, Application No. 42853/98, 43609/98 and 44291/98; Judgment of 21 June 2007, Case of *Zhechev v. Bulgaria*, Application No. 57045/00; Judgment of 3 May 2007, Case of *Backowski and Others v. Poland*, Application No. 1543/06; Judgment of 3 May 2007, Case of *Demokratik Kitle Partisi y Elçi v. Turkey*, Application No. 51290/99; Judgment of 12 December 2006, Case of *Linkov v. Czech Republic*, Application No.10504/03; Judgment of 2 October 2001, Case of *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Applications No. 29221/95 and 29225/95; and Judgment of 10 July 1998, Case of *Sidiropoulos and Others v. Greece*, Application No. 57/1997/841/1047. See also: Inter-American Court of Human Rights, Judgment of 5 February 2001, Case of *Olmedo Bustos et. al v. Chile* (“*Last Temptation of Christ*”) and Judgment of 2 July 2004, Case of *Herrera-Ulloa v. Costa Rica*; Inter-American Commission on Human Rights, Annual Report on Human Rights 1994, “*Report on the Compatibility of Desacato Laws with the American Convention on Human Rights*”, OEA/Ser.L/V/II.88., Doc. 9 rev (1995).

522. European Court of Human Rights, Judgment of 24 November 1993, Case of *Informationsverein Lentia and Others v. Austria*, Application No. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, para. 38.

## 1.2 The rights of peaceful assembly and association

The rights of peaceful assembly and association are closely linked with the right to freedom of expression. Freedom of assembly focuses on the process of forming, expressing and implementing political opinions in a democratic society, while freedom of association entails the right to choose, join and form associations which often form and express thoughts and opinions. This inter-relation has been affirmed by the African Commission on Human and Peoples' Rights as it has stated that the right to associate cannot be divorced from the right to assemble freely and peacefully.<sup>523</sup>

Like freedom of expression, the rights of peaceful assembly and association are key components of a democratic society. The Human Rights Committee has affirmed that "the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably received by the government or the majority of the population, is a cornerstone of a democratic society".<sup>524</sup> The European Court of Human Rights added, "the right to freedom of assembly is a fundamental right, it should not be interpreted restrictively".<sup>525</sup> The Human Rights Committee has pointed out that States must not only safeguard rights to freedom of assembly and association but also refrain from applying unreasonable indirect restrictions upon those rights.<sup>526</sup>

## 2. Derogations, limitations and restrictions

The right of expression and the freedoms of assembly and association are not absolute rights under international human rights law and can be restricted in times of normality as well as in times of emergency.<sup>527</sup>

International human rights instruments protecting the right of expression and freedom of assembly and association simultaneously encompass restrictions on these rights; notably on activities that advocate war or incite hatred,<sup>528</sup> threaten national security or public safety, health, order, or morals,<sup>529</sup> or impinge on the rights

523. Communication No. 251/2002, *Lawyers for Human Rights v. Swaziland*.

524. Views of 31 October 2006, Case of *Viktor Korneenko and Others v. Belarus*, Communication No. 1274/2004, para. 7.3. See also Views of 20 July 2005, Case of *Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, para. 7.2 and Views of 17 October 2006, Case of *Boris Zvozkov and Others v. Belarus*, Communication No. 1039/2001, para. 7.2.

525. Judgment of 20 February 2003, Case of *Djavit An v. Turkey*, Application No. 20652/92, para. 56.

526. *Ibid.*, European Court on Human Rights, Judgment of 26 April 1991, Case of *Ezelin v. France*; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *op. cit.*, para. 359.

527. The ICCPR (Article 4), the European Convention on Human Rights (Article 15), the Arab Charter on Human Rights (Article 4) and the American Convention on Human Rights (Article 27).

528. The ICCPR (Article 20) and the American Convention on Human Rights (Article 13.5).

529. ICCPR, Articles 19.3(b), 21; African Charter on Human and Peoples' Rights, Article 11; American Convention on Human Rights Articles 13.2(b), 13.3, 15; European Convention on Human Rights Articles 10.2, 11.2; Arab Charter on Human Rights, Article 24, 32.

of others.<sup>530</sup> The circumstances in which a State may limit the exercise of any guaranteed right are set out either in a general clause authorising such restrictions or in specific provisions relating to each right or freedom.

International human rights law specifies the strict conditions under which such restrictions on rights are possible.<sup>531</sup> It is recognised that, any restrictions or limitations have to be: established in law; necessary in a democratic society to protect national security, public order, public health, morality, or the rights and freedoms of others; proportionate to the interest to be protected and not impair the essence of the right in question; and consistent with other international obligations and the right to an effective remedy. When a State imposes certain restrictions on the exercise of freedoms or rights, these may not put in jeopardy the freedom or right itself.<sup>532</sup>

Finally, in order to be legitimate any such restriction or limitation must comply with both the substantive and procedural requirements of international law.

## 2.1 Limitations and Restrictions on freedom of expression

Regarding the limitations and restrictions of the right to freedom of expression, the Human Rights Committee has stated that the exercise of this right “carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself”.<sup>533</sup> Restrictions must cumulatively meet the following conditions: they must be “provided by law”; they may only be such that are necessary for respect of the rights or reputations of others, the interests of the community or the protection of national security, public order, public health or morals; and they must be justified as being “necessary” for the State in question to achieve one of those legitimate purposes.<sup>534</sup> In addition, under the *European Convention on Human Rights*, freedom of expression may be restricted “for preventing the disclosure of information received in confidence” and “for maintaining the authority and impartiality of the judiciary”.<sup>535</sup> The Human Rights Committee further considered “that the

530. ICCPR, Article 19.3(a); American Convention on Human Rights Articles 13.2(a) and 15; European Convention on Human Rights, Articles 10.2 and 11.2; Arab Charter on Human Rights, Articles 24 and 32.

531. See, among others, the Human Rights Committee: *General Comment No. 10, Freedom of expression (Article 19)*, para. 4 and *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 6.

532. See, for example, the Human Rights Committee: *General Comment No. 10, Freedom of expression (Article 19)*, para. 4, and *General Comment No. 27, Freedom of movement (Article 12)*, para. 13.

