

Invisible, Isolated, and Ignored Human Rights Abuses Based on Sexual Orientation and Gender Identity/Expression in Colombia, South Africa and Malaysia



Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

® **Invisible, Isolated, and Ignored**

Human Rights Abuses Based on Sexual Orientation and Gender Identity/Expression
in Colombia, South Africa and Malaysia

© Copyright International Commission of Jurists, 2021

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to its headquarters at the following address:

International Commission of Jurists
P.O. Box 1270
Rue des Buis 3
1211 Geneva 1
Switzerland
t: +41 22 979 38 00
www.icj.org

Cover painting: Ames Sia

Invisible, Isolated, and Ignored
Human Rights Abuses Based on Sexual
Orientation and Gender Identity/Expression
in Colombia, South Africa and Malaysia

This report was researched and written by Michelle Yesudas, Nokukhanya Farisè and Rocío Quintero Martínez, with additional the contributions and review by Timothy Fish Hodgson. The ICJ is grateful to civil society partners in Colombia, Malaysia and South Africa for their contributions and support: Justice for Sisters, Legal Dignity and Queer Lapis.

Livio Zilli provided legal and policy review.

TABLE OF CONTENTS

I. INTRODUCTION..... 2

A. BACKGROUND AND OVERVIEW..... 2

B. THE REPORT 4

II. INTERNATIONAL, INCLUDING REGIONAL HUMAN RIGHTS LAW AND STANDARDS..... 7

A. THE INTERNATIONAL HUMAN RIGHTS LEGAL FRAMEWORK..... 7

B. THE INTER-AMERICAN HUMAN RIGHTS FRAMEWORK..... 11

C. THE AFRICAN FRAMEWORK..... 16

D. ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN)..... 18

III. COUNTRY-SPECIFIC CONTEXT..... 20

A. COLOMBIA 21

B. SOUTH AFRICA..... 30

C. MALAYSIA..... 39

I. INTRODUCTION

"As a lesbian woman who is born a Muslim, when I go out with my partner in public, I am always wary of the things that we do as a couple, even if it's just holding hands. I try my best to make it seem like we are just two good/close friends in the eyes of the public as well as when I'm around my family and heterosexual friends.

I am also very careful about exposing my sexual orientation to people or spaces that I don't feel safe with/in. This is to avoid anything that could potentially expose my sexual orientation, being arrested and persecuted under the state Shariah laws and being seen as a "criminal deviant", and for fear of being outed and disowned by my family.

The sudden social isolation due to the [COVID-19] lockdown has not affected me much mainly because of my privileges and the fact that I am an extremely introverted person – I love staying at home and working from home. However, since I am currently living in the same house with unsupportive parents and siblings who are LGBTQ-phobic and unaccepting of my identity, it is difficult in terms of emotional and mental-health. I feel so alone most of the time."

-Nani¹ 25 years old, Selangor, Malaysia²

This is the personal experience of Nani, a lesbian woman living in Selangor, Malaysia, and her story is emblematic of the experience of lesbian, gay, bisexual and transgender (LGBT)³ persons who are at risk of being arrested, mistreated and socially ostracized by their family. This story is one of the many from around the world where LGBT persons are facing criminalization, a lack of acceptance and/or continued violence in a climate of impunity exacerbated by the COVID-19 outbreak.

A. BACKGROUND AND OVERVIEW

Around the world, LGBT persons are victims of "serious and widespread human rights violations",⁴ including killings, torture, sexual violence and discrimination in health care.⁵ The UN Committee Against Torture, for example, has documented evidence of abuse and mistreatment of LGBT persons at the hands of police, prison guards and other law enforcement agents.⁶

In recent years, the International Commission of Jurists (ICJ) has also documented widespread acts of violence, abuse and mistreatment by police officers and other law enforcement officials

¹ Names have been changed to protect the identity of the interviewee.

² ICJ Interview 1, 11 November 2020, Selangor.

³ As has been stated by the Inter-American Court of Human Rights (IACtHR), the terminology to refer to the different groups of people who do not assume conventional or traditional gender roles "is not fixed and evolves rapidly". In the present report, the ICJ uses the most common acronym: LGBT. However, the use of this acronym does not imply a lack of acknowledgment of other manifestations of sexual orientation or gender identity expression. On this point see: IACtHR, Gender Identity, And Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Serie A No. 24, 24 November 2017, para 32.

⁴ High Commissioner for Human Rights, Discrimination and violence against individuals based on their sexual orientation and gender identity, A/HRC/29/23, 4 May 2015, para 5.

⁵ Id.

⁶ Committee against Torture, Concluding observations of the Human Rights Committee on the United States of America CAT/C/USA/CO/2, 25 July 2006, paras 32, 37; Committee against Torture, Concluding observations of the Human Rights Committee on Ecuador, CAT/C/EQU/CO/3, February 2006, para 17; Committee against Torture, Concluding observations of the Human Rights Committee on Argentina, CAT/C/ARG/CO/3, 1 November 2004, para. 6(g); Committee against Torture, Concluding observations of the Human Rights Committee on Egypt, CAT/C/EGY/CO/2, 23 December 2002, para. 5(e).

and agencies perpetrated against LGBT persons in several countries, including India⁷ and Myanmar.⁸

LGBT persons have been the target of State and non-State violence, with such violence taking different forms. In many countries, the law is an instrument to marginalize and justify violence against LGBT individuals.⁹ Some legal provisions explicitly discriminate against LGBT persons for example, by prohibiting consensual same-sex sexual relationships and all non-conforming expression of sexual orientation and gender identity.¹⁰ Other laws, despite their neutral language,¹¹ are enforced in a discriminatory manner to target LGBT persons.

In other countries, while legislative protections may provide “formal equality”, LGBT persons experience other forms of insidious discrimination, violence and abuse because of their sexual orientation, gender identity and expression. Such human rights abuses cannot be identified in isolation, but only by taking into account the attitudes, acts and omissions of the general public and State institutions, including its law enforcement agencies and the courts.

Additionally, the COVID-19 pandemic has had a devastating and disproportionate impact¹² on LGBT persons across the world.¹³ The pandemic's adverse impact is directly connected to the inequality that LGBT persons experience in several aspects of their lives due to discrimination against their sexual orientation and gender identity. At the same time, such a detrimental impact is also connected to other factors of LGBT persons’ identities, such as disability, age, ethnicity, national origin, health status, socioeconomic status, among others.¹⁴

The pandemic has highlighted pre-existing human rights abuses that LGBT persons faced, such as those resulting from transphobic State structures, from a lack of access to healthcare services, and from their daily experiences of being targeted for discrimination and violence because of their real or perceived sexual orientation, gender identity, or expression. Furthermore, in some cases, it has been established that COVID-19 related measures have reproduced and exacerbated previous “patterns of social exclusion and violence” that LGBT persons were already experiencing.¹⁵

During COVID-19, the personal stories of LGBT persons across the world have shown that, despite the differences in domestic laws, regional mechanisms and legal status, LGBT persons face many common problems when seeking to access justice, healthcare and legal protections.

⁷ ICJ, Living with Dignity: Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work, and Public Spaces in India, June 2019. Available at: <https://www.icj.org/india-lgbtq-persons-face-discrimination-in-housing-work-and-public-spaces-despite-increased-legal-recognition-new-icj-report/>.

⁸ ICJ, In the shadows: Systemic Injustice Based on Sexual Orientation and Gender Identity/Expression in Myanmar, November 2019. Available at: <https://www.icj.org/myanmars-criminal-law-and-justice-system-perpetuates-stigmatization-discrimination-and-human-rights-violations-against-its-lgbtq-people-new-report-finds/>.

⁹ Graeme Reid, International Law and the Uncertainty of Rights of LGBT People, Human Rights Watch, 6 September 2014. Available at: <https://www.hrw.org/news/2014/09/06/international-law-and-uncertainty-rights-lgbt-people>

¹⁰ See for example, laws that criminalize ‘homosexuality’ and specifically outlaw homosexual relationships in Brunei, Burundi and Cameroon.

¹¹ See for example, the ‘Unnatural Offences’ of Malaysia and Singapore in their Penal Codes, where consensual oral sex and anal sex has been prohibited, however, gay men continue to be the primary target when being charged in court, when in fact, all sexual acts deemed unnatural, even heterosexual relationships fall under these provisions.

¹² Office of the High Commissioner for Human Rights, COVID-19: The suffering and resilience of LGBT persons must be visible and inform the actions of States, Statement by human rights experts on the International Day against Homophobia, Transphobia and Biphobia, 17 May 2020. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25884&LangID=E>

¹³ Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity, Violence and discrimination based on sexual orientation and gender identity during the coronavirus disease (COVID-19) pandemic, A/75/258, 28 July 2020, para 7.

¹⁴ Office of the High Commissioner for Human Rights, COVID-19: The suffering and resilience of LGBT persons must be visible and inform the actions of States, Statement by human rights experts on the International Day against Homophobia, Transphobia and Biphobia, 17 May 2020. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25884&LangID=E>

¹⁵ Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity, Violence and discrimination based on sexual orientation and gender identity during the coronavirus disease (COVID-19) pandemic, A/75/258, 28 July 2020, para 7.

Their stories have also demonstrated patterns of violence perpetrated by the police and other law enforcement officials, and discriminatory treatment at the hands of legal systems.

This report analyzes different aspects of violence experienced by LGBT persons, despite the different levels of protection provided by the law. To illustrate this complex pattern, this report discusses three systemic and widespread human rights violations experienced by LGBT people in all regions of the world: violence against LGBT persons, criminalization of consensual same-sex relations and the gaps within legislation providing for legal recognition of gender identity and its inadequacy. To do so, the report provides a window into the human rights situation of LGBT persons during the COVID-19 pandemic in three countries Colombia, South Africa and Malaysia.

It should be noted that the experiences recounted, and the testimonies collected in the course of preparing this report, are anecdotal. They have been collated through interviewing and speaking to human rights defenders around the world, who have experienced the pandemic as an event that has, to some extent, exacerbated the human rights abuses they already faced in their country. In addition, the report does not aim to provide a comparison of “danger” experienced by LGBT persons in different countries.

B. THE REPORT

The report is divided into two sections. The first section contains an overview of States’ legal obligations under the international, including regional, human rights framework applicable in relation to sexual orientation, gender expression and gender identity. This first section emphasizes, in particular, that sexual orientation, gender expression and gender identity are fundamental characteristics protected under the international human rights framework.

The second section examines the situation of LGBT persons in three countries in three continents: Colombia, South Africa and Malaysia. For each country, this second section analyzes the salient provisions of the domestic legal framework in light of their respective obligations under international, including regional, human rights law and standards, such as those affirmed by regional mechanisms, in relation to sexual orientation, gender identity and gender expression. Additionally, the report offers some key recommendations to advance respect for and the protection and fulfilment of the human rights of LGBT persons.

In the light of the above, this briefing aims to:

- i. Provide support to the work of LGBT human rights defenders working on these and other human rights issues.
- ii. Offer an overview of different contexts and issues through a human rights-based analysis to support lawyers working to enhance protection for the human rights of LGBT persons within their challenging domestic legal frameworks.
- iii. Assist policymakers to better understand the impact of law and policy on the human rights of LGBT persons globally.

In this regard, albeit this report focuses on three countries with strikingly different domestic legal frameworks and contexts, each with its own distinct regional and domestic protection mechanisms, some common themes have emerged from the research undertaken, as well as from the testimonies of LGBT human rights activists in their respective countries. The following common themes have been identified:

- i. The many forms through which stigma, discrimination and violence are directed against LGBT persons manifest themselves along a continuum, it is not attributable to the laws, culture, or legal system alone with responsibility attributable to different State institutions, such as the police and other law enforcement agents, as well as to non-State actors -- and manifestations that occur in the public and the private sphere, and that are reflected in digital spaces.
- ii. Despite wide gaps between the law and practical protections for the human rights of LGBT persons on the ground, **Malaysia**, **South Africa** and **Colombia** are all bound by their legal obligations under international human rights law to respect, protect and fulfil human rights, including the right to life; the right to be free from torture or other ill-treatment; the right to freedom from discrimination; the right to equality before the law and to equal protection of the law without discrimination; the right to freedom of expression; the right to the highest attainable standard of physical and mental health; the right to private and family life; and the right to access to justice and effective remedies.

Furthermore, the domestic legal system in **South Africa** and **Colombia** provide specific human rights protections for LGBT persons. The jurisprudence of their constitutional courts, in particular, have guaranteed and protected different human rights of LGBT persons, and both countries have promulgated protective legislation on the basis of equality and non-discrimination. Remarkably, the South African Constitution specifically proscribes unfair discrimination based on sexual orientation.¹⁶ However, in practice, the arm of the law does not reach far enough to provide effective protections for LGBT persons.

Human rights protections for LGBT persons enshrined in domestic and international law are illusory in practice when there are no effective domestic mechanisms to guarantee their respect and implementation. This is all the more concerning when violence and discriminatory actions emanate from State agents, such as public servants, the police and other law enforcement officials. This is because, among other negative consequences, these behaviours from State agents add to the deepening lack of trust of LGBT persons in the justice system. In addition, they foment a climate of impunity in society at large in relation to discrimination and violence against LGBT persons, whether at the hands of State or non-State actors. While civil society organizations have attempted to document and monitor violence and discrimination against LGBT persons and to offer support, these measures, along with other progressive policies and practices, are not enough to address the systemic discrimination that targets LGBT persons.

Additionally, while **Malaysia** shows the adverse impact of a discriminatory legal system, **Colombia** and **South Africa** prove that a progressive legal system may be insufficient. This is because "good policies and progressive constitutions are not enough to shape a society's values and sustain the clear rule of law".¹⁷ Therefore, challenging social norms and prejudice, as well as long-term changes in societal attitudes are necessary, alongside the development of effective legislative protections.

This report paper is to be read together with previous ICJ publications and materials. The ICJ has been working closely with LGBT activists and human rights defenders from around the

¹⁶ South African Constitution, section 9(3).

¹⁷ Z Devji, Forging Paths for the African Queer: Is There an 'African' Mechanism for Realizing LGBTIQ Rights? Journal of African Law 60, no. 3, 2016, page 343 to 463. Available at: <https://n9.cl/ne77>

world to protect and promote their work and the human rights LGBT persons globally. In November 2006, the ICJ, together with the International Service for Human Rights and a distinguished group of human rights experts, developed the Yogyakarta Principles, an international set of legal principles on the application of international law to human rights violations based on sexual orientation and gender identity.¹⁸

The ICJ has also issued numerous documents regarding the respect, protection and fulfilment of the human rights of LGBT persons. In particular, its Practitioners' Guide No. 4 (Sexual Orientation, Gender Identity and International Human Rights),¹⁹ and Practitioners' Guide No. 11 (Refugee Status Claims Based on Sexual Orientation and Gender Identity).²⁰

Other ICJ relevant documents include the comparative law casebook on sexual orientation, gender identity,²¹ as well as the ICJ reports on India, covering the period when the 'unnatural offences Act' was in force,²² and the decriminalization of consensual same-sex sexual relations by the Supreme Court²³. The organization has also documented human rights violations experienced by LGBT persons in Myanmar, in the report, "In the Shadows: Systemic Injustice Based on Sexual Orientation and Identity/Expression in Myanmar".²⁴

More recently, the ICJ has released a global report on COVID-19 and the right to health, highlighting the impact of the epidemic on different sectors of society, including migrants, refugees and stateless persons, older persons, women and girls and LGBT persons.²⁵

Finally, in 2020, the ICJ hosted several activities addressing the human rights of LGBT persons. For instance, in June and July 2020, the ICJ interviewed 13 LGBT human rights defenders from around the world about Pride Month during the COVID-19.²⁶ Similarly, in November 2020, an online discussion was held with activists in observance of Trans Remembrance Day²⁷ to commemorate the lives lost due to violence of transgender people. These interviews, and further ones conducted by the ICJ on a one-on-one basis since then, have contributed to a global scoping exercise on the impact of COVID-19 and States' responses to it on the human rights of LGBT persons worldwide.

¹⁸ The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, undertook a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States' human rights obligations. In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, in Indonesia, to outline a set of international principles relating to sexual orientation and gender identity. The result was The Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity: a universal guide to human rights which affirm binding international legal standards with which all States must comply. See: <https://www.icj.org/yogyakarta-principles/>

¹⁹ Available at: <https://www.icj.org/practitioners-guide-no-4-sexual-orientation-gender-identity-and-international-human-rights-law/>

²⁰ Available at: <https://www.icj.org/refugee-status-claims-based-on-sexual-orientation-and-gender-identity-icj-practitioners-guide-n-11-launched/>

²¹ See: ICJ, Gender Identity, and Justice: A Comparative Law Casebook, a collection of domestic cases addressing legal issues relating to sexual orientation and gender identity, 2011. Available at: <https://www.icj.org/sexual-orientation-gender-identity-and-justice-a-comparative-law-casebook/>

²² ICJ, Unnatural Offences: Obstacles to Justice in India Based on Sexual Orientation and Gender Identity, February 2017. Available at:

<https://www.icj.org/wpcontent/uploads/2017/02/India-SOGI-report-Publications-Reports-Thematic-report2017-ENG.pdf>

²³ ICJ, Living with Dignity: Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work, and Public Spaces in India, June 2019. Available at: <https://www.icj.org/india-lgbtq-persons-face-discrimination-in-housing-work-and-public-spaces-despite-increased-legal-recognition-new-icj-report>

²⁴ Available at: <https://www.icj.org/myanmars-criminal-law-and-justice-system-perpetuates-stigmatization-discrimination-and-human-rights-violations-against-its-lgbtq-people-new-report-finds/>

²⁵ ICJ, Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses, September 2020. Available at: <https://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>

²⁶ To watch the recording of these interviews, please see: ICJ ran a SOGIE Facebook Live Campaign for Pride Month, 5 July 2020. Available at: <https://www.icj.org/icj-ran-a-sogie-facebook-live-campaign-for-pride-month/>

²⁷ See for recording of this panel discussion: <https://fb.watch/1XmjDeEboA/>

II. INTERNATIONAL, INCLUDING REGIONAL HUMAN RIGHTS LAW AND STANDARDS

The vast majority of human rights treaties do not make explicit reference to sexual orientation or gender identity and expression. However, UN human rights treaty bodies, among others, have repeatedly interpreted international human rights treaties as requiring States to respect, protect and fulfil the human rights of LGBT persons.

In addition, in regard to the human rights of LGBT persons, several other international instruments, including declarations and principles, affirming States' obligations under international law have been developed and adopted. The human rights of LGBT persons are not "new" rights, but rights that inhere to any human being by virtue of their humanity, such as, for example, the rights to equality before the law, non-discrimination and equal protection of the law,²⁸ which are everyone's birth right.

In light of the above, it is clear that, under the international human rights legal framework, sexual orientation, gender identity and expression (SOGIE) may not be used as legitimate grounds justifying any restriction or limitation on the exercise and enjoyment of human rights, such as the right to life,²⁹ the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment³⁰ or the right to health.³¹

This chapter continues with a brief summary of the international human rights legal framework in relation to sexual orientation, gender identity and expression. The first part of the chapter discusses some key developments at the international level, mainly within the UN human rights system. The second part examines the key instruments and developments of three regional human rights systems: the Inter-American system, the African system and the Association of Southeast Asian Nations.

A. THE INTERNATIONAL HUMAN RIGHTS LEGAL FRAMEWORK

UN human rights treaty bodies

The Human Rights Committee (HRC) has ruled that Article 26 of the International Covenant on Civil and Political Rights³² (ICCPR) prohibits discrimination based on sexual orientation.³³ States

²⁸ See: Universal Declaration of Human Rights, Article 1; On equality, see: Article 7 of the Universal Declaration of Human Rights; Articles 2, 4 (1), and 26 of the International Covenant on Civil and Political Rights; Article 2 of the International Covenant on Economic, Social and Cultural Rights; Article 2 of the Convention on the Rights of the Child; Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 3 of the Convention on the Rights of Persons with Disabilities, on non-discrimination, see: Article 7 of the Universal Declaration of Human Rights; Article 26 of the International Covenant on Civil and Political Rights.

²⁹ Among others, see: Universal Declaration of Human Rights, Article 3; International Covenant on Civil and Political Rights, Article 6; American Convention on Human Rights, article 4; African Charter on Human and Peoples' Rights, article 4.

³⁰ Among others, see: Universal Declaration of Human Rights, article 5; International Covenant on Civil and Political Rights, Article 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2; American Convention on Human Rights, Article 5; African Charter on Human and Peoples' Rights, Article 5.

³¹ Among others, see: Universal Declaration of Human Rights, article 25; International Covenant on Economic, Social and Cultural Rights, Article 12; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Article 10; African Charter on Human and Peoples' Rights, Article 16; African Charter on the Rights and Welfare of the Child, Article 14.

