

Backgrounder: Joint Statement on Ending Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity

Some Questions and Answers

"We must reject persecution of people because of their sexual orientation or gender identity, who may be arrested, detained or executed for being lesbian, gay, bisexual or transgender. I understand that sexual orientation and gender identity raise sensitive cultural issues. But cultural practice cannot justify any violation of human rights. When our fellow humans are persecuted because of their sexual orientation or gender identity, we must speak out. Human rights are human rights everywhere, for everyone."

- **UN Secretary General Ban Ki-moon, Special Address to Human Rights Council, 25 January, 2011**
(<http://www.un.org/apps/sg/sgstats.asp?nid=5051>)

Summary

- Around the world, people face **human rights violations** because of their sexual orientation or gender identity, including killings, torture, rape, criminal sanctions, and violence;
- The Human Rights Council is **"responsible for promoting universal protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner"** (GA resolution 60/251, OP 2);
- Joint statements provide a constructive opportunity to **raise awareness and support** for human rights issues relating to sexual orientation and gender identity;
- Although issues of sexual orientation and gender identity are **sensitive issues** for many States, and the joint statement reflects that, **no human being should face violence, torture, stigmatisation and abuse**, on any ground;
- UNAIDS, UNDP and the UN Special Rapporteur on Health have also emphasized the importance of addressing human rights violations based on sexual orientation and gender identity as part of **HIV education and prevention efforts**;
- The joint statement does **not seek to create new rights** but simply affirms the application of existing human rights standards to those who are lesbian, gay, bisexual, transgender or intersex;
- The terms 'sexual orientation' and 'gender identity' are well understood and have been applied by **UN treaty bodies and regional and national courts**, and included in **constitutions of States** from all regions;
- States from diverse regions recently appealed for an open and inclusive process to foster dialogue and build additional understanding of **how issues of sexual orientation and gender identity may best be addressed** through the international human rights framework. This joint statement will help to advance that goal.

Q. What is being proposed?

A **short joint statement** on ending violence and related human rights violations based on sexual orientation and gender identity is proposed on behalf of a cross-regional grouping of States, to be delivered at the Human Rights Council at its 16th session in March 2011. Joint statements provide a constructive opportunity to raise awareness and support for human rights issues relating to sexual orientation and gender identity. They enable those States that wish to express support for an issue to do so.

This statement **builds on similar past initiatives**, including joint statements delivered to the former Commission on Human Rights, the Human Rights Council and the General Assembly. From 2008-2010, a declaration on sexual orientation, gender identity and human rights has also been adopted unanimously by all 34 States in the **Organization of American States**.

Q. Why is the issue important?

Around the world, people face human rights violations because of their sexual orientation or gender identity, including **killings, torture, rape, criminal sanctions, and violence**. These violations have been brought to the Human Rights Council's attention by more than a dozen different Special Rapporteurs.

UNAIDS, UNDP and the UN Special Rapporteur on Health have also emphasized the importance of addressing human rights violations based on sexual orientation and gender identity as part of **HIV education and prevention** efforts.

Although issues of sexual orientation and gender identity are sensitive issues for many States, we trust we can all agree that **no human being should face violence, torture, stigmatisation and abuse**, on any ground.

Q. Why the focus on sexual orientation and gender identity? Will this detract from other priorities?

Addressing human rights violations based on sexual orientation and gender identity takes nothing away from our shared commitment to combat discrimination based on race, religion, gender, socioeconomic status and other grounds. That is why the proposed joint statement will **reaffirm our commitment to addressing all forms of discrimination**, including within our own societies. There can be no hierarchies of rights, and it is our common duty to ensure that no person faces violations of their human rights on any grounds, including because of their sexual orientation or gender identity.

Q. Are human rights violations on these grounds inconsistent with international human rights law?

The right of all human beings to life, liberty and security of the person, to freedom from torture, privacy, and protection from arbitrary detention are as settled and timeless as the Universal Declaration itself.

The statement **does not seek to create new rights** but simply affirms the application of **existing human rights standards** to those who are lesbian, gay, bisexual, transgender or intersex.

In addition, treaty bodies have consistently recognized, in communications, concluding observations and general comments, that **international human rights law prohibits discrimination** on grounds including sexual orientation and gender identity. As noted by the International Commission of Jurists,¹ drafters of both international and regional human rights instruments were careful to ensure that the lists of grounds for non-discrimination were not exhaustive, by employing terms such as "of any kind", "such as" and "or other status".

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, a position affirmed many times subsequently.²

¹ <http://www.icj.org/dwn/database/ICJBriefingPaper-Criminalization-SSSConduct-May2010.pdf>

² *Toonen v Australia*, CCPR/C/50/D/488/1992, April 4, 1994. See also 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

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.

This position is consistent with other regional and national jurisprudence, including decisions of the **European Court of Human Rights, the African Commission on Human and Peoples Rights, and courts in South Africa, Hong Kong, Fiji, India, Nepal and the USA.**³

Q. Aren't these issues culturally sensitive?

It is recognised that these are sensitive issues in many societies, and the joint statement will acknowledge that. The statement does not ask States to take a moral stance on the issues: rather, it merely urges States to **protect all persons from human rights violations**, including on the basis of their sexual orientation or gender identity.

