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ADDRESSING HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION & GENDER IDENTITY AT THE 16th SESSION OF THE HUMAN RIGHTS COUNCIL

March, 2011

There are a number of opportunities to raise awareness of human rights violations based on sexual orientation and gender identity at the upcoming 16th session of the Human Rights Council. These include **high-level segment** interventions, interactive dialogue with the **High Commissioner**, interactive dialogue with the **Special Procedures** (particular attention was paid to LGBTI issues by the **Special Rapporteur on Human Rights Defenders**, whose report is summarised in Annex II), the **UPR** and **general debate under item 3 or 8**, with particular focus on a **cross-regional joint statement** on human rights, sexual orientation and gender identity. In addition, it will be necessary to address negative challenges, such as the proposed resolution on **traditional values**.

This document provides a summary of these opportunities. In addition:

- **Annex I** provides excerpts from the Secretary General's recent address to the Council;
- **Annex II** excerpts the references to sexual orientation and gender identity in the reports of the **Special Procedures** and other reports to the Council;
- **Annex III** highlights **UPR recommendations** relating to sexual orientation and gender identity in the reports of the 16 States under review.

Summary and Overview:

Opportunities to raise awareness of human rights violations based on sexual orientation and gender identity at the 16th session of the Human Rights Council include:

➤ **High level and general segment statements:**

High-level interventions could:

- affirm your government's support for the joint statement on human rights, sexual orientation and gender identity, which is to be delivered to the Human Rights Council during this session on behalf of States from all geographic regions;
- underline the principles of universality and non-discrimination, and emphasise that the Council's effectiveness in advancing its mandate will be measured by the extent to which it addresses the rights of the most marginalised;
- acknowledge the leadership of the Secretary General and High Commissioner on these issues, and reiterate their call for world-wide decriminalisation of same-sex conduct between consenting adults (see Annex I for a copy of the Secretary-General's remarks);
- express support for the *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity*, and commend the Principles to the attention of States and the Council;

- note that human rights violations on the grounds of sexual orientation and gender identity continue to occur in all regions of the world, and urge the Council to address these issues as matters of priority.

In addition, the High-level segment serves as an opportunity for **Foreign Ministers** and other high-ranking officials to **meet bilaterally with their counterparts** in other States or regions. This affords a key opportunity for outreach to **build cross-regional support for the joint statement** on human rights, sexual orientation and gender identity. It would also be appropriate for Foreign Ministers to **thank the High Commissioner** for her important work in this area, and encourage her to raise the joint statement in her meetings with key States.

➤ **Interactive Dialogue with High Commissioner:**

The High Commissioner has played an active role in calling for an end to violence, discrimination and criminalisation based on sexual orientation and gender identity over recent months. During a high-level panel event during the last regular session of the Human Rights Council, the High Commissioner stated that:

“If we are all entitled to the full range of human rights and to equal protection of the law then, I believe, it can never be acceptable to deprive certain individuals of their rights, indeed to impose criminal sanctions on those individuals, not because they have inflicted harm on others or pose a threat to the wellbeing of others, but simply for being who they are, for being born with a particular sexual orientation or gender identity. To do so is deliberately to exclude a whole lot of people from the protection of international human rights law. It is, in short, an affront to the very principles of human rights and non-discrimination.”

Relevant State interventions might:

- commend the High Commissioner for her strong and principled affirmation that no human being may be denied their rights, solely because of their sexual orientation or gender identity, and note that this position is reinforced by the comments of the Secretary General, the recent vote on extrajudicial executions at the General Assembly, the findings of treaty bodies, and the clear evidence of human rights violations brought to the Council’s attention by its Special Procedures;
- ask the High Commissioner what steps can be taken both to enhance recognition of the principle that all persons are entitled to the full enjoyment of all human rights, without discrimination based on sexual orientation or gender identity, and to secure the implementation of this commitment;
- inquire what plans the OHCHR has to advance recognition of these principles, and what in her view the Human Rights Council can do to ensure respect for these rights;
- affirm the High Commissioner’s **leadership in upholding the principle of universality of human rights for all**, and emphasise the importance of the **independence** of her Office.

➤ **Interactive Dialogue with Special Procedures:**

A number of Special Procedures address human rights violations based on sexual orientation or gender identity in their reports. Full details are provided in **Annex II**. In particular:

- The **Special Rapporteur on Human Rights Defenders** notes that alleged violations directed against persons because of their sexual orientation or gender identity “related **to freedom of assembly and association, killings** of LGBT human rights defenders, ... **rape** and **sexual violence**. ... Various other communications detailed many instances of threats, death threats, physical attacks and violence, and stigmatization. Further, the **criminalization** of homosexuality has in some countries led to alleged **arrests, torture** and **ill-treatment**, including of a sexual nature, while in other countries it effectively prevented defenders from engaging in any advocacy for LGBT rights”. (see Annex II, paras 42-43)

- The reports of the **Working Group on Arbitrary Detention**, the **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment** (addendum on his mission to Jamaica), and the **Independent Expert on Burundi** also address these issues.

Relevant State interventions might:

- commend the Special Procedures for their work in this area;
- highlight the serious human rights violations identified on grounds of sexual orientation and gender identity, including killings, rape, torture and violence;
- invite them to elaborate on what States can do to promote tolerance, respect for diversity and address the root causes of such violations; and
- ask how the Council and its mechanisms can best promote and protect the human rights of the most marginalised, including those who are lesbian, gay, bisexual or transgender.

If the Special Rapporteur on Human Rights Defenders is challenged for addressing these issues within a gender framework, it may be pointed out that women human rights defenders face increased risk because of their sexual orientation or gender identity, including “curative” rape, gender-based violence and threats, stigmatisation and violence for challenging gender-based stereotypes.

➤ **UPR 6 report adoptions:**

Many relevant recommendations relating to sexual orientation and gender identity issues were raised during the UPR of those States whose reports are due to be adopted. For example, positive recommendations on these issues were **accepted** by **Honduras, Mongolia and Jamaica** (in relation to one recommendation), and the responses to many more recommendations are pending. In relation to **Malawi**, it is disappointing that the State rejected numerous recommendations to decriminalise same-sex conduct between consenting males – and even worse has recently moved to extend these provisions to also criminalise same-sex conduct between consenting adult women, under the guise of “equality”.