³² Article 26 provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

³³ Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992, 31 March 1994; para 8; Human Rights Committee, *Edward Young v. Australia*, Communication No 941/2000, CCPR/C/78/D/941/2000, 18 September 2003, para 10.4. See also: Human Rights Committee, *X v. Colombia*, Communication No 1361/2005, CCPR/C/89/D/1361/2005, 14 May 2007, para 7.2.

therefore have a legal obligation to guarantee the human rights enshrined in the ICCPR without discrimination on the basis of sexual orientation.³⁴ In its landmark *Toonen* decision, the Human Rights Committee interpreted the word “sex” in Articles 2, paragraph 1, and 26 of the ICCPR to include sexual orientation.³⁵

The Committee on Economic, Social and Cultural Rights (CESCR) has confirmed that, under the International Covenant on Economic, Social and Cultural Rights (ICESCR), “sexual orientation” and “gender identity” are prohibited grounds of discrimination.³⁶ Likewise, the Committee on the Elimination of Discrimination against Women have used the concept of “intersectionality”³⁷ to recognize that discrimination against women, which is based on gender and sex, is inextricably connected with other prohibited grounds of discrimination, including “sexual orientation and gender identity”.³⁸

In addition, similar holdings affirming that sexual orientation and gender identity are both prohibited grounds of discrimination under international human rights law are found in decisions of other UN human rights treaty bodies, including the Committee on the Rights of the Child³⁹ and the Committee Against the Torture.⁴⁰

The Yogyakarta Principles and Yogyakarta Principles +10

A set of legal principles on the application of international law to human rights violations based on sexual orientation and gender identity and expression were developed and clarified in 2007 by human rights specialists, including the International Commission of Jurists.⁴¹ These

³⁴ Human Rights Committee, Consideration of reports submitted by states parties under Article 40 of the Covenant, United States of America, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para 25.

See also: Human Rights Committee, Consideration of reports submitted by states parties under Article 40 of the Covenant, Chile, UN Doc: CCPR/C/CHL/CO/5, 17 April 2007, para 16.

³⁵ The Human Rights Committee sets out the following: “The State party has sought the Committee's guidance as to whether sexual orientation may be considered an “other status” for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.” See: Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992, 31 March 1994, para 8.7.

See also: ICJ, Practitioners Guide No.4: Sexual Orientation, Gender Identity and International Human Rights Law, 2009. Available at: <https://www.icj.org/wpcontent/uploads/2009/07/sexual-orientation-international-law-Practitioners-Guide-2009-eng.pdf>; ICJ, SOGI Casebook. Available at: <https://www.icj.org/sogi-casebook-introduction/>.

³⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, 11 August 2000, para 18; Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, 2 July 2009, para 32.

³⁷ On this point, the Working Group on discrimination against women in law and in practice has said: “Human rights treaties prohibit discrimination on a number of grounds including sex, race, and national or social origin. Notwithstanding, women are often discriminated against not only because of their sex and gender relations, but also because of their race or status in society or other defining characteristics. Intersectional/multiple forms of discrimination thus arise from a combination of discriminatory treatments based on various grounds which produce compounded discrimination. It takes into account historical, social and political contexts and thus recognises the unique experience of women who have been targets of discrimination on more than one ground. Women living in poverty, migrant women and non-citizens, women with disabilities, rural and indigenous women, minority women, including LBT women, older women, girls, women in conflict and post-conflict situations, including women victims of gross human rights violations, refugee women, internally displaced and stateless women and women human rights defenders are often victims of intersectional/multiple forms of discrimination”. See: Submitting information to the Working Group on discrimination against women in law and in practice, available at: <http://www.esem.org.mk/en/index.php/important-news/2168-un-working-group-on-discrimination-against-women-in-law-in-practice-overview-submission-of-information-cases-to-the-working-group.html>

³⁸ Committee on the Elimination of Discrimination Against Women, General recommendation No. 27 on older women and protection of their human rights, CEDAW/C/GC/27, 16 December 2010, para 13.

³⁹ Committee on the Rights of the Child, General Comments No. 4 (CRC/GC/2003/4), 2003, para. 6, and No. 9 (CRC/C/ GC/9), 2007, para 8.

⁴⁰ Committee against Torture, General Comments No. 2: Implementation of article 2 by States parties, CAT/C/GC/2, 24 January 2008, para 21.

⁴¹ The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, undertook a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States’ human rights obligations. In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, in Indonesia, to outline a set of international principles relating to sexual orientation and gender identity. The result was The Yogyakarta Principles. More information available at: <https://www.icj.org/yogyakarta-principles/>

principles are known as the “Yogyakarta Principles”. The principles were complemented in 2017 by the “Yogyakarta Principles plus 10”.⁴² Collectively, they provide further detail on States’ binding obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics.

Importantly, the Principles recognize that LGBT rights are human rights. They also emphasize that States’ obligations under international human rights law apply in relation to sexual orientation, gender identity, gender expression and sex characteristics and the importance of clarifying “State obligations under international human rights law, in order to promote and protect all human rights for all persons on the basis of equality and without discrimination.”⁴³

Over the years, the Yogyakarta Principles have played a key role in promoting “legal reform, policy change, judicial decision, political activism and social awareness”.⁴⁴ They have also been used to galvanize calls on “governments to meet their obligations under International Human Rights Law”⁴⁵ as far as the human rights of LGBT persons are concerned.

Since their adoption, domestic and regional courts around the world have relied on and referenced the Yogyakarta Principles and the Yogyakarta Principles + 10 when delivering seminal judgments on the protection of LGBT persons. Examples include:

On the issue of legal gender recognition, the Supreme Court of Nepal in the case of Sunil Babu Pant and Others v Nepal Government and Others (2007)⁴⁶ referred to and adopted the Yogyakarta Principles’ definition of sexual orientation and gender identity, recognizing the ‘Third Gender’. Subsequently, in 2015, Nepal amended its constitution and under its provision for equality (Article 18(3)) and right to social justice (Article 42 of the Nepal Constitution) “gender and sexual minorities” have been included as a protected category.⁴⁷

In 2016, the Court of Appeal in Botswana referenced the Yogyakarta Principles and ordered the registration of an LGBTI organization, LEGABIBO. LEGABIBO’s registration as an organization had previously been rejected by the Department of Civil and National Registration of Botswana, on the grounds that the constitution did not recognize homosexuals and found their objectives unlawful.⁴⁸

In India’s landmark judgment on the decriminalization of consensual same-sex sexual relations in the Indian Penal Code, the Indian Supreme Court relied on the Yogyakarta Principles in 2018.⁴⁹ In June 2018, in the Netherlands, the District Court of Roermond referred to the Yogyakarta Principles and precedents from India and Nepal when providing for the self-identification and the recognition of the “third gender”.⁵⁰

In 2018, referring to the Yogyakarta Principles and the Yogyakarta Principles +10, the Inter American Court advised Costa Rica that it should ensure that same-sex couples enjoy full family rights, including to marriage. The Yogyakarta Principles were relied upon in a communication

⁴² The Yogyakarta Principles plus 10, available at <https://yogyakartaprinciples.org/principles-en/yp10/>.

⁴³ Id., Introduction.

⁴⁴ M Cabral Grinspan and J Ehart, Introduction to the YP+10, in: State Sponsored Homophobia, International Lesbian, Gay, Bisexual, Trans and Intersex Association, 2019. Available at: <https://ilga.org/ilga-launches-state-sponsored-homophobia-2019>

⁴⁵ Id.

⁴⁶ Sunil Babu Pant and others v Nepal Government and Others, 2 NJA Law Journal 261 (2008) (Nepal).

⁴⁷ Human Rights Watch, How Did Nepal Become a Global LGBT Rights Beacon?, 11 August 2017. Available at:

<https://www.hrw.org/news/2017/08/11/how-did-nepal-become-global-lgbt-rights-beacon>

⁴⁸ Attorney General of Botswana v. Thuto Rammoge & others, Court of Appeal Civil Case No. CACGB-128-14, 78.

⁴⁹ Navtej Singh Johar et al. v Union of India and Others, (2018) 10 SCC 1-

⁵⁰ Rechtbank Limburg, 28-05-2018, C/03/232248 / FA RK 17-687 (in Dutch) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBLIM:2018:4931>

see also: Human Rights Watch, Dutch Court Signals Need for Gender Neutral Option, 1 June 2018. Available at: <https://www.hrw.org/news/2018/06/01/dutch-court-signals-need-gender-neutral-option>

to the UN Human Rights Committee as calling for legal recognition of gender identity, regardless of marital status, and were referenced by the Inter-American Court in its decision on the case in 2017.⁵¹

UN Human Rights Council

In 2011, the UN Human Rights Council adopted a resolution on “Human rights, sexual orientation and gender identity”,⁵² the first UN human rights resolution on sexual orientation and gender identity. The resolution expressed “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity”.⁵³

Subsequently, in 2016, the Human Rights Council decided to appoint an Independent Expert “on protection against violence and discrimination based on sexual orientation and gender identity”⁵⁴ (IE SOGI). The mandate of the IE SOGI includes assessing:

“the implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, while identifying both best practices and gaps”.⁵⁵

With respect to this, the work of the IE SOGI has focused, among other things, on:

“bringing to light the evidence of the inextricable links existing between stigma, violence and discrimination, as well as the cycles of exclusion and poverty to which many LGBT and gender-diverse persons are condemned if they decide to live freely and openly according to their sexual orientation and gender identity.”⁵⁶

In June 2020, the IE SOGI released the “ASPIRE Guidelines on COVID-19 response and recovery free from violence and discrimination based on sexual orientation and gender identity”. The guidelines recommend six fundamental actions, identified as good practices in the “design, implementation and the evaluation of measures of the pandemic response and recovery”.⁵⁷

⁵¹ IACTHR, Gender Identity, And Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Serie A No. 24, 24 November 2017.

⁵² Human Rights Council, Human rights, sexual orientation and gender identity, A/HRC/17/19, 14 July 2011, adopted on 17 June 2011.

⁵³ Id, 4th preambular paragraph.

⁵⁴ Human Rights Council, Protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/RES/32/2, 15 July 2016, para 3.

⁵⁵ id, para 3(a).

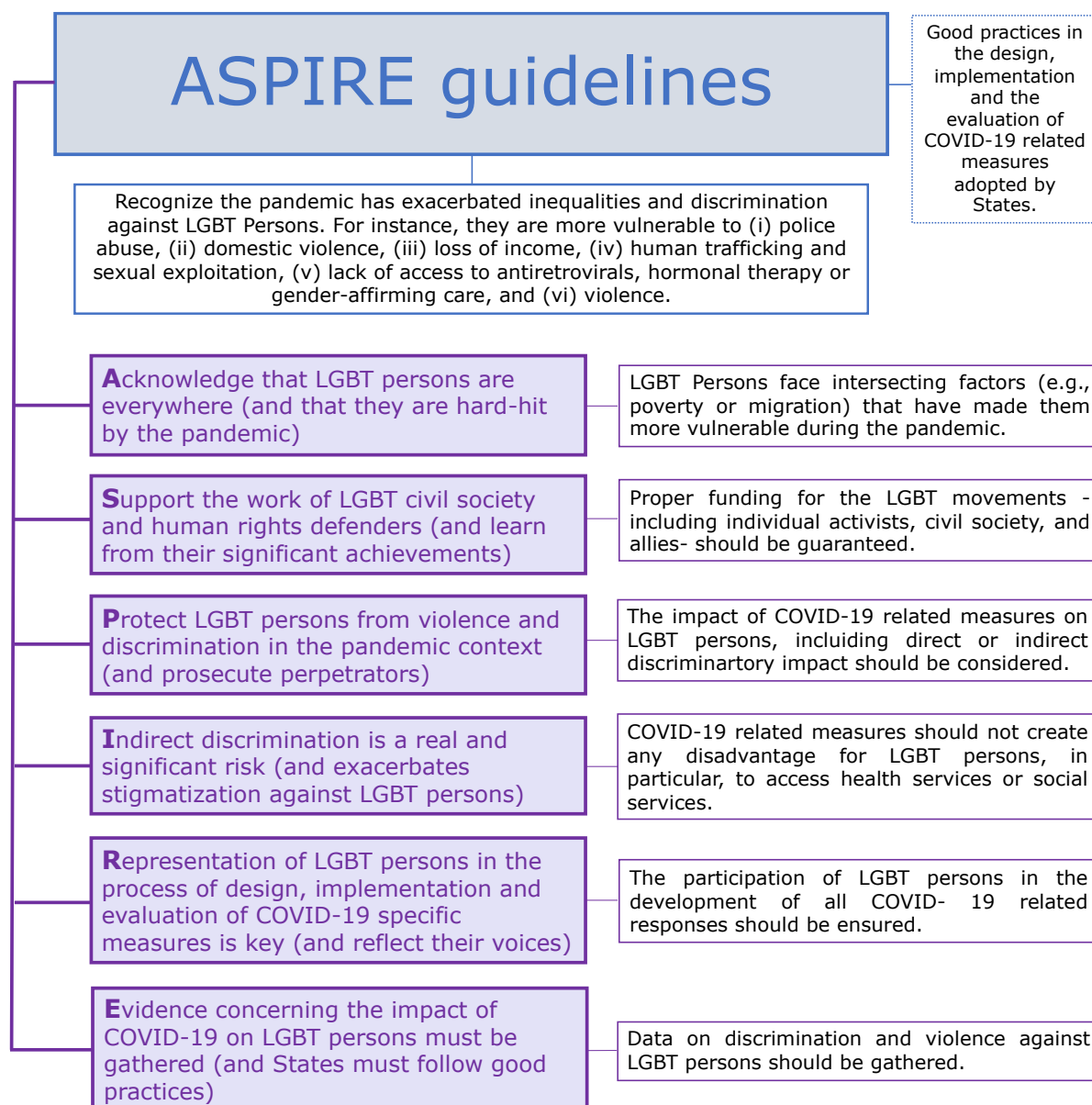
⁵⁶ Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity, Violence and discrimination based on sexual orientation and gender identity during the coronavirus disease (COVID-19) pandemic, A/75/258, 28 July 2020, para 10.

⁵⁷ Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity, Guidelines for an LGBT-inclusive COVID-19 response, 18 June 2020- Available at:

https://www.ohchr.org/Documents/Issues/SexualOrientation/SOGI-GuidelinesCOVID19_EN.docx

See also: Office of the High Commissioner for Human Rights, COVID-19: The suffering and resilience of LGBT persons must be visible and inform the actions of States, Statement by human rights experts on the International Day against Homophobia, Transphobia and Biphobia, 17 May 2020. Available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25884&LangID=E>



Graph 1. Source: own elaboration. Based on *ASPIRE Guidelines on COVID-19 response and recovery free from violence and discrimination based on sexual orientation and gender identity (2020)*.

B. THE INTER-AMERICAN HUMAN RIGHTS FRAMEWORK

In recent years, legal protection of the human rights of LGBT persons has improved in the Americas.⁵⁸ In South America, for instance, countries such as Argentina, Brazil, Colombia, Ecuador and Uruguay now recognize same-sex marriage.⁵⁹ With the exception of Guyana, homosexuality is not illegal in Latin American countries.⁶⁰ Some countries have even adopted affirmative measures to protect the human rights of LGBT people. By way of example, in September 2020, Argentina established that 1% of the public servants should be transgender people.⁶¹

⁵⁸ In this regard, see: Corte IDH, Caso Duque Vs. Colombia, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 26 de febrero de 2016, Serie C No. 310, para 112 and ff.

⁵⁹ Equaldex, Marriage. Available at: <https://www.equaldex.com>

⁶⁰ Equaldex, Homosexuality. Available at: <https://www.equaldex.com>

⁶¹ Portal Oficial del Estado Argentino, Cupo laboral para personas travestis, transexuales y transgénero. Available at: <https://www.argentina.gob.ar/justicia/derechofacil/leysimple/cupo-laboral-personas-travestis-transexuales-transgenero>

In some countries, domestic legal protection of the human rights of LGBT persons has been influenced by the Inter-American system for the protection of human rights. For instance, in June 2019, the Ecuadorian Constitutional Court ruled that same-sex couples had the right to get married on the same terms as heterosexual couples. To draw this conclusion, the Constitutional Court relied on the jurisprudence of the Inter-American Court of Human Rights.⁶²

B.1. The American Convention on Human Rights

Article 1.1. of the American Convention on Human Rights reads as follows:

“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

Therefore, any discriminatory treatment in the exercise of human rights is, *per se*, a violation of the treaty.⁶³ In addition, Article 24 of the Convention guarantees the right of all persons to equality before the law and the right to equal protection of the law without discrimination.

SOGIE is a protected category

The Inter-American Court of Human Rights has affirmed that States have the duty to refrain from actions that create discriminatory situations, *de facto* or *de jure*.⁶⁴ In addition, States have an obligation to design and implement “affirmative measures” to address discriminatory circumstances faced by some sectors of the population.⁶⁵

Importantly, the Inter-American Court of Human Rights has held that sexual orientation and gender identity are categories protected by the American Convention on Human Rights,⁶⁶ and may not be grounds on which any Convention right is denied or restricted.⁶⁷ To put it simply, the Convention “prohibits any discriminatory law, act or practice based on a person’s sexual orientation or gender identity”.⁶⁸

For example, in its judgment in the case of *Atala Riffo y niñas versus Chile*, the Inter-American Court held that the sexual orientation of the child’s parents may not be considered in itself a

⁶² Corte Constitucional del Ecuador, Sentencia 11-18-CN/19, 12 June 2019. Available at: <http://sgc.corteconstitucional.gob.ec:8494/FichaRelatoria.aspx?numdocumento=11-18-CN/19>

⁶³ Corte IDH, Caso Atala Riffo y niñas Vs. Chile, Fondo, Reparaciones y Costas, Sentencia de 24 de febrero de 2012, Serie C No. 239, para 78.

⁶⁴ Id, para 80.

⁶⁵ Corte IDH, Caso Atala Riffo y niñas Vs. Chile, Fondo, Reparaciones y Costas, Sentencia de 24 de febrero de 2012, Serie C No. 239, para 80; Corte IDH, Caso Flor Freire Vs. Ecuador, Excepción Preliminar, Fondo, Reparaciones y Costas, Sentencia de 31 de agosto de 2016, Serie C No. 315, para 110.

⁶⁶ IACTHR, Gender Identity, And Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Serie A No. 24, 24 November 2017, para 68; Corte IDH, Caso Duque Vs. Colombia, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 26 de febrero de 2016, Serie C No. 310, para 104; Corte IDH, Caso Atala Riffo y niñas Vs. Chile, Fondo, Reparaciones y Costas, Sentencia de 24 de febrero de 2012, Serie C No. 239, para 91.

⁶⁷ Corte IDH, Caso Atala Riffo y niñas Vs. Chile, Fondo, Reparaciones y Costas, Sentencia de 24 de febrero de 2012, Serie C No. 239, para 93.

⁶⁸ IACTHR, Gender Identity, And Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Serie A No. 24, 24 November 2017, para 68.

valid criterion to deny legal custody of a minor child.⁶⁹ The Court also indicated that children cannot be discriminated against on the ground of the sexual orientation of their parents.⁷⁰

The Court has explained that the protection of sexual orientation and gender identity includes respect for one's private life and one's life plan.⁷¹ In its judgment in the case of *Flor Freire versus Ecuador*, the Inter-American Court noted that the prohibition of discrimination on the ground of sexual orientation covered all the elements of personal development. This includes, for example, the choice of a career in the military.⁷²

Protection also extends to "real or self-perceived identity",⁷³ and to "the identity perceived externally, regardless of whether or not that perception corresponds to the reality".⁷⁴ Furthermore, the Court has also stressed that social intolerance and stereotypes are not valid justifications for the perpetuation of discrimination based on sexual orientation.⁷⁵ On the contrary, States must take action to promote more inclusive societies.⁷⁶

The State has a duty to protect LGBT persons from violence

The Inter-American Court has spelt out the positive duty of States to protect LGBT persons. In *Azul Rojas Marín y Otra versus Peru*, the Court emphasized the State's duty to take action to prevent private individuals, acting with the authorization or acquiescence of the State, from committing violent acts or hate crimes against LGBT persons,⁷⁷ or otherwise from creating, perpetuating or promoting discrimination.⁷⁸

Notably, the Court also ordered several reparation measures to improve the protection of LGBT persons from violence. These measures include the conduct of criminal investigations;⁷⁹ the creation of LGBT protocols for the investigation and prosecution of crimes committed against LGBT persons;⁸⁰ the training of State agents (mainly, law enforcement officials, e.g. police officers, the prosecutors and judges) on sexual orientation and gender identity issues; and the design and implementation of a data system on violence against LGBT persons.⁸¹

The right to identity and recognition before the law

⁶⁹ Id, para 110.

See also: Corte IDH, Caso Ramírez Escobar y otros Vs. Guatemala, Fondo, Reparaciones y Costas, Sentencia de 9 de marzo de 2018, Serie C No. 351, para 301.

⁷⁰ Corte IDH, Caso Atala Riffo y niñas Vs. Chile, Fondo, Reparaciones y Costas, Sentencia de 24 de febrero de 2012, Serie C No. 239, para 151 to 155.