533. Human Rights Committee, *General Comment No. 10, Freedom of expression*, para. 4.

534. *Ibid.*, para. 4. See also Views of 8 November 1996, Case of *Robert Faurisson v. France*, Communication 550/1993, paras. 9 (4) and (6), and Views of 21 July 1994, Case of *Albert Womah Mukong v. Cameroon*, Communication No. 458/1991, para. 9.7.

535. Article 10 of the *European Convention on Human Rights*.



legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights”.<sup>536</sup> However, it is relevant to underscore that the “right to hold opinions without interference”, according to the Human Rights Committee, “is a right to which the ICCPR permits no exception or restriction.”<sup>537</sup>

## 2.2 Limitations and Restrictions on the rights to freedom of assembly and association

Under the ICCPR, the limitations and restrictions of the freedom of peaceful assembly and association must meet the following conditions: (a) they must be provided for by law; (b) they may only be imposed for one of the purposes set out in paragraph 2 of Article 22 the ICCPR – the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others; and (c) they must be “necessary in a democratic society” for achieving one of these purposes.<sup>538</sup>

The ICCPR and the *American Convention on Human Rights*, prohibit propaganda for war or advocacy of national, racial or religious hatred that constitute incitement to discrimination, hostility or violence.<sup>539</sup> The European Court of Human Rights has also stated that the clear incitement of violence, hostility or hatred between citizens is a fundamental criterion for distinguishing between freedom of expression and prohibited propaganda or advocacy.<sup>540</sup> In this context restrictions on this freedom may be permitted on expressions of a nature likely to incite or strengthen anti-Semitism, xenophobia, and similar sentiments.<sup>541</sup>

States are obliged to take affirmative steps to protect expressions of political opinion that are so unpopular as to foreseeably provoke public disorder.<sup>542</sup> In addition to preventing violence and strife, reasonable restrictions on assembly and expression when their purpose is to protect public safety and order are also legitimate. Thus,

536. Views of 21 July 1994, Case of *Albert Womah Mukong v. Cameroon*, *doc. cit.*, para. 9.7.

537. Human Rights Committee, *General Comment No. 10*, *doc. cit.*, para. 1.

538. Views of 31 October 2006, Communication No. 1274/2004, *Viktor Korneenko and Others v. Belarus*, para. 7.2 (UN.Doc CCPR/C/88/D/1274/2004). Along the same lines see also: Articles 26 (2) and 40 (2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 16 of the American Convention on Human Rights; Article 11 of the European Convention on Human Rights; and Article 8 (1,b) of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

539. Article 20 of the ICCPR and Article 13 (5) of the American Convention on Human Rights.

540. Judgment of 25 November 1997, Case of *Zana v. Turkey*, and Judgment of 8 June 1998, Case of *Incal v. Turkey*.

541. Views of 18 October 2000, Case of *Malcolm Ross v. Canada*, Communication No. 736/1997 and Views of 8 November 1996, Case of *Robert Faurisson v. France*, Communication No. 550/1993.

542. European Court of Human Rights, Judgment of 20 October 2005, Case of *Toxo v. Greece*, Application No. 74989/01, paras. 43.

a routine permitting process for assemblies, allowing the authorities to plan for crowd control and traffic circulation is permissible so long as it makes no distinction based on the assembly's political message.<sup>543</sup> Restrictions on assembly for pressing reasons of health and safety are also legitimate.<sup>544</sup> Thus, a government's decision to have riot police forcibly evict hunger-strikers from a church they had been occupying was not illegitimate because the "hunger-strikers' health had deteriorated and sanitary conditions [had] become wholly inadequate".<sup>545</sup>

The European Court has ruled that States may have an "obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute of any form of public debate capable of further progress in human affairs".<sup>546</sup> Religious freedom is not the only right that can be protected by limiting the rights to expression and assembly. The UN Human Rights Committee affirmed a Canadian school board decision to reassign a teacher to a non-classroom job after he had gained notoriety for publishing books critical of Jews, since the "restrictions imposed on him were for the purpose of protecting the 'rights or reputations' of persons of Jewish faith, including the right to have an education in the public school system".<sup>547</sup>

The regulation of expression, association, or assembly with no specific purpose is not a legitimate restriction of those rights. The State has the burden show that a restriction on the freedom of expression, association, or assembly is necessary and serves a legitimate purpose compatible with Articles 19, 21 and 22 of the ICCPR.<sup>548</sup> The Human Rights Committee found a violation of an activist's rights to expression and assembly where the government of Belarus prohibited him from distributing copies of the *Universal Declaration of Human Rights* on a public street, and could not "[invoke] any specific ground on which the restrictions imposed on the author's activity which, [...] it is uncontested did not pose a threat to public order".<sup>549</sup>

The scope for restrictions of expression, assembly and association is very narrow in the area of political affairs. Restrictions on political associations that do not advo-

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543. For example, Human Rights Committee, Views of 31 March 1994, Case of *Kivenmaa v. Finland*, Communication No. 412/1990, para. 9.2.

544. European Court of Human Rights, Judgment of 9 April 2002, Case of *Cisse v. France*, Application No. 51346/99, para. 52.

545. *Ibid.*, para. 51.

546. European Court of Human Rights, Judgment of 20 September 1994, Case of *Otto-Preminger-Institut v. Austria*, Application No. 13470/87, para. 49.

547. Human Rights Committee, Views of 18 October 2000, Case of *Ross v. Canada*, Communication No. 736/1997, para. 11.5.

548. See *inter alia*, Human Rights Committee: Views of 10 August 2006, Case of *Patrick Coleman v. Australia*, Communication No. 1157/2003, para. 7.3; Views of 20 July 2005, Case of *Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, para. 7.2; Views of 24 July 2007, Case of *Aleksander Belyatsky et al. v. Belarus*, Communication No. 1296/2004, para. 7.3.

549. Human Rights Committee, Views of 20 October 2005, *Velichkin v. Belarus*, Communication No. 1022/2001, para. 7.3.

cate for violent or non-democratic change are usually deemed unlawful restrictions on the freedom of expression, no matter how unpopular the associations' ideas.<sup>550</sup> Curtailment on rights in this regard "must meet a strict test of justification."<sup>551</sup>

Scope for restrictions of expression, assembly and association via private matters such as morals, religion and reputation appears wider. The European Court reasoned that: "Whereas there is little scope [...] for restrictions on political speech or on debate of questions of public interest, [...] a wider margin of appreciation is general[ly] available [...] in relation to matters liable to offend intimate personal convictions".<sup>552</sup> This is due both to the fact that such restrictions may serve to protect "the rights of others", and because the great diversity of such convictions among countries makes it more difficult for international human rights bodies, in their removed position, to determine whether such restrictions are appropriate or excessive.<sup>553</sup> However, when considering the "rights of others" in making limitations on the rights of assembly, expression or association, "the principle of the indivisibility of human rights" requires that States must balance the rights equally, and may not systematically favour one over the other.<sup>554</sup> The principle of proportionality, as well as evolving practice in other countries, is often persuasive in this respect.

