

# **The Mandate of the SOGI Independent Expert: The compelling case for its renewal in 2019**

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## Introduction

Civil Society organizations from around the world were passionately invested in the struggle to establish the mandate of the Independent Expert on Sexual Orientation and Gender Identity (SOGI). In fact, over 850 civil society organisations from over 157 countries signed a statement supporting the mandate.

After a long drawn out battle, where the establishment of the mandate was furiously contested not only in the Human Rights Council but also in the Third Committee of the United Nations, The Fifth Committee of the United Nations and the General Assembly, the mandate finally stood established.<sup>1</sup>

This mandate of the SOGI Independent Expert which was appointed in 2016 is poised to expire in 2019 and its up to the Human Rights Council to vote on whether the mandate should be renewed. This article argues that the mandate must be renewed, basing the call for renewal on an evaluation of what the mandate has achieved and its significance for the LGBT movement worldwide.

The working of the mandate can be assessed in terms of how the following three responsibilities of the mandate holder have been discharged

- a) transmits [urgent appeals and letters of allegation](#) to States with regard to cases of violence and discrimination against persons on the basis of their sexual orientation or gender identity.
- b) undertakes fact-finding [country visits](#).
- c) submits annual reports to the [Human Rights Council](#), and [General Assembly](#), on the activities, trends and methods of work.<sup>2</sup>

## Urgent Appeals/ Letters of Allegation

Since the mandate was established, there have been 40 communications which have been sent by the Independent Expert on SOGI. A diversity of countries from all regions of the world have been sent Letters of Allegation by the Independent Expert. The table below list countries by region which have been sent Letters of Allegation.

Africa	Egypt, Kenya, Tanzania and Tunisia
Asia	Brunei, Malaysia, Indonesia, Singapore and Korea
Europe	Russia, Azerbaijan, Armenia, Romania, Turkey and Kazakhstan
North America	Canada and US
South and Central America	Brazil, Chile, Honduras, El Salvador, Guatemala, Haiti, Peru

<sup>1</sup> <http://arc-international.net/research-and-publications/defending-ie-on-sogi/>

<sup>2</sup> <http://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/Index.aspx> (accessed on 12.02.18)

An analysis of the responses to Letters of Allegation reveals that they can be grouped in three broad categories.

### **Ignoring the communication of the Independent Expert**

One response to the Letters of Allegation is to simply ignore the communication. Russia has repeatedly ignored communications which detail grave violation of human rights based on SOGI. For example, in the communication issued to Russia<sup>3</sup> regarding the extra judicial killings in Chechnya of homosexual persons it was observed that:

Mr. Alvi Karimov, spokesperson of Mr. Ramzan Kadyrov, the head of the Chechen Republic, responded to reports of arrests of gay and bisexual men to Interfax news agency with the following statement: “It is impossible to detain and persecute people who simply do not exist in the Republic. If there were such people in Chechnya, the law-enforcement agencies wouldn’t need to have anything to do with them because their relatives would send them somewhere from which there is no returning”. Similarly, Ms. Kheda Saratova, a member of the human rights council of Chechnya, told a Russian radio station: “I didn’t receive a single appeal, but in case of any I would not even consider it. (...) In our Chechen society, any person who respects himself, our traditions and culture will hunt down this kind of person without any help from the authorities and do everything to make sure that they do not exist in our society.”<sup>4</sup>

Even if the statements could be passed off as those of local authorities, what was telling was Russia’s non-response to the joint communication which reinforced the negation of the existence of LGBT persons in Chechnya and the ‘non-issue’ that violence suffered by LGBT persons was for the Russian state. In responding to another joint Communication regarding alleged administrative proceedings against Ms. Evdokia Romanova for “promotion of non-traditional sexual relations to minors through social networks and Internet”, the Russian Federation indicated the reason for its non-reply:

The Russian Federation does not intend to respond to individual or joint submissions from the special procedures of the Human Rights Council when the author or co-author is the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. We wish to recall that, at the Council’s thirty-

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<sup>3</sup> Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

<sup>4</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23080>

second session, Russia formally stated that it would not recognize the mandate of or cooperate with this special procedures mechanism.<sup>5</sup>

The USA is one more of the states that choose to ignore the communication from the Independent Expert on SOGI. One letter of allegation was regarding the ‘death sentence to Mr. Charles Rhines, a gay man on death row in South Dakota, as a result of an anti-gay bias of the jurors’. The letter of allegation documents that jurors made a number of biased statements about Mr Rhines including that Mr. Rhines might be “a ‘sexual threat to other inmates and take advantage of other young men in or outside of prison.” In a signed statement, one juror stated that the jury “knew that he was a homosexual and thought that he shouldn’t be able to spend his life with men in prison.” Another juror recalled a juror saying “if he’s gay we’d be sending him where he wants to go if we voted for [life in prison].” A third juror confirmed that “[t]here was lots of discussion of homosexuality. There was a lot of disgust.” The letter of allegation noted that, ‘Considering the newly identified information about the jury’s anti-gay bias, carrying out Mr. Rhines’s death sentence before reviewing these new facts would be in violation of his right to life.’<sup>6</sup> The United States simply ignored this communication from the Independent Expert.

In sum, what stands reinforced is how the existence of LGBT persons, leave alone the possibility that LGBT persons have rights stands denied. The challenge in a swath of countries across the world including Egypt, Malaysia, Guatemala, Kenya is to assert the existence of LGBT persons and the fact that the framework of universal human rights applies to all persons, including LGBT persons. The gravity of this challenge can be seen in the fact that even when grave violations of human rights occur, and the violations are brought to the attention of these states, they have chosen not to respond.

