



International Gay and Lesbian Human Rights Commission Submission to the Universal Periodic Review: The Gambia

Executive Summary:

1. In the Gambia, homosexual conduct has been criminalized since the enactment of its 1965 Criminal Code. Article 144 of the Code states that homosexual acts between men or women are “unnatural offense(s)” and those found guilty of such acts can be imprisoned for up to 14 years. In 2008 and 2009, the President of the Gambia called for violence and discrimination against and expulsion of ‘homosexuals’ and called for them to be expelled from their dwellings.

2. We recommend that the Human Rights Council, in its upcoming review, urge the Gambia to bring its legislation into conformity with its international human rights obligations by repealing all provisions criminalizing sodomy or other sexual activity between consenting adults and by ensuring non-discrimination by ensuring access to adequate housing and freedom from or remedies for forced evictions or the threat of forced evictions on the basis of sexual orientation.

Legal and Normative Frameworks:

3. In the Gambia, homosexual conduct has been criminalized since the enactment of its 1965 Criminal Code. Article 144 of the Code states that homosexual acts between men or women are “unnatural offense(s)” and those found guilty of such acts can be imprisoned for up to 14 years:

*Criminal Code 1965, Revised Laws 1990, as amended in 2005
Article 144: Unnatural offences*

“(1) Any person who—

- (a) has carnal knowledge of any person against the order of nature; or*
- (b) has carnal knowledge of an animal; or*
- (c) permits any person to have carnal knowledge of him or her against the order of nature; is guilty of a felony, and is liable to imprisonment for a term of 14 years.*

(2) In this section- “carnal knowledge of any person against the order of nature” includes-

- (a) carnal knowledge of the person through the anus or the mouth of the person;*
- (b) inserting any object or thing into the vulva or the anus of the person for the purpose of simulating sex; and*
- (c) committing any other homosexual act with the person”*

4. The President of the Gambia has also contributed to the unsafe and discriminatory environment in the Gambia with several homophobic and extreme statements calling for violence and discrimination against homosexuals, with a particular focus on forcing them from their homes. For example, on May 15, 2008, in the town of Tallinding, during the presidential “Dialogue with the People” tour, President Yahya A. J. J. Jammeh ordered security services to “seek out and arrest any person who is gay,” close down any motel “harboring gays,” and expel “suspected gays” from dwellings. He also vowed to “cut off the head” of any homosexual.¹

5. Then, on May 23, 2009, President Jammeh urged party members of the Alliance for Patriotic Reorientation and Construction (APRC), which represents the majority party in the country’s National Assembly, to not entertain homosexuals in their compounds and also to not allow them to transfer money.²

The Gambia’s International Human Rights Obligations:

Rights to privacy and equality before the law without any discrimination:

6. Provisions against sexual activity between consenting adults have been found to constitute a clear violation of international human rights law.

7. In *Toonen v Australia*, the **UN Human Rights Committee** in March 1994 confirmed that laws criminalizing consensual same-sex activity violate both the right to privacy and the right to equality before the law without any discrimination, contrary to articles 17(1) and 2 of the International Covenant on Civil and Political Rights.³

8. The Committee further considered that such laws interfere with privacy rights, whether or not they are actively enforced, and “run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention” by driving marginalised communities underground.

9. The UN Human Rights Committee has affirmed this position on many occasions, either urging States to repeal laws which criminalize consensual same-sex activity or commending them for bringing their legislation into conformity with the Covenant by repealing such provisions.⁴

¹The Point for Freedom and Democracy, *President Jammeh Gives Ultimatum for Homosexuals to Leave*, Available at <http://thepoint.gm/africa/gambia/article/2008/5/19/president-jammeh-gives-ultimatum-for-homosexuals-to-leave>; Human Rights Watch, *Letter to the Gambia Regarding Reported Statements that Fuel Homophobia*, June 10, 2009. Available at <http://www.hrw.org/en/news/2008/06/10/letter-gambian-president-regarding-reported-statements-fuel-homophobia>.

²Gambia News, *Gambia News : President Jammeh Calls for Behavioural Change, As He Condemns Homosexuality*, May 26, 2009. Available at <http://www.gambianow.com/news/News/President-Jammeh-Calls-for-Behavioural-Change-As-He-Condemns-Hom.html>.

