



OUTRIGHT INTERNATIONAL

Minimum international legal standards underpinning the pillars of transitional justice (truth, justice, reparation, memorialization and guarantees of non-recurrence)

Submission to the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

Introduction

Outright International works with partners around the globe to strengthen the capacity of the lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ) human rights movement, document and expose human rights violations against LGBTIQ people, and advocate for inclusion and equality. Founded in 1990, with staff in over a dozen countries, Outright works with the United Nations, regional human rights monitoring bodies and civil society partners. Outright holds consultative status at the United Nations where it serves as the secretariat of the UN LGBTI Core Group. This submission is a response to the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence call for inputs for the upcoming thematic report “Minimum international legal standards underpinning the pillars of transitional justice (truth, justice, reparation, memorialization and guarantees of non-recurrence).”

Human rights violations against LGBTIQ people must be considered under the international legal standards underpinning the duties of States and the rights of victims in the fields of truth, justice, reparation, memorialization, and guarantees of non-recurrence (hereinafter “transitional justice”). The first section of this submission highlights the main sources of international law which mandate the inclusion of all persons, including those who are marginalized due to their sexual orientation, gender identity and expression and sex characteristics (SOGIESC), in transitional justice processes. These sources include core international treaties on human rights, the American Convention on Human Rights, the European Convention on Human Rights, the African Charter on Human and Peoples’ Rights, and the Rome Statute. The second section of this submission highlights three cases in which LGBTIQ people have been considered in transitional justice processes: Colombia, Syria, and Yemen. At the end of this submission, we offer recommendations for Member States and other stakeholders.

Marginalized populations, including LGBTIQ people, are uniquely impacted by war, humanitarian crises, anti-democratic dictatorships and other mass human rights violations. In conflict, LGBTIQ people are targeted for violence on the basis of their perceived SOGIESC. To be successful, transitional justice processes must include and account for the experiences of all victims, including those of diverse SOGIESC.

Transitional justice measures are only effective if they are part of broader efforts to foster political, social, and economic transformation and advance gender equality and inclusion of all. As such, transitional justice processes should include redress for victims, contribute to the creation of accountable and inclusive institutions, foster peaceful coexistence and reconciliation, and bolster civil resilience to ensure systematic abuses do not recur. LGBTIQ populations must be included in each of these processes.

I. International Legal Standards

A. International Human Rights Law

International Human Rights Law standards are applicable to all without distinction. Under international human rights law, human rights are universal, inalienable, indivisible, interdependent, equal, and non-discriminatory.¹ The universality and inalienability of human rights mean that every individual is inherently entitled to all human rights.² The indivisibility and interdependence of human rights mean that one set of rights cannot be fully realized without all other rights.³ Finally, human rights belong to all people equally, and therefore each individual is entitled to their human rights without discrimination.⁴

International human rights have been codified in the Universal Declaration of Human Rights⁵, in multilateral treaties on human rights⁶, in UN human rights instruments⁷, and in regional human rights treaties including the American Convention on Human Rights⁸, the European Convention on Human Rights⁹, and the African Charter on Human and Peoples' Rights.¹⁰ When these rights are violated, individuals are entitled to redress, including through truth, justice, reparation, memorialization, and guarantees of non-repetition.¹¹

The universality of human rights flowing from the above sources is analyzed with a SOGIESC lens in the Yogyakarta Principles.¹² The principles instruct that victims of human rights violations on the basis of sexual orientation or gender identity have a right to effective, adequate, and appropriate reparative measures.¹³ Ten years after the Yogyakarta Principles were established, the Yogyakarta Principles Plus 10 (YP +10) were created to be more inclusive and to reflect current developments in international law. The YP+10 added the right to truth in its article 37, meaning that victims of human rights violations based on SOGIESC have a right to know the “truth about the facts, circumstances and reasons why the violation occurred,” including through “effective, independent and impartial investigation to establish the facts” and “all forms of reparation recognized by international law.”¹⁴

The mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (“IE SOGI”) addressed the inclusion of LGBTIQ considerations in

¹ UN, *United Nations Declaration on Human Rights* (“UDHR”) (1948) at preamble, arts. 1-2, available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>; World Conference on Human Rights in Vienna, *Vienna Declaration and Programme of Action* (“Vienna Declaration”) (1993) at art. 5, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action>.

² UDHR at art. 1; Vienna Declaration at preamble.

³ Vienna Declaration at art. 5.

⁴ UDHR at preamble, arts. 1, 7.

⁵ UDHR

⁶ International Covenant on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination Against Women, Convention Against Torture, Convention on the Rights of the Child, International Convention on the Protection of the Rights of Migrant Workers and Members of their Families, International Convention on the Protection of All Persons from Enforced Disappearance, and Convention on the Rights of Persons with Disabilities, available at <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies>.

