July 16, 2008

**Recommendation to the CEDAW Committee from IGLHRC**\(^1\) and **ILGA-Europe**\(^2\) **on the scope of art. 2 of CEDAW on Equality:**

**Equality.** Inequality derives from the larger culture of patriarchy, which has institutionalized unequal power relations between men and women, resulting in the historical oppression of the female gender through the enactment, administration, and implementation of laws and customary practices in most countries. The human rights framework is premised on fundamental freedoms and human rights enjoyed by able-bodied heterosexual and often, white men. The scope of art. 2 on equality should be expanded to allow for the dismantling of the patriarchal view of human rights, and protect all people, including sexually marginalized women, particularly female born sexual minorities.

**Who is left out?** A General Recommendation on art. 2 should explicitly expand the concept of equality and list all categories of women who experience discrimination not only based on sex but also on multiple and intersecting characteristics, including sexual orientation and gender identity,\(^3\) as well as others that are listed in international law and jurisprudence (e.g. race, ethnicity, religion, etc). An “other status” category should be added in order to allow protections

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\(^1\) IGLHRC—The International Gay and Lesbian Human Rights Commission—works to secure the full enjoyment of the human rights of all people and communities subject to discrimination or abuse on the basis of sexual orientation or expression, gender identity or expression, and/or HIV status. A US-based nonprofit, nongovernmental organization, IGLHRC effects this mission through advocacy, documentation, coalition building, public education, and technical assistance.

\(^2\) ILGA-Europe—an organization with UN consultative status—is the European Region of the International Lesbian and Gay Association, a nongovernmental umbrella organization which represents over 220 member organizations at the European level. ILGA-Europe works towards a world in which the human rights of all people are respected and everyone can live in equality and free from discrimination on the grounds of sexual orientation, gender identity or expression.

\(^3\) IGLHRC and ILGA-Europe support the definition of gender identity and sexual orientation as elaborated in the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity ([www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org)), Preamble:

“UNDERSTANDING ‘sexual orientation’ to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;

UNDERSTANDING ‘gender identity’ to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”
for women whose situations we might not be able to identify and remedy today, but whose inequality will be documented and voiced in the future.

A lesbian woman is subject to discrimination both because she is perceived as a woman (her gender) and as a lesbian (her sexual orientation).

We have seen time after time in all cultures and on all continents that whenever equality does not explicitly include sexual orientation and gender identity, various people are left unprotected at domestic level by laws or judicial decisions. They include lesbian, transgender, intersex women and other gender variant people who have been known in other cultures by different names (e.g. toms and katoey in Thailand, bissu and waria in Indonesia, kanisi in East Africa, travesti in Argentina).

CEDAW precedent. By including sexual orientation and gender identity in regards to the scope of Art. 2 of the Convention, the CEDAW Committee will observe the precedent it already has set by explicitly referencing sexual orientation in several concluding observations on the topics of asylum (Sweden, A/56/38, July 31, 2001), criminalization of consensual sexual relations among women (Kyrgyzstan, A54/38, August 20, 1999; Mexico A/53/38, May 14, 1998), and protection through anti-discrimination legislation (Ireland, A/54/38, July 1, 1999; Canada, A/52/38/Rev.1, August 12, 1997; New Zealand, A/49/38, April 12, 1994). (Please see exact references in Appendix 1).


In addition to the Committee on Economic, Social, and Cultural Rights (CESCR), and the Committee on the Rights of the Child (CRC), the Human Right Committee, the Committee Against Torture, and the Committee on the Elimination of Racial Discrimination made explicit reference to sexual orientation or gender identity in Concluding Observations, Communications, and Reports.

The CEDAW Committee has very effectively and diligently challenged governments to not only take measures to protect women from discrimination but to also take measures to promote equality for all women and enable an environment of respect for women’s equality in society. We ask the Committee to consider the same standard of due diligence for women’s right to express their sexual orientation and gender identity without fear or experience of violence by the state.