### **Limited engagement and limited acknowledgment of existence of LGBT persons**

The OIC on the establishment of the SOGI mandate communicated its decision to boycott the mandate holder. However, though Brunei is a member of the OIC, it chooses to engage with the communication sent by the Independent Expert on SOGI along with other mandate holders which brought the violations of international human rights law of the Syariah Penal Code to the attention of Brunei:

Defining adultery and consensual same sex relations as criminal offenses, such as is done in the Syariah Penal Code Order, result in discrimination and violence against women and persons based on their perceived or actual sexual orientation or gender identity. The definition of sexual relations between consenting adults as criminal offenses should be regarded as an unlawful interference with the right to privacy of the individuals concerned, such as defined in article 12 of the UDHR, which provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family,

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<sup>5</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=81857>

<sup>6</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24005>

home or correspondence, nor to unlawful attacks on his honour and reputation. The imposition of the death penalty for offences related to homosexuality and adultery violates the right to life. Criminalization of same-sex relations also fuels stigma, legitimizes prejudice and exposes people to family and institutional violence and further human rights abuses such as hate crimes, death threats and torture.<sup>7</sup>

In its response Brunei noted its commitment to ‘international obligations in promoting and protecting human rights’ including commitments under ‘CEDAW and the Convention Against Torture (UNCAT)’. It went on to assert that ‘it takes pride in its sovereignty’ and to note that ‘diversity in cultural, religious and traditional values, means that that ‘there is no one standard that fits all’ Coming to the specific allegation regarding the breach of international law, by the criminalization of same sex conduct it stated that, ‘the Syariah Special Code ‘does not criminalize nor has any intention to victimize a person’s status based on sexual orientation or belief including same sex relations. The criminalisation of adultery and sodomy is to safeguard the sanctity of family lineage and marriage of individual Muslims particularly women.’ When it came to the question of punishment for sodomy, Brunei made the point that the proof required was of a high standard as it required ‘no less than two or four men of high moral standing and piety as witnesses- to the exclusion of every form of circumstantial evidence, coupled with very high standard of proof of ‘no doubt at all’ for all aspects, which goes further than the common law standard of ‘beyond reasonable doubt’. The standards of piety of the male witness is extremely high that it is extremely difficult to find in this day and age, to the extent that convictions for had may solely rest on confessions of the offender. Unlike the common law principle, confessions are encourage to be withdrawn and can be withdrawn at any time even during execution of sentence’.

Brunei showed a form of engagement with the mandate which acknowledged the roots of the mandate in international human rights law and then chooses to interpret international human rights law in the light of its own religious and cultural specificities. The assertion that it ‘does not criminalize a person’s status based on sexual orientation or belief including same sex relations’, willfully fails to understand the link between sexual conduct, sexual relations and sexual identity. The criminalization of a form of sexual conduct associated with a certain group impacts LGBT persons. The procedural protections against the use of the law may mean that that the conviction rate is low. But the problem with anti-sodomy laws worldwide are not necessarily ‘prosecution’ but ‘persecution’ under the cover of the law. Anti-sodomy laws chill the expression of one’s selfhood and violate the right to expression, dignity and privacy. As such, regardless of the procedural protections, the fact that such a law exists on the statute books legitimizes the persecution of LGBT persons.

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<sup>7</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24522>

Indonesia is the other member of the OIC, which has chosen to engage with the SOGI mandate. This was in response to a joint communication<sup>8</sup> concerning the alleged arbitrary arrests, detention and ill-treatment of twelve waria, or transgender women, in Aceh province.<sup>9</sup>

The Indonesian government highlighted the fact that Aceh province had a special autonomy which meant it could frame by-laws to complement existing criminal laws. The response also highlighted that in Indonesia, there are ‘divergent views on LGBT/SOGI’ and that ‘the national philosophy emphasizes the primacy of religious values in daily life’. The response went on to assert ‘Indonesia’s commitment to respect human rights in parallel with social norms that exist in Indonesia’. The response also noted that ‘there should be no discrimination against minorities in Indonesia’ and stressed the responsibility of the Indonesian police to ‘protect’ anyone ‘who feels threatened due to his or her sexuality’.<sup>10</sup>

While the response does raise many questions including the legality of placing ‘respecting social norms’ and the ‘commitment to respect human rights’ on the same plane<sup>11</sup> it’s important to note that the Government is not ‘negating’ LGBT existence but in a limited sense, acknowledging LGBT persons rights to non-discrimination as a part of universal human rights. This response requires a deeper engagement with the Indonesian government with a view to ensuring respect for LGBT rights in Indonesia.

### **Robust engagement and full acknowledgment promising change**

While the response of Brunei and Indonesia can be seen as sharing some of the premises of international human rights law which disagreeing with other premises, the response by the government of Korea can be characterized as a more robust acknowledgment. In the joint communication to the government of Korea, the Independent Expert along with other mandate holders, drew attention to ‘recent cases of arrests, interrogations, detentions and prosecutions of soldiers and military personnel perceived to be gay, under the Republic of Korea’s Military Criminal Act.’<sup>12</sup> Details regarding 16 cases of gay military personnel who were identified by the Cyber Investigation Team were brought to the attention of the Government.