⁷ See, e.g., UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (“Basic Principles”), A/RES/60/147 (Dec. 2005), available at

<https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>.

⁸ IACHR, *American Convention on Human Rights*, available at

<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

⁹ ECHR, *European Convention on Human Rights*, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

¹⁰ ACHPR, *African Charter on Human and Peoples' Rights*, available at <https://www.achpr.org/legalinstruments/detail?id=49>.

¹¹ *Basic Principles*.

¹² *Yogyakarta Principles* (2006), available at <http://yogyakartaprinciples.org/principles-en/official-versions-pdf/>.

¹³ *Id.* at art. 28.

¹⁴ *YP +10* (2017) at art. 37, available at <http://yogyakartaprinciples.org/principles-en/official-versions-pdf/>.

transitional justice in his report on LGBTIQ people in conflict. Having reviewed international legal standards and a substantial body of evidence, the IE SOGI called on states to:

“enact relevant policies and legislation that ensure LGBT and gender-diverse persons who are victims of armed violence comprehensive access to all their rights as victims and citizens, including: truth-seeking mechanisms; reparations programmes; justice proceedings; and other social and development programmes aimed at rebuilding the social fabric in the aftermath of conflict.”¹⁵

In creating transitional truth-seeking and justice institutions, the IE SOGI said that states should aim to transform “structural forms of exclusion and discrimination fueling the armed violence against LGBT and gender-diverse persons during conflict.”¹⁶

Regional mechanisms have also stated the need to include LGBTIQ people in all processes. The Inter-American Commission on Human Rights (IACHR), the body that promotes the implementation and tracks violations of the American Convention on Human Rights, has instructed members of the Organization of American States to ensure LGBTIQ victims of human rights violations have access to reparations, including guarantees of non-recurrence in accordance with international legal standards.¹⁷ With respect to human rights violations against intersex persons, the IACHR noted that intersex persons have the right to redress, reparation, access to justice, and the right to truth. Citing the Council of Europe, the IACHR stated that intersex persons whose rights have been violated through medical interventions have a right to “at least symbolic compensation” for their suffering.¹⁸

In a joint dialogue, the Inter-American Commission on Human Rights, the African Commission on Human and Peoples’ Rights, and UN human rights mechanisms emphasized states’ obligation to respect, protect, and fulfill the human rights of LGBTIQ people, and to investigate, prosecute, and provide reparative justice measures for violations.¹⁹

B. International Criminal Law

The development of transitional justice moved the needle forward on ad hoc International Courts, and the creation of a permanent mechanism, the International Criminal Court (ICC). The Rome Statute, which governs the ICC, instructs that the ICC “shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”²⁰ The ICC “may make an order directly against a convicted person specifying appropriate reparations” to victims of human rights violations.²¹ Under international criminal law, perpetrators who target victims on the basis of SOGIESC for violations of their fundamental rights can be held accountable under the crime against humanity of

¹⁵ UNGA, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, Victor Madrigal-Borloz, A/75/235 (2022) at ¶75.

¹⁶ *Id.* at ¶78(a).

¹⁷ IACHR, *Violence Against LGBTI Persons* (2015) at ¶516, available at <https://www.oas.org/en/iachr/reports/pdfs/ViolenceLGBTIPersons.pdf>

¹⁸ *Id.* at ¶513

¹⁹ African Commission on Human and Peoples’ Rights, IACHR & UN, *Ending Violence and Other Human Rights Violations Based on Sexual Orientation and Gender Identity*, p. 13, ¶16, available at https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf.

²⁰ ICC, *Rome Statute of the International Criminal Court*, art. 75(1), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

²¹ *Id.* at art. 75(2).

gender persecution.²² Victims of gender persecution, including LGBTIQ people, may be entitled to restitution, compensation and rehabilitation under international criminal law.

The ICC Office of the Prosecutor “supports a gender-inclusive approach to reparations” which includes consultation with victims to promote reparations that are “transformative and contribute to advancing nondiscrimination and gender equality.”²³ The reparations can include monetary and non-monetary measures “such as commemorations or the (re)construction of cultural or social centers... archives, literature or art belonging to, for example, women, girls or LGBTIQ+ people’s communities, schools, or health care facilities.”²⁴

II. Case Examples

Despite the fact that most transitional justice mechanisms and processes have not included a focus on LGBTIQ persons, the crimes perpetrated against them, and reparations to those affected, there are some recent cases where this focus exists. With different levels of development and success, we narrate here three of these examples, showing that though there is still a large room for improvement, there are attempts to include all in transitional justice, leaving no one behind.