A full list of UPR recommendations for the 16 States under review is attached as **Annex III**. The report adoption process affords an opportunity to **commend those States which have responded favourably** to relevant recommendations, and to **encourage States who have not to address these issues more positively in future**. Item 6 general debate also affords an opportunity to comment on general positive trends.

➤ **General statements – item 3 & 8 (particularly joint statement):**

There will be opportunity for statements during general debate, particularly under **item 3** (*promotion and protection of all human rights*) or **item 8** (*Follow-up and implementation of the Vienna Declaration and Programme of Action*, which affirms the principles of universality and non-discrimination). The main focus at the 16th session will be delivery of a **cross-regional joint statement on human rights, sexual orientation and gender identity**.

➤ **Traditional values resolution:**

The OHCHR report of the October 2010 workshop on traditional values is due to be presented under Item 8 of this session. Parts of the report are excerpted in Annex II. It has been announced that Russia is planning to table another resolution on traditional values. If this resolution legitimises a “traditional values” approach to human rights, we have no doubt that this concept will be misused in future to restrict the human rights of marginalised groups.

From the outcomes of the workshop, it was concluded that the common values of humankind are already inscribed in the Universal Declaration of Human Rights which, having incorporated diverse, cultural and political traditions and perspectives and having been adopted by consensus, “represents a common standard of achievement for all peoples and all nations”. The workshop conclusions were very clear in highlighting the potential for abuse of a traditional values approach,

and emphasising that the core values to be promoted are those already found in international human rights law. Any future initiatives should therefore instead refer to “**universal values**” or “**values underpinning international human rights law**”.

ANNEX I: EXCERPTS FROM SECRETARY-GENERAL'S ADDRESS TO HUMAN RIGHTS COUNCIL

UNITED NATIONS



NATIONS UNIES

THE SECRETARY-GENERAL

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REMARKS TO THE HUMAN RIGHTS COUNCIL

Geneva, 25 January 2011

The Universal Declaration of Human Rights has been translated into more languages than any other document in the world.

This is more than an historic record – this is the collective voice of the world's people insisting that the Declaration applies everywhere, that no matter what language you speak, or where you live, you should be sheltered by its principles.

And yet, though we have translated the Declaration into more than 300 languages, we have yet to fully translate its principles into action.

This is our shared responsibility, the express mission of the Human Rights Council: to ensure that every single person can enjoy their human rights in full. All rights for all people. ...

We must reject persecution of people because of their sexual orientation or gender identity ... who may be arrested, detained or executed for being lesbian, gay, bisexual or transgender.

They may not have popular or political support, but they deserve our support in safeguarding their fundamental human rights.

I understand that sexual orientation and gender identity raise sensitive cultural issues. But cultural practice can not justify any violation of human rights.

Women's treatment as second-class citizens has been justified, at times, as a “cultural practice.” So has institutional racism and other forms of inhuman punishment.

But that is merely an excuse. When our fellow humans are persecuted because of their sexual orientation or gender identity, we must speak out.

That is what I am doing here, that is my consistent position. Human rights are human rights everywhere, for everyone.

The General Assembly founded this Council to promote universal respect for the human rights and fundamental freedoms for all, without distinction, in a fair and equal manner.

The Assembly charged you, the members of this Council, with upholding the highest standards of human rights.

Now you must act in a fair and equal manner, and uphold the highest human right standards, in your own countries and around the world.

ANNEX II: REFERENCES TO SEXUAL ORIENTATION & GENDER IDENTITY IN REPORTS OF SPECIAL PROCEDURES AND OTHER REPORTS

Compilation of United Nations manuals, guides, training material and other tools on minority issues

A/HRC/16/29

47. This tool has been adapted from the UNDP Toolkit for a Human Rights Based Approach and Gender Analysis for Local Governance. It was developed by UNDP Bosnia and Herzegovina's Rights-based Municipal Development Programme (RMAP) project. It includes a "Vulnerable Groups List", which is an extensive list of pertinent indicators and questions for identifying potentially vulnerable groups and assess likely human rights issues affecting them in the country context. The list includes groups such as women, persons with disabilities, national minorities, Roma, displaced persons, refugees and returnees, children, the elderly, trafficked persons, detainees, HIV positive persons, homosexuals and the very poor. The Vulnerability Assessment for Roma is provided as an example of how to target assessment to a specific minority group. The questions can be adapted for other minorities.

A/HRC/16/37 - **Workshop on traditional values of humankind**

Many panellists and participants expressed concern about the potential of a "traditional values" approach to undermine human rights, particularly of marginalised groups. In addition some explicitly referenced concerns relating to sexual orientation and gender identity:

36. The Youth Coalition for Sexual and Reproductive Rights drew attention to the fact that traditional values, such as those surrounding gender, age, disability, race, caste and sexuality, had led to the marginalization of numerous individuals and groups of persons. Examples of human rights violations and abuses included the murder of young women and men who married outside their caste, the denial of contraception to young unmarried people in public health services, the denial of comprehensive sexuality education in public schools and violence against lesbians and gays.

42. The delegate from the United States of America stated that the broad concept of "traditional values" remained a troubling one. The notion of "traditional values", which was alien to human rights law, could undermine the universal principles enshrined in the international human rights instruments, such as women's rights and the rights of minorities and other vulnerable groups. The term "traditional values" has not been clearly defined and understood, and was therefore so vague and open-ended that it could be used to legitimize human rights abuses. The inherent nature of tradition was that it evolved: what was considered to be traditional was constantly being contested and redefined. Slavery and the disenfranchisement of women were once traditions; today, most countries embraced very different traditions with regard to racial minorities and women. The idea of traditional values had been misused by some to justify restrictive and unjust treatment of lesbian, gay, bisexual or transsexual communities. The United States would continue to collaborate to reinforce universal human rights standards, and opposed the distortion of traditional values to support the imposition by States of discriminatory and repressive laws and policies.