The Government in its response justified the arrests as necessitated by Articles 92-6 of the Military Criminal Act under which the arrests of serving military personnel perceived to be

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<sup>8</sup> Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the human rights of internally displaced persons; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

<sup>9</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23635>

<sup>10</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=81990>

<sup>11</sup> See Vienna Declaration and Platform for Action which states that, ‘While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.’

<sup>12</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23282>

gay was not to ‘impose criminal punishment by reason of one’s sexual orientation’, but in order to ‘uphold military order and discipline, taking into account the nature of communal living in the barracks’.

The response went on to note that, ‘an amendment bill to abolish the provision has been submitted to the National Assembly, so the Ministry of National Defense is considering the necessity of the amendment.’ The response also reiterated that, ‘the rights of homosexuals within the military are protected by a separate regulation. The regulation stipulates prohibition of discrimination based on sexual orientation; prohibition of any acts to identify homosexuals through questionnaires and the like; confidentiality of personal secrets so that even when one’s sexual orientation is revealed, such fact or record thereof will not be disclosed.’<sup>13</sup>

The robust response of the Republic of Korea lies in its promise of action to rectify the situation by committing to reforming the relevant laws. This provides an opening for civil society groups to advocate that Korea must fulfil its commitment and repeal the offending criminal provisions.

### **Relevance of continued engagement**

The four responses by Russia, Brunei, Indonesia and the Republic of Korea indicate the range of possibilities between complete negation, limited acknowledgement and a robust acknowledgement. While Korea’s response promises action, Brunei’s response is based on an acknowledgement of the applicability of international human right law, but is limited in its understanding of sexual expression as a part of the right to dignity, privacy and equality under international human rights law. With respect to Indonesia, while the acknowledgment of LGBT persons as persons entitled to the enjoyment of universal human rights is an important starting point, the ‘solution’ of an internal investigation by the North Aceh chief of police is less than reassuring. With respect to Russia and Egypt the struggle is to assert that LGBT persons are human beings. The strategy will have to be a continuous assertion of the humanity of LGBT persons entitled to the full panoply of human rights. Regardless of the response or lack of response by the state, the mechanism of the ‘Letter of Allegation’ allows for the domestic issue to get a wider international audience.

### **Addressing the underuse of Letters of Allegation**

While there is a regional diversity of countries represented, it is clear that this aspect of the mandate is significantly underused especially when compared to other mandates. The table below shows the use of Letters of Allegation by other mandate holders such as ‘arbitrary detention’, ‘freedom of opinion and expression’ etc. An analysis of the table shows that there is scope for more extensive use of this aspect of the mandate of the Independent Expert on SOGI.

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<sup>13</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=81820>

Statistics on communications and replies by mandate<sup>14</sup>

**Reporting period: 1 June to 30 November 2018**      **Reporting period: 1 June 2006 to 30 November 2018**

**Mandate**

<b>Communications sent</b>	<b>replied to by 31 January 2019</b>	<b>response rate#</b>	<b>Communications sent</b>	<b>replied to by 31 January 2019</b>	<b>response rate#</b>
Arbitrary Detention (+)	99	45 46%	1692	947	56%
Freedom of opinion and expression	130	61 47%	3246	1729	53%
Freedom of peaceful assembly and of association	79	37 47%	1257	721	57%
Human rights defenders	122	62 51%	3454	1940	56%
Sexual orientation and gender identity	12	4 33%	30	16	53%

The reason for the comparative underuse of this aspect of the SOGI mandate compared to the other mandates listed above, could be because:

- the mandate holder has not received information which fit the format prescribed to be considered a letter of allegation or urgent appeal.
- the mandate holder in spite of receiving many communications has not sent many urgent appeals or letters of allegations to the concerned government
- The mandate holder has felt that strategically it made more sense for the communication to go from another mandate holder with whom the subject matter overlaps

Keeping in mind the strategic concern highlighted above it is nonetheless important to increase civil society awareness around the mandate and encourage more civil society organisations with a SOGI focus to begin filing communications with the Special Procedures. As a recent study on impact of communications sent by the Special Rapporteur on Human Rights Defenders shows that a majority of those who sent communications felt that the communications by the Special Rapporteur had a positive impact in redressing the human

<sup>14</sup>The above table is extracted from Communications Report of the Special Procedures, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/030/68/PDF/G1903068.pdf?OpenElement>

rights violation.<sup>15</sup>The study cautiously indicates that greater engagement with the mechanism of the Special Procedures can be of value to human rights activists seeking redressal for egregious human rights violations.

In this context of documented value of the Special Procedures, the underuse by civil society organisations engaging with SOGI issues of the Special Procedures is striking especially when we consider that the campaign letter to support the resolution had 850 signatures from 157 countries from around the world.

## Country Visits

In the three years of the mandate there have been four country visits which have been undertaken to Ukraine, Georgia, Argentina and Mozambique. Country visits are at the invitation of the country concerned and provide an opportunity for a more in-depth engagement with both the best practices in the country regarding the protection of the rights of all persons regardless of SOGI as well as the specific challenges posed in ensuring full protection of the human rights of all persons regardless of their SOGI.

Country visits are an important mechanism through which an international focus can be given to a domestic context. It's also an opportunity for a more sustained interaction allowing for the understanding of nuance and context. If we take the example of the country visits to Ukraine, the Independent Expert was able to reflect upon the situation of LGBT persons in the self-proclaimed 'Donetsk People's Republic' and self-proclaimed 'Luhansk People's Republic in Ukraine and how conflict lessens the space for acceptance of LGBT persons.