⁷¹ Corte IDH, Caso Atala Riffo y niñas Vs. Chile, Fondo, Reparaciones y Costas, Sentencia de 24 de febrero de 2012, Serie C No. 239, para 133 to 136; Corte IDH, Caso Flor Freire Vs. Ecuador, Excepción Preliminar, Fondo, Reparaciones y Costas, Sentencia de 31 de agosto de 2016, Serie C No. 315, para 119.

⁷² Corte IDH, Caso Flor Freire Vs. Ecuador, Excepción Preliminar, Fondo, Reparaciones y Costas, Sentencia de 31 de agosto de 2016, Serie C No. 315, para 136.

⁷³ IACTHR, Gender Identity, And Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Serie A No. 24, 24 November 2017, para 79.

See also: Corte IDH, Caso Flor Freire Vs. Ecuador, Excepción Preliminar, Fondo, Reparaciones y Costas, Sentencia de 31 de agosto de 2016, Serie C No. 315, para 103 and 120 to 122.

⁷⁴ IACTHR, Gender Identity, And Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Serie A No. 24, 24 November 2017, para 79.

⁷⁵ Corte IDH, Caso Atala Riffo y niñas Vs. Chile, Fondo, Reparaciones y Costas, Sentencia de 24 de febrero de 2012, Serie C No. 239, para 119.

⁷⁶ Id, para 120.

⁷⁷ Corte IDH, Caso Azul Rojas Marín y otra Vs. Perú, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 12 de marzo de 2020, Serie C No. 402, para 91 and ff.

⁷⁸ Id, para 89.

⁷⁹ Id, para 229.

⁸⁰ Id, para 242 to 244.

⁸¹ Id, para 252.

The Inter-American Court has recognized that the **general right to identity** includes “sexual and gender identity”.⁸² In turn, “the right to sexual and gender identity” is closely connected to:

“the concept of liberty and to the possibility of all human beings [of] self-determination and to freely choose the options and circumstances that give meaning to their existence, according to their own convictions”.⁸³

At the same time, for the Court, “the right to identity and, in particular, the manifestation of identity”, is linked to the right to freedom of thought and expression (Article 13 of the American Convention).⁸⁴

Regarding transgender people, the Inter-American Court has found that the recognition of sexual and gender identity:

“is critical to ensuring that transgender persons can fully enjoy all human rights, including protection from violence, torture, ill-treatment, the right to health, education, employment, housing, access to social security, and freedom of expression and association.”⁸⁵

In a similar vein, the Court has held that one of the components of the right to identity is **the right to a name** (Article 18 of the American Convention).⁸⁶ For the Court, the right to a name is “a basic and essential element of the identity of each person, without which they cannot be recognized by society or registered by the State”.⁸⁷ Therefore, everyone should have the right to change their name in accordance with their self-perceived identity.⁸⁸

It is also significant that the Inter-American Court has acknowledged the relationship between the recognition of gender identity and **the right to a name, as well as to the recognition of juridical personality** (Article 3 of the American Convention).⁸⁹ The Court has also indicated that there is a close connection between the right to identity and the right to privacy and personal autonomy (Article 11 of the American Convention).⁹⁰

The right to family and the right to marry

Finally, the Inter-American Court has adopted a progressive interpretation of **the right to family and the right to marry** (Article 17 of the American Convention, “Rights of the Family”). Specifically, the Court has explicitly recognized that a family may be formed by a same-sex couple,⁹¹ and that, “[a]ll these [family] models require protection by society and the State

⁸² IACtHR, Gender Identity, And Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Serie A No. 24, 24 November 2017, para 91 and 92.

⁸³ Id, para 93.

⁸⁴ Id, para 96.

⁸⁵ Id, para 98.

⁸⁶ Id, para 90.

⁸⁷ Id, para 106.

⁸⁸ Id, para 111 and 115 and ff.

⁸⁹ Id, para. 102. In the words of the Court: “(...) the right of individuals to define, autonomously, their own sexual and gender identity is made effective by guaranteeing that their self-determined identities correspond with the personal identification information recorded in the different registers, as well as in the identity documents. This implies the existence of the right of all individuals to have their personal attributes and characteristics, which are recorded in these registers and other identification documents, coincide with their own identity definition and, if this is not the case, that there should be a mechanism of amending those records.”

See: IACtHR, Gender Identity, And Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Serie A No. 24, 24 November 2017, para 105.

⁹⁰ IACtHR, Gender Identity, And Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Serie A No. 24, 24 November 2017, para, para 90.

⁹¹ Id, para 179, and 189 and ff.

because [...] the Convention does not protect a single or a specific model of a family".⁹² In addition, the Court has ruled that same-sex couples have the same rights as different-sex couples, including the right to marry.⁹³

B.2. Other Inter-American human rights treaties, institutions and experts

The majority of Inter-American human rights treaties⁹⁴ does not explicitly refer to sexual orientation, gender identity and expression. However, more recent Inter-American human rights instruments reference those fundamental characteristics. For instance, Article 1.1 of the Inter-American Convention Against All Forms of Discrimination and Intolerance (2013) includes sexual orientation and gender identity and expression among the prohibited grounds of discrimination. However, the Convention has only recently entered into force, in February 2020, and it has been ratified only by two States (Uruguay and Mexico).⁹⁵

The Inter-American Commission on Human Rights plays a role in ensuring the human rights of LGBT persons.⁹⁶ As part of its functions, the Commission monitors the enjoyment of the human rights of LGBT persons and offers recommendations to States. In this regard, for instance, the Commission has issued reports on violence against LGBT and intersex (LGBTI) persons⁹⁷ and on the recognition of the human rights the LGBT persons⁹⁸ in the Americas. More recently, the Commission has issued a report on economic, social, cultural and environmental rights of trans and gender-diverse persons.⁹⁹

In addition, the Commission has established a Rapporteurship on the human rights of LGBTI persons. Since 2014, the Rapporteur has monitored the enjoyment of human rights by LGBTI persons in the Americas. The Rapporteurship also provides technical assistance to the Organization of American States' organs and member States.¹⁰⁰

Finally, the General Assembly of the Organization of American States has adopted several resolutions on the protection of persons against discriminatory treatment based on their sexual orientation and gender identity. It adopted its first resolution on this topic in 2008.¹⁰¹

⁹² Id, para. 179.

⁹³ Id, para 218 and ff.

⁹⁴ Among others: the Inter-American Convention on Protecting the Human Rights of Older Persons, the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, the Inter-American Convention Against All Forms of Discrimination and Intolerance, the Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention Of Belem Do Para).

⁹⁵ See: http://www.oas.org/en/sla/dil/inter_american_treaties_a-69_discrimination_intolerance_signatories.asp

⁹⁶ The mission of the Inter-American Commission on Human Rights "is to promote and protect human rights in the American hemisphere". As part of its functions, the Commission can submit cases to the Inter-American Court. The Commission is "is a principal and autonomous organ of the Organization of American States ("OAS"). See: Inter-American Commission on Human Rights, Basic Documents in the Inter-American System. Available at: <http://www.oas.org/en/iachr/mandate/Basics/intro.asp>

⁹⁷ Inter-American Commission on Human Rights, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, OEA/Ser.L/V/II.rev.1, 12 November 2015. Available at: <http://www.oas.org/en/iachr/reports/pdfs/ViolenceLGBTIPersons.pdf>

⁹⁸ Inter-American Commission on Human Rights, Advances and challenges towards the recognition of the rights of LGBTI persons in the Americas, OEA/Ser.L/V/II.170 Doc.184, 7 December 2018. Available at: <http://www.oas.org/en/iachr/reports/pdfs/LGBTI-RecognitionRights2019.pdf>

⁹⁹ Inter-American Commission on Human Rights, Report on Trans and Gender- Diverse Persons and Their Economic, Social, Cultural, and Environmental Rights, OEA/Ser.L/V/II., 7 August 2020. Available at: <http://www.oas.org/en/iachr/reports/pdfs/TransDESCA-en.pdf>

¹⁰⁰ Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGBTI Persons, mandate and functions. Available at: <http://www.oas.org/en/iachr/lgtbi/mandate/mandate.asp>

¹⁰¹ General Assembly of the Organization of American States, human rights, sexual orientation, and gender identity, AG/RES. 2435 (XXXVIII-O/08), 3 June 2008.

C. THE AFRICAN FRAMEWORK

More than half of countries in Africa continue to criminalize consensual same-sex sexual conduct, often on the basis of laws originating in colonial times.¹⁰² Many of these countries, for example, have inherited those “unnatural offences” from the British Empire.¹⁰³

As in other continents, many LGBT individuals in Africa are subjected to violations of their human rights, including civil and political, as well as economic, social and cultural rights, such as the right to the highest attainable standard of physical and mental health and the right to housing, on the basis of their sexual orientation and gender identity.¹⁰⁴ Indeed, as the African Commission on Human and Peoples’ Rights has noted with alarm in its 275 Resolution on Protection against Violence and other Human Rights violations against Persons on the basis of their real or imputed sexual orientation or gender identity:

“acts of violence, discrimination and other human rights violations continue to be committed on individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity.”¹⁰⁵

Resolution 275 is a landmark resolution of the African Commission on Human and Peoples’ Rights.¹⁰⁶ It is an important iteration of the duty of the States to uphold the human rights of LGBT persons under the African Charter on Human and Peoples’ Rights.

C.1. The African Charter on Human and Peoples’ Rights (the “Banjul Charter”)

There are several binding treaties and non-binding instruments in Africa relevant to the protection of the human rights of LGBT persons. The first is the African Charter on Human and Peoples’ Rights (the “Banjul Charter”),¹⁰⁷ which guarantees human rights, including civil and political rights, economic social and cultural rights and the rights of peoples and groups in Africa. Some of the key provisions in this treaty enshrine the principle of non-discrimination¹⁰⁸ and the equality of all individuals.¹⁰⁹ The Banjul Charter further provides for every individual the right to life, integrity of the person and prohibits torture and other cruel, inhuman and

¹⁰² For further reading, see: Human Rights Watch, This Alien Legacy, The Origins of “Sodomy” Laws in British Colonialism, 17 December 2008. Available at: <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>

See also: ILG.org, Maps- Sexual Orientation Laws, <https://ilga.org/maps-sexual-orientation-laws>

¹⁰³ The countries that have inherited the British colonial definitions of ‘unnatural offences’ are Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Tanzania, Uganda, Zambia and Zimbabwe. Former French colonies such as Benin, Cameroon, and Senegal continue to criminalize consensual same-sex sexual relations. For further reading, see: Human Rights Watch, This Alien Legacy, The Origins of “Sodomy” Laws in British Colonialism, 17 December 2008. Available at: <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>

¹⁰⁴ Chimaraoke Izugbara, Seun Bakare, Meroji Sebany, Boniface Ushie, Frederick Wekesah & Joan Njagi (2020) Regional legal and policy instruments for addressing LGBT exclusion in Africa, Sexual and Reproductive Health Matters, 28:1, 1698905, DOI: 10.1080/26410397.2019.1698905. Available at: <https://www.tandfonline.com/doi/pdf/10.1080/26410397.2019.1698905?needAccess=true>

¹⁰⁵ African Commission on Human and Peoples’ Rights, 275 Resolution on Protection against Violence and other Human Rights violations against Persons on the basis of their real or imputed sexual orientation or gender identity, ACHPR/Res.275(LV)2014. Available at:

<https://www.achpr.org/sessions/resolutions?id=322#:~:text=275%20Resolution%20on%20Protection%20against,Gender%20Identity%20%2D%20ACHPR%2FRes>

¹⁰⁶ Id.

¹⁰⁷ Organisation of African Unity, African Charter on Human and Peoples’ Rights (“Banjul Charter”), 27 June 1981. Available at: <https://au.int/en/treaties/african-charter-human-and-peoples-rights>

¹⁰⁸ For example, Article 2 “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”

¹⁰⁹ For example, Article 3: 1. Every individual shall be equal before the law, 2. Every individual shall be entitled to equal protection of the law.

degrading treatment or punishment.¹¹⁰ The Charter also guarantees the right to dignity of every individual.¹¹¹ Fifty-four African Union member States are parties to the Banjul Charter.¹¹²

While sexual orientation, gender identity and expression are not explicitly mentioned among the prohibited grounds of discrimination in this treaty, its provisions have been used in strategic litigation cases seeking to enforce the human rights of LGBT persons and in which various domestic courts in Africa have handed down landmark decisions.¹¹³ Examples include domestic cases establishing the right to register LGBT organisations in Botswana,¹¹⁴ and the subsequent decriminalization of consensual same-sex sexual conduct in that country.¹¹⁵

The Banjul Charter was also referred to by the Kenyan Court of Appeal when it declared forced anal examinations as a means of ascertaining evidence of homosexuality unconstitutional in 2018.¹¹⁶ The provisions of the Charter continue to inform part of the ongoing strategic litigation on the continent, including, for example, in the pending litigation before the Kenyan appeal courts aiming to bring about the decriminalization of consensual same-sex sexual relations.¹¹⁷

C.2. Other binding instruments

Other binding human rights instruments relevant to the protection of the human rights of LGBT persons in Africa include the African Youth Charter¹¹⁸ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol"),¹¹⁹ which places a duty on States to eliminate gender-based discrimination and abuse against all women in Africa, including LBT women,¹²⁰ and guarantees the right to health, including with respect to sexual and reproductive health and rights.¹²¹

¹¹⁰ Banjul Charter, Articles 4 and 5.

¹¹¹ *Id.*, Article 5.

¹¹² African Commission on Human and Peoples' Rights, African Charter on Human and Peoples' Rights, <https://www.achpr.org/legalinstruments/detail?id=49>

¹¹³ See: Human Rights Watch, African Rulings Move LGBT Rights Forward, 5 August 2015. Available at: <https://www.hrw.org/news/2015/08/05/africa-rulings-move-lgbt-rights-forward>

¹¹⁴ For example, in the court upheld freedom of association rights of LGBT persons protected by article 10 of the Banjul Charter in *The Attorney General of Botswana v Rammoge T, Dadani R et al* Civil Appeal No. CACBG128-14 CFR Botswana: Ministry of Justice, 2016, High Court of Botswana, *Letsweletse Motshidiemang v Attorney General*. Case No. MAHGB-000591-16. The court struck down law criminalizing same-sex sexual conduct in Botswana Ministry of Justice, 2019. *Attorney General of Botswana v Thuto Rammoge and others*, Court of Appeal Civil Case No. CACGB-12814. See summary: Law.gov, Botswana Highest Court Rules Government Must Register Gay Rights Advocacy Group, 29 March 2016. Available at: <https://www.loc.gov/law/foreign-news/article/botswana-highest-court-rules-government-must-register-gay-rights-advocacy-group/>

¹¹⁵ *Letsweletse Motshidiemang v Attorney General*. [2019] MAHGB-000591-16, a result of years of litigation for LGBT rights. See, Botswana: ICJ welcomes High Court judgment striking down law criminalizing consensual same-sex sexual relations, 13 June 2019. Available at: <https://www.icj.org/botswana-icj-welcomes-high-court-judgment-striking-down-lawcriminalizing-consensual-same-sex-sexual-relations/>

¹¹⁶ The court ruled forced anal examinations were illegal citing article 5 of Banjul Charter right to dignity in *COI& GMN v Principal Magistrate Ukunda Law Courts 4 others*. Civil appeal 56 of 2016. CFR. Kenya: Ministry of Justice, 2018

¹¹⁷ *EG & others v Attorney General* Petition 150 and 234 of 2016, available at: <http://kenyalaw.org/caselaw/cases/view/173946/>

¹¹⁸ Article 2: Non-discrimination "Every young person shall be entitled to the enjoyments of the rights and freedoms recognised and guaranteed in this charter irrespective of their race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status" and Article 16: Health "Every young person shall have the right to enjoy the best attainable state of physical, mental and spiritual health." African Union Commission, African Youth Charter, 2 July 2006. Available at: https://www.un.org/en/africa/osaa/pdf/au/african_youth_charter_2006.pdf

¹¹⁹ African Union Commission, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003. Available at: https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf. See also Maputo Plan of Action 2016-2030 which provides for investment in vulnerable populations and in efforts to ensure that no groups or vulnerable populations are left behind. African Union Commission, Maputo Plan of Action 2016-2030, para 17(v). Available at: https://au.int/sites/default/files/documents/30358-doc-mpoa_7-revised_au_stc_inputs_may_se-rob-director_002.pdf

¹²⁰ Article 2: Elimination of Discrimination Against Women. (1) "States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. African Union Commission, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003

¹²¹ Article 14: Health and Reproductive Rights (1) States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and protected. African Union Commission, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003.

D. ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN)

The ASEAN SOGIE Caucus¹²² characterizes the Southeast Asia region as continuing to be “unsafe” for LGBT persons, with existing legal provisions effectively criminalizing LGBT persons in Brunei,¹²³ Malaysia, Myanmar¹²⁴ and Singapore¹²⁵ -- through the criminalization of consensual same-sex sexual conduct -- while cultural norms continue to discriminate and legitimize violence against them.¹²⁶

The Association of Southeast Asian Nations (ASEAN)¹²⁷ was established by the 1967 ASEAN Declaration to further their common goals: economic growth, regional peace, stability and regional cooperation. The main body tasked with the protection and promotion of human rights is the ASEAN Intergovernmental Commission on Human Rights (AICHR). In the absence of a regional court, the AICHR’s human rights functions are currently “promotional”, unlike its regional counterparts in other regions, namely, the Inter-American System and the African System.

Furthermore, the AICHR’s Terms of Reference¹²⁸ require adherence to the principles of “national sovereignty”, “non-interference” in domestic affairs and “national identity”. As a result, the AICHR’s overall capacity to protect and promote universal human rights, including the human rights of LGBT persons, has been called into question. The ICJ considers that “non-interference” in domestic matters is a barrier¹²⁹ to carrying out effective human rights¹³⁰ protection.

In addition, ASEAN has staunchly preached its brand of “Asian Values”, in spite of the 1993 UN Vienna Declaration and Programme of Action (VDPA), which, among other things, states:

“All human rights are universal, indivisible and interdependent and interrelated. The international community **must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis**. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, **it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.**” (Article 5 of the 1993 UN Vienna Declaration and Programme of Action (VDPA)).¹³¹

¹²² The ASEAN SOGIE Caucus (ASC) is a network of human rights activists from Southeast Asia. The ASC works for the inclusion of Sexual Orientation, Gender Identity, Gender Expression, and Sex Characteristics (SOGIESC) in the mandate of human rights duty bearers in the ASEAN region, see more at: <https://aseansogiecaucus.org/about>

¹²³ Consensual same-sex sexual relations remain a crime in Brunei’s Sharia Penal Code Order, see more at, ICJ, Brunei Darussalam: implementation of Syariah Penal Code is anathema for Human Rights, 2 April 2019. Available at: <https://www.icj.org/brunei-darussalam-implementation-of-syariah-penal-code-is-anathema-for-human-rights/>

¹²⁴ Myanmar’s Penal Code criminalizes consensual same-sex sexual relations, under Section 377 of its Penal Code, while LGBT persons remain at risk of arrest, harassment and detention under a host of laws, including the Police Act 1945, for more see: ICJ, In the Shadows: Systemic Injustice Based on Sexual Orientation and Identity/Expression in Myanmar, November 2019. Available at: <https://www.icj.org/myanmars-criminal-law-and-justice-system-perpetuates-stigmatization-discrimination-and-human-rights-violations-against-its-lgbtq-people-new-report-finds/>

¹²⁵ Section 377A of the Singapore Penal Code continues to criminalize consensual same-sex sexual relations. See, also: Gay Sex Still a Crime in Singapore Thanks to Dubious Legal Rulings, Human Rights Watch, 14 April 2020. Available at: <https://www.hrw.org/news/2020/04/14/gay-sex-still-crime-singapore-thanks-dubious-legal-rulings>

¹²⁶ ASEAN SOGIE Caucus Statement to Commemorate IDAHOT, 15 May 2015. Available at: <https://aseansogiecaucus.org/statements/asc-statements/29-asean-sogie-caucus-statement-to-commemorate-idahot>

¹²⁷ Member States of ASEAN: Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam, available at: <https://asean.org/asean/asean-member-states/>

¹²⁸ ASEAN, AICHR Terms of Reference. Available at: <https://www.asean.org/storage/images/archive/publications/TOR-of-AICHR.pdf>

¹²⁹ ICJ, Memorandum on the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (AICHR) (2014). Available at: <https://www.icj.org/wp-content/uploads/2014/06/Memorandum-on-TOR-of-AICHR.pdf>

¹³⁰ Abubakar Eby Hara, The struggle to uphold a regional human rights regime: the winding role of ASEAN Intergovernmental Commission on Human Rights (AICHR), Revista Brasileira de Política Internacional, 62(1), e011. Epub July 29, 2019, available at: <https://doi.org/10.1590/0034-7329201900111>

¹³¹ Article 5 of the 1993 UN Vienna Declaration and Programme of Action (VDPA) (own emphasis).

