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ADDRESSING HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION & GENDER IDENTITY AT THE 10th SESSION OF THE HUMAN RIGHTS COUNCIL

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There are a number of opportunities to raise awareness of human rights violations based on sexual orientation and gender identity at the upcoming 10th session of the Human Rights Council. In particular, it may be useful to explore ways of raising awareness of the landmark joint statement on human rights, sexual orientation and gender identity, delivered at the GA in December on behalf of 66 States from all UN regions, as well as the High Commissioner's powerful statement of support.

This overview addresses **high-level segment** interventions, interactive dialogue with the **High Commissioner, general debate**, and the reports of the **Special Procedures**. The Annex 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 10th 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, delivered to the UN General Assembly on December 18, 2008 on behalf of 66 States from all geographic regions;
- acknowledge the High Commissioner's strong support for these issues;
- recognise that it is particularly appropriate that this statement was delivered on the 60th Anniversary of the Universal Declaration of Human Rights, which affirms the principles of universality and non-discrimination;
- 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.

➤ **Interactive Dialogue with High Commissioner:**

The High Commissioner delivered a very powerful video statement at a high-level parallel event at the GA on December 18, 2008. Key passages include:

- "As we celebrate this month the 60th Anniversary of the Universal Declaration of Human Rights, it is timely to remember the spirit and intent behind that most vital of instruments ... No human being, simply because of their perceived sexual orientation or gender identity, may be denied their human rights. No human being, simply because of their perceived sexual orientation or gender identity, may be subject to discrimination, violence, criminal sanctions, or abuse."

- “There are those who argue that because sexual orientation or gender identity are not explicitly mentioned in any of the conventions and covenants then there is no protection. My answer is that such a position is untenable as a matter of law ... The principle of universality admits no exception. Human rights truly are the birthright of all human beings.”
- “Sadly, ... there remain too many countries which continue to criminalize sexual relations between consenting adults of the same sex in defiance of established human rights law. Ironically many of these laws, like Apartheid laws that criminalized sexual relations between consenting adults of different races, are relics of the colonial era and are increasingly becoming recognized as anachronistic and as inconsistent both with international law and with traditional values of dignity, inclusion and respect for all.”
- “It is our task and our challenge to move beyond a debate on *whether* all human beings have rights – for such questions were long ago laid to rest by the Universal Declaration – and instead to secure the climate for implementation Those who are lesbian, gay or bisexual, those who are transgender, transsexual or intersex, are full and equal members of the human family, and are entitled to be treated as such.”

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;
- emphasise the High Commissioner’s comments that it is time “to move beyond a debate on *whether* all human beings have rights ... and instead to secure the climate for *implementation*”;
- 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.

➤ **Interactive Dialogue with Special Procedures:**

Most Special Procedures’ reports are not available at the time of writing. The **Special Rapporteur on Human Rights Defenders** noted in her report:

- “21. On 24 October 2008, the Special Rapporteur presented her first report (A/63/288) to the General Assembly, in which she presented her vision and defined her priorities for the mandate. ... The priorities outlined by the Special Rapporteur are: the analysis of trends and challenges, and the reinforcement of scrutiny of defenders exposed to specific violations and attacks, including ... lesbian, gay, bisexual and transgender people.”
- In the context of her assessment of the UPR, the Special Rapporteur also noted “targeting of ... lesbian, gay, bisexual, transgender and intersex groups in Eastern European States such as Poland and Serbia, and South American States such as Argentina and Ecuador” (para. 65), “restrictions on the exercise of rights to freedom of human rights defenders included ... Poland (assembly, campaigns for equality and relating to sexual orientation)” (para. 72), “targeting of ... defenders working on lesbian, gay, bisexual and transgender issues in Israel, Montenegro, the Republic of Korea, Serbia and Sri Lanka” (para. 74), and “the situation of and problems faced by activists working on lesbian, gay, bisexual and transgender rights in Poland and Romania” (para. 82).

- Relevant State interventions might commend the Special Rapporteur for continuing the work of her predecessor by identifying as a priority particularly marginalised groups of defenders, including those who are lesbian, gay, bisexual and transgender people, and ask how the Council, through its mechanisms such as the UPR, can best address the human rights needs of the most marginalised.