The other point to be noted about country visits is that they are structured by the mandate of 'constructive dialogue' and as such, the mandate holder often begins by acknowledging the work done by the concerned country before highlighting the challenges still faced. Thus a country visit could become a way in which some successful local level initiatives get a wider profile. In this context it may be useful to highlight some of the successful initiatives which were highlighted by the Independent Expert on his visit to Argentina.

The Independent Expert apart from commending Argentina for its Gender Identity law, noted a couple of interesting experiments in the NGO sector:

The Mocha Celis Trans High School, 'the first of its kind worldwide, was initiated by the non-governmental sector and subsequently received recognition as a high school, with teachers and school staff receiving funds from the Autonomous City of Buenos

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<sup>15</sup>The organizations and individuals surveyed in assessing case development were also asked about their perception of whether the Special Rapporteur's communication had a distinct impact on the respective defender's situation. In 24 percent of cases the respondents felt that there was a definite impact and in 40% of the cases there was a probable impact. However, as the author notes, 'impact' is difficult to measure when complainants pursue a range of strategies. See Janika Spannagel, *Chasing Shadows: A quantitative study of the Scope and Impact of UN Communications on Human Rights Defenders (2000–2016)*, [https://www.gppi.net/media/Spannagel\\_2018\\_Human\\_Rights\\_Defenders.pdf](https://www.gppi.net/media/Spannagel_2018_Human_Rights_Defenders.pdf)

Aires. It is a response to the sad finding that many transgender people drop out of school and have to resort to prostitution to survive. It offers education to help end violence and discrimination, with a focus on sexual and gender diversity. It benefits, in particular, transgender persons and provides a rounded experience which enables the students to leave their past marginalized settings behind and progress towards other professions.<sup>16</sup>

The Independent Expert also heard about “Hotel Gondolín”, a place historically open to trans people from all over the country and also for those from other countries. It helps address the housing gaps faced by trans women, particularly as many leave their original homes in the provinces or neighbouring countries at a young age and as part of a migration to the capital city and have no place to live when they arrive in Buenos Aires. The hotel now works as a cooperative where the expenses and household chores are shared among the inhabitants. This institution offers great insight into how to deal with intersectional issues (e.g., sexual orientation and gender identity and migration) and also interlinks with sociocultural and economic inclusion by providing a safety cushion for those who are already marginalized.<sup>17</sup>

The Independent Expert also provided an insight into how the comprehensive sexuality programme in Argentina was functioning.

The Independent Expert met with several teachers who are part of the implementation process. They provided great insight into the methodology, psychology and substance for integrating sexual orientation and gender identity into the curriculum, underlining the need to engage parents, teachers and children in the process. The following comments by one of the teachers are particularly instructive:

“Instead of saying ‘the girl has a boyfriend’, we should ask, ‘is she with a partner?’”

“Girls and boys — as men and women — will have sex, so let’s build them so that at school, they have the tools they need. Let’s speak about prevention .... We have to speak about this ... to prevent HIV. The only thing to use is a condom.”

“A princess can save a prince.”

“Two kings might get married.”<sup>18</sup>

Of course the Independent Expert in all country visits also points out to lacunae and what the country concerned should be addressing. In the context of Argentina the Independent Expert noted that ‘Various forms of violence and discrimination are pervasive in the country. In

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<sup>16</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/097/10/PDF/G1809710.pdf?OpenElement>

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

particular, institutional violence remains ingrained, historically deep rooted in society, and it lies at the heart of the problem. Institutional violence, through negative acts and omissions on the part of State officials, is a root cause of violence and discrimination’

In the case of Georgia as well the Independent Expert, appreciated the slew of positive legislations which had been enacted he did go on to observe that the problem lay in ‘the pervasive notion that this inherent aspect of the identity of each one of these [LGBT]Georgians is something sinful, shameful or pathologic’ and the encouragement given by the Church and the political establishment to these attitudes.<sup>19</sup>

In the case of Mozambique, while the Independent Expert was appreciative of the fact that Mozambique was ‘free from massive, systematic or flagrant physical violence against LGBT persons’ he went on to observe that this was not enough as ‘During his visit, he said LGBT people had provided many examples of invisible mechanisms of exclusion that have led to their marginalisation’ and that he was “convinced that the problem lies in the State not yet having taken fully on board its responsibility to dispel some misconceptions around this topic, including the fact that homosexuality, lesbianism, bisexuality and gender diversity cannot be *promoted*. These are not lifestyles: they are inherent traits of human nature, and I believe that every Mozambican knows that.”<sup>20</sup>

The Independent Expert was also deeply appreciative of the work of the LGBT group LAMBDA and noted that, “Seldom in my career have I reported on a context in which a single organisation has taken it, entirely upon itself, to defend the lives and integrity of every LGBT person in a country of almost 30 million persons. I am convinced that through its work Lambda has saved many lives and furthered the cause of human rights. Every Mozambican, and the Mozambican State, owes a debt of gratitude to this most extraordinary organisation.”<sup>21</sup>

It’s important to note that the country visit has the potential to both give greater visibility and profile to domestic level activism as seen in Argentina and Mozambique and highlight sometimes forgotten issues within a country context as seen in the mention of conflict in the Ukraine. The value of the visit is dependent to some degree on how civil society sees it as an opportunity to mobilize, the degree of press coverage the visit gets and the response of the state to the visit itself. As such a county visit can be useful lever to take forward the LGBT rights struggle.