58. ARC International expressed concern at the potential of an approach based on traditional values to erode international human rights standards, and at attempts to portray tradition as static and monolithic. Traditional values were invoked to justify past practice or resist change, whereas human rights frequently required changes to ensure conformity with international standards. It pointed out that tradition and culture were pluralistic and evolving and that, while some traditions were consistent with international human rights law, others were not. Tradition could not be seen as simply a reflection of the values of the majority. Much of international human rights law was designed to protect minorities that had been historically marginalized and subjected to abuses by

the State or by the majority. States had a positive obligation to eradicate harmful stereotypes, values, traditions and practices that were inconsistent with international human rights law. Tradition and culture may be useful to help promote respect for human rights in our diverse societies by way of human rights education at the national level, but no one could invoke traditional values to justify human rights violations or to restrict the scope of human rights. Given the potential for abuse of an approach based on traditional values, it suggested that it would be more productive in future to refer to “universal values” or “values underpinning international human rights law”.

Note also: The workshop conclusions were very clear in highlighting the potential for abuse of a traditional values approach, and instead emphasizing that the core values to be promoted are those already found in international human rights law.

A/HRC/16/39 - [Rights of persons belonging to national or ethnic, religious and linguistic minorities](#)

III. Treaty bodies

B. General comments

59. At its forty-seventh session, held from 4 to 22 October 2010, the Committee on the Elimination of Discrimination against Women adopted general recommendation No. 27 on older women and the protection of their human rights (CEDAW/C/2010/47/GC/1). Referring to the multidimensional aspect of the discrimination experienced by older women, the Committee observed that it was compounded by other forms of discrimination based on sex, gender, ethnic origin, disability, levels of poverty, sexual orientation and gender identity, migrant status, marital and family status, literacy and other grounds. The Committee also observed that older women who are members of minority, ethnic or indigenous groups or who are internally displaced or stateless often experienced a disproportionate degree of discrimination.

A/HRC/16/44 - [Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekagya](#)

III. Women human rights defenders and those working on women’s rights or gender issues

B. The approach of the mandate

22. Notwithstanding the legal recognition of the legitimacy of their work, women defenders continue to face significant challenges. Since its inception, the mandate has, both in its thematic and mission reports and other aspects of its work, consistently addressed the specificities of the situation of women human rights defenders and the particular challenges they face.

23. In this regard, the mandate holders have reiterated on several occasions that women defenders are more at risk of suffering certain forms of violence and other violations, prejudice, exclusion, and repudiation than their male counterparts. This is often due to the fact that women defenders are perceived as challenging accepted socio-cultural norms, traditions, perceptions and stereotypes about femininity, sexual orientation, and the role and status of women in society. Their work is often seen as challenging “traditional” notions of the family which can serve to normalize and perpetuate forms of violence and oppression of women. This can, in certain contexts, lead to hostility or lack of support from the general population, as well as the authorities.

1. Most common activities of those who face violations

37. A large number of communications sent during the period (196) concerned alleged violations against defenders, including males, working on women’s rights or gender issues, including lesbian, gay, bisexual and transsexual issues (LGBT). This group is thoroughly heterogeneous, including women and men carrying out a vast range of activities related to women’s rights, including those working on issues related to sexual and reproductive rights; organizations dealing with violence against women, rehabilitation and impunity related to violence, rape and sexual violence, women’s shelters caring for victims of the above; and journalists and bloggers writing on women’s rights issues.

42. The 28 communications sent regarding defenders working on women's rights or gender issues in Europe and Central Asia predominantly concerned LGBT activists in East and Central European countries including Poland, Moldova, Serbia, and the Russian Federation, as well as women's rights activists operating in Uzbekistan and Belarus. Alleged violations against LGBT activists in this region generally related to freedom of assembly or association, such as denial of permits for peaceful rallies or refusal to register an organization. Other reported violations against women's rights defenders were again largely judicial by nature, including arrests, detentions, judicial harassment, and conviction.

43. During the period, the mandate sent 47 communications regarding defenders working on LGBT issues. Aside from the aforementioned alleged violations related to freedom of assembly and association, killings of LGBT human rights defenders were alleged in five communications, with rape and sexual violence, including against males, being reported in a further six. Various other communications detailed many instances of threats, death threats, physical attacks and violence, and stigmatization. Further, the criminalization of homosexuality has in some countries led to alleged arrests, torture and ill-treatment, including of a sexual nature, while in other countries it effectively prevented defenders from engaging in any advocacy for LGBT rights.

58. The human rights activities carried out by those subjected to threats and death threats in the Americas region ranged very widely. Among the groups which appear to be most at risk are women defenders working to fight impunity for alleged human rights violations, particularly in Brazil, Colombia, Guatemala, Mexico, and Peru. Moreover, those working on indigenous rights also appear to be at risk, particularly in Brazil, Chile, Colombia, Ecuador, Guatemala, and Honduras; trade unionists, particularly in Colombia and Guatemala; and women's rights and/or LGBT defenders in the region.

(c) Stigmatization

85. Aside from the "political" stigmatization to which both women defenders and their male counterparts are subjected in certain contexts, including accusations of being fronts for guerrilla movements, terrorists, political extremists, separatists, foreign countries or interests, women human rights defenders often face further stigmatization by virtue of their sex or the gender- or sexuality-based rights they advocate. As noted above, such work can be perceived as challenging established socio-cultural norms, tradition or perceptions about the role and status of women in society. As a result of this, women defenders often find themselves and their work subjected to stigmatization by both State and non-State actors. A common accusation directed in particular at those working on women's rights, gender issues, and LGBT rights, is the assertion that these defenders are somehow advocating or attempting to import "foreign" or "Western" values which contradict national or regional culture. State agents or representatives are often alleged to be responsible for such stigmatization.

(d) Sexual violence and rape

86. As both mandate holders have reiterated on various occasions, female human rights defenders are subject to particular risks to which their male counterparts are not so greatly exposed, foremost among these being the risk of rape, sexual abuse, and other forms of sexual violence and harassment. During the 2004-2009 period, the mandate sent 26 communications regarding cases of rape, threatened rape, or other forms of sexual violence and harassment against women defenders. However, of these, six communications concerned abuses of this kind against LGBT activists.