Limiting the rights of expression, association and assembly is broadest in regards to protection of the interests and well-being of children. The European Court of Human Rights affirmed a wide margin of appreciation in respect to measures restricting expression to prevent "pernicious effects on the morals of [...] children and adolescents".<sup>555</sup> Thus, the decision by the British Government to destroy all copies of a children's reference book whose unorthodox views on sexuality it determined would have "a tendency to 'deprave and corrupt'" a good number of the children who read it, did not exceed its margin of appreciation.<sup>556</sup>

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550. European Court of Human Rights: Judgment of 30 January 1998, Case of *United Communist Party of Turkey and Others v. Turkey* Application No. 133/1996/752/951, paras. 40-45; Judgment of 2 October 2001, Case of *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Applications No. 29221/95 and 29225/95, paras. 88-107.

551. Human Rights Committee, Case of *Velichkin v. Belarus*, *doc. cit.*, para. 7.3.

552. European Court of Human Rights, Judgment of 22 October 1996, Case of *Wingrove v. the United Kingdom*, Application No. 17419/90, para. 58.

553. *Ibid.*, See also Human Rights Committee, Views of 2 April 1982, Case of *Hertzberg v. Finland*, Communication No. 61/1979.

554. Inter-American Court of Human Rights, Case of *The Last Temptation of Christ*, *doc. cit.*, para. 63k.

555. European Court of Human Rights, Judgment of 7 December 1976, Case of *Handyside v. the United Kingdom*, Application No. 5493/72, para. 52.

556. *Ibid.*, para. 57.

### **3. Freedom of expression, peaceful assembly and association applied to sexual orientation and gender identity.**

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The right of freedom of expression, peaceful assembly and association are crucial to LGBT activism and HIV/AIDS advocacy. Civil society is considered to be functioning and healthy when it includes the possibility of participation of all citizens in the democratic process. This may be achieved through peaceful assembly or belonging to associations in which they may integrate with each other and pursue common objectives collectively. In the case of *Baczkowski and others v. Poland*, the European Court of Human Rights described the scope of the right to democratic participation through assembly and association as follows:

*“[a] genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms [...] This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimization”.*<sup>557</sup>

In *Baczkowski and others v. Poland*, the authorities banned a planned march and six stationary assemblies. These were advocacy events to promote tolerance and to protest discrimination against LGBT persons. The appellate authorities reversed the first-instance decision and criticised it for being poorly justified and in breach of the applicable laws. The appellate decision, however, was given after the dates of the planned march. The demonstration had been held on the planned dates. In going ahead with the demonstration and assemblies the applicants had taken a risk given the official ban in force at that time.

The European Court observed that the refusal to give authorisation could have had a chilling effect on the applicants and other participants in the assemblies. It could also have discouraged other persons from participating on the grounds that they did not have official authorisation, and consequently no official protection against possible hostile counter-demonstrators would be ensured by the authorities. The court was further of the view that when the assemblies were held the applicants were negatively affected by the refusal to authorise them. The legal remedies available to them could not have ameliorated their situation as the relevant decisions were given by the appellate proceedings after the date on which the assemblies were held. There had therefore been an interference with the applicants' rights guaranteed by Article 11 of the European Convention, and the interference with the applicants' right to freedom of peaceful assembly was not prescribed by law.

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557. Judgment of 3 May 2007, Case of *Baczkowski and others v. Poland*, Application 1543/06, para. 64.

The Court decided that in the assessment of the case it could not disregard the strong personal opinions publicly expressed by the mayor on issues directly relevant for the decisions regarding the exercise of the freedom of assembly. It observed that the decisions concerned were given by the municipal authorities acting on the mayor's behalf after he had made known to the public his opinions regarding the exercise of the freedom of assembly and "propaganda of homosexuality". Accordingly, a violation of the discrimination provision of Article 14 in conjunction with Article 11 of the *European Convention on Human Rights* was found.

An important element of the freedom of expression is the freedom of gender expression, especially through dress, deportment and mannerism. The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has noted arbitrary arrests owing to gender expression:

*"representatives of organizations of sexual minorities and transvestites [...] reported to him cases of violations of human rights because of their sexual orientation. The Special Rapporteur was concerned at the number of [cases of violations of human rights on account of sexual orientation. He] was informed that the provincial legislation allows police to impose detention or sanctions for infractions that do not constitute criminal offences. He has also been informed that in several provinces there is a 'Contravention Code' which penalizes those 'who are dressed as somebody of the opposite sex' with detention for up to 15 days".*<sup>558</sup>

Violations of the right to freedom of expression sometimes manifest themselves through the threat of violence. The Special Representative on the situation of human rights defenders noted that the rights of gays and lesbians in Jamaica, especially those in a human rights lobby group called *Jamaica Forum for Lesbians, All-Sexuals and Gays* were at risk from both attempts by public authorities to suppress their exercise of free speech and from violent attacks by homophobic individuals. The contents of the following letter by the Police Federation's Public Relations Officer, in relation to a Human Rights Watch study on HIV/AIDS and how homophobia fuels the disease, exemplifies this situation:

*"the Police Federation's Public Relations Officer 'condemn[s] the role of these so-called 'human rights' groups to spread lies and deliberately malign and slander the police force and the government'. He calls on 'the Minister of Justice to examine these allegations and slap on sedition charges where necessary to both foreign and local agents of provocation'. In stating that 'the Government and the police cannot be held responsible for [...] the cultural responses of the population towards gays', the letter also appears to condone violence against gays and lesbians. This impression is insuf-*

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558. *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Mission to Argentina*, E/CN.4/2002/75/Add.1, 17 January 2002, paras. 123- 124.