### **Building a SOGI Jurisprudence: The Reports of the Independent Expert**

The mandate holder has submitted four Reports in all to the Human Rights Council and the General Assembly. The fifth Report is expected to be presented in the 41 Session of the Human

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<sup>19</sup> <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23682&LangID=E>

<sup>20</sup> <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24002&LangID=E> (accessed on 31.05.19)

<sup>21</sup> Ibid.

Rights Council. The four reports which have been submitted, between them make significant contributions to the development of a SOGI jurisprudence.

### **The First Report: Six Underpinnings**

The first Report which was introductory in nature outlined what Vitit Muntarbhorn called the six underpinnings to which attention will have to be paid to come up with a ‘strategy of preventing and protecting against violence and discrimination on the basis of sexual orientation and gender identity’

- Decriminalization of consensual same-sex relations
- Effective anti-discrimination measures
- Legal recognition of gender identity
- Destigmatization linked with depathologization
- Sociocultural inclusion
- Promotion of education and empathy<sup>22</sup>

### **The Second Report: Focussing on Decriminalisation and Discrimination**

In the second report Prof Muntarbhorn specifically analysed the first two underpinnings, namely decriminalisation and anti- discrimination. The two Reports of the Independent Expert on SOGI established a policy direction in the international realm. By highlighting both best practices as well as violations when it came to both criminalisation of same-sex relations, gender identity and expression as well as non-discrimination on grounds of SOGI, Prof Muntarbhorn highlighted two areas in which policy action has been undertaken by some countries and is also urgently called for in other countries.

With respect to decriminalisation of same-sex relations, gender identity and expression he noted that states such as Belize, Mozambique, Nauru, Palau, Sao Tome and Principe and Seychelles had decriminalized same sex relations in recent years. The Report also highlighted best practices with respect to non-discrimination from a range of countries from the global south including India, Pakistan Fiji, Ecuador, South Africa, Bolivia, Malta, Thailand, Philippines, Bolivia, Mexico, Argentina, Brazil, Columbia, Uruguay, Peru as well as many western countries. By stressing the fact that change has been happening including from countries which opposed the SOGI mandate (Pakistan), Prof Muntarbhorn aims to build a larger consensus on the basis of fidelity to the Universal Declaration of Human Rights (UDHR) philosophy, i.e. that no persons should be subject to violence and discrimination. Prof Muntarbhorn has been at pains to stress that he is not talking about ‘advocacy of new rights for particular groups’ but rather ‘action against violence and discrimination’ which is based on ‘existing international law’.

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<sup>22</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/095/53/PDF/G1709553.pdf?OpenElement>  
(accessed on 10.02.18)

However, this effort to build a broader consensus is still to bear fruit as the OIC and the Africa Group continued to boycott the presentations of the Independent Expert on SOGI both in the Human Rights Council and the General Assembly.

### **The Third Report: Intersectionality, Negation and Acknowledgment**

While raising awareness is an important part of the work of the mandate, the other function, which this report of the Independent Expert in particular does, is to shed light on the nuances of how violence and discrimination affect persons differentially and examine the root causes of such violations. The Third Report disaggregates the acronym LGBT and explores the specific forms of violence experience by lesbians, bisexuals, trans men and trans women. To give an example from this report:

Information currently available suggests that trans men and other trans-masculine persons tend to be less visible in reports and data than lesbians, gays or trans women. Arguably, if this is a reflection of less visibility in everyday situations, this may shield them from the types of societal violence usually affecting other gender non-conforming persons; they are, however, victims of severe violence in the family, in the health sector, and of school bullying. Acts of violence include verbal, physical and sexual abuse, including so-called “corrective” rape, and forced marriage.<sup>23</sup>

By highlighting the specific forms of violence faced by trans men, the mandate holder has demonstrated a sensitivity to nuance and a willingness to engage with the complex lived realities of marginalized groups within the LGBT spectrum. This is an important perspective to stress because even as the issues facing trans communities in general are being taken up at the global and national level, the specificity of violence facing transmen often slips through the cracks.

By stressing the intersectionality of forms of oppression, the mandate holder has painted a picture of a human continuum along which violence and discrimination happens. Sexual orientation and gender identity are not discrete and insular categories but instead form part of the make up of persons who may also be older persons, refugees, of Afro-Asian descent, etc. Thus one cannot think of SOGI outside the actual life experiences of persons. By stressing intersectionality as an approach, the mandate holder signals his intention to produce more complex accounts of the actual forms of violence and discrimination that persons suffer on the basis of their sexual orientation or gender identity, even as they relate to other forms of marginalization based on caste, class gender, disability, etc. Intersectionality also points to how the SOGI mandate is connected to the work of other mandate holders and hence, the importance of working closely with other mandate holders.

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<sup>23</sup> <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/AnnualReports.aspx>

The report also makes an important theoretical contribution by stressing the importance of what the mandate holder calls ‘negation’ and ‘acknowledgement’. One of the reasons for the extreme forms of violence and discrimination faced on grounds of SOGI is the negation of the experience of one’s sexual orientation or gender identity as a part of being human:

Negation is adopting the position that violence and discrimination based on sexual orientation or gender identity do not exist in a particular context or that, in a given social context, there are no lesbian, gay, bisexual, trans or gender non-conforming persons. It enables violence and discrimination and lies at the root of some of the heinous acts described in the present report. In a context of negation, perpetrators feel motivated and enabled to suppress or punish diversity. Invariably, any data gathered will be unreliable, unsystematic and biased; all State measures to address violence and discrimination, be it public policy, access to justice, law reform or administrative actions, will be therefore hindered by this fact.<sup>24</sup>

If ‘negation’ is the problem, then ‘acknowledgement’ is part of the solution. The report goes on to document best practices of ‘acknowledgement’.