87. In 2005, the mandate sent a communication regarding the systematic use of sexual and other forms of violence against women defenders in the Democratic Republic of the Congo. Aside from this, two other cases of threatened and attempted rape were reported from the DRC, along with one attempted rape of a women defender's daughter in the Central African Republic, and the threatened rape of an LGBT activist in Kenya. Sexual assaults, including instances of gang rape in detention of LGBT activists, were also reported in Ecuador, Honduras, Mexico, India, and Nepal. The alleged perpetrators of these acts were mostly unknown/ unidentified but also included members of the police, military, armed groups, or local members of the community.

II. General context in which human rights defenders operate

17. The prevailing atmosphere of political dispute has also led to a context within which civil and political rights defenders appear to predominate within the human rights community. In contrast, economic and social rights activists, including those who work on women's' and lesbian, gay, bisexual and transgender (LGBT) rights as well as other social issues, are able to escape much of the politicization of other organizations, and the authorities have been responsive to some of their recommendations. However, economic and social rights activists often find themselves marginalized within dominant human rights discourse and are successful in their work insofar as it does not impact on civil and political issues, or touch on the vested interests of powerful individuals within society.

IV. Challenges faced by human rights defenders

A. Overview of civil society in Armenia

60. Among the most vulnerable groups of human rights defenders in Armenia are those working on the rights of LGBT persons, women human rights defenders, NGOs working in remote areas and environmental activists.

61. Defenders working on the rights of LGBT persons frequently face hate speech by the media and verbal and physical abuse by representatives of law enforcement agencies. Intimidation of LGBT defenders is recurrent and it is felt that they are not understood even by some other parts of the civil society. There is a lack of awareness about issues related to LGBT persons in society in general, but also within civil society itself. Defenders working on LGBT issues are not able to register their organization as such, and are often forced to carry out their activities as human rights and sexual health organizations.

B. Recommendations

Recommendations for the consideration of the Government

- **Address the specific needs of human rights defenders, including women and LGBT human rights defenders, in the National Action Plan on Human Rights**

A/HRC/16/46 [Recommendations of the Forum on Minority Issues at its third session, on minorities and effective participation in economic life \(14 and 15 December 2010\)](#)

II. General considerations

13. Particular attention should be given to multiple and intersecting forms of discrimination against minorities, including on the basis of sex, age, disability, sexual orientation and gender identity. Intersectional discrimination deepens and complicates the impact of the denial of access to jobs, housing and other economic rights, making it more difficult to identify sustainable solutions. Minority women in rural or remote areas in some countries must cope with a profound isolation created by boundaries of the home, lack of education and language barriers. Their workload is made heavier by the lack of basic amenities such as clean water and sanitation, cheap and clean cooking fuels, the availability of child-care support, and protection against domestic and societal violence. Entrenched gender roles leave women highly vulnerable, particularly with regard to ownership of land or property, inheritance rights and access to credit, technology or markets.

III. Recommendations

A. Governments

16. Governments should eliminate de jure and de facto discrimination affecting participation in economic life for minorities. Measures must be taken to eliminate discrimination against minorities in both the public and private sectors, including in the key fields of employment and labour rights, financial services, education and training,

productivity-enhancing technologies, social security, land tenure and property rights. Governments should recognize and address multiple and intersecting forms of discrimination against minorities, including on the basis of sex, age, sexual orientation and gender identity or disability and their compounded negative impact on the women and other groups concerned.

D. Trade unions

51. Trade unions should survey union members to identify issues of discrimination on the basis of minority identity, including multiple and intersecting forms of discrimination on the basis of sex, age, disability, sexual orientation and gender identity, that have affected equal access to employment and labour rights. Trade unions should establish task forces to develop plans of action to eradicate labour practices that discriminate against minorities.

A/HRC/16/47 [Report of the Working Group on Arbitrary Detention](#)

III. Implementation of the mandate of the Working Group

7. The mandate of the Working Group is to investigate cases of deprivation of liberty imposed arbitrarily. In the discharge of its mandate, the Working Group refers to the relevant international standards set forth in the Universal Declaration of Human Rights, as well as to the relevant international instruments accepted by the States concerned, in particular the International Covenant on Civil and Political Rights; the Convention relating to the Status of Refugees of 1951; the International Convention on the Elimination of All Forms of Racial Discrimination, as well as, when appropriate, the following standards:

e) When the deprivation of liberty constitutes a violation of the international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights (Category V).

A/HRC/16/52/add.3 [Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Addendum: Mission to Jamaica](#)

C. Conditions of detention

3. Correctional centres

47. Homosexuals detained at St. Catherine and Tower Street correctional centres were held in the "vulnerable persons unit" as a protective measure. However, their separation led to a loss of privileges of a punitive character, such as work and recreation, including the use of the library and playing field. In the security section in the Tower Street centre, detainees were locked up in dark, solitary cells without a toilet or water, and had nobody to call for help.

A/HRC/16/69 [The protection of human rights in the context of human immunodeficiency virus \(HIV\) and acquired immune deficiency syndrome \(AIDS\), Report of the Secretary-General](#)

II. Contributions from Member States, United Nations funds, programmes and specialized agencies, and non-governmental organizations

B. Stigma

6. Many informants reported that people's association of HIV with injection drug use, sex work, homosexuality and promiscuity entrenched already deeply held stigma associated with these forms of behaviour. Various Governments stated that HIV remained a "gay disease" in the public mind, which reinforced discrimination against men who have sex with men, and further reinforced in some countries by the criminalization of homosexuality. UNAIDS noted that sex workers, men who have sex with men and people who inject drugs were often stigmatized as "vectors" of a deadly epidemic. Some respondents observed that, since many of the populations at risk of infection are also criminalized, and therefore, have been in prison or pretrial detention, they faced many layers of stigma.