A. Colombia

The Colombian peace process provides the most comprehensive example to date on the inclusion of LGBTIQ people in transitional justice processes. The 52-year Colombian conflict officially began in 1964, and officially concluded with the signing of a peace agreement in 2016.²⁵ The peace agreement created a transitional justice architecture including the Truth, Co-Existence and Non-repetition Commission (“Truth Commission”), a special unit for searching for missing persons, and the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, also known as the “JEP”).

The Truth Commission sought to clarify what happened during the conflict and recognize victims and those responsible for violence. The mandate of the Truth Commission of Colombia included LGBTIQ persons among the categories to be addressed to understand the impact of the conflict.²⁶ The Truth Commission incorporated a gender approach across its work, and created a working group to coordinate with women’s and LGBTIQ organizations.²⁷ The truth-seeking process documented violations against LGBTIQ people: as of 2014, Colombia’s registry of victims had registered 1,299 cases in which LGBTIQ were victims of human rights violations in the course of the conflict.²⁸

The JEP is the judicial component of the transitional justice system. In July 2022 the JEP charged gender persecution in Case 03, charging 22 military officers and soldiers with crimes against humanity.²⁹ The case involves the extrajudicial execution of 303 civilians, including “one person of diverse sexual

²² *Id.* at arts. 7(1)(h), 7(2)(g); ICC Office of the Prosecutor, *Policy on the Crime of Gender Persecution*, (2022) available at <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf> (“ICC policy paper”)

²³ ICC policy paper at ¶¶100-101.

²⁴ *Id.* at ¶102.

²⁵ Neela Ghoshal, *LGBTQ Lives in Conflict and Crisis: A Queer Agenda for Peace, Security and Accountability* at p. xi, available at https://outrightinternational.org/sites/default/files/2022-10/28Oct22_LGBTQ_Peace_Security_Working_Paper.pdf (“Ghoshal”).

²⁶ UNGA, *The Gender Perspective in Transitional Justice Processes*, A/75/174 (July 2020) at ¶10, available at <https://www.ohchr.org/en/calls-for-input/report-gender-perspective-transitional-justice-processes>.

²⁷ *Id.* at ¶13.

²⁸ Ghoshal at p. xi (citing Colombia Diversa, “*Personas LGBT víctimas del conflicto armado: subregistro e impunidad*,” (2015) <http://www.colombia-diversa.org/2015/03/personas-lgbt-victimas-del-conflicto.html>).

²⁹ Ghoshal at p. xii.

orientation or gender identity.”³⁰ This was the first time a tribunal anywhere in the world recognized that violence on the basis of SOGIESC might be considered gender-based persecution that amounts to a crime against humanity.³¹

In a separate pioneering case, Case 05, which addresses violence by the FARC guerrilla group in the departments of Cauca and Valle del Cauca, the JEP in April 2021 accredited five persons identified as LGBTIQ victims.³² It was the first time the JEP “resolved that gender-based persecution covers sexual orientation and gender identity, setting an important precedent for international criminal law.”³³ The JEP’s Chamber for the Acknowledgement of Truth will examine whether the alleged crimes against LGBTIQ individuals in Case 05 constitute gender-based persecution as a crime against humanity.³⁴

More recently, the JEP launched Case 11, which focuses on the crimes of sexual violence, reproductive violence, and other crimes motivated by the gender, sexual orientation, and gender identity of the victim.³⁵ Case 11 is an important step towards understanding the specific impacts of the Colombian conflict on people of diverse SOGIESC. Further, Case 11 paves the way for reparations to be issued to people who have been targeted on the basis of SOGIESC and for perpetrators to be held accountable for crimes that have historically been rendered invisible.

B. Syria

The Independent, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM) documents violations of international criminal law in Syria. The IIIM’s work “contributes to criminal accountability as part of a broader transitional justice approach, which includes other processes that collectively aim to combat impunity, provide redress to victims, recognize their dignity and guarantee the non-recurrence of violations and crimes.”³⁶

The IIIM incorporated a gender and LGBTIQ sensitive lens across its work, recognizing that people of diverse sexual orientations and gender identities may be targeted in conflict.³⁷ The IIIM implemented gender analyses across its work, including by developing gender-competent investigatory tools, collecting and organizing information to fill evidentiary gaps, and analyzing information with a gender lens.³⁸ The

³⁰ Ghoshal at p. xii (citing Jurisdicción Especial Para La Paz, *COMUNICAGO 057 DE 2022*, <https://www.jep.gov.co/Sala-de-Prensa/Paginas/JEP-imputa-a-22-miembros-del-ej%C3%A9rcito,-un-funcionario-del-extinto-das-y-a-dos-civiles-por-%C2%B4falsos-positivos%C2%B4-en-Casanare.aspx>).

³¹ Ghoshal at p. xii.