ASEAN has historically relied on its own brand of exceptionalism coined as “Asian Values” in the form of cultural relativism evident in the 1993 Bangkok Declaration.¹³² This notion creates a tension when it comes to expressing open support for the human rights of LGBT persons. Indeed, many member States, including Malaysia, have often used cultural relativism as an excuse not to recognize the human rights of LGBT persons, stating that they are a “Western Concept”¹³³.

In 2012, when the ASEAN Human Rights Declaration was adopted, it was widely criticized, most notably by the ASEAN SOGIE Caucus, for failing to guarantee the human rights of LGBT persons,¹³⁴ and for omitting to recognize that the principle of non-discrimination and the right to equality before the law and equal protection of the law without discrimination apply to discrimination on the grounds of sexual orientation, gender identity and expression.¹³⁵

In 2016, the Vientiane Declaration on the Adoption of The Master Plan on ASEAN Connectivity 2025 (Master Plan) was adopted, as an affirmation of the vision of ASEAN leaders to build a more “competitive, resilient and well-connected ASEAN”.¹³⁶ The Master Plan’s vision aims to: “achieve a seamlessly and comprehensively connected and integrated ASEAN that will promote competitiveness, inclusiveness, and a greater sense of Community”, focusing on sustainable infrastructures, digital innovation, seamless logistics, regulatory excellence and “people mobility”.

Similar to the ASEAN Human Rights Declaration, the Master Plan does not include LGBT persons, any mention of sexual orientation, gender identity, expression, nor does it take into account gendered lenses.

In January 2021, Malaysia was tasked with the coordination of the development of the ASEAN Digital Master Plan.¹³⁷ At the launch in January 2021, the Prime Minister of Malaysia mentioned that it was important for the region to focus on enacting online hate speech laws, and threats of violence online.¹³⁸ The Prime Minister noted that people could be faced with threats because of their gender or sexual orientation,¹³⁹ a statement that is a radical departure from the stance of his administration that has staunchly called for the arrest¹⁴⁰ and criminal punishment of LGBT persons.¹⁴¹

¹³² Sou Chiam, ‘Asia’s Experience in the Quest for A Regional Human Rights Mechanism’, 40 Victoria University of Wellington Law Review 127, 2009, page 145.

¹³³ SCMP, Mahathir Mohamad claims LGBT rights are ‘Western values’ that will not be embraced in Malaysia, (26 October 2018), available at: <https://www.scmp.com/news/asia/southeast-asia/article/2170274/mahathir-mohamad-claims-lgbt-rights-are-western-values-will>

¹³⁴ Human Rights in Asean, ASEAN SOGIE Caucus highlights exclusion of LGBTs from ASEAN anti-violence declaration, 17 October 2013. Available at: <https://humanrightsinasean.info/news/asean-sogie-caucus-highlights-exclusion-of-lgbts-from-asean-anti-violence-declaration/>

¹³⁵ Common Africa Position on the Post 2015 Development Agenda – calls for inclusion and equality of all persons, para 93; and Agenda 2063 – nondiscrimination and inclusiveness.

¹³⁶ The Vision of The Master Plan on ASEAN Connectivity 2025.

¹³⁷ The Malaymail, Muhyiddin urges Asean to legislate against online hate speech, threats based on race, gender, sexual orientation, 21 January 2020. Available at: <https://www.malaymail.com/news/malaysia/2021/01/21/muhyiddin-urges-asean-to-legislate-against-online-hate-speech-threats-based/1942613#.YAkmgG1I82w.twitter>

¹³⁸ Id.

¹³⁹ Id.

¹⁴⁰ ICJ, Malaysia: Minister’s order to take action against the transgender community must be revoked, 15 July 2020. Available at: <https://www.icj.org/malaysia-ministers-order-to-take-action-against-the-transgender-community-must-be-revoked/>

¹⁴¹ The Malaymail, Group slams deputy minister for ‘political’ attack on LGBT when country suffering from Covid-19, 20 January 2020. Available at: <https://www.malaymail.com/news/malaysia/2021/01/20/group-slams-deputy-minister-for-political-attack-on-lgbt-when-country-suffe/1942198>

III. COUNTRY-SPECIFIC CONTEXT

This chapter contains an analysis of three country-contexts: Colombia, South Africa and Malaysia. For each country, one of the systemic and widespread human rights violations experienced by LGBT people has been selected for illustrative purposes as a key concern.

In the case of **Colombia**, violence perpetrated against LGBT persons has been chosen as the main focus of analysis. The report expresses concern about the fact that, despite the existence of an enabling legal framework, progressive constitutional protections and access to a developed regional human rights system (i.e., the Inter-American human rights system), violence against LGBT persons is still rampant. LGBT individuals still remain targets of physical violence, abuse and assault by State and non-State actors fuelled by prejudice and stigma. Moreover, the discriminatory attitudes and harmful gender stereotypes espoused by some key players in the criminal justice system, such as the police and the Office of the Attorney General, create a climate of impunity for violence against LGBT persons, fomenting an endless cycle of human rights abuses with no recourse. With the outbreak of the COVID-19 pandemic, the situation of LGBT persons has not improved. On the contrary, credible reports indicate that violence, prejudices and discrimination against LGBT persons have escalated during the pandemic.

In the context of **South Africa**, the topic of legal gender recognition was selected as a key human rights concern. South Africa is among the few countries in the world that explicitly lists “sexual orientation” as a prohibited ground of discrimination in its Constitution,¹⁴² and its domestic legal framework provides protection for the human rights of LGBT persons. It is also the first sub-Saharan country that recognizes same-sex unions. Despite these advances, the existing system for legal gender recognition continues to pose challenges for transgender and gender non-conforming persons; as a result of flaws in the implementation of the legal framework on legal gender recognition, as well as problematic practices and policies, transgender people continue to experience discriminatory treatment. Transgender persons face discriminatory treatment by State authorities during the process of pursuing legal gender recognition.

They also bear the brunt of arbitrary and capricious application of local policies by government agencies, barring them from fully enjoying their rights to freedom from discrimination, to equality before the law, to recognition before the law and to equal protection of the law without discrimination. Additionally, the briefing analyzes the impact of these discriminatory practices on transgender people in the context of COVID-19. In particular, the predicaments that transgender persons have faced due to the incongruence of their gender markers and the barriers to access to basic healthcare.

In **South Africa** and **Colombia**, despite progressive and comprehensive legislation upholding their human rights, LGBT persons continue to face high levels of discrimination and violence. In Colombia, reports of violence against LGBT persons, especially transgender persons have increased during the COVID-19 pandemic.

In **Malaysia**, its domestic legal system continues to penalize LGBT persons with harsh penalties and Muslim LGBT persons bear a double-burden of being penalized in two seemingly parallel legal systems. For instance, consensual same-sex sexual relationships are crimes both in the

¹⁴² Section 9 (3) provides “the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The Constitution of the Republic of South Africa, 1996.

penal code and in Syariah state-enacted religious laws. Similarly, transgender and gender non-conforming persons are penalized under State Syariah law. The criminalization of LGBT persons exposes them to threats, harassment, extortion, arbitrary detention and violence in public spaces, or at private events where LGBT persons are known to be in attendance. Discussing protection of the human rights of LGBT persons is 'taboo'. In this regard, for instance, LGBT human rights defenders face stigma, and prominent lawmakers have openly made homophobic and transphobic statements against LGBT persons with impunity.

The COVID-19 pandemic has shown that criminalization of consensual same-sex relations and of gender identity or expression, coupled with stigma, discrimination and violence against LGBT persons and a global public health emergency can be a fatal combination, as LGBT persons have faced increasing level of hostility, scapegoating, hate crimes, as well as greater barriers in their access to healthcare, goods and services. Prejudice, stigma, discrimination, criminalization and violence have enhanced the risk that LGBT persons would experience violations and abuses of their human rights during the COVID-19 pandemic,¹⁴³ including as a result of being confronted by additional barriers in their access to healthcare, goods and services, even in respect of health treatment for COVID-19.¹⁴⁴

A. COLOMBIA

Context and background

When it comes to the respect and protection of the human rights of LGBT persons, the Colombian legal framework is progressive. Although there are some gaps that need to be addressed, in general terms, the legal framework guarantees the human rights of LGBT persons, including civil and political rights, as well as economic, social and cultural rights. In addition, the legal framework recognizes the importance of tackling discrimination based on sexual orientation and gender identity.

Notwithstanding the country's progressive legal framework, LGBT persons have not witnessed much improvement in their living standards or a significant reduction in the discrimination and violence they face on a daily basis.¹⁴⁵ After Brazil, Colombia is considered "the most dangerous country in the Americas for LGBT+ people".¹⁴⁶ Unfortunately, their situation has not improved during the COVID-19 pandemic, and in fact, if anything, it has got worse.

This chapter first discusses the national legal framework, focussing specifically on the human rights of LGBT persons, and then documents violence against LGBT persons, including violent acts during the COVID-19 pandemic. There is a particular emphasis on transgender people. Finally, the chapter offers some recommendations to the Colombian authorities.

The focus on violent acts was chosen as they, in turn, constitute one of the most serious human rights abuses among those to which LGBT persons are subjected in Colombia. The chosen emphasis on violence against LGBT persons should not be interpreted as indicating that they

¹⁴³ See: Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity, Violence and discrimination based on sexual orientation and gender identity during the coronavirus disease (COVID-19) pandemic, A/75/258, 28 July 2020, para 11 and ff.

¹⁴⁴ ICJ, Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses, September 2020, page 62 and ff. Available at:

<https://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>.

¹⁴⁵ Colombia Diversa, Promsex and Cattrachas, Informe trinacional: litigio estratégico de casos de violencia por prejuicio por orientación sexual, identidad y expresión de género en Colombia, Perú y Honduras, 2020, Pag. 18. Available at: https://colombiadiversa.org/colombiadiversa2016/wp-content/uploads/2020/05/INF-TRINACIONAL_PRSX_FINAL-BKUP.pdf

¹⁴⁶ WOLA, LGBT+ Rights and Peace in Colombia: The Paradox Between Law and Practice, 3 July 2020. Available at: <https://www.wola.org/analysis/lgbt-rights-and-peace-in-colombia-the-paradox-between-law-and-practice/>

do not face other human rights abuses.¹⁴⁷ By way of example, in the case of transgender persons, they have faced serious obstacles in accessing health services during the pandemic.¹⁴⁸ Same-sex couples also continue to experience problems in the exercise of their right to marry.¹⁴⁹

A.1. Legal system

For more than a decade, the Colombian legal framework has gradually expanded the protection it affords to the human rights of LGBT people. This has been possible mainly due to a progressive interpretation of the 1991 Colombia Constitution. In addition, since the 2000s, an explicit reference to sexual orientation or gender identity has been enshrined in a number of legal provisions. Likewise, Colombia is a State party of the main human rights treaties at the international¹⁵⁰ and regional level¹⁵¹.

A.1.1. Constitutional law

The 1991 Colombian Constitution is considered a progressive constitutional text.¹⁵² The Constitution guarantees a wide range of civil, political, economic, social and cultural rights. Among others, the Colombian Constitution guarantees the right to life (Article 11); the right to non-discrimination and equality (Article 13);¹⁵³ the right to free development of personality (Article 16); the right to recognition of juridical personality (Article 14); the right to privacy (Article 15); the right to be free from torture or other cruel, inhuman or degrading treatment or punishment (Article 12); the right to family (Article 42); the right to health (Article 49) and the right to housing (Article 51). It also contains provisions to protect the rights of some minorities, such as indigenous groups (Article 246).

Similarly, the Colombian Constitution establishes human dignity as a founding principle,¹⁵⁴ which, as a result, is a principle that should be considered in the context of the respect, protection and fulfilment of constitutional rights. The Constitutional Court has affirmed that human dignity guarantees:¹⁵⁵

¹⁴⁷ La Silla Vacía, La violencia es apenas uno de los padecimientos de las personas trans en pandemia, 30 de junio de 2020. Available at: <https://n9.cl/z3a0g>

¹⁴⁸ Local organizations, such as *Caribe Afirmativo*, have been reported problems in access to health services, including the lack of access to health care for transgender women living with HIV, and barriers in access to treatments or procedures related to gender affirmation/recognition. In this regard, an emblematic case was the death of a transgender woman in Bogota, reportedly as a result of the paramedics' failure to take her to hospital after she had fallen ill. At the time of her death, she had COVID-19 symptoms. The paramedics, who tended to her, decided not to take her to a hospital after being informed that she was a person living with HIV. They stated that she was probably suffering an overdose. She died 40 minutes after the paramedics left her house. See: O Steadman, A Black Trans Sex Worker Died After Paramedics Failed to Take Her to The Hospital, 25 July 2020, BuzzFeed News. Available at: <https://n9.cl/jq8i9>; Caribe Afirmativo, ¿Cuánto más en espera de una ambulancia?, 12 de junio 2020. Available at: <https://n9.cl/6np4x>; La Silla Vacía, La violencia es apenas uno de los padecimientos de las personas trans en pandemia, 30 de junio de 2020. Available at: <https://n9.cl/z3a0g>

¹⁴⁹ El Tiempo, Por tercera vez un juez cristiano se niega a casar a dos mujeres, 21 octubre de 2020. Available at: <https://n9.cl/ff2cu>

¹⁵⁰ Colombia is a party to all core UN human rights treaties: Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights; the Convention for the Protection of All Persons from Enforced Disappearance; the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and; the Convention on the Rights of the Child, CRPD - Convention on the Rights of Persons with Disabilities.

¹⁵¹ At the regional level, among others, Colombia is party to: the American Convention on Human Rights; the Inter-American Convention to Prevent and Punish Torture; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women; and the Inter-American Convention on Forced Disappearance of Persons.

¹⁵² See, for instance: R Uprimny Yepes and L M Sánchez Duque, *Constitución de 1991, justicia constitucional y cambio democrático: un balance dos décadas después*, *Cahiers des Amériques latines*, 2012. Available at: <https://n9.cl/el0n>

¹⁵³ The right to equality is a fundamental right in the Colombian Constitution and it offers legal protection against any form of discrimination. When it comes to the authorities' actions and policies, the Constitutional Court has affirmed that authorities have the duty to: (i) offer the same treatment in cases where the circumstances are equivalent unless there are strong reasons to establish a different treatment and (ii) offer a different treatment in cases where the circumstances are not the same or equivalent.

¹⁵⁴ Constitución Política de Colombia, artículo 1.

¹⁵⁵ Corte Constitucional, Sentencia T-881 de 2002.

- i. The personal autonomy to choose a lifestyle (“live as wished”).
- ii. Minimum standards of living (“live well”).
- iii. The respect of physical and moral integrity (“live without fear”).

Albeit none of the articles of the Constitution expressly refers to sexual orientation or gender identity or expression, gradually, the Constitutional Court has interpreted the Constitution and the rights it enshrines as requiring that the State respect, protect and fulfil the human rights of LGBT persons.

A.1.2. Constitutional Court and the human rights of LGBT persons

In Colombia, mainly due to Constitutional Court’s decisions, people with diverse sexual orientations and gender identities have been found to be entitled to equality in their enjoyment of civil, political, economic, social and cultural rights. Since the creation of the Constitutional Court by the 1991 Colombian Constitution,¹⁵⁶ a progressive and gradual recognition that LGBT persons were entitled to human rights without discrimination started.

In general terms, the Constitutional Court has considered that sexual orientation-related rights are protected by different constitutional rights, such as the right to privacy and personal autonomy, the right to equality and the right of everyone to the free development of their personality. Therefore, everyone has the right to develop their own “life plans”,¹⁵⁷ free from discrimination.

For instance, the Constitutional Court has held that it is a violation of the right to the free development of one’s personality not to allow the legal change of a male name to a female name.¹⁵⁸ The Court has also guaranteed the right to equality and not to be discriminated against on the ground of sexual orientation in different settings and institutions, such as the military,¹⁵⁹ in schools¹⁶⁰ and in prisons.¹⁶¹

In relation to economic and social rights, the Constitutional Court has protected the right to health of transgender people, for instance. In several decisions, the Court has set out that transgender people have the right to access gender-affirming surgeries.¹⁶²

The rights of same-sex couples have also been recognized thanks to the Constitutional Court’s progressive interpretation of the legal framework.¹⁶³ For example, in decision C-075 of 2007, the Constitutional Court established that same-sex couples may form a marital union. As a consequence, same-sex couples were granted access to additional rights, such as inheritance rights and pension rights.¹⁶⁴

Decision C-029 of 2009 is another landmark decision in which the Constitutional Court analyzed the constitutionality of a significant number of laws that established rights and duties only for different-sex couples. The Court held that the only valid constitutional interpretation of those laws was to require that they should apply to same-sex couples, as to hold otherwise, pursuant

¹⁵⁶ Constitución Política de Colombia, artículo 239.

¹⁵⁷ Corte Constitucional, Sentencia T-152 de 2007.

¹⁵⁸ Corte Constitucional, Sentencia T-594 de 1993.

¹⁵⁹ For example, see: Corte Constitucional, Sentencia T- 097 de 1994.

¹⁶⁰ For example, see: Corte Constitucional, Sentencia T-101 de 1998, Sentencia C-491 de 1998, Sentencia T- 478 de 2015 and Sentencia T- 443 de 2020.

¹⁶¹ For example, see: Corte Constitucional, Sentencia T-499 de 2003.

¹⁶² For example, see: Corte Constitucional, Sentencia T-876 de 2012 and Sentencia T-771/13

¹⁶³ See: Corte IDH, Caso Duque Vs. Colombia, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 26 de febrero de 2016, Serie C No. 310, para 81 and 82.

¹⁶⁴ See also, Corte Constitucional, Sentencia T-717 de 2011

to other interpretations, would constitute a violation of the right to equality. Subsequently, in other key decisions, the Constitutional Court recognized that same-sex couples have the right to family,¹⁶⁵ and to be eligible to adopt.¹⁶⁶ Finally, in the decision SU-214 of 2016, the Court recognized that same-sex couples have the right to marry.

Additionally, the Constitutional Court has held that sexual orientation is a "suspect category"¹⁶⁷ (*categoría sospechosa*) from a non-discrimination perspective. While the term "suspect category" is not enshrined in domestic legislation, it is referred to explain that when a ground, such as sexual orientation, for instance, is used to establish a legal classification or distinction, then ordinarily such a distinction will not be permissible because it violates the right to non-discrimination and to equality.

To put it another way, a category is considered "suspect" when it is *prima facie* discriminatory since it ostensibly creates different treatment among groups of people in a manner that is not justifiable from a non-discrimination and equality standpoint. Therefore, when State authorities use a ground belonging to a "suspect category", it is reasonable to conclude that a discriminatory treatment has been established. Whenever State authorities resort to a "suspect category", then they have to prove that its use is justified on the basis of very weighty reasons.¹⁶⁸

The categories that the Constitutional Court recognizes as "suspect categories" relate to: (i) immutable personal characteristics or permanent features; (ii) attributes related to the individual personality (e.g., religion, belief or political conviction); or (iii) cultural or historical patterns of marginalization and exclusion of some sectors of the population (e.g., women or ethnic minorities).¹⁶⁹

A.1.3. Criminal law

In Colombia, the 1936 criminal code criminalized consensual homosexual sexual conduct.¹⁷⁰ Subsequently, since the enactment of a new criminal code in 1980, consensual same-sex sexual conduct has been decriminalized. The current criminal code, enacted in 2000, continues to exclude consensual same-sex sexual conduct from criminal proscription.

In addition, Law 1482 of 2011, known as "Antidiscrimination law" (*Ley Antidiscriminación*), amended the Colombian criminal code to introduce two new crimes for discriminatory acts¹⁷¹ and harassing conducts¹⁷² on the grounds of sexual orientation, among others. Finally, Law 1761 of 2015, which establishes femicide as a separate and specific crime, stipulates that one aggravating circumstances of the crime of femicide is its perpetration due to discriminatory prejudice on sexual orientation grounds.¹⁷³

¹⁶⁵ Corte Constitucional, Sentencia C-577 de 2011.

¹⁶⁶ Corte Constitucional, Sentencia SU-617 de 2014, Sentencia C-071 de 2015, and sentencia C-683 de 2015.

¹⁶⁷ Among others see: Corte Constitucional, Sentencia SU- 214 de 2016, Sentencia C-317 de 2000 and Sentencia T-152 de 2007. More information about the concept "suspect category", see: T Loenen, Conceptualizing sexual orientation as a "suspect" category in non-discrimination law: some reflections on the Atala judgment of the Inter-American Court of Human Rights, *Revista Derecho y Humanidades*, 2013.

¹⁶⁸ See: T Loenen, Conceptualizing sexual orientation as a "suspect" category in non-discrimination law: some reflections on the Atala judgment of the Inter-American Court of Human Rights, *Revista Derecho y Humanidades*, 2013, page 249.

¹⁶⁹ Corte IDH, Caso I.V. Vs. Bolivia, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 30 de noviembre de 2016, Serie C No. 329, para 240 and 241.

¹⁷⁰ Código Penal de 1936, artículo 324.