C. Discrimination

12. Echoing observations related to stigma, many respondents noted that HIV-related discrimination was integrally linked to discrimination based on a person's status as a sex worker, man who has sex with men, transgender person, prisoner or former prisoner, or person who uses illicit drugs. The International HIV/AIDS Alliance, a non-governmental organization based in the United Kingdom of Great Britain and Northern Ireland, asserted that transgender persons often faced heinous discrimination, abuse and violence, sometimes exacerbated by HIV-related discrimination. According to the Alliance, more than 200 transgender persons had been murdered for reasons linked to their gender identity worldwide in 2008 and 2009. The Economic and Social Commission for Asia and the Pacific (ESCAP) reported that, in resolution 66/10 of May 2010, ESCAP member countries had recognized that an effective regional response must tackle HIV-related discrimination and discrimination linked to sex work, drug use and sexual orientation.

D. Participation of vulnerable groups

15. Information provided for the present study suggests that meaningful participation of vulnerable populations at risk of HIV infection — notably sex workers, men who have sex with men, and people who use illicit drugs — is impeded in many places by deeply entrenched stigma, social exclusion and criminalization. This is the case even though these groups are best placed to design programmes that will work for them. Respondents and presenters emphasized that criminal sanctions against sex work, drug use and homosexuality impeded meaningful participation in and uptake of HIV service. Not only did criminalized persons have a justifiable fear of processes that may identify them with an illegal behaviour, but they were also often unable to be part of officially registered nongovernmental organizations of the kind invited to Government consultations. Even if they had organizations, those organizations were unlikely to have the resources and experience needed to participate effectively in HIV planning and decision-making. As noted by the Government of Mauritius, the fact of having been in prison or pretrial detention, a frequent occurrence for vulnerable persons in many places, also singled them out for further stigma and exclusion.

1. Men who have sex with men

19. The International HIV/AIDS Alliance emphasized the marginalizing effect of laws criminalizing homosexuality in over 86 countries. UNDP, for example, reported that the HIV response in many countries was undermined by discrimination and violence against men who have sex with men that were not publicly condemned or prosecuted. UNAIDS noted that the national AIDS response in India was aided greatly by the landmark court decision of 2009 that overturned its Victorian-era sodomy law, but added that much remained to be done to ensure that non-discrimination was a reality for men who have sex with men and lesbian, gay, bisexual and transgender persons. According to UNAIDS, criminal law on same-sex conduct as a source of stigma and discrimination directed against men who have sex with men drives them underground, out of reach of HIV services. Mauritius cited its achievement as one of only a few African countries that had legal prohibitions against discrimination based on sexual orientation. At the Geneva consultation, a representative of the Brazilian lesbian, gay, bisexual and transgender persons' rights organization, AGBLT/Grupo Dignidade, described the three-year struggle of the organization to gain observer status of the Economic and Social Council as a step to meaningful participation in United Nations processes. This milestone had been achieved thanks partly to support from the highest level of the Government of Brazil. The representative of France at the Geneva consultation noted that the endorsement by over 60 countries of a 2008 statement in the General Assembly condemning discrimination based on sexual orientation and gender identity and related abuses showed that progress was possible on politically difficult issues.

2. Drug use

20. Non-governmental organizations and United Nations bodies in several countries noted the absence of recognized organizations of people who use drugs as a barrier to their participation. A number of countries reported that people who use drugs participated in HIV responses largely as peer educators and outreach workers, and did not have a meaningful voice in the design of programmes and policies. According to the Canadian HIV/AIDS Legal Network, a non-governmental organization based in Toronto, while Canada had many networks of people who use drugs, those

organizations had been excluded from the formulation of the national drug policy in 2007, which eliminated harm reduction as a “pillar” of the policy. Responses from several countries noted that reform of repressive drug laws was the key to enabling meaningful participation of people who use drugs in health policy and programmes, although mobilizing political support for such reform was difficult. The representative of Lebanon at the Geneva consultation reported that the decriminalization of certain categories of drug offences there had greatly facilitated the provision of HIV services to people who use drugs. The Executive Director of the International Harm Reduction Association, a non-governmental organization based in the United Kingdom, pointed out that drug addiction was described as a “serious evil” in the widely ratified Single Convention on Narcotic Drugs (1961), language that tended to encourage demonization and exclusion of people living with drug dependency. The representative of the Association in the Geneva consultation, among others, called on Member States and United Nations bodies to recognize and address the fact that drug law at the national and international levels had been developed largely without reference to human rights norms. With regard to illicit drugs, sex work and criminalized same-sex conduct, leadership was urgently needed to change legal frameworks that had allowed the proliferation of arbitrary arrest and detention, lack of due process and lack of access to justice.

E. Lack of access to health services

24. Many of the Member States that provided information for the present study cited greatly expanded care for HIV, especially access to antiretroviral therapy, as the most important human rights achievement in their HIV responses. Nonetheless, respondents and presenters at the consultation pointed out that stigma, discrimination and fear of criminal prosecution kept many people living with and vulnerable to HIV from seeking health services they needed, including HIV prevention and treatment services. Several respondents cited the urgent need to help health workers to be part of the solution to HIV-related stigma in health services rather than part of the problem. UNAIDS cited widespread stigma and mistreatment of people living with HIV in public health services in India and the lack of mechanisms of redress for these abuses. In 2008, the Supreme Court of India had issued interim directions to ensure access to care for people living with HIV at public hospitals. Such judicial remedies appeared to be rare elsewhere. The Government of Mexico emphasized the need to address both HIV-related prejudices and homophobia among health service providers.

25. Several respondents reported that people living with HIV, sex workers, people who use illicit drugs and men who have sex with men were often excluded from health services because they were unable to get health insurance or feared being mistreated by health-care providers. In some cases, people living with HIV could be covered for antiretroviral therapy paid for by donor funding, but might be unable to obtain affordable care for opportunistic infections and other problems. The World Food Programme noted that, although food and nutrition assistance should be part of comprehensive HIV care, it rarely was.

