**Increased Criminalization, Arbitrary Detention, and other Deprivations of the Right to Liberty and Security of Person for Lesbian, Gay, Bisexual and Transgender (LGBT) and Intersex People**

Draft General Comment: Liberty and Security of the Person

Article 9 of the International Covenant on Civil and Political Rights

**SUBMITTED TO**:

The United Nations Human Rights Committee

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23. International Gay and Lesbian Human Rights Commission (IGLHRC), International
24. International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), International
25. International Planned Parenthood Federation IPPF, Global
26. Justice for Sisters
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28. MANODIVERSA CIVIL ASOCIATION MANODIVERSA, Bolivia
29. Micro Rainbow International (MRI)
30. Network of European LGBT Families Associations (NELFA) Belgium
31. Organisation Intersex International (OII) Australia, Australia
32. Organization for Refuge, Asylum & Migration (ORAM), Global
33. Pacific Feminist SRHR Coalition, Regional: Pacific
34. PinkAnatomy BWPAB, Botswana
35. Punanga Tauturu Inc. (PTI), Cook Islands
36. Quality of Citizenship Jamaica (QCJ), Jamaica
37. St. Paul's Foundation, United States of America
38. The Global Forum on MSM & HIV (MSMGF), United States of America
39. The Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL), Sweden
40. Tonga Leitis' Association (TLA), Tonga
41. Transgender Victoria (TGV), Australia
42. Unitarian Universalist United Nations Office (UU-UNO), United States of America
43. United and Strong Inc. (U&S), Saint Lucia
44. Victorian Gay and Lesbian Rights Lobby (VGLRL) Australia
45. **Introduction**

This submission seeks to highlight the particular ways lesbian, gay, bisexual and transgender (LGBT) people and intersex people are targeted for violence and discrimination in violation of their right to liberty and security of person and articulates the need to include specific reference to sexual orientation,[[1]](#footnote-1) gender identity[[2]](#footnote-2) (SOGI) and intersex status/body diversity[[3]](#footnote-3) within the Committee’s General Comment on article 9 of the International Covenant on Civil and Political Rights (ICCPR).

LGBT and intersex people are extremely vulnerable to violations of personal security through violent attacks by both state and non-state actors. LGBT and intersex people continue to be regular targets for arbitrary arrest because of their sexual orientation, and gender identity. Intersex people suffer infanticide, and effects of non-consensual medical intervention that are tantamount to torture, or cruel, inhuman or degrading treatment.[[4]](#footnote-4) Furthermore, increased criminalization and widespread social stigma against diverse sexual orientations and gender identities, and intersex status preclude individuals from seeking traditional forms of legal redress. General Comment 35 must make explicit reference to sexual orientation and gender identity in order for States to discharge their responsibility under international law to protect the liberty and personal security of all people.

In 1994, the Human Rights Committee became one of the first international bodies to explicitly acknowledge its obligation to protect the rights of individuals targeted for discrimination because of their actual or perceived sexual orientation by holding that laws that criminalize sexual orientation violate Section 17 of the ICCPR and, importantly, that reference to “sex” within the ICCPR must be interpreted to include “sexual orientation.”[[5]](#footnote-5)

In the years since 1994, various parts of the UN human rights system have consolidated this understanding of the right to freedom of discrimination through increased explicit reference to sexual orientation and also more recently to gender identity, including in General Comments and Recommendations.[[6]](#footnote-6) The Human Rights Committee took official note welcoming positive legislation for same-sex couples as early as 1993[[7]](#footnote-7) and has in the subsequent decades repeatedly called upon States to stop violence and discrimination against people because of their actual or perceived sexual orientation and increasingly also gender identity. In fact, the Committee has made more than thirty specific references to LGBT people, sexual orientation and/or gender identity in its concluding observations across different States in the last five years alone.