➤ **UPR 3 report adoptions:**

Many relevant recommendations relating to sexual orientation and gender identity issues were raised during the UPR of the 16 States whose reports are due to be adopted. 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. A full list of UPR recommendations for the 16 States under review is attached as an Annex.

➤ **General statements – item 3 & 8:**

There will be opportunity for statements by individual States or regional groupings of States (e.g. EU, Mercosur, JUSCANZ) to make short interventions 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). State interventions during general debate could:

- affirm the joint statement on human rights, sexual orientation and gender identity, delivered to the UN General Assembly on December 18, 2008 on behalf of 66 States from all geographic regions – including 21 Members of the Human Rights Council;
- 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;
- express concern at human rights violations based on sexual orientation and gender identity, and call upon the Council to address the issues.

➤ **Human Rights Situations – item 4:**

Specific situations of concern may also of course be addressed under item 4. Many of the most sensitive current situations relate to States which are also undergoing UPR review, and may better be addressed within that context.

➤ **Parallel event:**

We are also seeking to organise, with State support, a parallel event to help raise awareness of human rights issues based on sexual orientation and gender identity, most likely on 19 March. This event would draw attention to the GA Statement on human rights, sexual orientation and gender identity, and to the High Commissioner's support, and explore ways in which the Human Rights Council can best address these issues through its various mechanisms. State sponsorship of the event would be appreciated, possibly through the same Core Group of States that supported a similar event in New York last December.

ANNEX:

UPR RECOMMENDATIONS RELATING TO SEXUAL ORIENTATION & GENDER IDENTITY

Botswana

Conclusions and Recommendations

- Adopt the necessary measures to combat discrimination of all kinds, including those based on homosexual orientation, gender, colour, religion, and political opinion (France) (**Recommendation 18**).
- Decriminalize homosexual relationships and practices/consensual same-sex activities between adults (Spain, Netherlands, Slovakia, Czech Republic, Canada); and forbid discrimination on the basis of sexual orientation (the Netherlands) (**Recommendation 23**).
- With regard to consensual same-sex activity between adults, adopt measures to promote tolerance and allow effective educational programmes on HIV/AIDS prevention (Czech Republic) (**Recommendation 24**).

Response: Botswana's response to these recommendations will be included in the outcome document to be adopted by the Human Rights Council at its Tenth Session.

Bahamas

Conclusions and Recommendations

- To continue the efforts to combat all forms of discrimination and consider specific measures in order to promote tolerance and non discrimination on the grounds of sexual orientation (Sweden) (**Recommendation 4**).

Response: The Bahamas declared that they **supported** this recommendation.

Note: The Bahamas may be commended for supporting this recommendation, and asked what specific measures it is contemplating to promote tolerance and nondiscrimination on the ground of sexual orientation.

Burundi

Conclusions and Recommendations

- Extend the protection against discrimination and ensure that no-one is subject to discrimination on the basis of sexual orientation, bearing in mind the universality of human rights and the recommendation of the Human Rights Committee on the right to privacy and non discrimination (Netherlands) (**Recommendation 4**).
- Reconsider the inclusion in the draft criminal code of the provision criminalizing same-sex sexual relations (Belgium, Chile, Slovenia), in conformity with Burundi's obligations to ensure non-discrimination and the right to privacy (Belgium, Slovenia) (**Recommendation 5**).

Response: Burundi's response to these recommendations will be included in the outcome document to be adopted by the Human Rights Council at its Tenth Session.

Note: The draft provision criminalising homosexual relations was recently rejected by the Senate, and the Bill has been sent back to the National Assembly. Burundi's response to these recommendations will be interesting, and they may be encouraged to accept the Bill in its revised form. Given that the matter is an evolving one, however, careful consideration will need to be given to the situation as it exists at the time of the report adoption in assessing what interventions, if any, are appropriate.

Luxembourg

Note: No references were made to sexual orientation or gender identity in the course of the review. Luxembourg may be commended for supporting the GA joint statement on human rights, sexual orientation and gender identity.