I. Criminalization of HIV transmission and exposure

43. At the Geneva consultation, in response to a Member State query, a UNAIDS expert emphasized again that new HIV-specific laws in this area were likely to contribute to stigma and run counter to efforts to expand the uptake of HIV prevention and treatment, and that the rare cases that merited prosecution should be handled by existing law. The Governments of Brazil and of Sweden reported their decisions to use existing law for cases of intentional transmission rather than to make an HIV-specific law. Brazil noted that there was still a need to work with judicial officials to avert unnecessary criminal prosecutions. Switzerland was in the process of modifying its penal code to restrict prosecutions to cases where intentional transmission could be demonstrated. At the Geneva consultation, the representative of Lebanon emphasized that some degree of decriminalization could go a long way to improving access to HIV services for socially marginalized persons; laws that criminalized drug use and addiction, sex work and homosexuality, which were major barriers to the meaningful participation of affected persons and thus to effective HIV responses, were, however, often politically difficult to revise or rescind.

III. Conclusions

46. **Sex workers, people who use illicit drugs, transgender persons, men who have sex with men, prisoners and former prisoners and migrants, among others, face structural factors beyond their control that exacerbate their vulnerability to HIV infection, including many associated with criminal law. Their right to meaningful participation in HIV decision-making – which would allow them to bring to the policy table their unique and needed perspective on the structural and personal risks they face and how these can be addressed – is too often unfulfilled. Stigma, discrimination and criminalization directly undermine the provision and utilization of HIV services that key affected populations need. In spite of epidemiological imperatives and clear evidence of their effectiveness, basic HIV- prevention services for people who inject drugs are all too often simply unavailable.**

IV. Recommendations

A. Strategic reorientation of global and national HIV response

50. A number of concrete programme priorities are implied by such a realigned strategy, which would, if funded, implemented and taken to scale in national HIV responses, go a long way to reduce HIV-related stigma and discrimination, open up space for greater uptake of HIV services, and increase access to justice in the context of HIV. The priorities are:

(a) To reform and monitor laws that may impede effective HIV responses, including removing punitive criminal laws used repressively against sex workers, men who have sex with men, transgender persons and people who use drugs

B. Decriminalization

51. **The reform of repressive laws that impede HIV responses is a long-term undertaking and seems to happen infrequently. At issue is the overly-broad application of criminal laws to people engaging in non-violent crimes, which then results in significant pretrial detention and incarceration. This criminalization has an impact on HIV in two ways: first, the chilling effect of these laws, as well as the stigma, discrimination and illegal police practices attached to them, drive people living with HIV and key populations at risk away from HIV services; secondly, if held in pre- or post-trial detention, people are further subjected to environments where the risk of HIV transmission is significantly higher than in communities. Pretrial detainees who have not been convicted of a crime make up a large proportion of persons in State custody in many countries. In these cases, minimizing the use of pretrial detention, in accordance with human rights norms, should be part of the enabling environment contributing to effective national HIV responses. Political leaders should be supported to enable them to confront issues involving decriminalization with data, conviction and courage. Much greater efforts must therefore be made by States to reconsider the widespread application of criminal law against sex work and drug use. Criminalizing homosexuality should be stopped.**

A/HRC/16/CRP.1 [Report of the Independent Expert on the situation of human rights in Burundi, Akich Okola](#)

IV. Human rights situation

A. Major human rights violations and abuses

5. Gender equality and sexual and gender-based violence

38. The revised Criminal Code adopted in April 2009 by the Parliament criminalizes same sex relationship. In this context, on 5 December 2008, the Independent Expert on the human rights situation in Burundi, jointly with three other Special Rapporteurs of the Human Rights Council, sent an allegation letter to the Government of Burundi, requested it to review the provision criminalizing homosexuality and to reconsider its decision on this matter, as it had undertaken during the Universal Periodic Review in December 2008. However, the provision has so far remained unchanged. The Independent Expert therefore observes that discrimination on the basis of sexual orientation continues to pose a potential threat.

ANNEX III: UPR RECOMMENDATIONS RELATING TO SEXUAL ORIENTATION & GENDER IDENTITY

Liberia

No references

Malawi

(Note that Malawi has subsequently *extended* its criminal provisions against same-sex conduct between consenting males to also criminalise same-sex conduct between consenting adult women)

Conclusions and Recommendations

105. The recommendations below did not enjoy the support of Malawi:

- 105.1. Completely overhaul the legal system to ensure the compliance of the Constitution and all other domestic legislation with international human rights obligations and standards and, in this regard, amend and/or derogate all legal provisions, including customary law, which result in discrimination, especially on the basis of sexual orientation (Mexico);
- 105.17. Put in place a moratorium on convictions for same-sex relationships and, over time, decriminalize homosexuality in order to fully apply the principle of equality and non-discrimination among all persons (France);
- 105.18. Put in place effective measures to prevent discrimination, prosecution and punishment on the basis of sexual orientation or gender identity (Canada);
- 105.19. Reform the penal code and abolish discrimination against people based on their sexual orientation (Germany);
- 105.20. Fulfil its obligations under international human rights law and review its national legislation, as a matter of urgency, to decriminalize same-sex relationships and prohibit discrimination on any grounds, including sexual orientation (Sweden);
- 105.21. Repeal legislation discriminating against individuals on the basis of their sexual orientation or gender identity (Australia);
- 105.22. Review penal code provisions that discriminate against individuals on the basis of sexual orientation or gender identity, in order to ensure an end to hostility or violence against such groups (United Kingdom of Great Britain and Northern Ireland);
- 105.23. Review national legislation with the aim of decriminalizing homosexuality between consenting adults and prohibiting discrimination on the grounds of sexual orientation and gender identity (Italy);
- 105.24. Repeal legislation criminalizing homosexuality and introduce policies aimed at ending discrimination against LGBT people (Austria);
- 105.25. Decriminalize homosexual activity (United States of America);
- 105.26. Derogate legislation that criminalizes same-sex activities between consenting adults and adopt measures to combat incitement to hatred for reasons of sexual orientation or gender identity, and allow the registration of NGOs that defend matters of sexual orientation and gender identity without discrimination (Spain);
- 105.27. Review domestic legislation with a view to decriminalizing homosexual relations and prohibiting all forms of discrimination, in compliance with Malawi's international commitments. Release immediately and unconditionally all persons currently deprived of their liberty only for this reason (Switzerland);
- 105.28. Renew its efforts to combat ongoing discrimination on a de facto and de jure basis concerning sexual orientation, and decriminalize same-sex relations (Luxembourg);
- 105.29. Decriminalize same-sex relations (Ireland);