Intersex status or body diversity is a new and emerging area of concern. In February 2013, the UN Special Rapporteur on Torture documented concern regarding “irreversible sex assignment, involuntary sterilization, involuntary genital normalizing surgery, performed without [affected persons’] informed consent, or that of their parents, “in an attempt to fix their sex”, leaving them with permanent, irreversible infertility and causing severe mental suffering”.4

The submission will focus on four main areas: (1) the need to ensure “right to personal security” for people targeted for violence, arrest, or persecution because of their actual or perceived sexual orientation, gender identity and/or intersex status, (2) the disproportionate impact of arbitrary detention of individuals on the basis of their sexual orientation, gender identity and/or intersex status, (3) the difficulty LGBT and intersex people have achieving effective remedies for redress as a result of arbitrary detention and (4) the importance of including specific reference to “sexual orientation and gender identity” and “intersex status” or “body diversity” in the general comment.

1. **The Human Rights Committee must ensure “right to personal security” includes individuals targeted for violence, arrest, or persecution because of their actual or perceived sexual orientation and gender identity under Article 9(1).**

Article 9(1) of the ICCPR states that “everyone has the right to liberty and security of person.”[[8]](#footnote-8) This provision “obliges States parties to take appropriate measures …to protect individuals from foreseeable threats to life or bodily integrity proceeding from either governmental or private actors.”[[9]](#footnote-9) In the context of continued or increasing criminalization of bodily autonomy linked to actual or perceived sexual orientation, and of freedom of expression and assembly linked to advancing the human rights of everyone, regardless of their sexual orientation, the threat to life and bodily integrity of lesbian, gay, bisexual, trans, and intersex persons is arguably foreseeable.

From January 1, 2008 to March 31, 2014 at least 1,509 cases of reported killings of transgender and gender non-conforming people have been documented.[[10]](#footnote-10) In the first three months of 2014, 75 reported murders of transgender people in 13 countries have been documented.[[11]](#footnote-11) There is little documentation on attacks against intersex persons, but press materials show evidence of an attempting lynching in Nigeria; the person’s fate is unknown. [[12]](#footnote-12) Intersex persons are also subject to infanticide and mutilation.[[13]](#footnote-13) Given the drastic underreporting associated with violence against transgender and gender non-conforming people, and intersex people, civil society organizations estimate actual numbers to be much higher.

Recent laws criminalizing homosexuality and/or freedom of speech surrounding homosexuality have resulted in surges of attacks against LGBT people. A local human rights organization in Uganda reports that since Ugandan president signed an Anti-Homosexuality Act[[14]](#footnote-14) into law in February 2014, an LGBT security hotline in Uganda has received reports of roughly 130 incidents of evictions, arrests and mob attacks.[[15]](#footnote-15) Violent attacks in Nigeria have increased in recent time since it passed a Same-Sex (Prohibition) Act prescribing 14 years imprisonment for LGBT people in the country.[[16]](#footnote-16) In February 2014, 10 men perceived to be gay, were beaten by a mob of 40 people near the capital city soon after the act was signed into law.[[17]](#footnote-17)

Moreover, where the law requires the deprivation of liberty through prison sentences for actions that most adequately can be described as an exercise of human rights—such as freedom of speech or assembly, or adults engaging in consensual sexual behavior in private—these laws are, *prima facie*, in violation of Covenant provisions on the right to liberty. It is paramount for the Committee to recognize this, and to call for the repeal of such laws.

**III. Arbitrary Arrest and Detention**

States have an obligation to protect individuals against arbitrary detention. International human rights bodies have recognized in a variety of contexts that individuals are regularly targeted for arbitrary detention on the basis of their sexual orientation and gender identity, and that such persecution constitutes a violation of various human rights. For example, the Working Group on Arbitrary Detention has held that detention of an individual on the basis of the individual’s sexual orientation or gender identity constitutes arbitrary detention in breach of article 9 of the ICCPR.[[18]](#footnote-18) The Human Rights Committee and other treaty monitoring bodies have expressed serious concern regarding arbitrary detention by police of persons because of their actual or perceived sexual orientation, or because they are gender non-conforming.[[19]](#footnote-19)

The restriction against detaining individuals because of their sexual orientation and gender identity is not limited to offenses related to sexual conduct, it extends to detention for offenses pertaining to physical appearance, often through the use of so-called “public scandal” or morality laws, laws that prohibit impersonation, or move-on ordinances which, in their implementation, target vulnerable or marginalized populations including in particular trans persons, but also intersex persons. Authorities frequently use such laws to punish individuals who do not conform to social norms, and because many of them contain vague or overbroad provisions, they are often implemented in a discriminatory or arbitrary fashion, targeting the most marginalized.