*ficiently dispelled by the assurance that ‘as law enforcement officers we try our utmost “to serve, to reassure and to protect”’.*<sup>559</sup>

States obligations include providing education and making information available, especially in relation to matters of sexuality and health. Addressing the matter of AIDS in Colombia, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression observed:

*“In accordance with the nature and the spirit of his mandate, the Special Rapporteur considers that all citizens, regardless of, inter alia, their sexual orientation, have the right to express themselves, and to seek, receive and impart information. The Special Rapporteur also considers that Governments have the obligation to provide citizens with reliable information on health issues in general and, bearing in mind the extreme gravity of the epidemic, on AIDS in particular. [...] Gay and lesbian groups and individuals’ right to freedom of opinion and expression is hindered by the opposition they find in the media where sexual issues, especially homosexuality, are treated in a prudish and traditional way and never broadcast on prime time”.*<sup>560</sup>

Access to information is relevant to the right to health. This interdependence is noted by the Special Rapporteur as follows:

*“With respect to access to information for the purposes of education and prevention of HIV/AIDS, the Special Rapporteur wishes first to underline that the level of protection of human rights in a given country has a direct impact on the spread of the epidemic, and that the realization of human rights, in particular of specific groups such as women, young people, men and women working in prostitution, men who have sex with men, migrants, refugees, intravenous drug users and other vulnerable groups, is essential to reduce vulnerability to HIV/AIDS”.*<sup>561</sup>

In *Hertzberg et al v. Finland*, editors of the State-run Finnish Broadcasting Company complained that the director of the company had censored their programmes on homosexuals because the Finnish Penal Code made it criminal to “encourage indecent behaviour between persons of the same sex”. The UN Human Rights Committee opined that:

*“It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national*

559. *Report of the Special Representative of the Secretary-General on the situation of human rights defenders*, E/CN.4/2005/101/Add.1, 16 March 2005, paras. 240 and 242.

560. *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Mission to Colombia*, E/CN.4/2005/64/Add.3, 26 November paras. 75 and 76.

561. *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, E/CN.4/2003/67, 30 December 2002, para. 74.

*authorities. [...] The Committee finds that it cannot question the decision of the responsible organs of the Finnish Broadcasting Corporation that radio and TV are not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour. According to article 19 (3), the exercise of the rights provided for in article 19 (2) carries with it special duties and responsibilities for those organs.”<sup>562</sup>*

In an individual opinion appended to the Committee’s views, one member opined as follows:

*“[a]lthough I agree with the conclusion of the Committee, I wish to clarify certain points. This conclusion prejudices neither the right to be different and live accordingly, protected by article 17 of the Covenant, nor the right to have general freedom of expression in this respect, protected by article 19. Under article 19 (2) and subject to article 19 (3), everyone must in principle have the right to impart information and ideas – positive or negative – about homosexuality and discuss any problem relating to it freely, through any media of his choice and on his own responsibility”.*<sup>563</sup>

As *Hertzberg* was decided in 1979, it is debatable whether this decision would be repeated by UN Human Rights Committee today, given similar facts. The right to information in relation to sexuality and its implications for health have been acknowledged by various UN human rights bodies. This unequivocal line of reasoning would challenge the inclination to consider an educational programme on homosexuality as limited by “public health or morals”. This idea was directly rejected in the case of *Nicholas Toonen v. Australia*.<sup>564</sup> The notion that freedom of expression and respect of minority views also includes those that offend, shock or disturb the majority, has solidified and is considered a feature of a democratic and pluralistic society.

In *Baczowski and others v. Poland* the European Court took note of statements made by the Mayor of Warsaw that a gay pride parade constituted “propaganda of homosexuality”, and stated that:

*“the exercise of the freedom of expression by elected politicians, who at the same time are holders of public offices in the executive branch of the government, entails particular responsibility. In certain situations it is a normal part of the duties of such public officials to take personally administrative decisions which are likely to affect the exercise of individual rights, or that such*

562. Human Rights Committee, Views of 2 April 1982, Case of *Hertzberg et al v. Finland*, Communication No. 61/1979, paras. 10.3 and 10.4.

563. *Ibid.*, Appendix Individual opinion of Mr. Torkel Opsahl. Mr. Rajsoomer Lallah and Mr. Walter Surma Tarnopolsky joined the individual opinion.

564. Human Rights Committee, Views of 31 March 1994, Case of *Nicholas Toonen v. Australia*, Communication No. 488/1992.

*decisions are given by public servants acting in their name. Hence, the exercise of the freedom of expression by such officials may unduly impinge on the enjoyment of other rights guaranteed by the Convention [...]. When exercising their freedom of expression they may be required to show restraint, bearing in mind that their views can be regarded as instructions by civil servants, whose employment and careers depend on their approval”.*<sup>565</sup>

## Summary

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- The rights of association and peaceful assembly, and freedom of expression, are cornerstones of a democratic society. These rights are universally recognized and protected by international human rights law;
- All persons, regardless of, *inter alia*, their sexual orientation, have the right to express themselves, and to seek, receive and impart information;
- The rights of expression and the freedom of assembly and association are crucial to LGBT activism and HIV/AIDS advocacy;
- The right to freedom of expression includes the right to express thoughts and ideas and the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of one’s choice;
- The protection of freedom of expression must encompass not only the flow of “information” or “ideas” that are received favourably or without offence, but also expressions that “offend, shock or disturb”; such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”;
- The pluralism necessary for the maintenance of a democratic society requires the free flow of information and opinions, including those which the majority may find shocking. Assembly and association are necessary for the formation, development, expression and diffusion of political ideas;
- A State cannot consider an opinion or the association or assembly within which it is expressed to jeopardize the integrity or the national security of a country, unless the opinion, association or assembly is incompatible with a democratic society;
- Freedom of assembly focuses on the process of forming, expressing and implementing political opinions in a democratic society, while freedom of association is about the right to choose, join and form associations relevant to the formation and expression of thoughts and opinions;

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<sup>565</sup>. Case of *Baczkowski and others v. Poland*, doc. cit., para. 98.