A study about the criminalization of same-sex sexual can be found at: W A Bustamante Tejada, El delito de acceso carnal homosexual en Colombia: Entre la homofobia de la medicina psiquiátrica y el orden patriarcal legal, Co-herencia, volumen 5, número 9, 2008. Available at: http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S1794-58872008000200006

¹⁷¹ Ley 1482 de 2011, artículo 3.

¹⁷² Ley 1482 de 2011, artículo 4.

¹⁷³ Ley 1761 de 2015, artículo 3.

A.1.4. Other laws

As already mentioned, some Colombian laws feature a formal and explicit recognition of sexual orientation. Law 1448 of 2011, known as “victims’ Law” (*Ley de Víctimas*)¹⁷⁴ stands out among them. This law establishes numerous mechanisms in favour of the victims of the armed conflict and stipulates that the measures it envisages will be implemented without discrimination on various grounds, including sexual orientation.¹⁷⁵

Other laws, which also recognize sexual orientation and/or sexual identity as prohibited grounds of discrimination, include Law 1257 of 2008,¹⁷⁶ Law 1620 of 2013,¹⁷⁷ Law 1801 of 2016 (the National Police Code),¹⁷⁸ and Decree 1227 of 2015, which establishes the legal procedure to change sex designation on identity documents. More recently, the National Electoral Council (*Consejo Nacional Electoral*) enacted Resolution 3480 of 2020, a protocol to guarantee the right to vote to transgender persons without discrimination¹⁷⁹.

In addition, the National Government issued Decree 762 of 2018. This Decree created a public policy to guarantee that LGBTI persons enjoy their rights effectively.¹⁸⁰ Crucially, the Decree recognizes a deficit in the protection of human rights enjoyed by LGBTI persons, as well as the fact that they are often the target of violent acts. Unfortunately, as the Colombian Ombudsperson's Office has noted, the Decree has not been adequately implemented.¹⁸¹

Finally, the 2016 Peace Agreement between the Colombian Government and the Revolutionary Armed Forces of Colombia-People’s Army (*Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo*, FARC-EP)¹⁸² recognizes the importance of considering the needs and rights of LGBT persons in the post-conflict period.¹⁸³ For instance, the Agreement establishes that the Colombian Government will implement measures to promote a democratic and participatory culture, including to:

“[promote] democratic values, political participation and political mechanisms, to guarantee and enhance knowledge of them and their effective use, thereby consolidating the exercise of constitutional rights, doing so through media campaigns and training workshops. Special emphasis will be placed on the most vulnerable populations such as campesino communities, women, indigenous and Afrodescendent

¹⁷⁴ This law contains the most ambitious reparation program for victims in Colombia’s history. The Victims Law establishes a complete reparation program that includes a wide range of measures, including special measures for women and children. The law also includes measures for land restitution and humanitarian assistance.

¹⁷⁵ See, Ley 1448 de 2011, artículo 6.

¹⁷⁶ The law establishes measures to prevent violence against women. See, Ley 1257 de 2008, artículo 6.7.

¹⁷⁷ The law creates the national school rules and regulations (Sistema Nacional de Convivencia Escolar). See, Ley 1620 de 2013, artículo 5.4.

¹⁷⁸ The Code establishes penalties for acts of gender-based discrimination. See, for instance: Article 33 (e) and article 44.5.

¹⁷⁹ More information about the protocol see: Caribe Afirmativo, Colombia da un paso histórico en la defensa de los derechos políticos de las personas trans, 2 de diciembre de 2020. Available at: <https://n9.cl/gal2>

¹⁸⁰ Interestingly, the Decree mentions several Constitutional Court’s decisions and the Inter-American Court of Human Rights’ decision as part of the justification for the need for the policy.

¹⁸¹ Defensoría del Pueblo, Palabras del Defensor del Pueblo en presentación de cartilla sobre derechos de personas transgénero, 13 de marzo de 2019. Available at: <https://n9.cl/5hi9n>

¹⁸² After more than four years of negotiation, on November 24, 2016, the National Government and the FARC-EP signed the final version of the peace agreement: *Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace*. An official English translation of the Final Peace Agreement can be found at: <https://undocs.org/en/S/2017/272>

¹⁸³ Regarding the inclusion of the human rights of LGBT persons in the Peace Agreement, WOLA has said: “*Through a Gender Subcommittee that included an LGBT+ representative, the negotiating actors recognized that women and LGBT+ people were disproportionately affected by the armed conflict, and correspondingly, 41 gender-specific provisions were included throughout the agreement. Including this focus on women and LGBT+ groups helped make Colombia’s 2016 peace deal one of the most inclusive peace agreements in history.*” See: WOLA, LGBT+ Rights and Peace in Colombia: The Paradox Between Law and Practice, 3 July 2020. Available at: <https://n9.cl/sbk2>

populations and LGBTI groups. The contents of these campaigns will include values that address discrimination in its multiple forms.¹⁸⁴ (emphasis added)

A.2. Violence against LGBT persons

For decades, LGBT persons in Colombia have been victims of violence motivated by prejudice, discrimination and stigma against their real or imputed sexual orientation, gender identity or expression.¹⁸⁵ In some cases, violence directed at LGBT persons has been committed in the context of the ongoing internal armed conflict.¹⁸⁶ Additionally, although a considerable number of violent attacks have been committed by private individuals, it is not uncommon to find State agents, such as police officers and members of the army, among those responsible for discrimination and violence against LGBT people.¹⁸⁷

For example, the Colombian Ombudsperson's Office has documented patterns of police violence against LGBT persons, in particular, against transgender sex workers. These patterns include physical violence but also verbal abuse (e.g., the use of pejorative words).¹⁸⁸ Making matters worse, stigmatization and prejudice around sex work increase the risk that the police fail to take seriously and act on reports of violence against LGBT sex workers.¹⁸⁹

Likewise, according to the local NGO *Colombia Diversa*, between 2009 and 2017, at least 318 LGBT persons were murdered due to discrimination against their sexual orientation and gender identity. No effective investigations have been conducted in the vast majority of these cases.¹⁹⁰ Furthermore, it is not uncommon that the Office of the Attorney General (*Fiscalía General de la Nación*) considers those crimes as "crimes of passion"¹⁹¹ or questions the lifestyle of the victims.¹⁹²

The UN Office of the High Commissioner for Human Rights in Colombia has also documented violence, including killings, against LGBT individuals. In relation to the situation of LGBT persons during 2019, the Office reported the following:

"Despite legislation and jurisprudence protecting their rights, violence and discrimination against LGBTI persons continued. Between January and November 2019, NGO sources reported the killing of 45 LGBT persons. In its 2018 report, the National Institute of Forensic Medicine recorded 45 killings of LGBT persons and 237 cases of sexual violence against individuals belonging to the LGBT community. Over 34 per cent of victims were lesbians, 33.75 per cent were gay men and 22.36 per cent were bisexual women. OHCHR documented the killing of a bisexual woman human rights defender that occurred on 16 May in Ocaña, Norte de Santander. The victim had previously

¹⁸⁴ Final agreement for ending the conflict and building a stable and lasting peace, 24 November 2016, 2.2.4 "Guarantees for reconciliation, coexistence, tolerance and non-stigmatization, especially on grounds of political and social action, within a context of mutual respect".

¹⁸⁵ Colombia Diversa, Promsex and Cattrachas, Informe trinacional: litigio estratégico de casos de violencia por prejuicio por orientación sexual, identidad y expresión de género en Colombia, Perú y Honduras, 2020, Pag. 51. Available at: https://colombiadiversa.org/colombiadiversa2016/wp-content/uploads/2020/05/INF-TRINACIONAL_PRXS_FINAL-BKUP.pdf

¹⁸⁶ See: Colombia Diversa, Orders of Prejudice: Systematic Crimes against LGBT People in the Colombian Armed Conflict, July 2020. Available at: <https://n9.cl/t25t1>; Caribe Afirmativo, Juguemos en el bosque mientras el lobo no está. Violencias en el marco del conflicto armado contra niñas, niños y adolescentes con OSIGEG diversas en Colombia, 18 de diciembre de 2020. Available at: <https://n9.cl/w608a>

¹⁸⁷ J D Trujillo, ¡Quiero que me llamen Danna! Es mi derecho, Sentiido, 15 de febrero 2019. Available at: <https://n9.cl/3ys89>; El Espectador, El caso de Juliana Giraldo, en manos de la Fiscalía, 24 de septiembre de 2020. Available at: <https://n9.cl/2oh5q>

¹⁸⁸ Defensoría del Pueblo, Cuando autoridad es discriminación, Violencia Policial contra personas con orientación sexual e identidad de género diversas en espacios públicos, 2018, page 29 and ff.

¹⁸⁹ WOLA, LGBT+ Rights and Peace in Colombia: The Paradox Between Law and Practice, 3 July 2020. Available at: <https://n9.cl/sbk2>

¹⁹⁰ Colombia Diversa, Promsex and Cattrachas, Informe trinacional: litigio estratégico de casos de violencia por prejuicio por orientación sexual, identidad y expresión de género en Colombia, Perú y Honduras, 2020, Pag. 52. Available at: <https://n9.cl/fq3ti>

¹⁹¹ It has been argued the use of the expression "crimes of passion" is a form of justifying a crime. It implies that the perpetrator felt intense "love" or "passion" for the victim.

¹⁹² Id.

received threats related to her sexual orientation. OHCHR also documented two cases that occurred in Cesar and La Guajira, where a total of seven victims were physically abused, humiliated and threatened with rape by police officers."¹⁹³ (emphasis added)

Moreover, some sectors of society have been promoting a political agenda against the rights of LGBT persons in Colombia. In this regard, for at least the last four years, some conservative and right-wing sectors have falsely accused LGBT persons of promoting a "gender ideology" (*ideología de género*).¹⁹⁴ They have, for example, argued that LGBT persons are using "gender ideology" with the aim of destroying the traditional family and changing the sexual orientation of children. They have also taken the view that it is not appropriate to let same-sex couples, or LGBT persons raise children.¹⁹⁵

Unfortunately, national and local authorities have not taken decisive actions to stop the dissemination of misinformation about LGBT persons.¹⁹⁶ Similarly, there have been few advances in the implementation of the measures related to LGBT rights established by the Peace Agreement.¹⁹⁷

A.2.1. LGBT persons and COVID-19

Since the first confirmed case of COVID-19 in Colombia, on 6 March 2020, the human rights situation of LGBT persons has worsened.¹⁹⁸ For instance, in 2019, the Ombudsperson's Office documented 309 cases of violent acts (physical, sexual or psychological violence) against LGBT persons. In 2020, just between January and August, the same Office documented 388 cases.¹⁹⁹ Thirty-six of those cases involved the police. In addition, at least 37 violent cases involved violence committed against LGBT human rights defenders.²⁰⁰

Echoing this, a transgender rights organization, *Red Comunitaria Trans*, identified an upward trend in the number of killings of transgender persons during 2020.²⁰¹ Similarly, *Caribe Afirmativo*, a local NGO that monitors the enjoyment of the human rights of LGBT persons in the Caribbean area of Colombia,²⁰² denounced an upward trend in the number of killings of transgender persons during 2020. According to *Caribe Afirmativo*, in 2018, there were 15 killings of LGBT persons in the Caribbean area. In 2019, it was documented 17 killings of LGBT persons. In 2020, as of June 2020, it had been reported 15 killings of LGBT individuals. Significantly, 12 of those killings took place after the outbreak of the pandemic in Colombia.²⁰³

¹⁹³ Office of the High Commissioner for Human Rights in Colombia, Situation of human rights in Colombia, A/HRC/43/3/Add.3, 26 February 2020, para 85.

¹⁹⁴ Regarding "gender ideology" in Latin America, see: M Gallo, "Gender Ideology" Is a Fiction That Could Do Real Harm, 29 August 2017. Available at: <https://www.opensocietyfoundations.org/voices/gender-ideology-fiction-could-do-real-harm>

¹⁹⁵ L F Gómez Cruz, Explicador: ¿Qué es la 'Ideología de género?', 10 junio 2020. Available at: <https://n9.cl/bne0>

¹⁹⁶ Colombia Diversa, Promsex and Cattrachas, Informe trinacional: litigio estratégico de casos de violencia por prejuicio por orientación sexual, identidad y expresión de género en Colombia, Perú y Honduras, 2020, Pag. 53. Available at: https://colombiadiversa.org/colombiadiversa2016/wp-content/uploads/2020/05/INF-TRINACIONAL_PRSX_FINAL-BKUP.pdf

¹⁹⁷ Id., Pag. 56.

¹⁹⁸ C Badillo Gutiérrez, Recomendaciones para reducir el déficit de derechos de las personas LGBTI en de la pandemia, Caribe Afirmativo, septiembre de 2020, Pag. 11. Available at: <http://library.fes.de/pdf-files/bueros/kolumbien/16524.pdf>

¹⁹⁹ Defensoría del Pueblo, En pandemia aumentaron los homicidios y la violencia contra personas Lgbti, 15 de septiembre de 2020. Available at: <https://n9.cl/s3mcs>

²⁰⁰ Id.

²⁰¹ E Ulises, Comunidad trans marcha: temen más a violencia que a COVID-19, Homosensual, 8 julio de 2020. Available at: <https://www.homosensual.com/lgbt/trans/comunidad-trans-marcha-temen-mas-a-violencia-que-a-covid-19/>

²⁰² The Caribbean area of Colombia is composed of eight departments/states (*departamentos*): Guajira, Magdalena, Cesar, Atlántico, Bolívar, Sucre, and Córdoba. In total, Colombia has 32 departments.

²⁰³ El Herald, Preocupa aumento en 2020 de homicidios de personas LGBT, 16 de junio de 2020. Available at: <https://n9.cl/rpfav>
See also: El Herald, Los retos pendientes de la Justicia con población LGBT, 26 de julio de 2020. Available at: <https://n9.cl/lycfk>

Several local civil society organizations have condemned this increase in violence committed against LGBT persons during the pandemic. This trend also led to peaceful protests in several Colombia cities in July 2020.²⁰⁴

The Ombudsperson's Office has also pointed out that LGBT persons have faced problems and barriers in filing criminal complaints. In particular, the Ombudsperson's Office highlighted the lack of empathy and awareness about the specific predicaments (e.g., the greater risk of violence and discrimination compared to the rest of the population) faced by LGBT persons on the part of the authorities in charge of offering a legal response to abuses and crimes perpetrated against LGBT persons.²⁰⁵

While LGBT persons, as a whole, have suffered a disproportionate, negative impact compared with the rest of the general population during the pandemic, such impact is not the same for all of them just because they are LGBT persons. Some have suffered a more severe impact than others. Transgender persons, transgender women sex workers, migrants²⁰⁶ and LGBT persons living with HIV have been more likely to be victims of discrimination and violence during the pandemic than the general LGBT population.²⁰⁷

In order to illustrate this differential impact, it is useful to consider, for example, the hardship faced by transgender persons and transwomen sex workers during the pandemic. Certain measures adopted by local authorities with the stated intent to curb the spread of the virus had seriously detrimental effects on the human rights of transgender people. For instance, during lockdown periods, in Bogota, the authorities enacted a gender-based curfew, allowing women and men to access public places and generally to be outdoors on alternate days.²⁰⁸ Although the authorities in Bogota assured the public that they would respect people's ability to identify their own gender identity,²⁰⁹ the implementation of these measures led to police abuse against transwomen.²¹⁰ Transgender people also faced harassment, discrimination and violence in supermarkets, banks and other public places.²¹¹ In one particularly serious case, a transgender woman was stabbed by a neighbour, who questioned her about being outdoors on a day for women.²¹²

While the phenomenon of police violence against transgender sex workers predates COVID-19, in different cities, such as Bogota, Medellin and Manizales, it worsened during the pandemic.²¹³

²⁰⁵ Defensoría del Pueblo, En pandemia aumentaron los homicidios y la violencia contra personas Lgbti, 15 de septiembre de 2020. Available at: <https://n9.cl/s3mcs>

²⁰⁶ Regarding migrants, see the work done by *Caribe Afirmativo*. Available at: <https://n9.cl/5i4t6>
See also: Fundación Grupo de Acción y Apoyo a Personas con Experiencia de Vida Trans, Trans-Migraciones, Caminos Posibles, octubre de 2020. Available at: <https://n9.cl/nrtml>

²⁰⁷ C Badillo Gutiérrez, Recomendaciones para reducir el déficit de derechos de las personas LGBTI en de la pandemia, Caribe Afirmativo, septiembre de 2020, Pág. 13 and f.f. Available at: <http://library.fes.de/pdf-files/bueros/kolumbien/16524.pdf>

²⁰⁸ The measure was called "pico y género". See: Decreto 106 de 2020, artículo 2, parágrafo 5. The measure was in force from 13 April to 10 May 2020.

²⁰⁹ The respect of gender identity was set out in the Decree that created the measure (Decree 106 of 2020, Article 2, paragraph 5). Additionally, local authorities said that the implementation of the measure was a success and that they conducted activities to create awareness about the importance of respecting gender identity. In that regard, see: Secretaria Distrital de Gobierno, La medida de restricción de género en Bogotá ha sido un Éxito, 22 de abril de 2020. Available at: <http://www.gobiernobogota.gov.co/noticias/nivel-central/la-medida-restriccion-genero-bogota-ha-sido-exito>

²¹⁰ See: D Arias Bonfante, Investigan presuntas vulneraciones a transexuales en Bogotá durante 'pico y género', RCN Radio, 16 de abril de 2020, Available at: <https://n9.cl/cq1ib>

See also: Caracol TV, La dura realidad de las trabajadoras sexuales que se quedaron sin trabajo por la cuarentena, 26 abril de 2020, available at: <https://n9.cl/190nk>

²¹¹ The Guardian, 'Separation by sex': gendered lockdown fuelling hate crime on streets of Bogotá, 8 May 2020. Available at: <https://n9.cl/34fne>. See, also: El Tiempo, Mujer trans denuncia discriminación por su identidad de género, 29 de abril de 2020. Available at: <https://n9.cl/1td3w>; Washington Blade, ¡Los derechos trans no están en cuarentena!, 24 de abril de 2020. Available at: <https://n9.cl/50vg>; Fondo Lunaria Mujer, Lo que nos deja el pico y género. Available at: <https://n9.cl/epoch>

²¹² El Espectador, Burlas, discriminación y puñaladas: la violencia que revela el Pico y Género, 3 de mayo de 2020. Available at: <https://n9.cl/1pnon>

²¹³ C Badillo Gutiérrez, Recomendaciones para reducir el déficit de derechos de las personas LGBTI en de la pandemia, Caribe Afirmativo, septiembre de 2020, Pág. 14. Available at: <http://library.fes.de/pdf-files/bueros/kolumbien/16524.pdf>

It is common for transgender sex workers to suffer from verbal police abuse on a daily basis. During 2020, *Red Comunitaria Trans* documented cases of transgender sex workers shot with rubber bullets.²¹⁴

Unfortunately, violence against LGBT has continued during 2021. On 2 January 2021, the first killing of a transgender woman of the year was reported.²¹⁵ As of 20 February 2021, two transgender rights organizations, *Red Comunitaria Trans* and *Fundación Grupo de Acción y Apoyo a Personas con Experiencia de Vida Trans*, have documented seven killings of transgender persons in 2021.²¹⁶ In addition, due to the increase in COVID-19 cases, local authorities have imposed new lockdowns and curfews. In this regard, for instance, a gender-based curfew was recently imposed in Zipaquirá,²¹⁷ a town close to Bogota. As it was the case in 2020, it is very likely that these measures will have a disproportionate, negative impact on LGBT persons.

A.3. Recommendations

In light of the concerns identified above, the Colombian authorities should take at least the following measures to improve the human rights situation of LGBT persons:

- Take concrete steps to enforce existing legal human rights protections in favour of LGBT persons as guaranteed under the national legal framework. National and local authorities should identify and eliminate barriers faced by LGBT persons in the enjoyment of their human rights. The authorities should publicly condemn anti-LGBT rhetoric and transphobic behaviour by State officials.²¹⁸
- Ensure that State agents respect in practice the human rights of LGBT persons and do not discriminate against them on the grounds of their sexual orientation or gender identity or expression.
- Conduct training programmes on the human rights of LGBT persons based on national and international human rights standards. The programmes should also raise awareness about harmful stereotypes, including the use of pejorative language, directed at LGBT persons.
- Implement educational and cultural programmes to the benefit of the general public, as well as public officials, to promote full social inclusion of LGBT persons. This should include, for example, “conduct[ing] campaigns to prevent and combat homophobia, transphobia and discrimination based on sexual orientation, ensuring that the right to gender identity is protected”.²¹⁹
- Implement the Peace Agreement, including the measures designed to protect the human rights of LGBT persons, as well as LGBT human rights defenders.
- Design and implement COVID-19 related measures with an intersectional approach, ensuring that LGBT persons are considered as a diverse group with varying needs, facing

See also: El Espectador 2020, Charla Ser Trans en Colombia, 7mo Festival Internacional de Cine por los Derechos Humanos - Colombia, 13 de noviembre de 2020. Available at: <https://n9.cl/uvpw>

²¹⁴ El Tiempo, Trabajadoras sexuales trans denuncian violencia policial en Bogotá, 21 de junio de 2020. Available at: <https://n9.cl/ie295>

²¹⁵ El Tiempo, Denuncian el asesinato de una mujer trans en Mariquita, Tolima 4 de enero de 2020. Available at: <https://n9.cl/90dt>

²¹⁶ Red Comunitaria Trans, 20 de febrero 2021. Available at: <https://n9.cl/tmj1>; Fundación Grupo de Acción y Apoyo a Personas con Experiencia de Vida Trans, 20 de febrero de 2021. Available at: <https://n9.cl/bcost>

²¹⁷ Gobierno Municipal de Zipaquirá, Decreto 033 de 20 de enero de 2021. Available at: <https://n9.cl/6fid5>

²¹⁸ Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, ASPIRE Guidelines on COVID-19 response and recovery free from violence and discrimination based on sexual orientation and gender identity, 18 June 2020, Guideline III: Protect LGBT persons from violence and discrimination in the pandemic context (and prosecute perpetrators).