Mongolia

Conclusions and Recommendations

84. The recommendations formulated during the interactive dialogue and listed below have been examined by Mongolia and enjoy its support:

- 84.17. Enact broad anti-discrimination legislation that explicitly prohibits discrimination based on sexual orientation and gender identity (Canada);
- 84.56. Publicly condemn all forms of violence and discrimination based on sexual orientation, and investigate and prosecute all reported attacks and threats against individuals based on their sexual orientation (Netherlands);
- 84.57. Develop its legislation with a view to effectively protecting the rights of LGBT persons, and discourage the development of discriminatory ideologies in the country through information and human rights education (Switzerland);
- 84.58. Ensure thorough and impartial investigations into all allegations of attacks and threats against individuals targeted because of their sexual orientation and gender identity, and bring to justice those responsible (Canada);
- 84.96. Ensure thorough and impartial investigations into all allegations of attacks and threats against individuals targeted because of their sexual orientation, as in the case of LGBT individuals, and bring to justice those responsible in accordance with international standards of fair trial (Sweden);
- 84.99. Promote the rights to freedom of expression, association and assembly without discrimination of members of the LGBT community (Sweden);

86. The following recommendations will be examined by Mongolia, which will provide responses in due course, but no later than the 16th session of the Human Rights Council, in March 2011:

- 86.8. Amend the provisions of the Criminal Code and eliminate legal provisions and practices by public authorities, including possible practices of harassment and bullying by the police forces, which lead to discrimination based on sexual orientation and gender identity (Spain);

Panama

Conclusions and Recommendations

70. The following recommendations will be examined by Panama, which will provide responses in due course, but no later than the 16th session of the Human Rights Council, in March 2011.

- 70.13. Harmonize all national legislation and elaborate policies in accordance with the Yogyakarta Principles (Norway);

Maldives

Conclusions and Recommendations

100. The following recommendations will be examined by Maldives, which will provide responses in due course, but no later than the 16th session of the Human Rights Council, in March 2011. The response of Maldives to these recommendations will be included in the outcome report adopted by the Council at its 16th session, in March 2011:

- 100.50. Reconsider the legal status of lesbian, gay, bisexual and transgender people, and consider taking concrete steps to protect them from violence and discrimination (Norway);

- 100.51. Introduce policies aimed at ending discrimination against individuals on the basis of their gender identity or sexual orientation, and repeal legislation criminalizing homosexuality (Australia);
- 100.52. Repeal legal provisions which criminalize sexual activity between consenting adults of the same sex (Canada);
- 100.53. Decriminalize homosexuality and, as a first step, declare a moratorium on the application of penalties (France);
- 100.54. Take measures to prevent human rights violations based on sexual orientation and gender identity (France);

Andorra

No references

Bulgaria

Conclusions and Recommendations

80. The recommendations formulated during the interactive dialogue and listed below will be examined by Bulgaria, which will provide responses in due course, but no later than the sixteenth session of the Human Rights Council, to be held in March 2011:

- 80.8. Adopt legislation to prevent discrimination on the grounds of sexual orientation in the same manner as existing legislation to protect against discrimination on the grounds of ethnicity, gender and religion (United Kingdom);
- 80.9. Study the possibility of introducing a criminal aggravating factor for racial and religious hatred or hatred against persons with a minority sexual orientation (Spain);
- 80.38. Continue its efforts to overcome stereotypical attitudes regarding the roles of men and women and existing gender inequality (Ukraine);
- 80.43. Support more actively the implementation of the rights of sexual minorities as a means to fight social isolation and discrimination (Norway);
- 80.44. Develop effective measures to overcome continuing discriminatory patterns against ethnic minorities and lesbian, gay, bisexual and transgender persons through education and training (Spain);

Honduras

Conclusions and Recommendations

81. The recommendations formulated during the interactive dialogue and listed below have been examined by Honduras and enjoy its support:

- 81.1. Review its national law in order to ensure full and unhampered enjoyment of human rights by all members of society, including those belonging to the most vulnerable groups, such as women, lesbian, gay, bisexual and transgender persons and indigenous peoples (Czech Republic);

82. The following recommendations enjoy the support of Honduras, which considers that they have already been implemented or are in the process of implementation:

- 82.35. Carry out independent, impartial and effective investigations into the unlawful use of force against lesbian, gay, bisexual and transgender activists by Honduran law enforcement officials (Ireland);

- 82.36. Take concrete steps to ensure prompt, adequate, and transparent investigation of killings, intimidations and other abuses of persons from the lesbian, gay, bisexual and transgender community (United States);
- 82.38. Intensify actions and adopt broad measures to combat violence against women, children, young people and lesbian, gay, bisexual and transgender persons (Brazil);

83. The following recommendations will be examined by Honduras, which will provide responses in due course, but no later than the 16th session of the Human Rights Council, in March 2011. The response of Honduras to these recommendations will be included in the outcome report adopted by the Council at its 16th session:

- 83.4. Enact comprehensive anti-discrimination legislation to effectively protect the human rights of persons belonging to indigenous minorities and Afro-Honduran peoples and of lesbian, gay, bisexual and transgender persons, in particular with regard to violence against such persons and their access to the labour market (Austria);
- 83.7. Adopt a comprehensive law on non-discrimination based on international human rights standards, including gender identity and expression, and sexual orientation, which would enhance and specify the protection provided for in article 321 of the Penal Code, and which would create an independent body to promote non-discrimination and equality, and monitor compliance with this law by public and private actors (Ireland);
- 83.8. Include sexual orientation and gender identity as grounds in antidiscrimination legislation, and provide training to law enforcement and judicial officials to promote respect for the rights of all persons, regardless of their sexual orientation or gender identity (Netherlands);

USA

Conclusions and Recommendations

92. In the course of the discussion, the following recommendations were made to the United States of America:

- 92.86. Undertake awareness-raising campaigns for combating stereotypes and violence against gays, lesbians, bisexuals and transsexuals, and ensure access to public services paying attention to the special vulnerability of sexual workers to violence and human rights abuses (Uruguay);
- 92.112. Take measures to comprehensively address discrimination against individuals on the basis of their sexual orientation or gender identity (Australia);
- 92.116. Continue its intense efforts to undertake all necessary measures to ensure fair and equal treatment of all persons, without regard to sex, race, religion, colour, creed, sexual orientation, gender identity or disability, and encourage further steps in this regard (Israel);

93. The response of the United States of America to these recommendations will be included in the outcome report adopted by the Council at its sixteenth session.