- The right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities;
- The right of expression and the freedom of assembly and association may be limited if they advocate war or incite hatred, threaten national security or public safety, health, order or morals, or impinge on the rights of others;
- The right of expression and the freedoms of assembly and association can be restricted in times of emergency. However, limitations or derogations of rights in times of emergency must be based on the principles of public declaration, legality, legitimacy, non-discrimination, necessity and proportionality and be of limited duration. Human rights that are subject to lawful limitation in times of emergency can never be deemed to have disappeared: derogation does not mean obliteration;
- The right to freedom of expression, and of assembly and association can also be restricted in times of normality. All limitations, restrictions and derogations must: be provided for by law; not exceed the minimum scope necessary to protect the rights or reputations of others, be in the interests of the community, national security or public order, health or morals, and they must be justified as being “necessary” for the State in question to achieve one of those legitimate purposes.



*“The Convention and Protocol have proved resilient in the face of the changing nature of persecution over the last 50 years. In parallel, for instance, with increased awareness of the protection needs of certain groups in society – including women, indigenous groups or those with differing sexual orientation, who are at risk – the Convention has been the mechanism allowing protection to be provided to such groups who are forced to flee”.*

– Executive Committee of the United Nations High Commissioner for Refugees Programme<sup>566</sup>

## VIII. Asylum and Refuge

### 1. Legal Nature and Scope

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The *Universal Declaration of Human Rights* recognises that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution”.<sup>567</sup> The *UN Declaration on Territorial Asylum* also protects this right.<sup>568</sup> The World Conference on Human Rights, held in Vienna in June 1993, reaffirmed “that everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one’s own country”.<sup>569</sup> This right is also protected by regional human rights instruments: the *African Charter on Human and Peoples’ Rights*;<sup>570</sup> the *Protocol to the Charter on Human and Peoples’ Rights on the Rights of Women in Africa*;<sup>571</sup> the *American Declaration of the Rights and Duties of Man*;<sup>572</sup> the *American Convention on Human Rights*;<sup>573</sup> the *Arab Charter on Human Rights*;<sup>574</sup> and the *Charter of Fundamental Rights of the European Union*.<sup>575</sup> International refugee law also protects these rights and provides the general legal frame of the legal status of refugees and their rights and duties in their country of refuge, including the *Convention Relating to the Status of Refugees* (1951 Convention), the *Protocol Relating to the Status of Refugees* (1967 Protocol),

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566. *Note on International Protection*, UN doc. A/AC.96/951 of 13 September 2001, para. 9.

567. Article 14 of the *Universal Declaration of Human Rights*.

568. Adopted by the UN General Assembly resolution 2312 (XXII) of 14 December 1967.

569. *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 23.

570. Article 12 (3), *African Charter on Human and Peoples’ Rights*.

571. Article 11, *Protocol to the Charter on Human and Peoples’ Rights on the Rights of Women in Africa*.

572. Article XXVII, *American Declaration of the Rights and Duties of Man*.

573. Article 22 (7), *American Convention on Human Rights*.

574. Article 28, *Arab Charter on Human Rights*.

575. Article 18, *Charter of Fundamental Rights of the European Union*.

the *Statute of the Office of the United Nations High Commissioner for Refugees*;<sup>576</sup> the *Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa* and other international instruments.<sup>577</sup>

According to the 1951 Convention, a refugee is a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.<sup>578</sup>

This definition and criteria determining who is entitled to refugee status, has been expanded by the 1967 Protocol<sup>579</sup> and legal instruments and guidelines adopted by the United Nations High Commissioner for Refugees (UNHCR).<sup>580</sup>

## 2. States' obligations toward refugees

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Once a refugee has established a well-founded fear of being persecuted, the receiving State has an obligation to grant them asylum or help them resettle in a third country where they will be safe.<sup>581</sup> By granting asylum, a State obliges itself to extend the asylee permission to work, as well as the protections of all its laws, specifically including the protections of labour legislation and the benefits of social

576. Adopted by Resolution 428 (V) of the General Assembly on 14 December 1950.

577. See also *inter alia*; Cartagena Declaration on Refugees, 22 November 1984, OAS/Ser.L. /V/II.66, doc. 10, rev. 1; the *Convention on Asylum*, (Havana, 1928); the *Convention on Political Asylum*, (Montevideo, 1933); the *Convention on Diplomatic Asylum*, (Caracas, 1954); the *Convention on Territorial Asylum*, (Caracas, 1954); *Council of Europe, Parliamentary Assembly, Recommendation 773 (1976) on the Situation of de facto Refugees*, 26 January 1976; *European Union, Council Directive 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and content of the protection granted*, OJ L 304, 30 September 2004.

578. 1951 Convention, Article 1(A)(2).

579. The Protocol relating to the Status of Refugees (1967 Protocol) and the Statute of the Office of the United Nations High Commissioner for Refugees both eliminate two limitations included in the 1951 Convention: the limitation on considering as refugees only those persons who became before 1 January 1951 (Article 1.2), and geographic limitations (Article 1.3).

580. See *inter alia*: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 (2nd ed. 1992); *Guidelines on International Protection 1: Gender-Related Persecution* within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01 (2002); *Guidelines on International Protection 2: “Membership of a particular social group”* within the context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02 (2002); *Guidelines on International Protection No. 6: Religion-Based Refugee Claims* under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06 (2004) ; and *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, HCR/GIP/06/07 (2006).

581. UNHCR, *Note on International Protection*, U.N. Doc. A/AC.96/951 (2001), paras. 96-106.

security.<sup>582</sup> No State may expel a refugee to a country in which he/her faces a real risk of persecution or other gross human rights violations. This absolutely prohibited practice is known as “*refoulement*”. The prohibition of *refoulement* is firmly established in refugee law and several universal and regional human rights instruments<sup>583</sup> as well as in the international customary law, binding on all States, as a *jus cogens* norm.