In this connection, the Working Group on Arbitrary Detention, for example, has voiced concern over the wide discretion given to “morality police” or other enforcement entities charged with oversight ‘moral’ or ‘immoral’ behavior and to determine what constitutes immoral actions. A 2008 case reviewed by the Working Group on Arbitrary Detention revealed four men in Egypt were imprisoned for homosexual conduct, their convictions “not based on any evidence except for coerced and repudiated statements…taken from them at the Ministry of Interior’s Morality Police Department.” The Working Group reported the actions of morality police “[do] not bode well for basic human rights such as right to privacy, right to own liberty, freedom of opinion and freedom of expression.”[[20]](#footnote-20)

Since *Toonen v. Australia* in 1994, the Human Rights Committee has held that laws that criminalize private, adult, consensual same-sex sexual relations violate rights to privacy and to non-discrimination.[[21]](#footnote-21) States have attempted to justify criminalization as “reasonable” on grounds of protection of public health or morals but the Committee consistently rejects these grounds indicating criminalization is neither necessary nor proportionate.[[22]](#footnote-22)

1. **Effective Remedy for Redress**

Article 9(5) provides, “anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”[[23]](#footnote-23) Unfortunately, rarely do LGBT or intersex people have an effective method for seeking or achieving redress for unlawful arrest or arbitrary detention. Statutes of limitations and affect the ability of intersex persons to seek redress for childhood medical intervention.

Under international law, States must prohibit and punish acts of torture and ill-treatment, and must provide redress to victims of such acts. However, police and other authorities are often the actors responsible for the widespread and systemic violence against LGBT and intersex people. Police often refuse to investigate and prosecute violence committed at the hands of non-State actors. States have an obligation to ensure that all acts of brutality by law enforcement officers and other agents of the State are independently, promptly and thoroughly investigated, and that those responsible are brought to justice.[[24]](#footnote-24)

In practice, retaliation and impunity continue to leave many LGBT and intersex individuals without an effective remedy for redress.

1. **The importance of including sexual orientation and gender identity, and intersex status in the document**

It is critical that the Committee include explicit reference to sexual orientation, gender identity and intersex status in any list of explicitly named prohibited grounds for discrimination. State obligations under the ICCPR require protection against violence (including violence motivated by hatred or prejudice), preventing and punishing acts of torture and cruel, inhumane and degrading treatment against anyone, including LGBT and intersex people, decriminalizing consensual same-sex sexual acts, prohibiting discrimination based on sexual orientation, gender identity, and intersex status, and respecting freedom of expression, association and peaceful assembly.

The terms “sexual orientation and gender identity” have gained recognition in other international conventions and resolutions,[[25]](#footnote-25) as well as in many nations’ domestic laws that protect the rights of LGBT people. Intersex status has gained recognition in Australia and the Council of Europe,[[26]](#footnote-26) while the Inter-American Commission on Human Rights has made reference to “body diversity”. As this submission has shown, discrimination on the grounds of sexual orientation, gender identity or intersex status also take on specific importance in the context of the right to liberty and security.

To reflect this understanding, and to ensure proper guidance is given to States in their implementation of ICCPR obligations, it is paramount that any list of prohibited grounds of discrimination in the General Comment explicitly clarify that there can be no discrimination on the basis of sexual orientation, gender identity or intersex status.