Acknowledgment of responsibility — the opposite of negation — is an essential element in the establishment of historical truth, the process of reparation and the reconstitution of the social fabric... On 17 April 2018, the Prime Minister of the United Kingdom expressed deep regret for the fact that discriminatory legislation had been introduced across the Commonwealth, and the resulting “legacy of discrimination, violence and even death that persists today. The Independent Expert values these statements highly, in that they include both acknowledgment of the facts and acceptance of responsibility; he is persuaded that they will be valuable building blocks in the process of eradication of violence and discrimination on the basis of sexual orientation and gender identity.”<sup>25</sup>

The Independent Expert is right to identify one of the key problems being that of ‘negation’. If the very existence of a grouping is denied, then the violence and discrimination to which the grouping is subjected, remains an invisible crime, committed on invisible bodies. To visibilize the grouping, to document the violence and to demand acknowledgement remains an ongoing task.

By documenting these forms of ‘acknowledgment’, the report opens out important pathways to combatting violence and discrimination on grounds of SOGI. By noting the ‘deep regret’ expressed by the Prime Minister of UK for the introduction of anti sodomy laws in the Commonwealth, the Independent Expert points to a form of acknowledgement which can alter the existing frames of reference. Activists throughout the Commonwealth have been contesting the frame of reference which sees same sex conduct as alien to local cultures, traditions and

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<sup>24</sup> <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/AnnualReports.aspx>

<sup>25</sup> <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/AnnualReports.aspx>

religions. The acknowledgement by the British Prime Minister, provides LGBT activists in all parts of the Commonwealth a tool to argue that, it is in fact these laws which are an ‘alien legacy’.

This Report has, inter alia, initiated new thinking about the right to truth as embodied in Principle 37 of the Yogyakarta Principles plus 10, with its stress on countering ‘negation with ‘acknowledgment’.<sup>26</sup> The right to truth, with its emphasis on public apology, expungement of relevant criminal convictions and records, rehabilitation and recovery services, adequate compensation and guarantees of non-recurrence remains an important goal for much of LGBTI activism, even as it confronts new challenges.

### **The Fourth Report of the Independent Expert: Deconstructing the gender norm**

UN Reports were caustically characterized by Phillip Alston as “painfully boring... in which everything said is factually correct and yet where nothing really stimulates fresh thinking.” The Report of the Independent Expert on Sexual Orientation and Gender Identity, Victor Madrigal-Borloz which was presented in the General Assembly in October 2018 is anything but that in its willingness to challenge one of the fundamental tenets of socio-cultural life in the modern world, namely the link between sex one is born into and the gender assigned at birth.

Madrigal declares that ‘the notion that there is a gender norm, from which certain gender identities “vary” or “depart” is based on a series of preconceptions that must be challenged if all humankind is to enjoy human rights’. The Madrigal report shows the problematic nature of the social assumption that gender roles and behaviour are determined by sex.

By referencing a range of sources Madrigal makes the case that to persist with the gender norm which neatly divides the world into male and female and assigns gender based on the sex into which one is born into, is to do violence to all those who fall outside the norm. The gender norm itself violates the right to individuality, the right to privacy, the right to identity and a range of socio-economic rights which flow from the right to recognition before the law.

The Independent Expert makes the important case that the pervasiveness of gender as source of identification can violate the right to privacy and integrity of the person. Madrigal challenges the shibboleth that identity documents must have gender as a category. The centrality of ‘gender’ as a marker of official identity documents be it in passports, driving licences or birth certificates, end up stigmatizing those who fall outside the normative expectations of gender. To give an example, the harassment faced by many transgender people by immigration authorities is based on the fact that for example they could ‘look’ female, but the passport says

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<sup>26</sup> Principle 37: Every victim of a human rights violation on the basis of sexual orientation, gender identity, gender expression or sex characteristics has the right to know the truth about the facts, circumstances and reasons why the violation occurred. The right to truth includes effective, independent and impartial investigation to establish the facts, and includes all forms of reparation recognised by international law. The right to truth is not subject to statute of limitations and its application must bear in mind its dual nature as an individual right and the right of the society at large to know the truth about past events.

that they are male. If gender was not a category in the passport, there would be no reason for such harassment.

The Independent Expert expresses, ‘significant doubts as to the real need for the pervasive exhibition of gender markers in official and non-official documentation’ and asserts that the survival of the gender marker ‘appears to be fulfilling the vestiges of needs that have long been superseded’. Madrigal makes the point that the need for gender in official identity documents is not a given but must be demonstrated. ‘The simple principle remains that States must refrain from gathering and exhibiting data without a legitimate, proportionate and necessary purpose.’

Of course gender will continue to be a marker of identification especially when persons choose to identify on the basis of gender. The Report documents that the question of the right to choose gender is now entering the legal domain with 10 countries around the world adopting a legislative model of recognition based on self-determination: Argentina in 2012; Denmark in 2014; Colombia Ireland and Malta in 2015; Norway in 2016; Belgium in 2017; and Austria, Brazil and Pakistan in 2018. Since the Report was published, Uruguay and Chile can be added to this list of ten countries adopting self-recognition of gender.