Barbados

Report Excerpts:

Introductory Remarks of the Delegation of Barbados

- 14. Although there is no separate legislation protecting the rights of persons with disabilities and those of persons based on sexual orientation from discrimination, the Minister drew attention to section 11 of the Constitution relating to the protection of fundamental rights and freedoms of the individual, which generally reflects the principle that all men and women shall enjoy equal civil and political rights.

Comments of Delegation of Barbados:

- 51. The Constitution of Barbados provides protection against discrimination for gays and lesbians. Pending a full report, the Government is considering a set of laws pertaining to discrimination. Given that the Office of the Attorney General faces enormous pressure owing to constraints on resources and a backlog of pending legislation, the Government would require technical assistance in drafting legislation.

Concluding Remarks of the Delegation of Barbados:

- 74. [The delegation stated that t]he contentious issue of consensual sex between adults of the same sex is a one and it would be disingenuous of the Government to treat it flippantly. It is an issue that engages not only legal considerations but also socio-cultural and historical considerations. Barbados is a heavily religious society and has a tremendous lobby in terms of the church, including activist evangelists, who have their own views on this issue. The Government has to therefore consider all the elements involved and all suggestions and submissions but at this stage is not in a position to make an intervention to abolish those laws; just as we are not yet in a position to allow the use of condoms in prison. These two issues are interlinked and have to be addressed together in their totality. It would be necessary to decriminalise consensual sex between persons of the same sex before any decision can be taken on the issue of allowing condoms in prison. The Government has received a report from the HIV/AIDS Commission which considers all of these issues and a National HIV/AIDS Policy has been laid in Parliament. We hope to address all of these issues in the fullness of time to the satisfaction of all interested parties.

Conclusions and Recommendations

- Bring its criminal laws on criminalization of consenting relations between adults of the same sex, and on offences of indecent assault and serious indecency that are defined vaguely, into line with international norms with respect to privacy and non-discrimination (France); decriminalize consensual sexual acts between adults of the same sex (Canada, Slovenia, Czech Republic, Chile); adopt measures to promote

tolerance in this regard which would encourage more effective educational programmes for prevention of HIV/AIDS (Czech Republic); take all necessary actions to protect homosexuals from harassment, discrimination and violence (Slovenia); consider introducing specific legislation and additional policy measures in order to promote tolerance and non-discrimination of lesbians, gays, bisexual and transsexuals (Sweden) **(Recommendation 17)**.

Response: The response of Barbados to this recommendation will be included in the outcome document to be adopted by the Human Rights Council at its Tenth Session.

Note: Barbados engaged on the issue of decriminalisation several times during interactive dialogue, and repeatedly affirmed that the right of all persons, including gays and lesbians, to protection from discrimination is protected by the Constitution. If they do not accept the relevant recommendations, it might be useful to draw their attention relevant jurisprudence and the statement of the High Commissioner, and urge them to do so in future.

Montenegro

Report Excerpts:

Comments of the Delegation of Montenegro:

- 43. The delegation noted that, while equality before the law and prohibition of direct and indirect discrimination are regulated by a set of laws, the Government wants to develop and adopt before the end of 2008 an anti-discriminatory general law. The delegation noted that the law gives a clear definition of discrimination, forms and fields of discrimination, including sexual orientation and gender identity. The draft law envisions setting up a body to monitor discrimination on all grounds.

Conclusions and Recommendations:

- Pursue the adoption of a general anti-discrimination act and aim at its adoption as soon as possible (Austria); include in the draft legislation on the prohibition of discrimination comprehensive anti-discrimination measures, including on sexual orientation and gender identity (Slovenia) **(Recommendation 6)**.
- Include explicit references to sexual orientation as a protected category against discrimination in the existing laws on labour and employment as well as in the legislation on hate speech and hate crimes (Canada) **(Recommendation 8)**.
- Introduce specific education programmes and sensitivity trainings for all relevant judiciary and police personnel aimed specifically at the protection of human rights of NGOs activists and members of minorities, including national minorities and persons of minority sexual orientation and gender identity (Czech Republic) **(Recommendation 11)**.

Response: Montenegro's response to these recommendations will be included in the outcome document to be adopted by the Human Rights Council at its Tenth Session.

It may also be noted that Montenegro supported the GA joint statement on human rights, sexual orientation and gender identity.