1. **Conclusion**

The Human Rights Committee has been a strong leader in human rights, particularly ensuring the human rights of individuals discriminated against on the basis of their sexual orientation and gender identity. Due to the disproportionate impact violence, persecution and arbitrary arrest has on LGBT and intersex people and the mandate for ensuring the protection of security of all individuals, it is imperative the Human Rights Committee includes sexual orientation, gender identity and intersex status as express categories for protection in General Comment 35 regarding liberty and security of person.

1. Sexual orientation is understood 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. International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: http://www.refworld.org/docid/48244e602.html [accessed 1 May 2014]. [↑](#footnote-ref-1)
2. Gender identity is understood 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. International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: http://www.refworld.org/docid/48244e602.html [accessed 1 May 2014]. [↑](#footnote-ref-2)
3. Intersex status refers to congenital physical, hormonal or genetic features that are neither wholly male nor wholly female, a combination of female and male, or neither female nor male. Commonwealth of Australia Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013, <http://www.comlaw.gov.au/Details/C2013A00098>; WHO’OHCHR/UN Women/UNAIDS/UNDP/UNFPA/UNICEF “Eliminating forced, coercive and otherwise involuntary sterilization, An interagency statement (2014); Inter-American Commission on Human Rights, "The IACHR creates Rapporteurship to address issues of Sexual Orientation, Gender Identity, Gender Expression, and Body Diversity" (2013) http://www.oas.org/en/iachr/media\_center/PReleases/2013/094.asp [↑](#footnote-ref-3)
4. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/22/53 (2013) [↑](#footnote-ref-4)
5. *Toonen v. Australia*, Communication No. 488/1992 ¶ 8(3), 8(7), U.N. Doc. CCPR/C/50/D/488/1992 (1994). [↑](#footnote-ref-5)
6. General Recommendation No. 27 on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ¶13, U.N. Doc. CEDAW/C/GC/27, General Recommendation No. 28 on CEDAW, ¶18, U.N. Doc. CEDAW/C/GC/28; General Comment No. 13 on the Convention on the Rights of the Child (CRC) ¶55, U.N. Doc. CRC/C/GC/14 (May 29, 2013), [referencing only “sexual orientation”]; General Comment No. 15 on CRC, II(B), U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013) [↑](#footnote-ref-6)
7. Concluding Observations of the Human Rights Committee (Norway) U.N. Doc. CCPR/C/79/Add.27 (Nov. 4, 1993). [↑](#footnote-ref-7)
8. UN General Assembly, *International Covenant on Civil and Political Rights*, Ar1. 9(1) 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, *available at* http://www.refworld.org/docid/3ae6b3aa0.html. [↑](#footnote-ref-8)
9. Human Rights Committee, Draft general comment No. 35, Article 9: Liberty and security of person ¶ 7. [↑](#footnote-ref-9)
10. “Alarming figures: Transgender Europe’s Trans Murder Monitoring project unveils interactive map of more than 1,500 reported murders of trans people since January 2008,” Trans Murder Monitoring (TMM), May 1, 2014, <http://www.transrespect-transphobia.org/en_US/tvt-project/tmm-results.htm/idahot-2014>. [↑](#footnote-ref-10)
11. “Alarming figures: Transgender Europe’s Trans Murder Monitoring project unveils interactive map of more than 1,500 reported murders of trans people since January 2008,” Trans Murder Monitoring (TMM), May 1, 2014, <http://www.transrespect-transphobia.org/en_US/tvt-project/tmm-results.htm/idahot-2014>. [↑](#footnote-ref-11)
12. See Daily Post (21 March 2013) “Police save hermaphrodite from getting lynched in Sapele”, <http://oii.org.au/22107/nigeria-letter/> [↑](#footnote-ref-12)