The right to choose one’s gender, Madrigal locates within deeper wellsprings of the human right to individuality. Drawing from the recent advisory opinion OC-24/17,<sup>17</sup> the Inter-American Court of Human Rights, Madrigal argues that ‘the very basis of individual rights is the right of persons to be recognized as unique and distinguishable from others.’ The judgment of the Inter-American Court notes that, “consolidating the individuality of the person before the State and before society implies having the legitimate authority to establish the exteriorization of their persona according to their most intimate convictions”. This passage is cited by the Independent Expert to make the point that there is a ‘close connection with self-determination, self-perception, dignity and liberty’ and to conclude that ‘Self-determined gender is a fundamental part of a person’s free and autonomous choice in relation to roles, feelings, forms of expression and behaviours, and a cornerstone of the person’s identity’.

The point the Report is making is that we need to see non normative gender expression not as a pathology but rather as embodying a deep meaning of the right to freedom of intimate choice. As a part of an individual’s right to express a fundamental aspect of their personality, such a choice should be inviolable. If classification systems based on gender violate this aspect of personhood, then these classification systems must change. If states impose barriers right from sterilization to sex reassignment surgery, for a person to be recognized in the gender of their choice, then these requirements need to go.

This thoughtful and nuanced Report also signposts one of the significant challenges to the recognition of the right of transgender persons. Just when parts of the UN system are showing a willingness to rethink some of the core concepts which have marginalized transgender people, the resistance to such rethinking is also building. The Independent Expert ‘notes the emergence in certain regions of the world of a populist discourse that seeks to delegitimize the plight of

persons discriminated against on the basis of sexual orientation or gender identity through an attempt to rebrand the term “gender ideology”.

The point being referenced in no uncertain terms by the Independent Expert is the problematic position being taken by the Trump administration both domestically and internationally. The US Department of Health and Human Services in a [memo noted that “Sex means a person’s status as male or female based on immutable biological traits identifiable by or before birth.”](#) Activists have also noted that in the recently concluded session of the Commission on Status of Women (CSW62), the USA proposed a similar restrictive definition of gender.

Taking into account these emerging battle lines, this Report of the Independent Expert will be a significant resource for those fighting against current attempts to strip transgender people of their human rights. If one of the objectives of the mandate of an Independent Expert is to produce reports which generate fresh thinking and chart new directions in international law, this Report fulfils that expectation in ample measure. The struggle now will be to use this pioneering report as a basis to bring about changes in laws and policies at the national level.

### **Can the Reports be used in national/regional level advocacy?**

Apart from contributing to emerging jurisprudence on SOGI, one hopes that the Reports of the Independent Expert will continue to capture the current state of the law and practise when it comes to concerns of SOGI and hence can begin to be used to shape change in various national and regional contexts. The possible uses of the Reports can include:

#### *Use in litigation efforts*

Previous reports of the UN system have been used as credible documentation in domestic level litigation.<sup>27</sup> While the Reports have no binding value they can be used as a source of persuasive value to demonstrate before national courts the current global state of LGBTI rights as well as the direction in which the world community is tilting. The section of the Report on recommendations can in particular be used to make the case for decriminalization of LGBTI lives, repealing of anti-propaganda laws and ensuring legal recognition for transgender people in the gender of their choice. Of course, the receptiveness to international sources is likely to vary from jurisdiction to jurisdiction.

#### *Use in law and policy reform*

The Reports of the Independent Expert have not only documented challenges but clearly signposts advances in the field of rights of LGBTI persons. In particular the Second Report of the Independent Expert can be used to persuade reluctant states as to the sea change in vast

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<sup>27</sup> For example, the OHCHR Report of 2011 was cited before the Indian Supreme Court during the arguments in *Suresh Kumar Koushal v. Naz Foundation* by counsel representing Voices Against 377. The bench hearing the matter was however not receptive to arguments based upon international law and was reluctant to engage with international sources.

parts of the globe regarding the willingness to protect the rights of those discriminated on grounds of SOGI. The fact that a document by the UN posits a norm of equality of LGBTI persons with all other persons may be useful in certain contexts to push for policy change. It's possible that sub-regional authorities may be even more receptive to an international report than national authorities. It may also be possible that smaller countries may be very receptive to aligning their policies with what appears to be an international good practice.

### *Building a vision for tackling rights violation on grounds of SOGIESC*

As noted above the policy direction signified by the Reports of the Independent Expert can become useful documents in thinking about the nature of violation itself. If the Reports draw from grassroots level experience and analysis, they can capture both current forms of violation as well as possible responses to the violation. This can be very useful in setting an agenda for civil society which is trying to both comprehend and redress violations. For example, the understanding of sexual orientation, gender identity, gender expression and sex characteristics as distinct markers of discrimination can play a role in orientating civil society action to be within a more inclusive frame.

### **Need for Renewal of the Mandate: Institutionalizing a SOGIESC Jurisprudence**

The analysis of these Reports shows that they have been successful in building upon the excellent work of the Special Procedures and further cementing the emerging conceptual frameworks of SOGI as part of international human rights law. This work needs to continue. For that its essential that in the 41th session of the Human Rights Council, states vote to renew the mandate.