United Arab Emirates

Report Excerpts:

Interactive Dialogue:

- 55. Italy noted with satisfaction the de facto moratorium of the use of the death penalty since 2002, and that the State had not voted against recent resolutions of the United Nations on the establishment of a moratorium. However, it expressed concern at the broad scope of national legislation on death penalty, which goes beyond the most serious crimes as liable to capital punishment. Italy recommended that the State (a) consider, as a first step, amending its legislation on the death penalty to restrict its scope and adjust it to international standards, and (b) consolidate the de facto moratorium on the use of capital punishment with a view to adopting a legal moratorium.

[NB. Italy stated that: "Facts as drug trafficking, homosexual behaviour and apostasy are liable to capital punishment." This was not made specific in the written report of the review.]

- 62. Noting that consensual sexual activity of persons of the same sex is forbidden by law in the country, Sweden recommended (a) that the Government consider additional policy measures to promote tolerance and non-discrimination on the grounds of sexual orientation. Sweden noted that the practice of corporal punishment of adults exists in the country and recommended (b) that it consider legislative changes to repeal corporal punishment and bring legislation in line with international human rights obligations.

Recommendations and Conclusions:

The UAE **rejected** the recommendations made by Italy and Sweden on sexual orientation and gender identity.

Israel

Interactive Dialogue

- The UK stated that: "Israel has demonstrated good practice in many human rights areas, including the appointment of a national coordinator on the trafficking of persons, legislation to protect the rights of persons with disabilities, progress to promote the rights of same sex couples and the banning of corporal punishment throughout the educational system." This was not recorded in the written report of the review.

Report Excerpts:

- 21. the United Kingdom and Brazil [noted] the promotion of the rights of same-sex couples.

After the Adoption of the Report of the Working Group:

Egypt:

- "I would like to make a brief comment to the fact that no country took the floor to ask the state under review [Israel] to legitimize same-sex marriage. It seems that this has to be an Arab, Muslim or African state. Only those countries have to legitimize same-sex marriage. Let there be no mistake about it, this delegation will take the floor the next time somebody takes the floor to ask an Arab, Muslim or African delegation to legitimize same-sex marriage."

Note: It may also be noted that Montenegro supported the GA joint statement on human rights, sexual orientation and gender identity.

Liechtenstein

Report Excerpts:

Introductory Remarks of the Delegation of Liechtenstein

- 12. Responding to questions sent in advance by other countries, Liechtenstein indicated that the Equal Opportunity Commission and its operational Office of Equal opportunity were established in 2005....The Office of Equal Opportunity focuses its activities on combating discrimination and advancing de jure and de facto equal opportunity in areas such as gender equality, disabilities, migration and integration of foreigners, social disadvantages and sexual orientation.

Conclusions and Recommendations

The delegation of Liechtenstein **accepted** the following recommendations:

- Continue efforts to elaborate and implement policies aimed at eliminating all forms of discrimination and ensuring equality and full enjoyment of all human rights for all citizens (Cuba) (**Recommendation 5**).
- Pursue work to draft and enact law establishing registered partnership for same-sex couples (Switzerland) (**Recommendation 10**).

The responses of Liechtenstein to the following recommendations will be included in the outcome document to be adopted by the Human Rights Council at its Tenth Session.

- Include sexual orientation and gender identity in equality laws and initiatives (Netherlands) (**Recommendation 13**).

Note: Liechtenstein may be commended for accepting recommendations to finalise and enact a law establishing registered partnership for same-sex couples, and asked when such a law might be expected to come into effect. It may also be noted that Liechtenstein supported the GA joint statement on human rights, sexual orientation and gender identity.

Serbia

Conclusions and Recommendations

- To promote the work of the human rights defenders (Sweden, Canada, Switzerland) and take all necessary measures to ensure their safety (France, Czech Republic) and freedom of expression (Switzerland) and ensure they have a favourable working environment (France); to follow up to the recommendation of the Special Representative of the Secretary-General regarding the situation of human rights defenders and denounce more forcefully verbal and physical attacks against human rights defenders (Germany, Norway); to adopt a national plan of action to enhance the protection of human rights defenders and independent journalists (Netherlands), to develop and implement a comprehensive strategy designed to protect human rights defenders, including those working on behalf of the rights of lesbian, gay, bisexual, transgender persons (Canada); to apply the Yogyakarta Principles as a guide for the new policies in the area of lesbian, gay, bisexual, transgender rights (Netherlands); and ensure the effective investigation of alleged attacks against human rights defenders (Canada, Ireland) (**Recommendation 20**).