³*Toonen v Australia*, CCPR/C/50/D/488/1992, April 4, 1994.

⁴ See Human Rights Committee Concluding Observations: United States of America, A/50/40, October 3, 1995; Cyprus, CCPR/C/79/Add.88, April 6, 1998; Ecuador, CCPR/C/79/Add.92, August 18, 1998; Chile, CCPR/C/79/Add.104, March 30, 1999; Lesotho, CCPR/C/79/Add.106, April 8, 1999; Romania CCPR/C/79/Add.111, July 28, 1999; Australia, A/55/40, July 24, 2000; Egypt, CCPR/CO/76/EGY, November 28, 2002; Kenya, CCPR/CO/83/KEN, March 28, 2005; United States of America, CCPR/C/USA/CO/3, September 15, 2006; Barabdos, CCPR/C/BRB/CO/3, May 11, 2007; Chile, CCPR/C/CHL/CO/5, May 18, 2007.

10. The Gambia has acceded to **ICCPR**. In the Concluding observations upon the review of Sudan, the Human Rights Committee found that the death penalty for homosexual acts is incompatible with the ICCPR:

11. “The imposition in the State party of the death penalty for offences which cannot be characterized as the most serious...as well as practices which should not be criminalised such as committing a third homosexual act and illicit sex, is incompatible with article 6 of the Covenant [...] The State party should ensure that the death penalty, if used at all, should be applicable only to the most serious crimes...and should be repealed for all other crimes.”⁵;

12. Also the UN **Commission on Human Rights** in 2005 in the Resolution on the death penalty found that the death penalty for homosexual acts is incompatible with human rights principles: “...ensure also that the notion of “most serious crimes” does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as...sexual relations between consenting adults...”⁶

13. This position is consistent with other **regional and national jurisprudence and policy**, including decisions of the European Court of Human Rights⁷, the Organization of American States,⁸ and of the Constitutional Court of South Africa.⁹

14. States’ international obligations to respect the human rights of all persons, irrespective of sexual orientation and gender identity, were recently articulated in the “**Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity**”. The Principles were developed and unanimously adopted by a distinguished group of human rights experts, from diverse regions and backgrounds, including Africa. These experts included judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, members of civil society and others.

15. Principle 2 of the Yogyakarta Principles affirms the right of all persons to equality before the law without discrimination on the basis of sexual orientation or gender identity, and specifically confirms the obligation of States to “repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity.”

⁵Human Rights Committee, Concluding observations of the Human Rights Committee: Sudan, U.N. Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para. 19

⁶ Commission on Human Rights, Resolution on the death penalty, U.N. Doc. E/CN.4/RES/2005/59, 20 April 2005, para. 7 (f).

⁷ *Dudgeon v. United Kingdom*, Series A no. 45., 1981; *Norris v. Ireland*, 1991; *Modinos v. Cyprus*, 1993.

⁸ Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of September 17 2003, requested by the United Mexican, Concurring Opinion of Judge A.A. Cancado Trinate. Organization of American States, General Assembly, AG/RES. 2435 (XXXVIII-O/08), Human Rights, Sexual Orientation, and Gender Identity (Adopted at the fourth plenary session, held on June 3, 2008).

⁹ *National Coalition for Gay and Lesbian Equality and another v. Minister of Justice and others*, 1998.

16. Principle 6 of the Yogyakarta Principles affirms the right of all persons, regardless of sexual orientation or gender identity, to the enjoyment of privacy without arbitrary or unlawful interference, and confirms States' obligation to "repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity."¹⁰ The Principles also call on States to "ensure that criminal and other legal provisions of general application are not applied to *de facto* criminalise consensual sexual activity among persons of the same sex who are over the age of consent."

17. The former **UN High Commissioner for Human Rights** has welcomed the Yogyakarta Principles as a "timely reminder" of the basic tenets of universality and non-discrimination, and noted that "respect for cultural diversity is insufficient to justify the existence of laws that violate the fundamental rights to life, security and privacy by criminalizing harmless private relations between consenting adults."¹¹

Recommendation:

18. We therefore recommend that the Human Rights Council, in its upcoming review, urge the Gambia to bring its legislation into conformity with its international human rights obligations by repealing all provisions criminalizing sodomy or other sexual activity between consenting adults.