In calling for an end to laws which criminalise people on the basis of sexual orientation or gender identity on Human Rights Day, UN Secretary General Ban Ki-moon noted:

“Yes, we recognize that social attitudes run deep. Yes, social change often comes only with time. Yet, let there be no confusion: **where there is tension between cultural attitudes and universal human rights, universal human rights must carry the day.** Personal disapproval, even society's disapproval, is no excuse to arrest, detain, imprison, harass or torture anyone - ever.”

As recently pointed out by a group of UN experts, including the Independent Expert on Cultural Rights:⁴ **“Cultural diversity ... can only thrive in an environment that safeguards fundamental freedoms and human rights.”**

The Council has a responsibility to address all human rights violations, and we cannot shy away from discussions which challenge us. It is in the spirit of constructive dialogue to foster **open respectful discussion** on all human rights issues, including those which are sensitive.

Q. Is there a definition of these terms?

The terms ‘sexual orientation’ and ‘gender identity’ have been applied by **UN treaty bodies and regional and national courts**, and included in **constitutions of States** from all regions. Since 2000, the UN resolution on extrajudicial executions has consistently urged States to protect the right to life and investigate killings based on grounds including sexual orientation.

Often, marginalised groups are identified by the very fact that they are singled out for violence and abuse. As Rwanda noted during GA discussions on the extrajudicial executions resolution:

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; Barbados, CCPR/C/BRB/CO/3, May 11, 2007; Chile, CCPR/C/CHL/CO/5, May 18, 2007.

³ *Dudgeon v United Kingdom*, Series A no. 45., 1981; *Norris v Ireland*, 1991; *Modinos v Cyprus*, 1993; *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others*, 1998; *Zimbabwe Human Rights NGO Forum v Zimbabwe*, African Commission 245/2002. National jurisprudence examples include: *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, South Africa Constitutional Court, 1998 ZACC 15, 9 October 1998; *Lawrence v. Texas*, U.S. Supreme Court, 539 U.S. 558, 26 June 2003; *Nadan & McCoskar v. State*, High Court of Fiji at Suva, 26 August 2005; *Naz Foundation v. Government of NCT of Delhi and Others*, High Court of Delhi at New Delhi, WP(C) No. 7455/2001, 2 July 2009. In Hong Kong, recent decisions have struck down as discriminatory provisions related to differing ages of consent and public sexual activity between same-sex partners. See *Leung v. Secretary for Justice*, CACV 317/2005, 20 September 2006, and *Secretary for Justice v. Yau and Another*, FACC No. 12 of 2006, 17 July 2007. In Nepal, the Supreme Court ruled that transgender individuals should be recognized as a third gender should be recognized and protected from discrimination. See *Writ No. 917 (Blue Diamond Society)*, 21 December 2007.

⁴ “*Human Rights are essential tools for an effective intercultural dialogue*”, Statement for the World Day on Cultural Diversity for Dialogue and Development, by 7 UN Special Procedures.

"Mr. President, whether the concept of 'sexual orientation' is defined or not, whether or not we support the claims of people with a different sexual orientation, whether or not we approve of their sexual practices, we must deal with the urgency of these matters and recognise that these women and men, **these human beings, continue to be the target of murder** in many of our societies and are even more at risk than many of the other groups listed. ... Believe me, Sir, that a human group **does not need to be legally defined to be the victim of execution or massacre**, since those who target their members have previously defined them."

In addition, and to bring additional clarity to such discussions, definitions of these terms were set out in the *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation or gender identity*:

- '**sexual orientation**' refers 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;
- '**gender identity**' refers 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.

The term "sexual orientation" thus applies to both heterosexuals and homosexuals. **All forms of sexual relations are subject to legal restrictions** which must be applied in a non-discriminatory manner, such as the need for sexual relations - whether heterosexual or homosexual - to be based on consent, and the establishment of an appropriate age of consent. The obligation of States to ensure appropriate safeguards in this respect is clearly established in international instruments, such as the **Convention on the Rights of the Child** (article 34).

The above definitions have been **endorsed by UN agencies, treaty bodies, national courts and an increasing number of States**.

Q. How can the Human Rights Council address these issues?

The Council is "**responsible for promoting universal protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner**" (GA resolution 60/251, OP 2).

The Human Rights Council has a range of tools at its disposal to address human rights violations based on sexual orientation and gender identity.

During recent discussions around the extrajudicial executions resolution, diverse States appealed for an open and inclusive process to **foster dialogue and build additional understanding** of how issues of sexual orientation and gender identity may best be addressed through the international human rights framework. The joint statement will help advance this goal. Another possible approach to enhance constructive dialogue on these issues might be an expert panel discussion on addressing human rights violations based on sexual orientation and gender identity. Consideration of additional tools available to the HRC to advance understanding of these issues is welcome.

"You, at the United Nations, have a particular role to play. You have a responsibility. Lesbians, gays, bisexuals, transgender people are equal members of the human family whose rights you have sworn to uphold. Those who face hatred [and] violence look to you for protection. Do not fail them."

- **Nobel Peace Prize winner, Archbishop Emeritus Desmond Tutu**
<http://www.youtube.com/user/ARCSOGItube?feature=mhum#p/u/8/TYPYomXx7Zs>