²¹⁹ Inter-American Commission on Human Rights, Pandemic and human rights in the Americas, Resolution No. 1/2020, 10 April 2020, page 17. Available at: <http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>

different predicaments.²²⁰ In particular, these measures should consider LGBT people's specific needs and the differentiated impact of the pandemic on their enjoyment of human rights.²²¹ To do so, it is essential that the authorities take into account the historical prejudice, discrimination and violence that LGBT people have endured. In other words, the authorities should ensure that "COVID-19 emergency measures do not worsen inequalities or structural barriers faced by people with diverse sexual orientations and gender identities, or lead to increased violence and discrimination against them".²²² Additionally, it is essential to ensure the participation of LGBT persons in "in the process of design, implementation and evaluation of COVID-19 specific measures".²²³

- Guarantee access justice and effective remedies to LGBT persons.²²⁴ Crucially, criminal investigations for crimes committed against LGBT persons should be conducted. These investigations should be consistent with international human rights standards.²²⁵ In particular, the investigations must be "independent, impartial, prompt, thorough, effective, credible and transparent".²²⁶ This entails that investigations must be carried out using all available legal means and be oriented towards the determination of the truth and the prosecution and criminal sanction of those responsible.²²⁷ Likewise, all logical lines of investigation should be investigated and considered.²²⁸ Investigations should be capable of identifying whether a discriminatory motive, such as discrimination against sexual orientation or gender identity of the victims, played a part in the commission of the crime.

B. SOUTH AFRICA

B.1 Introduction and background

South Africa has a comprehensive and progressive legal framework, including legal protection for the human rights of LGBT persons. South African courts have also produced progressive jurisprudence affirming the human rights of LGBT persons.²²⁹ However, in practice, these legal

²²⁰ Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, ASPIRE Guidelines on COVID-19 response and recovery free from violence and discrimination based on sexual orientation and gender identity, 18 June 2020, Guideline I: Acknowledge that LGBT persons are everywhere (and that they are hard-hit by the pandemic).

²²¹ Inter-American Commission on Human Rights, Pandemic and human rights in the Americas, Resolution No. 1/2020, 10 April 2020, page 17. Available at: <http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>

See also: Office of the High Commissioner for Human Rights, COVID-19: The suffering and resilience of LGBT persons must be visible and inform the actions of States, Statement by human rights experts on the International Day against Homophobia, Transphobia and Biphobia, 17 May 2020. Available at: <https://n9.cl/38j71>

²²² Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity, 'States must include LGBT community in COVID-19 response': The how and why from a UN expert, 17 May 2020. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25889&LangID=E>

²²³ Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, ASPIRE Guidelines on COVID-19 response and recovery free from violence and discrimination based on sexual orientation and gender identity, 18 June 2020, Guideline V: Representation of LGBT persons in the process of design, implementation and evaluation of COVID-19 specific measures is key (and reflect their voices).

²²⁴ Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, ASPIRE Guidelines on COVID-19 response and recovery free from violence and discrimination based on sexual orientation and gender identity, 18 June 2020, Guideline III: Protect LGBT persons from violence and discrimination in the pandemic context (and prosecute perpetrators).

²²⁵ See: Human Rights Committee, General comment No. 36: Article 6: right to life, CCPR/C/GC/36, 3 September 2019, and the Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (2016).

²²⁶ Human Rights Committee, General comment No. 36: Article 6: right to life, CCPR/C/GC/36, 3 September 2019, para 28.

²²⁷ Corte IDH, Caso Baldeón García Vs. Perú, Fondo, Reparaciones y Costas, Sentencia de 6 de abril de 2006, Serie C No. 147, párr. 94.

²²⁸ Corte IDH, Caso Omeara Carrascal y otros Vs. Colombia, Fondo, Reparaciones y Costas, Sentencia de 21 de noviembre de 2018, Serie C No. 368, párr. 212.

²²⁹ Examples include: National Coalition for Gay and Lesbian Equality and others v Minister of Justice and Others (CCT10/99)[1999] ZACC 17; 2000(2) SA1; 2000(1) BCLR 39 (2 December 1999); Fourie and Another v Minister of Home Affairs and Another (232/2003) [2004] ZASCA 1 All SA 273 (SCA) (30 November 2004); Du Toit and Another v Minister of Welfare and Population Development and Others (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR 1006; 2003(2) SA 198 (CC) (10 September 2002); September v Subramoney NO and Others (EC10/2016) [2019] ZAEQC 4.

protections do not always translate into real protection of the human rights of LGBT persons. Many LGBT persons face significant challenges in the exercise and enjoyment of their human rights. In particular, many experience discrimination and violence on the basis of their sexual orientation or gender identity and expression.²³⁰

Indeed, LGBT persons remain at a high risk of violence in South Africa, and are frequently targeted because of their real or perceived sexual orientation or gender identity.²³¹ In addition, many transgender persons in South Africa cannot access gender affirming services, which greatly compromises their enjoyment of human rights. Making matters worse, these predicaments have been exacerbated by the COVID-19 pandemic.

This section will not exhaustively discuss the general legal framework in South Africa pertaining to the human rights of LGBT persons, but will only hone in on the challenges faced by transgender persons in accessing basic healthcare services, gender affirming services and the gaps in the policies adopted with the stated aim of guaranteeing legal gender recognition for LGBT persons.

It will briefly highlight the contextual circumstances that condition the enjoyment of human rights of LGBT persons in South Africa; it will assess the legal framework regulating changes to one's gender marker; and it will then analyze the challenges associated with this process. The section will conclude by making recommendations to the South African authorities with a view to improving the enjoyment of fundamental human rights by the LGBT persons, and more specifically, transgender persons in South Africa.

B.1.1 Context

LGBT persons in South Africa are at high risk of violence with data indicating that "conservative attitudes, and cultural, religious, and traditional moral codes disproportionately affect young lesbian and transgender women and leave them particularly vulnerable to violence."²³² As aptly described by the Special Rapporteur on Violence Against Women at the conclusion of her mission to South Africa in 2015:

"despite an explicit prohibition of discrimination based on sexual orientation in the constitution, lesbian women and other sexual minorities are very vulnerable to extreme forms of violence purported at 'correcting' their bodies, including so-called "corrective rape" often accompanied by a particularly heinous murder. This type of extreme violence was reported to be on the rise."²³³

In addition, UN human rights treaty monitoring bodies have expressed similar concerns regarding the context of violence and discrimination in which South African LGBT persons

²³⁰ Human rights Watch, Violence and Discrimination against Black lesbians and Transgender Men in South Africa, 5 December 2011. Available at: <https://www.hrw.org/report/2011/12/05/well-show-you-youre-woman/violence-and-discrimination-against-black-lesbians-and>

²³¹ In South Africa, there have been many reports of homophobic rapes and murders and attacks on lesbian women. As a response, The South Africa government has, for example, put in place a National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex Sector in order to develop a strategy to address "corrective" rape in the country. See: Department of Justice and Constitutional Development, National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Sector. Available at: <https://www.justice.gov.za/vg/lqbt/NIS-LGBTIProgramme.pdf>
See also, USAID, Access to Justice for Lesbian, Gay, Bisexual and Transgender Survivors of Sexual Offences in South Africa, 2018. Available at: http://www.ghju.uct.ac.za/sites/default/files/image_tool/images/242/report_images/1%20COP%20LGBT%20Doc%20PDF.pdf

²³² Iranti, Data Collection and Reporting on Violence Perpetrated Against LGBTQI Persons in Botswana, Kenya, Malawi, South Africa and Uganda, January 2019. Available at: <https://www.arcusfoundation.org/wp-content/uploads/2020/04/Iranti-Violence-Against-LGBTQI-Persons-in-Botswana-Kenya-Malawi-South-Africa-Uganda.pdf>

²³³ Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa, A/HRC/32/42/add.2, 14 June 2016, para 33.

live.²³⁴ Furthermore, South African female sex workers, and particularly transgender women sex workers, face extraordinary levels of violence.²³⁵ Due to sex work being outlawed, many are placed at increased risk of violence and abuse at the hands of both State and non-State actors. With respect to this, the Committee on Economic, Social and Cultural Rights (CESCR) has expressed concern about sex workers' exclusion from the enjoyment of rights guaranteed by the ICESCR, including their right to work and the right to health, as well as at the frequent harassment and abuse of sex workers by members of the police.²³⁶ Those concerns are also relevant to LGBT sex workers.

Certain religious beliefs, the perception that homosexuality is un-African, and a deep history of exclusion and violence through colonization and the apartheid regime²³⁷ foster homophobia, discrimination and violence against LGBT persons in South Africa. These factors contribute to South Africa being a heteronormative society steeped in harmful gender stereotypes, with a deeply rooted culture of violence, where LGBT persons are continuously at high risk of violence.²³⁸

While South Africa is a secular State, the significant majority of South Africans identify as Christian.²³⁹ As highlighted by Human Rights Watch "for most South Africans, the family and church are two of the most significant spaces in which socialization and communal life occurs, and where social attitudes and ethical responses form."²⁴⁰ The interpretation of Christian religious texts that homosexuality is against religion and therefore "un-Christian" significantly contributes to intolerance fuelling discrimination and violence against LGBT persons in South Africa.²⁴¹ In a country where pastors and other religious leaders have influence and power in many communities, homophobic and transphobic utterances by religious leaders have an impact on discrimination within the communities.

²³⁴ The Committee Against Torture has expressed concern about the "continuing prevalence of all forms of violence, including gender based and domestic violence, primarily against women and girls which encompasses murder, attempted murder and sexual offences that may be committed at the instigation, or with the support of state actors." See: Committee Against Torture, Concluding observations on the second periodic report of South Africa, CAT/c/zaf/co/2, 1 June 2019, para 34 and 35; The Committee on the Rights of the Child has expressed concern about the discrimination faced by girls and children living with HIV/AIDS and lesbian, gay, bisexual, transgender and intersex children in South Africa who face heightened exposure to violence, abuse and harassment. Committee on the Rights of the Child, Concluding observations on the second periodic report of South Africa, CRC/c/zaf/co/2, 27 October 2016, para 23; The CEDAW Committee has also expressed "grave concern about reported sexual offences and murder committed against women on account of their sexual orientation" and expressed concern about the practice of corrective rape of lesbians in South Africa. Committee on the Elimination of Discrimination against Women, Concluding observation of the Committee on the Elimination of Discrimination against Women, CEDAW/c/zaf/co/4, 5 April 2011.

²³⁵ SWEAT, Female and Transwomxn Sex Workers Deaths in South Africa (2018-2019), available at: http://www.sweat.org.za/wp-content/uploads/2020/02/Sweat-2020-Say-Her-Name_final-low-res.pdf

²³⁶ Committee on Economic, Social and Cultural Rights, Concluding observations on initial report of South Africa, E/c.12/zaf/co/1, 29 November 2018, para 32.

²³⁷ Human Rights Watch, Violence and Discrimination against black Lesbians and Transgender men in South Africa (5 December 2011), available at: <https://www.hrw.org/report/2011/12/05/well-show-you-youre-woman/violence-and-discrimination-against-black-lesbians-and>; Luise Vincent, 'Unnatural', 'Un-African' and 'Ungodly': Homophobic discourse in democratic South Africa (2014) Vol. 17(4) 472-483; see also N Mkhize, The country we want to live in: Hate crimes and homophobia in the lives of black lesbian South Africans, HSRC, (2011), available at: https://open.uct.ac.za/bitstream/handle/11427/7660/The_country_we_want_to_live_in_-_Entire_ebook.pdf?sequence=1&isAllowed=y ; B Tonono, Corrective rape of black lesbians in South African townships: cracks in the enforcement of human rights, (2020) available at, https://ujcontent.uj.ac.za/vital/access/manager/Repository/uj:39153?site_name=GlobalView

²³⁸ See for instance: Finn et al, Heteronormativity, homophobia and 'culture' arguments in KwaZulu-Natal, South Africa, Vol. 17(5/6) 707-723, 2014. Available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.819.9068&rep=rep1&type=pdf>; Sarah Frances Gordon, 'Ill show you how a real woman should act': exploring gender and identity in post-apartheid South Africa. available at: <https://ecpr.eu/Filestore/PaperProposal/bf420eee-2610-4660-ae6e-1922e4085295.pdf>; Z Devji, Forging Paths for the African Queer: Is There an 'African' Mechanism for Realizing LGBTIQ Rights? Journal of African Law 60, no. 3, 2016, page 343 to 463. Available at: <https://n9.cl/ne7Z> and; Vincent L, Howell S. 'Unnatural', 'Un-African' and 'Ungodly': Homophobic discourse in democratic South Africa. Sexualities 17, no. 4, 2014, page 472 to 483.

²³⁹ Statistics South Africa, General Household Survey, 2013. Available at: <https://www.statssa.gov.za/publications/P0318/P03182013.pdf>

²⁴⁰ Human Rights watch, Violence and Discrimination against black Lesbians and Transgender men in South Africa, 5 December 2011. Available at: <https://www.hrw.org/report/2011/12/05/well-show-you-youre-woman/violence-and-discrimination-against-black-lesbians-and>

²⁴¹ Human Rights watch, Violence and Discrimination against black Lesbians and Transgender men in South Africa, 5 December 2011. Available at: <https://www.hrw.org/report/2011/12/05/well-show-you-youre-woman/violence-and-discrimination-against-black-lesbians-and>

The view that homosexuality is un-African is also one still held by many,²⁴² and political and cultural leaders have in the past publicly espoused anti-gay sentiments.²⁴³ Evidence suggests that in South Africa, lesbians are more prone to be victims of “corrective rape”²⁴⁴ due to a cultural environment in which lesbianism is taboo and same-sex desire is deemed as alien to South African culture making lesbian women in South Africa the carriers of a “double-burden” for being lesbian, and for resisting culture.²⁴⁵ As a result of this, along with other factors, lesbians in South African townships are particularly vulnerable to discrimination, corrective rape and other violence.²⁴⁶

South Africa is a heteronormative society where patriarchy is deeply rooted; this also contributes to violence and discrimination against LGBT persons.²⁴⁷ In this regard, the South African Constitutional court has vehemently condemned the patriarchal nature of South African society, acknowledging its contribution to gender-based violence, including to “a culture of rape”.²⁴⁸

Furthermore, South Africa has a haunting history of exclusion through colonialism and apartheid laws of segregation based on race, and even today, post-apartheid, South Africans remain deeply divided by historically unequal social relationships. Inequality stems from various factors, including a history of institutionalized racism, sexism, exclusion and structural violence. These historical factors contribute to South Africa being an overall “deeply violent society”,²⁴⁹ with a deep-rooted violence and “rape culture”.²⁵⁰

LGBT persons in South Africa also face significant barriers in accessing justice and effective remedies for human rights violations; particular challenges affect the criminal justice system, resulting in many cases concerning the protection of human rights of LGBT persons not reaching

²⁴² Luise Vincent, ‘Unnatural’, Un-African’ and ‘Ungodly’: Homophobic discourse in democratic South Africa (2014) Vol. 17(4) 472-483; see also N Mkhize, The country we want to live in: Hate crimes and homophobia in the lives of black lesbian South Africans, HSRC, (2011), available at: https://open.uct.ac.za/bitstream/handle/11427/7660/The_country_we_want_to_live_in_-_Entire_ebook.pdf?sequence=1&isAllowed=y

²⁴³ Former President Jacob Zuma was quoted as saying gay marriage is a disgrace to the nation and to God.’ The new Humanitarian, Zuma slammed for vies on homosexuality, same-sex marriage, 27 September 2006. Available at: <https://www.thenewhumanitarian.org/news/2006/09/27/zuma-slammed-views-homosexuality-same-sex-marriage>; King Goodwill Zwelithini said homosexuality is unZulu and needs to be condemned and those doing it are ‘rotten.’ Iva Roze Skoch, Zulu king engages gay community, GlobalPost, 17 January 2012. Available at, <https://www.pri.org/stories/2012-01-27/zulu-king-enrages-gay-community>

²⁴⁴ Corrective Rape is a term used to describe a rape that is perpetrated with the explicit intention of changing the sexual orientation of a woman who is or is presumed to be lesbian. The use of this term is controversial because “the language of corrective rape evokes justification for attacks on women who overtly defy socially prescribed gender roles. Furthermore, the nature in which the term is used reinforces the myth that gender identity can be corrected”. See: L De Wee, The meaning of corrective rape as experienced by black South African lesbians, University of Johannesburg, 2017, Page 8 and 9. See also: R Koraan and A Geuld, “Corrective Rape” of Lesbians in the era of transformative constitutionalism in South Africa”, Volume 18 No 5, 2015. available at <http://www.saflii.org/za/journals/PER/2015/70.pdf>; Human Rights watch, Violence and Discrimination against black Lesbians and Transgender men in South Africa, 5 December 2011. Available at: <https://www.hrw.org/report/2011/12/05/well-show-you-youre-woman/violence-and-discrimination-against-black-lesbians-and>

²⁴⁵ R Koraan and A Geuld, “Corrective Rape” of Lesbians in the era of transformative constitutionalism in South Africa”, 2015 Volume 18 No 5. Available at <http://www.saflii.org/za/journals/PER/2015/70.pdf>

²⁴⁶ Id. See also: Action Aid, Hate Crimes: The rise of ‘corrective’ rape in South Africa (2009) available at, https://www.actionaid.org.uk/sites/default/files/publications/hate_crimes_the_rise_of_corrective_rape_in_south_africa_september_2009.pdf ; B Tonono, Corrective rape of black lesbians in South African townships: cracks in the enforcement of human rights, 2020. Available at: https://ujcontent.uj.ac.za/vital/access/manager/Repository/uj:39153?site_name=GlobalView

²⁴⁷ R Koraan and A Geuld, “Corrective Rape” of Lesbians in the era of transformative constitutionalism in South Africa”, 2015 Volume 18 No 5. Available at <http://www.saflii.org/za/journals/PER/2015/70.pdf>

See also: Constitutional Court of South Africa, President of the Republic of South Africa and Another v Hugo (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997), para 80; Constitutional Court of South Africa, Tshabalala v S; Ntuli v S (CCT323/18;CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) (11 December 2019), para 80; and Constitutional Court of South Africa Mahlangu and Another v Minister of Labour and Others (CCT306/19) [2020] ZACC 24 (19 November 2020), para 96.

²⁴⁸ President of the Republic of South Africa and Another v Hugo (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997) para 80; Tshabalala v S; Ntuli v S (CCT323/18;CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) (11 December 2019); Mahlangu and Another v Minister of Labour and Others (CCT306/19) [2020] ZACC 24 (19 November 2020)

²⁴⁹ Government of the Republic of South African, National Strategic Plan on Gender-Based Violence and Femicide (2020-2030). Available at: <https://www.samrc.ac.za/sites/default/files/files/2020-05-11/NSPGenderBasedVF.pdf>

²⁵⁰ USAID, Access to Justice for Lesbian, Gay, Bisexual and Transgender Survivors of Sexual Offences in South Africa, 2018. Available at: <https://n9.cl/35cbb>

the courts.²⁵¹ These barriers to access to justice include experiences of discrimination within the criminal justice system, as well as societal homophobia and transphobia.²⁵²

B.2 Legal Framework

As mentioned above, in South Africa, law and policy protection of the human rights of LGBT persons is strong. The South African Constitution protects the right to equality, the right to human dignity, the right to life, the right to freedom and security of the person, the right to privacy, the right to freedom of expression, the right to healthcare, the right to administrative justice, and the right to freedom of assembly and association, for all persons.²⁵³ The Constitution specifically proscribes unfair discrimination based on sexual orientation. In this regard, section 9(3) of the Constitution provides that:

“the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”. (emphasis added)

Although the Constitution does not expressly refer to gender identity, nor does it explicitly prohibit unfair discrimination against transgender persons, the Equality Court has confirmed that the law does prohibit unfair discrimination against transgender persons.²⁵⁴

The Constitutional Court of South Africa decided on two separate constitutional challenges to both the common law and statutory definitions of marriage in South Africa. The case of *Minister of Home Affairs and Another v Fourie and Another*²⁵⁵ concerned a challenge to the constitutionality of the South African common law’s exclusion of same-sex marriage. In the second case, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,²⁵⁶ the Lesbian and Gay Equality Project challenged the statutory definition of marriage in the Marriage Act.