Right to adequate housing:

19. State denial of the right to adequate housing, including forced evictions, is a clear violation of international human rights law and additionally implicates the rights to food, water, health, work, property, and security of person, security of the home and protection against inhuman and degrading treatment.¹²

20. The right to adequate housing is guaranteed under Article 25 of the **Universal Declaration of Human Rights (UDHR)**, and Article 11 of the **International Covenant of Economic, Social and Cultural Rights (ICESCR)**.

21. Additionally, the rights to dignity and security, which are both components of the right to adequate housing, are guaranteed under Articles 28(1), 31(1), 37(8) and 19(1) of the **Gambian Constitution** and Articles 5 and 6 of the **African Charter on Human and Peoples' Rights**. The jurisprudence of the **African Commission on Human and Peoples' Rights** also indicates that housing related rights are covered under the Charter.¹³

¹⁰ Available in all 6 UN languages at: www.yogyakartaprinciples.org.

¹¹ Statement of UN High Commissioner for Human Rights, Launch of the Yogyakarta Principles, 7 November, 2007, United Nations, New York.

¹² United Nations Economic and Social Council, Commission on Human Rights, 60th Sess., Report of the special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, para. 4, UN Doc. E/CN.4/2004/48 (8 March 2004).

¹³ "In a case brought before it against Nigeria in October 2001, concerning violence against and executions of Ogoni leaders who protested against the operations of the State oil company that have caused environmental degradation and health problems among the Ogoni people, the Commission concluded that the combined effect of articles 14, 16 and 18 (1) of the Charter implies a right to shelter or housing which the Government of Nigeria had accordingly violated. In its decision the Commission explicitly referred to Committee on Economic, Social and

22. The **Committee on Economic, Social, and Cultural Rights (CESCR) General Comment No. 4** describes the right to adequate housing as “the right to live somewhere in security, peace, and dignity,” and states that individual are entitled to adequate housing without discrimination. **General Comment No. 7** on forced evictions requires States to refrain from forced evictions, to enforce the law against third parties who forcibly evict and to take appropriate measures to prevent discrimination. **General Comment No. 20** states that sexual orientation and gender identity is a prohibited ground of discrimination under ICESCR and thus State Parties, including the Gambia, may not discriminate or forcibly evict people on these bases.

23. Moreover, the **UN Special Rapporteur on Adequate Housing** urges States to protect all persons from forced evictions and ensure non-discriminatory access to adequate housing for all persons, noting that “[f]orced evictions intensify inequality, social conflict, segregation and “ghettoization”, and invariably affect the poorest, most socially and economically vulnerable and marginalized sectors of society” including minorities.¹⁴

24. Principle 15 of the **Yogyakarta Principles** affirms that everyone has the right to adequate housing, including protection from eviction, without discrimination on the basis of sexual orientation or gender identity, and confirms states’ obligations to “ensure that adequate and effective legal or other appropriate remedies are available to any person claiming that a right to protection against forced evictions has been violated or is under threat of violation.”

Recommendation:

25. We therefore recommend that the Human Rights Council, in its upcoming review, urge the Gambia to bring its legislation into conformity with its international human rights obligations by ensuring non-discriminatory access to adequate housing and freedom from forced evictions on the basis of sexual orientation and by providing remedies to those who have been forcibly evicted or who are under threat of forced eviction because of their sexual orientation.

26. This information is submitted by the **International Gay and Lesbian Human Rights Commission (IGLHRC)**. IGLHRC’s mission is to advance human rights for everyone, everywhere to end discrimination based on sexual orientation, gender identity, and gender expression. A non-profit, non-governmental organization, IGLHRC is based in New York, with offices in Cape Town and Buenos Aires. www.iglhrc.org

Cultural Rights general comments Nos. 4 and 7, stating that “all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats”, concluding that the Ogoni’s collective right in this respect had been violated.” United Nations Economic and Social Council, Commission on Human Rights, 60th Sess., Report of the special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, para. 22, UN Doc. E/CN.4/2004/48 (8 March 2004).

¹⁴ United Nations Human Rights Council, 4th Sess., Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Basic Principles and Guidelines on Development-based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, UN Doc. A/HRC/4/18 (5 February 2007).