States’ right to expel a refugee lawfully in their territory on grounds of national security or public order,<sup>584</sup> is overridden if the issue of *refoulement* comes into play. In addition to the principle of *non-refoulement*, refugee law imposes on the State certain procedural safeguards.<sup>585</sup> According to the principle of *non-refoulement*, States shall not “expel or return (‘refouler’) a refugee [...] where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.<sup>586</sup> A decision by Britain to expel an Indian militant asylee on the grounds that he represented a threat to British national security was ruled to be in violation of the *non-refoulement* obligation under Article 3 of the European Convention, as he faced a real risk of torture in India.<sup>587</sup> The court took note that the *non-refoulement* obligation applied regardless of the asylee’s threat to national security.<sup>588</sup>

Refugees may, however, be voluntarily repatriated to their own countries once their fear of persecution has abated. Voluntary repatriation is the preferred outcome asylum.<sup>589</sup> Voluntary repatriation ends the validity of any outstanding claims to

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582. 1951 Convention, Articles 12, 17-19, 24, 32; ICCPR Article 13; see also *Legal Commentary to the ICJ Berlin Declaration*, *op. cit.*

583. The 1951 Convention relating to the Status of Refugees (Article 33), the OAS Convention on Territorial Asylum (Article IV); the Organization of African Unity’s Convention Governing the Specific Aspects of Refugee Problems in Africa (Article II (3)); the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (Article 3.1), the International Convention for the Protection of All Persons from Enforced Disappearance (Article 16), the Declaration on Territorial Asylum (Article 3.1), the Declaration on the Protection of All Persons from Enforced Disappearances (Article 8), the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 5), the American Convention on Human Rights (Article 22.8), the Inter-American Convention to Prevent and Punish Torture (Article 13.4), the Arab Charter on Human Rights (Article 28) and the European Convention of Human Rights (Article 3). Although the International Covenant on Civil and Political Rights does not explicitly provide for it, the Human Rights Committee has pointed out that the principle of *non-refoulement* is inherent in States’ obligation under the Covenant to guarantee the right not to be subjected to torture or ill-treatment (*General Comment No. 20*, para. 9). See also, *Concluding Observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 15.

584. Article 32 (1) of the 1951 Convention.

585. *Ibid.*, and Article 32 (2) of the 1951 Convention.

586. Article 33 of the 1951 Convention.

587. European Court of Human Rights, Judgment of 15 November 1996, Case of *Chahal v. the United Kingdom*, Application No. 22414/93, para. 107.

588. *Ibid.*, at paras. 79-80.

589. UNHCHR, *Note on International Protection*, U.N. Doc. A/AC.96/951, para. 97. Also, UNHCR *RSD Handbook and Guidelines on International Protection* (<http://www.unhcr.org/doclist/publ/3d3d5114.html>).

asylum, as it is assumed that a refugee's return home implies changed conditions there, allowing for the asylum seeker's safety.<sup>590</sup>

### 3. Asylum and Refugee Status on the Grounds of Sexual Orientation and Gender Identity

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#### 3.1 Particular social group including sexual minorities

"Membership of a particular social group", one of the five grounds enumerated in Article 1 of the 1951 Convention, has encompassed increasingly diverse claims.<sup>591</sup> This expanding category has accommodated women, families, tribes, occupational groups and homosexuals.<sup>592</sup> There is no doubt that this ground is amenable to advancing refugee claims based on sexual orientation and gender identity. This is explicitly stated by the UNHCR in its Guidelines on International Protection on "gender-related persecution":

*"[r]efugee claims based on differing sexual orientation contain a gender element. A claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve homosexuals, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination".*<sup>593</sup>

The UNHCR has also recognised States' obligation to consider the special risks faced by refugees from persecution on the grounds of sexual orientation and gender identity via its reference to the Yogyakarta Principles:

*"[w]ith regard to sexual orientation, the 2007 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity affirm the binding international legal standards on this issue as derived from key fundamental human rights instruments".*<sup>594</sup>

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590. For example, Immigration and Refugee Board of Canada, Decision of 18 October 2004, Case of *Applicant v. Minister*, No. dossier SPR VA3-01194.

591. See for example, UNHCR, Handbook; Alexander Aleinikoff, "Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group'", in *Refugee Protection in International Law: The UNHCR's Global Consultations on International Protection*, Erika Feller, editors, Volker Türk and Frances Nicholson, Cambridge University Press, 2003.

592. UNHCR, *Guidelines on International Protection 2*, op. cit. paras. 1, 6, 7, 20.

593. UNHCR, *Guidelines on International Protection 1*, op. cit. para. 16.

594. UNHCR, *Handbook for the Protection of Women and Girls* (2008), p. 72.

For the purpose of implementing the 1951 Convention, the European Union (EU) has adopted a definition of “social group” that includes sexual orientation, requiring EU member States to recognise that “depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation”.<sup>595</sup> This standard applies to and has been implemented in every EU member State except, through an anomaly of EU law, Denmark.<sup>596</sup> EU legislation also encompasses gender identity, although somewhat obliquely, noting that “[g]ender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article”.<sup>597</sup> These standards replace the earlier European jurisprudence on whether sexual orientation may define a social group.<sup>598</sup>

In the United States, the Board of Immigration Appeals has recognised “homosexuals” as a particular social group,<sup>599</sup> and one appeals court has recognised an asylum claim based on gender identity, “conclud[ing] as a matter of law that gay men with female sexual identities in Mexico constitute a ‘particular social group’”.<sup>600</sup>

The UNHCR has developed a standard of “particular social group” that includes two separate but complementary approaches for establishing such a group’s existence:

*“a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights”.*<sup>601</sup>

The first approach in this standard is the “protected characteristics” or “immutability” approach, which examines whether a group is united by an immutable

595. Council Directive 2004/83/EC, *op. cit.*

596. For example, *Guidelines for Investigation and Evaluation of Asylum Cases in which Persecution Based on Given Sexual Orientation* (Sweden) (2002), available at [www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f8c1af44](http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f8c1af44); *Refugee Act* (Ireland) para. 2 (1996).

597. *Ibid.*; see also ILGA Europe, “*Protecting LGBT People Seeking Asylum: Guidelines On The Refugee Status Directive*” (2005), p. 11 (noting that the “meaning of this statement is far from clear. [...] It may be possible to demonstrate the existence of a transgender community/identity, but this will require case-by-case determination”). See: [http://www.ilga-europe.org/europe/publications/non\\_periodical/guidelines\\_on\\_the\\_refugee\\_status\\_directive\\_october\\_2005\\_1](http://www.ilga-europe.org/europe/publications/non_periodical/guidelines_on_the_refugee_status_directive_october_2005_1)

598. See generally European Council for Refugees and Exiles (ECRE), “*Elena Research Paper on Sexual Orientation As a Ground For Recognition of Refugee Status*” (1997), available at [www.ecre.org/resources/Policy\\_papers/350](http://www.ecre.org/resources/Policy_papers/350).

599. United States Board of Immigration Appeals, Decision of 12 March 1990, *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 1990 WL 547189 (BIA 1990).

600. United States Court of Appeals for the Ninth Circuit, Decision of 24 August 2000, *Case of Hernandez-Montiel v. INS*.

601. Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, para. 11, UNHCR Doc. HCR/GIP/02/02 of 7 May 2002.

characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it.<sup>602</sup> A decision-maker adopting this approach would examine whether the asserted group is defined by:

- an innate, unchangeable characteristic;
- a past temporary or voluntary status that is unchangeable because of its historical permanence; or
- a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.

Applying this approach, courts and administrative bodies in a number of jurisdictions have concluded that homosexuals, amongst others, can constitute a particular social group within the meaning of Article 1A(2). In the case of *Re GJ*,<sup>603</sup> New Zealand's Refugee Status Appeals Authority ruled in favour of an Iranian man who argued that he had a well-founded fear of persecution based on his homosexuality. The authority found that homosexuals formed "a particular social group" and that sexual orientation is either an innate or unchangeable characteristic or so fundamental to identity and/or human dignity that it ought not to change. In this analysis, the tribunal offered a basis for the consideration of sexual orientation as constituting "a particular social group" deserving of judicial protection. A deeply felt sense of one's gender identity goes to the core of one's identity as a human being to the extent that one should not be forced on to forsake it. Therefore, gender identity may also constitute a particular social group.

The second, "social perception", approach examines whether or not members of a group share common characteristics constituting a recognizable group which sets them apart from society at large. The UNHCR Guideline on "Membership of a particular social group" cites women, families and homosexuals as examples recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist.<sup>604</sup> Expressions of gender identity could conceivably be included in this approach. Gender expression is visible and can be a source of identification, especially when, through characteristics such as dress, mannerisms and modifications of the body it subverts traditional expectations of gender expression. In the in the case of *Ourbih*, the Council of State (*Conseil d'Etat*) of France found that transsexuals may constitute a particular social group. In its decision, the

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602. See for example, Supreme Court of Canada, *Case of Attorney General of Canada v. Ward*, 1993, 2 SCR 689. The Court has stated that: "The meaning assigned to 'particular social group' [...] [comprises] three possible categories: (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence. The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation[...]"

603. Available at <http://www.refugee.org.nz/rsaa/text/docs/1312-93.htm>

604. Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, para. 1.



Conseil d'Etat rejected the decision of the body of appeal (*Commission des recours des réfugiés*) to deny the claim of Ourbih, an Algerian transsexual, finding that the body had not properly examined the evidence to determine whether transsexuals were regarded as a social group in Algeria “by reason of the common characteristics which define them in the eyes of the authorities and of society”.<sup>605</sup>

According to the UNHCR Guidelines on “Membership of a particular social group”, “[a] particular social group cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted”.<sup>606</sup> However, there is no requirement that a particular social group be “cohesive”, that is to say, known to each other or associate with each other.<sup>607</sup> Not all members of the group need be at risk for an individual claim to succeed.<sup>608</sup> The size of the purported social group is not a relevant criterion in determining whether the particular social group exists.<sup>609</sup>

## 3.2 Persecution

### 3.2.1 Scope of persecution

To give rise to refugee status persecution must be more severe than harassment, discrimination or threats, although it does not have to give rise to a threat to life.<sup>610</sup> This can sometimes be a fine line to adjudicate on. Past persecution must establish a presumption of future persecution. It is not by itself sufficient to establish a credible fear of being persecuted.<sup>611</sup> Persecution must also consist of acts committed by or with the acquiescence of the authorities.

### 3.2.2 Persecution in relation to sexual orientation and gender identity

An asylum-seeker does not need to show that he or she outwardly conforms to a stereotype or lives with an openly “homosexual” identity in order to demonstrate the potential for persecution. Courts have acknowledged the unique pressures that LGBT asylum-seekers have to conceal their identity and how this factors in the assessment of their claim. A person cannot be refused asylum on the basis that he or she could

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605. Conseil d'Etat, SSR, Decision No. 171858, 23 June 1997 (Original in French, free translation).

606. Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, para. 14.

607. *Ibid.*, para. 15.

608. *Ibid.*, para. 17.

609. *Ibid.*, para. 18.

610. United States Court of Appeals for the Seventh Circuit, Decision of 15 June 2005, Case of *Liu v. Ashcroft*.

611. *Ibid.*, para. 27.

avoid persecution by modifying behaviour that is the subject of the persecution. In the English case of *Danian v. SSHD*, Lord Justice Simon Brown opined:

*“[i]n all asylum cases there is ultimately a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason? [...] if returned, would the asylum seeker in fact act in the way he says he would and thereby suffer persecution? If he would, then, however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum”.*<sup>612</sup>

An US immigration judge who denied the asylum application of an Albanian because he “did not dress or speak like or exhibit the mannerisms of a homosexual” was censured by an appeals court for basing his decision on a “personal and improper opinion”, and was removed from the case.<sup>613</sup>

The High Court of Australia has similarly reasoned that applicants’ prior ability to avoid persecution by keeping their sexual orientation secret should have no bearing on a decision as to whether an asylum seeker has a reasonable fear of future persecution based on sexual orientation. The court ruled:

*“there is a natural tendency [...] to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor”.*<sup>614</sup>

In other words, “if such a person were required to keep his homosexuality secret in order to avoid persecution, that in itself was a persecutory action”.<sup>615</sup> The Australian Court ruled that, since an immigration tribunal had found that two asylum seekers “were discreet about their relationship only because they feared that otherwise they would be subjected to [persecution, it must therefore] consider what might happen to the appellants in Bangladesh if they lived openly as a homosexual couple”.<sup>616</sup>

The Refugee Status Appeals Authority of New Zealand (RSAA) has adopted this reasoning, concluding that the *Convention relating to the Status of Refugees* requires that: “[i]f the right proposed to be exercised by the refugee claimant in

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612. Court of Appeal (Civil Division), Judgment of 28 October 1999, Case of *Danian v. Secretary of State for the Home Department*, [1999] INLR 535, pp. 7G, 8C, 8D (United Kingdom). See also generally, *Jamaica v. Secretary of State for the Home Department*, Asylum and Immigration Tribunal / Immigration Appellate Authority, CG [2005] UKAIT 00168.

613. United States Court of Appeals, Eighth Circuit, Decision of 2 April 2007, Case of *Shahinaj v. Gonzales*.

614. *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*, 2003 HCA 71, para. 43.