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4 For exact references, please see International Commission of Jurists, Sexual Orientation and Gender Identity in Human Rights Law—References to Jurisprudence and Doctrine of the United Nations Human Rights System, Third updated ed., 2007, available at www.icj.org. All references to UN treaty bodies in this document are excerpted from this ICJ publication; emphasis in the text is added.
community or family, without persecution by religious authorities, without being forced into marriage, and without being denied the right to choose who they partner with.

We are aware of the difficult role the CEDAW Committee has had to play. Even as the legitimacy of women’s sexual rights continue to be attacked, the Committee has defended and promoted women’s rights to equality in civil, social, cultural, political, and economic arenas. We are also aware that the Committee has not always enjoyed the full support of the United Nations, let alone Member States, in demanding that women have full equal rights as that of men. To include sexual orientation and gender identity as protected categories along with sex, race, ethnicity, age, class, etc. is to risk upsetting the whole cart of other rights entitled to women because patriarchy deems that women have no right to sexual autonomy. But this Committee has already defended the rights of women to sexual autonomy by holding States accountable for not protecting women’s right to live free of domestic violence, sexual violence, forced marriage, and customary practices that harm women and girls. We ask that the Committee continue this trend and recognize the right of women to express their sexual orientation in all of its diversity without jeopardy, including the rights of lesbians and all female born sexual minorities.

Appendix 1

Explicit references to sexual orientation, lesbianism, homosexuality, and sexual preference in Concluding Observations from CEDAW

334. The Committee commends the Government for passing legislation that provides residence permits to individuals who have a well-founded fear of persecution on the basis of sexual orientation or gender, particularly in cases that involve discrimination against women.

Concluding Observations: Kyrgyzstan, A/54/38, August 20, 1999
127. The Committee is concerned that lesbianism is classified as a sexual offence in the Penal Code.
128. The Committee recommends that lesbianism be reconceptualized as a sexual orientation and that penalties for its practice be abolished.

Concluding Observations: Ireland, A/54/38, July 1, 1999
(a) Introduction by the State party
162. [...] The representative explained that the 1998 Employment Equality Act outlawed discrimination on nine grounds, including gender, marital status, family status, sexual orientation and membership in the "traveller" community.

420. The Committee requests information in the next report on whether homosexuality is penalized in the criminal code.

Concluding Observations: Canada, A/52/38/Rev.1, August 12, 1997
310. [...] A recent amendment to the Canadian Human Rights Act granted protection against discrimination on the basis of sexual orientation.

Concluding Observations: New Zealand, A/49/38, April 12, 1994
612. The Government had passed a new Human Rights Act in 1993, extending the grounds of prohibited discrimination. Its grounds would now cover gender issues, including pregnancy,
childbirth, sexual harassment, marital and family status, **sexual orientation**, disability, age, race, religion, employment status and political opinion.
The Act would come into force in 1994. (…)

**Concluding Observations: Netherlands, A/49/38, April 12, 1994**
253. (…) Members were favourably impressed by the fact that, one year before presenting each subsequent report to the Committee, the Government would have to report to Parliament, and they commended the concern that was shown about the issue of **sexual preference**. (…)

**Appendix 2**

Explicit references to sexual orientation in General Recommendations from UN human rights treaty bodies other than CEDAW

**COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

**General Comment No. 18: The Right to Work (art. 6), E/C.12/GC/18, February 6, 2006**
12. The exercise of work in all its forms and at all levels requires the existence of the following interdependent and essential elements, implementation of which will depend on the conditions present in each State party:

(b) **Accessibility**. The labour market must be open to everyone under the jurisdiction of States parties. Accessibility comprises three dimensions:
(i) Under its article 2, paragraph 2, and article 3, the Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), **sexual orientation**, or civil, political, social or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality.[…]

**General Comment No. 15: The Right to Water (arts. 11 and 12), E/C.12/2002/11, January 20, 2002**

*Non-discrimination and equality*
13. The obligation of States parties to guarantee that the right to water is enjoyed without discrimination (Art. 2, para. 2), and **equally between men and women** (Art. 3), pervades all of the Covenant obligations. The Covenant thus proscribes any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), **sexual orientation** and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to work. The Committee recalls paragraph 12 of General Comment No. 3 (1990), which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.


*Non-discrimination and equal treatment*
18. By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their
procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. (…)