The Constitutional Court heard the cases together, and the Applicants argued that the common law definition of marriage (a union of one man with one woman) violated the constitutional principles of equal protection and non-discrimination. The Marriage Act too required a marriage to be between a “wife and husband”. The Constitutional Court concluded that the common law definition of marriage violated the Constitution by excluding same-sex partnerships. The Marriage Act was also found to have fallen foul of the Constitution. Parliament was given twelve months to cure the “Defect”.

In 2006, in response to the *Fourie* decision,²⁵⁷ South Africa promulgated the Civil Union Act 17 of 2006, and became one of the first countries to legalise same-sex civil partnerships. The Civil Union Act was not without its problems, with provisions that allowed for objections to be raised during the solemnization of the wedding, provided for in Section 6 of the Act. Section 6 had the effect of marginalizing and violating the rights of same-sex couples by, inter alia, allowing for marriage officers to refuse to solemnize same-sex marriages based on religion, conscience and belief, thereby effectively endorsing discrimination by listing same-sex union as the only

²⁵¹ Id.

²⁵² Id.

²⁵³ Constitution of the Republic of South Africa, 1996, sections 9(3), 10, 11, 12, 14, 16, 27, 33, 35, 17 and 18.

²⁵⁴ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAFEC 4. See also, Pierre De Vos, Groundbreaking case on transgender rights could create a legal precedent, DailyMaverick (7 November 2018), available at <https://n9.cl/hmad>

²⁵⁵ *Minister of Home Affairs v Fourie & Ors* 2006(1) SA 542 (CC). This is a landmark judgement which ruled that same-sex couples have a constitutional right to marry under South African law.

²⁵⁶ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 (1) SA 6 (CC)

²⁵⁷ See note 257 above.

reason a civil marriage officer may object to solemnizing such a marriage.²⁵⁸ This section has now been repealed.²⁵⁹ However, only in the year 2020, did South Africa's Parliament pass a bill that bars marriage officers from objecting to marrying same-sex couples.²⁶⁰

Additionally, equality legislation has also been promulgated with the objective of preventing unfair discrimination and harassment in line with the Constitution.²⁶¹

The passing of the Civil Union Act, 2006 was seen as a victory for the human rights of LGBT persons by many. However, some were concerned that the Act would not guarantee full equality for lesbian and gay persons with respect to the institution of marriage, but instead effectively create a "separate but equal" status, which is discriminatory, for people married pursuant to the terms of this Act.²⁶² Activists argued that it would have been better for Parliament to read "spouse" as gender neutral term into the Marriage Act 25 of 1961, instead of enacting a complementary but separate legislation to cure the exclusion of same-sex couples from marriage.²⁶³ The Civil Union Act was however passed into law.

The Civil Union Act also provides for gender marker change but with onerous requirements which will be discussed in more detail below. However, it is noteworthy that transgender persons who have transitioned to a new gender have had challenges in the area of marriage registration with the Department of Home Affairs. This challenge was resolved by the High Court of South Africa in the decision the case of *KOS*.²⁶⁴ In this case, the Constitutional Court examined the situation of persons who were married in terms of the Marriage Act 25 of 1961 (which registers heterosexual marriages) and applied to the Department of Home Affairs to alter their sex description to match their 'new' gender. The Department of Home Affairs refused the registrations arguing that the registrations sought would be incompatible with the continued existence of their marriage under the Marriage Act, which envisions marriage between a man and a woman. For the Department of Home Affairs, one cannot remain in a marriage entered into under the Marriage Act and alter their gender marker.

The Court found that the refusal by Home Affairs to process gender marker change applications on this basis was unlawful. Moreover, the Court confirmed that the refusal was unconstitutional and violated the rights to equality and dignity of the applicants. Despite this judgment, transgender persons are still experiencing challenges and delays at the Department of Home Affairs with official identity management and marriage policies.²⁶⁵

B.2.1 Gaps in legal gender recognition

While South Africa has a comprehensive legal framework geared at protecting the human rights of LGBT persons, including the expressed prohibition of unfair discrimination based on sexual

²⁵⁸ Heinrich Böll Stiftung, Letter to the President Re: Civil Union Amendment Bill (19 August 2020) available at: <https://za.boell.org/en/2020/08/19/letter-president-re-civil-union-amendment-bill>

²⁵⁹ Government Gazette, Act to Amend the Civil Union Act, 2006 by repealing a section; and to provide for matters connected therewith (22 October 2020), available at: https://www.gov.za/sites/default/files/gcis_document/202010/43832gon1108.pdf

²⁶⁰ For further reading, see page 290 and 349 of the: ICJ, Gender Identity, and Justice: A Comparative Law Casebook, a collection of domestic cases addressing legal issues relating to sexual orientation and gender identity, 2011. Available at: <https://www.icj.org/sexual-orientation-gender-identity-and-justice-a-comparative-law-casebook/>

²⁶¹ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

²⁶² Human Rights Watch, South Africa: Grant full civil marriage rights to lesbian and gay couples, not 'civil unions' (18 October 2006), available at: <https://www.hrw.org/news/2006/10/18/south-africa-grant-full-civil-marriage-rights-lesbian-and-gay-couples-not-civil>

²⁶³ Julia Sloth-Nielsen, *KOS v Minister of Home Affairs and its relevance to the law of marriage in South Africa*, South African Journal on Human Rights (29 August 2019) available at: <https://core.ac.uk/download/pdf/287722845.pdf>

²⁶⁴ High Court of South Africa, (Western Cape Division, Cape Town), *KOS and Others v Minister of Home Affairs and Others* (2298/2017) [2017] ZAWCHC 90; [2017] 4 All SA 468 (WCC); 2017 (6) SA 588 (WCC), 6 September 2017.

²⁶⁵ Joint media statement of Home Affairs Minister Dr Aaron Motsoaledi and the Trans Activist Coalition (21 September 2020) available at: https://0ce9900d-c9c4-45eb-9f73-8e17bcae73f0.filesusr.com/ugd/3486ef_ca8c9a6094ff4731bcf438ad5be16e70.pdf

orientation in the Constitution, there is a considerable difference between the law and people's lived experience, in particular, the lived experience of transgender persons who face insurmountable challenges when they seek to change their gender markers.

If a person wishes to have their gender marker changed in South Africa, they need to apply to do so in terms consistent with the provisions of the Alteration of Sex Description and Sex Status Act ("the Act").²⁶⁶ The Act makes provisions for two categories of people: gender reassignment applicants and intersex applicants. The Act sets out the procedure to be followed by a person who wishes to change their gender marker; it provides that a person whose sexual characteristics have been altered by surgical or medical treatment, or a person who is intersexed, may apply to the Director General of the National Department of Home Affairs for the alteration of their sex description on the birth register.²⁶⁷ When making such an application to the Department of Home Affairs, an applicant must, in the case of a person whose sexual characteristics have been altered by surgical or medical treatment resulting in gender reassignment, provide a report prepared by the medical practitioners, stating the nature and results of any procedures carried out and any treatment undertaken.²⁶⁸

These requirements have frequently been narrowly interpreted or entirely misinterpreted by the authorities charged with effecting gender marker changes, thereby creating significant barriers for transgender persons to change their gender marker.²⁶⁹ This interpretation problem will be discussed in more detail below, however, its negative impact on transgender persons is significant.

Many transgender persons find themselves in a catch-22 situation of facing barriers to accessing gender affirming healthcare services, without which they cannot change their gender marker at the Department of Home Affairs. While the *KOS* case makes it clear that "gender reassignment surgery is actually not a requirement for relief in terms of the Alterations Act",²⁷⁰ the lived experience of transgender people on the ground indicates that they still encounter barriers when engaging with the department of Home Affairs; and, since the outbreak of the COVID-19 pandemic, their predicament has become even greater.

B.2.1.1 Arbitrary and onerous requirements from Department of Home Affairs

The main challenge that has been highlighted by various civil society organisations working in this area in South Africa is that the Department of Home Affairs, in many cases, either narrowly interpreted the Act or misinterpreted the Act entirely.²⁷¹ Section 2(2)(b), detailing the required

²⁶⁶ No. 49 of 2003. Available at: https://www.gov.za/sites/default/files/gcis_document/201409/a49-03.pdf. If the application is successful, the Births and Deaths Registration Amendment Act, 2010 (Act No.18 of 2010) provides:

"Section 27A (1) if the Director General Grants an application, made in the prescribed manner, or a magistrate issues an order in terms of section 2 of the Alterations of sex Description and Sex Status Act, 2003 (Act No. 49 of 2003) the Director General shall alter the sex description on the birth register of the person concerned" Births and Deaths Registration Amendment Act, No. 18 of 2010. Available at: https://www.gov.za/sites/default/files/gcis_document/201409/a1820100.pdf

²⁶⁷ Alteration of Sex Description and Sex Status Act Section 2(1) Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolution through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director- General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.

²⁶⁸ *Alteration of Sex Description and Sex Status Act* (2) An application contemplated in subsection (1) must- (a) be accompanied by the birth certificate of the applicant;(b) in the case of a person whose sexual characteristics have been altered by surgical or medical treatment resulting in gender reassignment, be accompanied by reports stating the nature and results of any procedures carried out and any treatment applied prepared by the medical practitioners who carried out the procedures and applied the treatment or by a medical practitioner with experience in the carrying out of such procedures and the application of such treatment; (c) in every case in which sexual characteristics have been altered resulting in gender reassignment, be accompanied by a report, prepared by a medical practitioner other than the one contemplated in paragraph(b) who has medically examined the application in order to establish his or her sexual characteristics.

²⁶⁹ Legal Resources Centre, Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003, available at https://drive.google.com/file/d/1xvXcmoa5OZ1qsrzMK-z7JbCvd_T0zz5W/view

²⁷⁰ High Court of South Africa, (Western Cape Division, Cape Town), *KOS and Others v Minister of Home Affairs and Others* (2298/2017) [2017] ZAWCHC 90; [2017] 4 All SA 468 (WCC); 2017 (6) SA 588 (WCC), 6 September 2017, Para 39.

²⁷¹ Legal Resources Centre, Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003, available at https://drive.google.com/file/d/1xvXcmoa5OZ1qsrzMK-z7JbCvd_T0zz5W/view

documents that should accompany an application for a gender marker change, has frequently been interpreted by the Department of Home Affairs to the effect that only transgender persons who have undergone gender affirming surgery may change their gender marker, resulting in the rejection of many applicants due to lack of proof of gender reassignment surgery.²⁷²

Notwithstanding the fact that the Act clearly does not require applicants to have undergone surgery, the Department of Home Affairs has frequently interpreted it as doing so.²⁷³ Even those who had undergone other forms of “medical treatment”, as permitted by the Act, such as hormone regimens, have been denied a gender marker change for lack of proof of surgery.²⁷⁴ This despite the fact that the Act provides for alteration of sexual characteristics by surgical or medical treatment, meaning that hormone treatment is sufficient for the purposes of the Act in order to apply for a gender marker change.

As mentioned above, while both the law and South African courts are clear on this issue, local civil society organizations have complained to the Minister of Home Affairs that there are systemic delays in dealing with amendments of particulars of transgender persons. In addition, they have also denounced the fact that official identity management and marriage policies of the Department are not up to date and the gender-affirming services provided by the Department are not in accordance with international recommended practice on this issue.²⁷⁵

B.2.1.2 The medical model of the Act is itself onerous and not in line with international human rights standards

The requirement that a person must have undergone medical or surgical gender affirmation, and produce medical reports to this effect, places significant barriers for transgender persons in South Africa as many among them do not have access to gender affirming treatment and cannot access reports from doctors as required. The barriers to accessing gender affirming healthcare will be discussed in more detail below.

In addition, such requirement effectively pathologizes transgender persons, and falls short of internationally recommended practices and human rights standards. Principle 31(c) of the Yogyakarta Principles (YP+10) provides that, while sex or gender continues to be registered, States shall:

“ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or other third party opinion, shall be a prerequisite to change one’s name, legal sex or gender.”²⁷⁶

By making medical interventions and medical reports a prerequisite for gender marker change, the Act limits the accessibility of such gender affirming services. This limitation negatively affects the enjoyment of human rights, such as the right to dignity, freedom of expression, freedom from discrimination and equal protection of the law of transgender persons in South

²⁷² Gender DynamiX (GDx) and the Legal Resources Centre (LRC), Keeping the Promise of Dignity and Freedom for All: A Position Paper on Legal Gender Recognition in South Africa, 2020.

²⁷³ Gender DynamiX (GDx) and the Legal Resources Centre (LRC), Keeping the Promise of Dignity and Freedom for All: A Position Paper on Legal Gender Recognition in South Africa, 2020.

²⁷⁴ Legal Resources Centre, Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003, available at https://drive.google.com/file/d/1xvXcmoa5OZ1gsrzMk-z7JbCvd_T0zz5W/view

See also: Southern African Litigation Centre, Laws and Policies Affecting Transgender Persons in Southern Africa, July 2016, available at: <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Transgender-Rights-Booklet.pdf>

²⁷⁵ Joint media statement of Home Affairs Minister Dr Aaron Motsoaledi and the Trans Activist Coalition (21 September 2020) available at: https://0ce9900d-c9c4-45eb-9f73-8e17bcae73f0.filesusr.com/ugd/3486ef_ca8c9a6094ff4731bcf438ad5be16e70.pdf

²⁷⁶ Yogyakarta Principles, available at: <https://yogyakartaprinciples.org/principle-31-yp10/>

Africa. Indeed, courts, for example in Botswana, have found that the human rights of transgender persons are violated where they apply for gender marker change and are refused.²⁷⁷

Furthermore, South African courts have also held that the right to dignity includes the right to gender identity and where a transgender person is prevented from expressing their identity, this right is violated.²⁷⁸ As CESCR has recommended to other States, there is a need for South Africa to “put in place quick, transparent and accessible procedures for legal gender recognition, to facilitate the enjoyment of Covenant rights by transgender persons.”²⁷⁹

B.2.1.3 Barriers to access gender affirming healthcare

Transgender persons may seek to access gender affirming healthcare services, such as, for example, hormone therapies, surgical procedures or other medical procedures, in order to alter their bodies to affirm their gender identities.

Only two hospitals in South Africa provide transgender specific healthcare services.²⁸⁰ These hospitals are in urban areas and are hard to access for transgender persons living outside those areas or in other provinces altogether. In addition, these hospitals have extremely long waiting lists of more than 25 years for gender affirming surgeries, which means many people never access them.²⁸¹

While private hospitals may provide these services, the costs for gender affirming health services are exorbitant and health insurance providers have on many occasions classified such health services as “cosmetic” and therefore do not fund them. In a country with high levels of unemployment and poverty, many transgender persons are excluded from accessing healthcare services from private healthcare providers.

B.3 Impact of COVID-19 on transgender persons

The COVID-19 health crisis has exacerbated pre-existing barriers in access to healthcare for transgender persons in South Africa. When lockdown regulations, enacted under the Disaster Management Act, were first implemented in South Africa, the change of gender marker under the Act was deemed a “non-essential service”, therefore the Department of Home Affairs stopped processing these applications at the start of lockdown.

This meant that many people could not access the Department of Home Affairs’ gender affirming services for a period of five months. A local NGO working on the human rights of transgender people in South Africa found that “not one applicant was successful in their search

²⁷⁷ ND v Attorney General and Others, available at: https://www.escr-net.org/sites/default/files/caselaw/nd_judgment.pdf; see also Kgositau v Attorney General and Registrar of National Registration

²⁷⁸ Jade September v Mr Subramoney NO Case No: EC10/2016

²⁷⁹ Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of the Russian Federation, E/c.12/rus/co6, 16 October 2017. Available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fRUS%2fCO%2f6&Lang=en; See also, for example, CEDAW Committee’s concluding observations to Slovakia where the committee recommended that the “review current laws and take measures to ensure that the rights of transgender and intersex women and girls to control their bodies are respected and protected and that they are free from non-consensual medical treatment, including by abolishing the requirement of compulsory sterilization and surgery for transgender women who wish to obtain legal recognition of their gender.” Committee on the Elimination of Discrimination Against women, Concluding observations on the combined fifth and sixth periodic report of Slovakia, CEDAW c/svk/co/5-6 (25 November 2015), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/SVK/CO/5-6&Lang=En

²⁸⁰ Legal Resources Centre, Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003, available at https://drive.google.com/file/d/1xvXcmoa5OZ1gsrzMk-z7JbCvd_T0zz5W/view

Also view testimony of Liberty Matthyse on ICJ Facebook Page.

²⁸¹ Marcia Zali, Transgender healthcare is a matter of human dignity, (31 March 2020), <https://health-e.org.za/2020/03/31/transgender-healthcare-is-a-matter-of-human-dignity/>

for gender affirming care during the lockdown period”.²⁸² This includes applicants who sought to have gender makers changed. Local civil society organizations, through the Trans Activists Coalition, have raised concerns about the “systemic delays in dealing with amendments of particulars of trans persons” and have lobbied government to amend the alterations of Sex Description and Sex Status Act to be in-line with international human rights standards and best practices.²⁸³ Recent research has characterized the situation as “a clear disregard by the [Department of Home Affairs] for the rights of transgender and gender-diverse persons during the pandemic.”²⁸⁴

B.4. Recommendations

In light of the concerns identified above, the South African authorities should take at least the following measures to improve the human rights situation of LGBT persons:

- Publish clear regulations to ensure a uniform approach by the Department of Home Affairs when dealing with applications for gender marker changes and provide training on the same. In particular, such guidelines should be geared at ensuring compliance by the Department with the *KOS* judgment.
- Reform section 2(2)(b) of the Alteration of Sex Description Act to make it compliant with international standards on self-identification and allow for gender to be entirely determined in line with internationally recommended practice and the Yogyakarta Principles instead of the current medical model.²⁸⁵
- Improve access to gender affirming healthcare by increasing the availability of government healthcare institutions providing such services, including in rural areas.
- Put in place measures to protect sex workers, including transgender sex workers from violence, including by decriminalizing sex work.

C. MALAYSIA

C.1. Introduction and background

In light of Malaysia’s obligations under international human rights law, this section analyzes: (i) Malaysia’s criminalization of LGBT people pursuant to the country’s domestic legal framework; (ii) its heavy penalties; and (iii) the attitudes of the State and its law enforcement agents towards matters related to SOGIE and human rights. This section takes into account Malaysia’s dual-legal system under its civil laws and state-enacted personal laws, recent judgments, and, in turn, its impact on different sections of the Malaysian population. This includes its discriminatory effects and its interconnectedness, more broadly, with human rights, for example: freedom from discrimination, torture and violence, and access to medical treatment.

C.1.1 Context

²⁸² Iranti, Our needs are essential, 23 August 2020, page 3. Available at: <https://n9.cl/gio6x>

²⁸³ Joint media statement of Home Affairs Minister Dr Aaron Motsoaledi and the Trans Activist Coalition, 21 September 2020. Available at:

https://0ce9900d-c9c4-45eb-9f73-8e17bcae73f0.filesusr.com/ugd/3486ef_ca8c9a6094ff4731bcf438ad5be16e70.pdf

²⁸⁴ R Igual, Home Affairs failing trans and gender-diverse South Africans during lockdown, Mamba, 24 August 2020. Available at: <https://n9.cl/ncpy8>

²⁸⁵ See also Genderdynamix, Position Paper: Keeping the promise of dignity and freedom for all: a position paper on legal gender recognition in South Africa, 2020, available at: <https://www.genderdynamix.org.za/for-lawyers-and-human-rights-defend>

Malaysia is a country made up of thirteen states and three Federal Territories. It is a country that has an ethnically, culturally and religiously diverse population. Political administration in Malaysia has historically been dominated by ethnic-based political parties.²⁸⁶

Despite shifts of political power, Malaysia's leaders have steadily championed common narratives, favouring "Asian values"²⁸⁷ and ethno-nationalism, and have attempted to expand the role of "Islam" in public administration.²⁸⁸ With respect to this, Human Rights Watch noted the rise of the politicization of Islam and its links to rising "transphobic and homophobic discourse" in its 2014 report on Human Rights Abuses Against Transgender People in Malaysia.²⁸⁹ Nationalist narratives casting government critics,²⁹⁰ migrants and refugees²⁹¹ as threats to national security are similarly applied to LGBT persons, contributing to homophobic and transphobic laws, practice, attitudes and policies by casting them as the "other" and criminals.²⁹²

In Malaysia, discussions in the public domain about sexual orientation, gender identity and expression are "often regarded as taboo".²⁹³ LGBT persons face discrimination and human rights violations. Consensual same-sex sexual relationships are criminalized through both penal code offences and Syariah state-enacted religious laws and these discrepancies have become subject to constitutional challenges.²⁹⁴ Transgender and gender non-conforming identities are also penalized under State Syariah law, and pathways to legal gender recognition are littered with cumbersome administrative barriers for Muslims and non-Muslims (discussed in the section below).