13. Stanford Medicine (4 March 2014) In Uganda, offering support for those born with indeterminate sex, <http://scopeblog.stanford.edu/2014/03/04/in-uganda-offering-support-for-those-born-with-indeterminate-sex/> [↑](#footnote-ref-13)
14. As stated in the bill, the Anti-Homosexuality Act in Uganda is “An Act to prohibit any form of sexual relations between persons of the same sex; prohibit the promotion or recognition of such relations and to provide for other related matters.” Anti-Homosexuality Act 2014, Uganda. [↑](#footnote-ref-14)
15. Colin Stewart, “As many as 12 awaiting gay-sex trials in Uganda,” Erasing 76 Crimes (Apr. 25, 2014), *available at* http://76crimes.com/2014/04/25/as-many-as-12-awaiting-gay-sex-trials-in-uganda/. [↑](#footnote-ref-15)
16. Same-Sex (Prohibition) Act 2014 (Nigeria). [↑](#footnote-ref-16)
17. IGLHRC Calls for Nigerian Government to Investigate Attacks Against People Thought to be Gay” International Gay and Lesbian Human Rights Commission (February 13, 2014). [↑](#footnote-ref-17)
18. Discrim Laws/ Practices ¶ 47 p 15. [↑](#footnote-ref-18)
19. Concluding Observations of the Human Rights Committee, Ecuador, ¶ 12, U.N. Doc. CCPR/C/ECU/CO/5 (November 4, 2009). Concluding Observations of the Human Rights Committee, Kyrgyzstan, ¶ 19, U.N. Doc. CAT/C/KGZ/CO/2 (December 20, 2013); Concluding Observations of the Human Rights Committee, Peru, U.N. Doc. CAT/C/PER/CO/6 (December, 2012). [↑](#footnote-ref-19)
20. “Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development Opinions adopted by the Working Group on Arbitrary Detention,” Human Rights Council 13th Sess. ¶18 U.N. Doc. A/HRC/13/30/Add.1 (Mar. 2, 2010) *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-30-Add1.pdf>. [↑](#footnote-ref-20)
21. *Toonen v. Australia*, Communication No. 488/1992 ¶ 8(3), 8(7), U.N. Doc. CCPR/C/50/D/488/1992 (1994). [↑](#footnote-ref-21)
22. UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, available at: http://www.refworld.org/docid/4ef092022.html [accessed 30 April 2014] *citing Toonen v. Australia*, Communication No. 488/1992 ¶ 8(3), 8(7), U.N. Doc. CCPR/C/50/D/488/1992 (1994). [↑](#footnote-ref-22)
23. UN General Assembly, *International Covenant on Civil and Political Rights*, Ar1. 9(5) 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, *available at* http://www.refworld.org/docid/3ae6b3aa0.html. [↑](#footnote-ref-23)
24. Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law, Office of the High Commissioner for Human Rights (2012) *available at* <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf> *citing* Human Rights Committee, General Comment No. 20; Committee against Torture, General Comment No. 2. [↑](#footnote-ref-24)
25. *See for example*, Human Rights Council Res. 17/19, UN H.R.C. Res. 17th Sess. May 30 – June 17 2011, “Human rights, sexual orientation and gender identity” U.N. Doc., A/HRC/Res/17/19 (Jul. 14, 2011);General Recommendation No. 27 on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ¶13, U.N. Doc. CEDAW/C/GC/27, General Recommendation No. 28 on CEDAW, ¶18, U.N. Doc. CEDAW/C/GC/28; General Comment No. 13 on the Convention on the Rights of the Child (CRC) ¶55, U.N. Doc. CRC/C/GC/14 (May 29, 2013), [referencing only “sexual orientation”]; General Comment No. 15 on CRC, II(B), U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013). [↑](#footnote-ref-25)
26. Human Rights Comment by Nils Muižnieks, Human Rights Commissioner of the Council of Europe, "A boy or a girl or a person – intersex people lack recognition in Europe", <http://humanrightscomment.org/2014/05/09/a-boy-or-a-girl-or-a-person-intersex-people-lack-recognition-in-europe/>; Parliamentary Assembly of the Council of Europe, Resolution 1952 (2013), "Children’s right to physical integrity", <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20174&lang=en> [↑](#footnote-ref-26)