615. Court of Appeal (Civil Division), Case of *Z v. The Secretary of State for the Home Department*, [2004] EWCA Civ 1578, (United Kingdom).

616. High Court of Australia, Judgment of 9 December 2003, Case of *Appellant of S395/2002 v. Minister for Immigration and Multicultural Affairs*, para. 54.

the country of origin is at the core of the relevant entitlement and serious harm is threatened, it would be contrary to the language context, object and purpose of the Refugee Convention to require the refugee claimant to forfeit or forego that right and to be denied refugee status on the basis that he or she could engage in self-denial or discretion on return to the country of origin”.<sup>617</sup> In the case of a homosexual applicant from Iran, the RSAA ruled that, since an exercise of discretion would violate the “fundamental rights” of privacy and non-discrimination guaranteed by the ICCPR, and living openly as a homosexual would entail “severe judicial or extra-judicial punishment”, asylum had to be granted.<sup>618</sup>

An initial reluctance to disclose sexual orientation at the beginning of the claim process, or even during its initial stages, should not be grounds for suspicion by an immigration tribunal. In a case called *Moab*, a US appeals court found “it reasonable that Mr. Moab would not have wanted to mention his sexual orientation [at his initial airport interview] for fear that revealing this information could cause further persecution as it had in his home country of Liberia”.<sup>619</sup>

Cases of persecution on the grounds of sexual orientation and gender identity often involve risks of harm from non-State actors. In such cases, the claim for asylum is valid where there is a real fear of persecution from a non-State actor, and where the State is unwilling or simply unable to protect the claimant. In its *Guidelines on International Protection: gender-related persecution*, the Office of the United Nations High Commissioner for Refugees has stated that:

*“[w]here homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalized, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm”.*<sup>620</sup>

In the United States of America, an asylum applicant seeking to avoid deportation is “not require[d] [...] to provide evidence that he or she would be singled out individually for [...] persecution if (i) [...] there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of [...] membership in a particular social group; and [...] (ii) [t]he applicant establishes his or her own

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617. Refugee Status Appeals Authority, Decision of 4 July 2004, *Refugee Appeal No. 74665/03*, para. 114.

618. *Ibid.*, paras. 127 and 129.

619. United States Court of Appeals for the Seventh Circuit, Decision of 13 September 2007, Case of *Moab v. Gonzales*.

620. Office of the United Nations High Commissioner for Refugees, *Guidelines on International Protection: gender-related persecution within the context of article 1 A (2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees*, UNHCR doc. HCR/GIP/02/01 of 7 May 2002, para. 17. See also UN Working Group on Arbitrary Detention, Opinion No. 7/2002 (Egypt) of 21 June 2002, Case of *Yasser Mohamed Salah et al. v. Egypt*, para. 27, in UN Doc. E/CN.4/2003/8/Add.1.

inclusion in and identification with such group [...] that it is more likely than not that his or her life or freedom would be threatened upon return”.<sup>621</sup> Applying this regulation, a US appeals court has ruled that, if an asylum seeker has “shown evidence of a pattern of persecution against the social group of homosexuals” and can “show his inclusion in the social group of ‘homosexuals’”, he need not “provide evidence that he or she would be singled out individually for such persecution”.<sup>622</sup>

Although “rights attaching to marriage, shall be respected by” States parties to the 1951 Convention,<sup>623</sup> the question of whether a refugee may sponsor a same-sex partner is unsettled. Practices vary: in the United States refugees granted asylum are not permitted to bring with them their same-sex partners,<sup>624</sup> whereas in Canada refugees are entitled to bring with them their same-sex “spouse, common-law partner or conjugal partner”.<sup>625</sup> However, given that many refugees’ persecution includes forced physical separation from their partners, there remain questions as to how many refugees would be able demonstrate the “conjugal” or “common law” links uniting the two of them.<sup>626</sup>

## Summary

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- Everyone has the right to seek and to enjoy in other countries asylum from persecution, except in the case of prosecutions genuinely arising from serious non-political crimes, from acts contrary to the purposes and principles of the United Nations, crime against peace, a war crime, or a crime against humanity;
- A refugee is a person unable to return to his country due to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, or membership of a particular social group;
- Sexual orientation and gender identity may constitute a “particular social group”. Constituting as such due to either innate or unchangeable characteristics or characteristics so fundamental to identity or human dignity that they ought not to change. Sexual orientation and gender identity may also

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621. 8 C.F.R. § 208.16 (b)(2) “Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture”, of the *Code of Federal Regulation*.

622. United States Court of Appeals for the Seventh Circuit, Decision of 7 January 2008, Case of *Eke v. Mukasey*.

623. Article 12, 1951 Refugee Convention.

624. *Defense of Marriage Act*, 1 U.S.C. § 7; Cf. Visas for Cohabiting Partners, Immigration Equality, available at [www.immigrationequality.org/template.php?pageid=155](http://www.immigrationequality.org/template.php?pageid=155) (2007) (noting that foreign nationals on temporary work visas are the only class of persons allowed by U.S. law to obtain visas for their same sex-partners).

625. *Immigration and Refugee Protection Regulations*, S.O.R./2002-227, part 7, division 1.

626. LaViolette, Nicole, “Coming Out to Canada: The Immigration of Same-Sex Couples Under the Immigration and Refugee Protection Act”, *McGill Law Journal*, Vol. 49, No. 4, 2004, McGill University, Canada, pages 988-991.

define a particular social group because they are defined as such in the eyes of the authorities and of society;

- Persons persecuted for his/her sexual orientation or gender identity have the right to seek and enjoy asylum. Persecution on the grounds of sexual orientation or gender identity is grounds for asylum;
- An asylum seeker does not need to show that he or she outwardly conforms to a stereotype in order to obtain asylum. Nor can he or she be denied asylum on the grounds that he or she could avoid persecution by keeping his or her sexual orientation or gender identity a secret;
- According to the principle of *non-refoulement*, States must not expel or return a refugee to a country in which he/her faces a real risk of persecution or other gross human rights violations. States must grant a refugee asylum or resettle them in safe a third country;
- The principle of *non-refoulement* includes a prohibition to expel lesbians and gays to countries which are known to engage in persecution for their sexual orientation or gender identity;
- By granting asylum, a State obligates itself to extend the asylee permission to work, as well as the protections of all its laws, including labour, social security and family law.