Marshall Islands

Conclusions and Recommendations

56. The following recommendations will be examined by the Republic of the Marshall Islands, which will provide responses in due course, but no later than the 16th session of the Human Rights Council, in March 2011:

- 56.24. Reinforce constitutional protections against discrimination to include sex, disability, sexual orientation and gender identity as prohibited grounds for discrimination (Canada);

Croatia

There were no references to sexual orientation and gender identity during the interactive dialogue.

Jamaica

Conclusions and Recommendations

99. The following recommendations enjoy the support of Jamaica, which considers that they have already been implemented or are in the process of implementation:

- 99.34. Provide all enforcement officials with proper sensitivity training in relation to sexual orientation, gender identity and HIV/AIDS (Slovenia);

100. The following recommendations will be examined by Jamaica, which will provide responses in due course, but no later than the 16th session of the Human Rights Council, in March 2011. The response of Jamaica to these recommendations will be included in the outcome report to be adopted by the Council at its 16th session:

- 100.21. Reinforce legal protections against discrimination to include sexual orientation and gender identity as prohibited grounds for discrimination (Canada)¹;
- 100.22. Initiate or join public campaigns so as to encourage tolerance towards homosexual, bisexual and transsexual persons (Belgium);
- 100.23. Start a public information campaign to combat discrimination based on sexual orientation (Netherlands).

101. The following recommendations do not enjoy the support of Jamaica:

- 101.18. Repeal all provisions that criminalize same-sex activities between consenting adults (Netherlands);
- 101.19. Repeal sections 76, 77 and 79 of the Offences against the Person Act, which criminalize same-sex male intercourse (United States);
- 101.20. Decriminalize consensual sexual relations between adults of the same sex, and abolish all legal provisions discriminating against homosexual, bisexual or transsexual persons (Belgium);
- 101.21. Decriminalize sexual activity between consenting adults of the same sex, and address hate crimes on the grounds of sexual orientation and gender identity, as a matter of urgency (Slovenia);
- 101.22. Decriminalize consensual same-sex relations between males, investigate all incidents and acts of violence suspected of being motivated on the grounds of sexual identity, and take all necessary measures to ensure the full enjoyment of human rights by lesbian, gay, bisexual and transgender persons, as stipulated by the principle of non-discrimination established under international human rights law and articulated in the Yogyakarta principles (Sweden);
- 101.23. Include in the Charter of Rights Bill, currently before Parliament, a specific prohibition of discrimination on the grounds of sexual orientation and repeal all legal provisions criminalizing consensual relations between adults of the same sex; and combat this type of discrimination through awareness-raising campaigns and education programmes in school (Spain);
- 101.24. Repeal all legal provisions constituting discrimination against lesbian, gay, bisexual and transgender persons (France);

¹ The recommendation as read during the interactive dialogue: "Adopt targeted policies and programmes to offer protections for the most vulnerable in society, including women, children, persons with disabilities and LGBT persons, and to eliminate discrimination against them" (Canada).

- 101.25. Remove legislation which discriminates against individuals on the basis of their sexual orientation or gender identity (Australia);

102. The following recommendation does not enjoy the support of Jamaica, as Jamaica considers it is based on false or erroneous premises:

- 102.1. Ensure the protection of defenders of the rights of lesbian, gay, bisexual and transgender persons; and take measures to ensure that lesbian, gay, bisexual and transgender persons can fully and freely exercise their rights without fear of attack or reprisal (United States).

Libya Arab Jamahiriya

Conclusions and Recommendations

95. The following recommendations will be examined by the Libyan Arab Jamahiriya, which will provide responses in due course, but no later than the 16th session of the Human Rights Council, in March 2011. The responses of the Libyan Arab Jamahiriya to these recommendations will be included in the outcome report adopted by the Council at its 16th session:

- 95.28. Ensure respect for the right to a private life, as guaranteed by the International Covenant on Economic, Social and Cultural Rights, to which the Libyan Arab Jamahiriya is a State party, by reviewing its national law criminalizing consensual sexual relations out of wedlock (Czech Republic);

Micronesia

No references

Lebanon

Conclusions and Recommendations

82. The recommendations below did not enjoy the support of Lebanon:

- 82.21. Decriminalise homosexuality and ensure non-discrimination on the basis of sexual orientation and gender identity (Norway);

Mauritania

Conclusions and Recommendations

93. The recommendations below did not enjoy the support of Mauritania:

- 93.2. Include sexual orientation and gender identity in non-discrimination laws and programmes, and promote tolerance and non-discrimination regarding sexual orientation or identity, in line with the Yogyakarta principles (Sweden);
- 93.3. Remove the provisions of the penal code that allow the punishment of the death penalty for homosexuality, as soon as possible (France);
- 93.4. Ensure that the death penalty is not applied to consensual same-sex relations between adults, and that the Penal Code does not criminalize such activity (Sweden).

Response of the State under Review during the Interactive Dialogue:

73. La délégation a indiqué que si le Code pénal contient des peines à l'encontre des personnes de même sexe ayant des relations sexuelles entre elles, il s'inspire de la loi musulmane Sharia, de l'éthique personnelle et de la spécificité du pays. Ces dispositions seront minutieusement étudiées afin de les conformer aux standards internationaux.

74. La Mauritanie a indiqué qu'à l'instar de la peine de mort, les châtiments corporels n'ont jamais été pratiqués et exécutés. Des dispositions de la loi musulmane et des lois pénales spéciales permettent des peines alternatives ou de substitution.