As can be seen by the range of countries which the mandate has interacted with as well as the nature of thematic issues which have been engaged with there has been both depth and breadth in the work undertaken so far.

One part of the task of the Independent Expert in the time going forward will be to ensure that the future reports advance a global understanding of violations affecting persons on grounds of SOGIESC, from the substantial base already established.

After the adoption of the Yogyakarta Principles plus 10, both international law and policy will have to respond to sexual orientation, gender identity, gender expression and sex characteristics as co-equal markers of discrimination. International human rights law has travelled quite a distance from its initial exclusive concern with sexual orientation to then include gender identity to now addressing four coequal markers of discrimination referred to by the acronym SOGIESC. This is an important landmark in the evolving understanding of the forms of discrimination to finally redress the wrongs suffered by historically marginalized sub populations among the broader LGBTI community. The Mandate Holder will have to take forward this new understanding in his work going forward.

New jurisprudential directions have usually emerged from an intense engagement with both international human rights law and the context of violations. The Yogyakarta Principles acknowledge this origin point in preambular paragraph 9, which states that ‘this articulation must rely on the current state of international human rights law and will require revision on a regular basis in order to take account of developments in the law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries’

The Independent Expert is uniquely placed to develop new understandings of international human rights law, if he can draw upon a grass roots understanding of the changing forms of violations and analyse these violations from within the frame of international human rights law. To get a global sense of the pattern of violations, if a new Independent Expert is appointed, he/she/they could initiate a series of consultations across the different regions of the world, which would feed in experiences, narratives and perspectives which can be the basis of new jurisprudential thinking.

To signpost two possible areas in which the jurisprudence could be strengthened:

- There is strong documentation about the human rights violations faced by persons of diverse SOGIESC who engage in sex work.<sup>28</sup> The violations suffered are egregious including torture, illegal detention, sexual violence besides violations of socio-economic rights. The community of persons who engage in sex work fall at the intersections of many forms of marginalisation including class, race and caste and there is indeed a necessity for sustained and systematic attention by the UN system to these egregious forms of violation. Principle 33 B of the Yogyakarta Plus 10, calls on states to ‘Repeal other forms of criminalisation and sanction impacting on rights and freedoms on the basis of sexual orientation, gender identity, gender expression or sex characteristics, including the criminalisation of sex work, abortion, unintentional transmission of HIV, adultery, nuisance, loitering and begging.’ It’s imperative that this understanding of the impacts of criminalisation be deepened in the future.
- The lives, experiences and violations suffered by LGBTI communities around the world have been historically invisibilized. The issue of invisibility of violations suffered is particularly stark when it comes to the intersex community whose experiences of ‘genital normalizing surgery’ at birth, though now recognized as ‘torture’ by international human rights law still continues to be seen as ‘normal’ and ‘acceptable’ in large parts of the world. This has resulted in untold suffering to intersex persons which has yet to be acknowledged in any significant sense. It is emerging from this context that the demand for the right to truth (both the truth as to the individual violation suffered by intersex persons and the collective truth about the violations suffered by the intersex community) has begun to be articulated and is now enshrined in Principle 37

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<sup>28</sup> Boglarka Federka and Lukas Berredo, The vicious circle of violence: Trans and gender-diverse people, migration, and sex work, <http://transrespect.org/wp-content/uploads/2018/01/TvT-PS-Vol16-2017.pdf>

of the Yogyakarta Principles plus 10 which is the right to truth. Developing this dimension of the human rights framework is to acknowledge that the violations suffered on grounds of SOGIESC have not only an individual dimension but also a collective dimension. Taking forward the collective dimension of Principle 37 could take the form of apologies, pardons, monetary compensation, building of spaces of memory to acknowledge the violations etc. In short, the collective dimension of human rights violations suffered on grounds of SOGIESC awaits further development.

With respect to the other dimensions of the mandate, be it the country visits or the letters of allegation, as has been shown they are a significant mechanism for putting the policies of a country in the global spotlight. As such these aspects of the mandate and in particular, ‘letters of allegation’ should be used more effectively by the LGBTI community.

To not renew the mandate would be a huge setback for the global LGBTI movement as it would violate the principle of non-retrogression. That is, rights once recognized, can’t be taken away without adequate and proper justification.<sup>29</sup>

The mandate of the SOGI Independent Expert has ensured a sustained and committed focus on violations on grounds of SOGI and this focus has to continue in the time going forward. It is for all these reasons that its vital that mandate be renewed so that LGBTI struggles can continue to draw upon the work of the Independent Expert as a resource for advocacy at national, regional and international levels.

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<sup>29</sup>In General Comment No. 22, which specifically deals with the topic of sexual and reproductive health, the CESCR observed:

Retrogressive measures should be avoided and, if such measures are applied, the State party has the burden of proving their necessity. This applies equally in the context of sexual and reproductive health. Examples of retrogressive measures include the removal of sexual and reproductive health medications from national drug registries; laws or policies revoking public health funding for sexual and reproductive health services; imposition of barriers to information, goods and services relating to sexual and reproductive health; enacting laws criminalizing certain sexual and reproductive health conduct and decisions; and legal and policy changes that reduce oversight by States of the obligation of private actors to respect the right of individuals to access sexual and reproductive health services. In the extreme circumstances under which retrogressive measures may be inevitable, States must ensure that such measures are only temporary, do not disproportionately affect disadvantaged and marginalized individuals and groups, and are not applied in an otherwise discriminatory manner.