³² *Id.*

³³ Ghoshal at p. xii (citing Susann Aboueldahab, *Gender-based Persecution as a Crime against Humanity: A Milestone for LGBTI Rights before the Colombian Special Jurisdiction for Peace*, EJIL: TALK!, Blog of the European Journal of International Law, (2021) <https://www.ejiltalk.org/gender-based-persecution-as-a-crime-against-humanity-a-milestone-for-lgbti-rights-before-the-colombian-special-jurisdiction-for-peace>).

³⁴ Ghoshal at p. xii (citing Lisa Davis, “Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities,” *Northwestern Journal of Human Rights* 1 (2021), <https://scholarlycommons.law.northwestern.edu/njihr/vol20/iss1/1>).

³⁵ Caribe Afirmativo, *Jurisdicción Especial Para la Paz abre macro caso para investigar graves crímenes e infracciones al DIH cometidos por las FARC y anuncia la próxima apertura de un macrocaso de violencia sexual y otros crímenes motivados por el género, sexo, orientación o identidad de género* (2022) available at: <https://caribeafirmativo.lgbt/jurisdiccion-especial-para-la-paz-abre-macro-caso-para-investigar-graves-crimenes-e-infracciones-al-dih-cometidos-por-las-farc-y-anuncia-la-proxima-apertura-de-un-macrocaso-de-violencia-sexual-y-otros/>

³⁶ IIIM, *IIIM Gender Strategy and Implementation Plan: Addressing the Adverse Impact of the Discriminatory Gender Hierarchy to Facilitate Justice for International Crimes in the Syrian Arab Republic* (2022) available at <https://iiim.un.org/wp-content/uploads/2022/10/Gender-Strategy-Implementation-TechnicalEnglish.pdf>.

³⁷ *Id.* at 9.

³⁸ *Id.* at 10.

IIM's approach strives to integrate LGBTIQ experiences into its work to capture a more complete and accurate distillation of events and create conditions for inclusive justice processes.³⁹

C. Yemen

The conflict that began in Yemen in 2014 has been marked by grave human rights violations on all sides.⁴⁰ The Group of Eminent International and Regional Experts on Yemen (Group of Experts), mandated by the UN Human Rights Council to monitor and report on human rights in Yemen, expressed concerns in 2019 that the “resurgence of norms controlling sexuality together with the polarizing effect of the conflict” was contributing to conflict-related abuses against LGBTIQ people.⁴¹ In its subsequent investigation, the Group of Experts found that both principal parties to the conflict, the Houthi de facto authorities and the UAE-backed Yemeni government, committed grave human rights violations that were “motivated by prejudice” on the basis of sexual orientation or gender identity.⁴²

The Group of Experts communicated with the Yemeni government a number of questions aimed at ensuring monetary and non-monetary reparations were provided for the victims of human rights violations.⁴³ While the mandate of the Group of Experts has since expired, the documentation of human rights violations against people based on SOGIESC and subsequent communications to the Yemeni government constitutes a good practice of LGBTIQ inclusion in a transitional justice mechanism.

Conclusion

As shown in this submission, there is a need to include LGBTIQ persons in transitional justice mechanisms and processes from their creation, through implementation, and to the grant of specific reparations. International law standards should be applied to all, including LGBTIQ people, and States and other stakeholders must follow their obligations.

General Recommendations

- Ensure better LGBTIQ inclusion in all policies and practices, including when developing guarantees of non-recurrence.
- Undertake to document human rights violations based on sexual orientation, gender identity and expression, and sex characteristics in all transitional justice processes.
- Utilize documentation of human rights violations to further investigate violations and hold perpetrators to account, including through ordering reparative measures.
- Develop long-term partnerships with LGBTIQ-led civil society organizations during creation and implementation of transitional justice processes.
- Work to advance decriminalization of same-sex intimacy and gender nonconformity in order to create a safer environment for truth-telling, justice-seeking, and redress related to violations based on sexual orientation, gender identity and expression, and sex characteristics.
- Train and raise capacity of staff that are dealing with transitional justice processes to avoid gender-based stereotypes and biases and to properly include LGBTIQ issues.

³⁹ *Id.*

⁴⁰ Ghoshal at p. viii (citing UN Human Rights Council, *Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014, Detailed Findings of the Group of Eminent International and Regional Experts on Yemen*, A/HRC/45/CRP.7, <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/GEE-Yemen/A-HRC-45-CRP.7-en.pdf>.)

⁴¹ *Id.*

⁴² *Id.*

⁴³ *List of Issues addressed to the Government of Yemen by the Group of Eminent Experts on Yemen established pursuant to Human Rights Council resolution, A/HRC/RES/45/15*, available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/GEE-Yemen/LoI-GoY-June2021_EN.pdf.

- Design and issue gender transformative recommendations through transitional justice processes by examining and targeting the root causes of violence against LGBTIQ people.