Response: The responses of Serbia to this recommendation will be included in the outcome document to be adopted by the Human Rights Council at its Tenth Session.

Note: It may also be noted that Serbia supported the GA joint statement on human rights, sexual orientation and gender identity.

Adoption of Report of Working Group

Pakistan (on behalf of the troika):

- “The Council still needs to deliberate on how to address the issue of recommendations being made for aligning laws to suggestions of regional organizations or to non-universally recognized legal concepts. This has the danger of undermining the credibility of the UPR process.”

Turkmenistan

Sweden:

- 36. Sweden also noted that consensual sexual activity among persons of the same sex is forbidden by law and asked whether the Government planned to change or repeal that law. Sweden recommended that the Government...consider legislation and/or additional policy measures in order to promote tolerance and non-discrimination of lesbian, gay, bisexual and transgender persons.

Czech Republic:

- 40. The Czech Republic...recommended that Turkmenistan...decriminalize consensual same-sex activity between adults and adopt measures to promote tolerance in this regard.

Conclusions and Recommendations

The recommendations of Sweden and the Czech Republic were **rejected** by the delegation of Turkmenistan.

Burkina Faso

No references were made to sexual orientation or gender identity in the course of the review.

Cape Verde

Conclusions and Recommendations

- 36. To consider appropriate policy measures in order to promote tolerance and nondiscrimination for lesbian, gay, bisexual and transgender persons (Sweden).

Response: The response of Cape Verde will be included in the outcome report to be adopted by the Council at its tenth session.

Note: It may also be noted that Serbia supported the GA joint statement on human rights, sexual orientation and gender identity.

Colombia

Recommendations and Conclusions

- Conduct public awareness campaigns against social prejudices and for upholding the principle of equality and non-discrimination regardless of sexual orientation and/or gender identity (Czech Republic) (**Recommendation 8**).

Response: Colombia **accepted** the recommendation, stating that:

- The subject of special protection for same-sex couples has appeared on the public agenda in Colombia, and has led to important developments in jurisprudence. The Constitutional Court has on various occasions upheld the right of same-sex couples to equality. It has recognized that a de facto marital union (and the ensuing property rights), access to the mandatory health scheme and access to a survivor's pension must be safeguarded for same-sex couples on the same terms as for heterosexual couples. Colombia now faces the challenge of continuing to advance in this area.

Note: Colombia may be commended for accepting the recommendation, and for supporting the GA joint statement on human rights, sexual orientation and gender identity. It may be asked what plans it has to ensure equal protection for same-sex couples and to carry forward its commitment to promote tolerance and respect based on sexual orientation and gender identity.

Uzbekistan

Interactive Dialogue:

Czech Republic:

- 79. With regard to the protection of the right to privacy and non-discrimination, the Czech Republic recommended the decriminalization of consensual same-sex activity between adults and the adoption of measures to promote tolerance in this regard.

Conclusions and Recommendations

It is likely, though not clear in the written report of the review (due to a lack of clarity in numbering the recommendations in para. 79), that Uzbekistan **rejected** this recommendation, concluding that it is not part of Uzbekistan's obligations under internationally agreed human rights standards. Clarification could be sought in this regard.

Tuvalu

Interactive Dialogue:

Introductory Remarks of Delegation of Tuvalu:

- 14. While stating that Tuvalu respects the rights of persons of all sexual orientations, the Head of Delegation stated that the question of legal protection in the Constitution will need to be carefully considered, and that Tuvalu is open to discussion and to relevant actions.

Note: Although not subject to any specific recommendations, Tuvalu could be commended for its openness to discussion and affirmation of the rights of persons of all sexual orientations, and encouraged to decriminalize sexual activity between consenting same-sex adults in furtherance of this commitment.