Malaysia has a legal system made up of both a common-law system of general (civil) law, applicable to all persons throughout the country, and state-enacted Syariah religious laws, applicable only to people professing the "Islamic faith"²⁹⁵, oftentimes referred to as a "dual legal system".

What is meant as the "dual legal system" in Malaysia has been contested in the public sphere²⁹⁶ and in court decisions. This report aims to look at the practical implications of this perceived "dual legal system" and the recent court rulings on this issue.

²⁸⁶ Id.

²⁸⁷ Nikkei Asia, Mahathir rejects LGBT rights, 25 October 2018. Available at: <https://asia.nikkei.com/Politics/Mahathir-rejects-LGBT-rights>

²⁸⁸ Business Times, Muhyiddin's Bersatu joins Muafakat to form grand Malay Muslim alliance, 22 August 2020. Available at: <https://www.businesstimes.com.sg/government-economy/muhyiddins-bersatu-joins-muafakat-to-form-grand-malay-muslim-alliance>

²⁸⁹ Human Rights Watch, Malaysia: "I'm scared to be a woman", Human Rights Abuses Against Transgender People in Malaysia, September 2014. Available at: https://features.hrw.org/features/HRW_reports_2014/Im_Scared_to_Be_a_Woman/index.html

²⁹⁰ ICJ, Situation of Human Rights Defenders in Malaysia, 4 March 2016. Available at: <https://www.icj.org/situation-of-human-rights-defenders-in-malaysia/>

²⁹¹ ICJ, Malaysia: End harassment and intimidation of media workers and critics, 11 July 2020. Available at: <https://www.icj.org/malaysia-end-harassment-and-intimidation-of-media-workers-and-critics/>

²⁹² In July 2019, Dato' Haji Marzuki bin Yahya, the then Deputy Minister of Home Affairs in a Parliament response said that sexual orientation and gender identity is one of the four main reasons cited by Malaysians who seek asylum in Australia. (Parliament Hansard, 2 July 2019, page 25-27).

²⁹³ ICJ, Briefing Paper: Challenges to Freedom of Religion or Belief in Malaysia, March 2019, Page 5. Available at: <https://www.icj.org/new-report-examines-right-to-freedom-of-religion-or-belief-in-malaysia/>

²⁹⁴ Iki Putra v The Selangor Government and the Religious Department of Selangor, Case No: BKA-3-11/2019 (W), Federal Court

²⁹⁵ ICJ, Briefing Paper: Challenges to Freedom of Religion or Belief in Malaysia, March 2019, page 14. Available at: <https://www.icj.org/new-report-examines-right-to-freedom-of-religion-or-belief-in-malaysia/>

Also see Article 74(2) of the Constitution.

²⁹⁶ For example, see the statement of former Minister Zaid Ibrahim had mentioned that "Malaysia's civil law and shariah systems are not parallels" and that leaders had perpetuated this "false" view that has created "controversial interfaith child custody disputes, see: Malaymail, "Zaid: Malaysia does not have dual legal system", 14 April 2014, available at: <https://www.malaymail.com/news/malaysia/2014/04/15/zaid-malaysia-does-not-have-dual-legal-system/653033>. For a more in-depth discussion on the problems of the perceived dual legal system in Malaysia and its gaps in the protection human rights, please refer to ICJ, Briefing Paper: Challenges to Freedom of Religion or Belief in Malaysia, March 2019, page 14. Available at: <https://www.icj.org/new-report-examines-right-to-freedom-of-religion-or-belief-in-malaysia/>

The existence of two parallel legal systems in practice places a double burden on Muslim LGBT persons and human rights defenders working on SOGIE issues. “They are stigmatized by families, potential employers, government officials, and communities because of their gender identity and expression”.²⁹⁷ In addition, activism by Muslim human rights defenders on a variety of issues is continuously stigmatized and branded as “deviant” acts, going against religion itself.²⁹⁸

Pursuant to the Federal Constitution, the power to promulgate laws at the federal level applicable to the entire country,²⁹⁹ regardless of religion and ethnicity, rests with Parliament. State-level Syariah laws are enacted at the level of the state; laws enforced at State level are enacted by State Legislative Assemblies.³⁰⁰ States, in contrast with the Federal State, have the power to criminally proscribe “offences” against the “precepts of Islam”.³⁰¹ Moreover, pursuant to a “State List”,³⁰² religious and family matters fall within the jurisdiction of the State legislative Assembly, which may adopt state religious law pertaining to these and other matters.

The Constitution recognizes that State law governs matters that fall into the category of “personal law” and is applicable only to people who profess the “religion of Islam”.³⁰³ State legislatures will only have the power to make laws when matters fall within the said “State List”.³⁰⁴

In 2018 the Committee on the Elimination of Discrimination Against Women, in its Concluding Observations on Malaysia’s combined third to fifth periodic reports, cautioned against this ‘parallel legal system’. The Committee stated it was *“concerned about the existence of a parallel legal system of civil law and multiple versions of Syariah law, which have not been harmonized in accordance with the Convention, as previously recommended by the Committee (see CEDAW/C/MYS/CO/2, para. 14), which leads to a gap in the protection of women against discrimination, including on the basis of their religion.”*³⁰⁵

However, as it stands, each State in Malaysia has its own provisions for Syariah criminal offences, creating a parallel system of criminal law applicable only to Muslims, different in each state.³⁰⁶ On 28 February 2021, the Federal Court of Malaysia, the apex court and constitutional

²⁹⁷ Human Rights Watch, Malaysia: “I’m scared to be a woman”, Human Rights Abuses Against Transgender People in Malaysia, September 2014, Page 17. Available at:

https://features.hrw.org/features/HRW_reports_2014/Im_Scared_to_Be_a_Woman/index.html

²⁹⁸ For example, see: ICJ, Malaysia: High Court ruling on Sisters in Islam threatens rights to freedom of expression and of religion or belief, 10 September 2019. Available at: <https://www.icj.org/malaysia-high-court-ruling-on-sisters-in-islam-threatens-rights-to-freedom-of-expression-and-of-religion-or-belief/>, where a 2014, Fatwa was issued, declaring a Muslim Women’s Organization, Sisters in Islam a “deviant organization.” For many years, Sisters in Islam has been promoting more egalitarian interpretations of Islamic laws with the aim of ending discrimination against women and achieving equality in the Muslim family.

²⁹⁹ Article 73 defines the powers of Parliament as that the “Parliament may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation”.

³⁰⁰ Article 73 further defines the powers of the State legislature as: “the Legislature of a State may make laws for the whole or any part of that State”.

³⁰¹ The Federal Constitution in List II, the State list, provides states with the power of the ‘creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List’. In Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354, the Federal Court preferred a broad meaning to the expression “precepts of Islam” to “include commandments, rules, principles, injunctions — all derived from the Qur’an, the Sunnah of the Prophet, the consensus of the religious scholars (ijma’) and the authoritative rulings (fatwas) of legitimate religious authorities, for the purpose of ensuring, preserving and/or promoting right beliefs, right attitudes, right actions and right conduct amongst the followers of Islam” (see paragraph 58)

³⁰² Article 74(2) of the Constitution provides that “Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule)) or the Concurrent List.” The State list empowers the State legislature to make laws pertaining to: Islamic personal law, including “personal and family law of persons professing the religion of Islam, including Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts.

³⁰³ Id.

³⁰⁴ Id.

³⁰⁵ Committee on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women: Malaysia, CEDAW/C/MYS/CO/3-5, 14 March 2018, Para 11.

³⁰⁶ Malik Intiaz Sarwar and S. Ananth, “Confronting the Constitutionality of Hudud”, Malayan Law Journals, 2016 4 MLJ xii, page 18.

court of Malaysia delivered a landmark decision on the competency of the state legislative houses to make religious criminal laws.³⁰⁷

This constitutional challenge was brought about following a charge of an “attempt” at “unnatural sex” under Section 28 of the Selangor Criminal Enactment 1995.³⁰⁸ The petitioner (male) was caught with another male persons in a house in November 2018.

He was charged in the Syariah Court for attempted “unnatural sex”. It is important to note that he was not charged under Section 377 and 377A of the Penal Code, the federal provisions for “unnatural offences”, namely “buggery” (Section 377) and “Carnal intercourse against the order of nature” (Section 377A).

The petitioner then filed a legal challenge questioning the competency of the state legislative houses to make religious criminal laws. Specifically, this case looks at Section 28 of the Syariah Criminal Offences (Selangor) Enactment 1998, which proscribes “sexual intercourse against the order of nature” and involves consideration of the argument that this criminal proscription falls within the purview of federal laws and it has already been provided for by Sections 377 to 377E of the Penal Code.³⁰⁹

On 25 February 2021, a 9-judge panel of the Federal Court, chaired by the Chief Justice had unanimously allowed the petition and declared Section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 void, due to its unconstitutionality. The main finding of the courts state that firstly, under the Federal Constitution, Parliament has the priority over the promulgation of criminal law pursuant to the Federal List. State Legislative Assemblies can enact offences against the precepts of Islam, however, it does not encroach to matters that fall into the Federal List, as that is the jurisdiction of Parliament.

It is important to emphasize that the court has clarified that the State Legislative Assemblies’ powers only stretch to offences of the religious nature. The outcome of this case is that “The court has clarified that there is one system of general criminal law, applicable to all persons, and another system of purely religious law in which offences can only relate to matters of religion. This will ensure that the law is applied without discrimination.”³¹⁰

This is an important outcome, as the existence of a parallel legal system has created a double-burden on LGBT persons and a “gap in the protection of women against discrimination, including on the basis of their religion.”³¹¹

C.2. Constitutional protections and its challenges

The Federal Constitution in Malaysia provides for the protection of fundamental rights, namely: the “liberty of the person”, which includes freedom from arbitrary detention (Article 5); the right to equality (Article 8); protection against repeated trials and retrospective criminal laws (Article 7); freedom of movement (Article 9); freedom of speech (Article 10); freedom of assembly (Article 10); freedom of religion (Article 11); the right to education (Article 12); and the right to property (Article 13). The Federal Constitution is supreme law in Malaysia and any

³⁰⁷ Iki Putra v The Selangor Government and the Religious Department of Selangor, Case No: BKA-3-11/2019 (W), Federal Court

³⁰⁸ Section 28. Sexual Intercourse against the order of nature: Any person who performs sexual intercourse against the order of nature with any man, woman or animal is guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof, this offence is defined in the interpreting statutes in Section 2

³⁰⁹ Iki Putra v Kerajaan Negeri Selangor, No. BKA-3-11/2019(W), Federal Court

³¹⁰ Response by Lawyers, M. Imtiaz & S. Ananth, 25 February 2021

³¹¹ Para 11 of the Concluding observations of the Committee on the Elimination of Discrimination against Women: Malaysia, CEDAW/C/MYS/CO/3-5, 14 March 2018.

law that contradicts the Constitution is void (Article 4). The Constitution states that Islam is the religion of the Federation (Article 3).

Gender and equality in the Federal Constitution

The equality clause of the Federal Constitution does not expressly prohibit discrimination on the basis of sexual orientation, gender identity and expression. It prohibits discrimination on the grounds of "*religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.*" (Article 8)

Up to now, the courts have taken conservative approaches in their interpretations of the protective scope of the term "gender" as a prohibited ground of discrimination in the Federal Constitution's equality clause. Successful applications have been few and far between, as seen in the 2021 Federal Court case that declared the unconstitutionality of Section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995.³¹² It is important to note that this decision was made on the competency of legislative houses to promulgate legislation, without the mention of the impact of these laws on LGBT persons.

For example, the courts have held that the equality provision only binds public bodies (i.e., the legislature, the executive and its agencies),³¹³ but it cannot be extended to private companies or "collective agreements".³¹⁴

However, in its decision in the case of *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors*,³¹⁵ the High Court did recognize that the word "gender", as a prohibited ground of discrimination, was incorporated into the Federal Constitution following Malaysia's accession to the CEDAW. The Court found that it was its "duty to take into account the government's commitment at an international level." In this case, the Court applied the CEDAW and ruled that the termination of a substitute teacher's teaching contract because of her pregnancy amounted to "gender discrimination".³¹⁶

Legal Gender Recognition: a "complex and costly process"

Government guidelines conflate "sex" and "gender", and both terms are often used interchangeably.³¹⁷ The Malaysian National Human Rights Commission has noted that the word "gender" translated into the national language is "jantina", which means "sex", further observing that "The interpretation of these two words have brought different arguments to the provision."³¹⁸

The report by the Malaysian Human Rights Commission, SUHAKAM, acknowledged that the administrative routes for legal gender recognition for LGBT persons is a "complex and costly

³¹² Iki Putra v The Selangor Government and the Religious Department of Selangor, Case No: BKA-3-11/2019 (W), Federal Court

³¹³ Beatrice Fernandez v Sistem Penerbangan Malaysia & Ors (2005) 3 MLJ 681, in this case, a flight attendant challenged her company's decision for dismissing her from her post upon her pregnancy on the basis of constitutional protections provided under Article 8, the equality provision and the Federal Court found that constitutional protections did not extend to private companies but only to the State and its agencies.

³¹⁴ Id.

³¹⁵ Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors [2012] 1 MLJ 832

³¹⁶ [Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors \[2012\] 1 MLJ 832](#)

³¹⁷ Galen Centre for Health and Social Policy, What It Means to Suffer in Silence Challenges to Mental Health Access Among LGBT People (April 2020), page 5. Available at: https://galencentre.org/wp-content/uploads/2019/04/PFA02_2019_Challenges-to-Mental-Health-Access-Among-LGBTPeople.pdf

³¹⁸ Study on discrimination against transgender persons based in Kuala Lumpur and Selangor (Right to Education, Employment, Healthcare, Housing and Dignity", Human Rights Commission of Malaysia (SUHAKAM), 2019, page 19. Available at: <https://www.suhakam.org.my/pusat-media/sumber/lain-lain/>

process³¹⁹ that has “become increasingly restrictive over the years”.³²⁰ The requirements include the mandatory need to have undergone surgery; Paragraphs 5.7.1 and 5.7.2 of a Practice Direction circulated by the National Registration Department, 9/2007, mentions the amendment of the “sex or gender category” in identity documents will only be allowed with a “court declaration”.³²¹ Furthermore, existing fatwas (as mentioned above) prohibit gender affirmation for Muslim transgender persons.

Due to the deepening stigma associated with protecting the human rights of LGBT people³²² and women human rights defenders,³²³ domestic jurisprudence has not been progressing in a positive direction with respect to human rights protections for either LGBT persons or women. A positive judgment is a rarity. When it comes to cases of legal gender recognition, the Malaysian National Human Rights Commission has noted that, “by and large, the courts are reluctant to allow transgender persons to change their identity card details to reflect the new gender status”.

In certain exceptional cases, however, the courts have guaranteed some human rights protection for transgender people.³²⁴

In the landmark case of *JG v. Pengarah Jabatan Pendaftaran Negara* (The Director of the National Registration Department),³²⁵ before the High Court of Kuala Lumpur, the plaintiff, a transgender woman, had applied for her national identification documents to be changed to indicate her gender as female. In a break from conservative rulings, the Court allowed the change on her identification documents by relying on expert medical evidence.³²⁶

In a more recent case, *Tan Pooi Yee v Ketua Pengarah Jabatan Pendaftaran Negara*,³²⁷ the High Court found the application of a transgender man to change his identity card documents to be a “genuine application”, and agreed with the expert medical evidence that he was indeed “male”. The Court read the constitutional protections of the “liberty of a person” (Article 5) to encompass the applicant’s right to live as a man.

In its decision in the case of *Mohammed Juzaili bin Mohd. Khamis & 2 Others v. Kerajaan Negeri Sembilan & 4 Others*,³²⁸ the Court of Appeal made a seminal finding. It declared an existing Syariah legal provision criminalizing “cross-dressing” in Negeri Sembilan as unconstitutional because it violated the liberty of the person, freedom of expression, freedom of movement and freedom of religion. This decision was overturned by the Federal Court on a technicality. In an appeal lodged by the government against the Court of Appeal’s decision, the judges ruled that the legal challenge against Section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 was void from the time it was filed. In a five-judge panel hearing, the Federal Court found that the challenge to the constitutionality of the impugned section should have been filed

³¹⁹ Study on discrimination against transgender persons based in Kuala Lumpur and Selangor (Right to Education, Employment, Healthcare, Housing and Dignity”, Human Rights Commission of Malaysia (SUHAKAM), 2019, page 26. Available at: <https://www.suhakam.org.my/pusat-media/sumber/lain-lain/>

³²⁰ Id, page 26.

³²¹ Id. Page 27.

³²² ICJ, Malaysia: Minister’s order to take action against the transgender community must be revoked, (15 July 2020), available at: <https://www.icj.org/malaysia-ministers-order-to-take-action-against-the-transgender-community-must-be-revoked/>

³²³ ICJ, Malaysia: High Court ruling on Sisters in Islam threatens rights to freedom of expression and of religion or belief, 10 September 2019. Available at: <https://www.icj.org/malaysia-high-court-ruling-on-sisters-in-islam-threatens-rights-to-freedom-of-expression-and-of-religion-or-belief/>

³²⁴ For a full list of cases decided on the issues of legal gender recognition in Malaysia and the recommendations by the National Human Rights Commission, please refer to: Study on discrimination against transgender persons based in Kuala Lumpur and Selangor (Right to Education, Employment, Healthcare, Housing and Dignity”, Human Rights Commission of Malaysia (SUHAKAM), 2019, page 29. Available at: <https://www.suhakam.org.my/pusat-media/sumber/lain-lain/>

³²⁵ *JG v. Pengarah Jabatan Pendaftaran Negara* (The Director of the National Registration Department) [2005]1 MLRH 760

³²⁶ For further reading, see page 179 of the: ICJ, Gender Identity, and Justice: A Comparative Law Casebook, a collection of domestic cases addressing legal issues relating to sexual orientation and gender identity, 2011. Available at: <https://www.icj.org/sexual-orientation-gender-identity-and-justice-a-comparative-law-casebook/>

³²⁷ *Tan Pooi Yee v Ketua Pengarah Jabatan Pendaftaran Negara* (The Director of the National Registration Department) [2016] 5 MLRH 501

³²⁸ *Muhamad Juzaili Mohd Khamis & Ors v State Govt of Negeri Sembilan and Ors* [2014] MLJU 1063

directly at the Federal Court (the Apex Court), instead of through the High Court.³²⁹ The Federal Court arrived at its decision by way of a conservative interpretation of Article 128 of the Federal Constitution (on the jurisdiction of the Federal Court), holding that the adjudication of constitutional matters lies exclusively with the Federal Court, limiting the role of the High Court and Court of Appeal in constitutional matters, with lasting impacts on constitutional legal challenges and public interest litigation.³³⁰

This decision raised two-fold concerns: firstly, the degree in which courts were able to engage in protecting the constitutional rights of an individual facing discrimination on the basis of their sexual orientation, gender identity, and orientation, and secondly, a deeper question on the independence of the judiciary and its commitment to upholding equality, and non-discrimination when dealing with SOGIE litigation.

C.3 Laws criminalizing consensual same-sex sexual relationships, transgender, and gender non-conforming identities

In Malaysia, being LGBT is challenging because of the different layers of social stigma, public policy, political sentiment, and the laws that discriminate against LGBT persons, instead of protecting them from harm. The criminal legal provisions in both the criminal law and State-drafted Syariah law expose LGBT persons to discrimination and to the risk of and actual violence, harassment and other abuse.

UN human rights mechanisms and agencies have recognized that the criminalization of LGBT persons "exposes people to hate crimes, police abuse, harassment, intimidation, blackmail, torture and family violence and perpetuates discrimination in the enjoyment of various human rights."³³¹

The Malaysian authorities have long taken the approach of "pathologizing LGBT adults and children",³³² branding them "ill" because of their sexual orientation, gender identity and expression. An example of this can be seen with the government programme called the Mukhayyam Programme, led by the Islamic Development Department (JAKIM) and religious state authorities with the intent of "rehabilitating the sexual orientation and gender identity of LGBT people." The Programme is set up as a residential programme, targeting LGBT persons, to "abandon" their lifestyle. According to the government National Strategic Plan for Ending AIDS, the goal of the programme is achieved through methods of abstinence, or "spiritual awareness" to ensure people stop "unnatural sex".

The Malaysian AIDS Council has denounced these practices, stating that LGBT Persons do "not require rehabilitation to correct their sexual orientation and/or gender identity".³³³ Although government bodies have repeatedly defended their actions, any act attempting to alter an

³²⁹ State Government of Negeri Sembilan & Ors v Muhammad Juzaili bin Mohd Khamis & Ors (Federal Court) (2015) 6 MLJ 736

³³⁰ For a more in-depth discussion on the decision of the Federal Court in the Mohammed Juzaili case and the arguments of the problems that emerge when the Federal Court is of the opinion that it possesses exclusive jurisdiction to hear constitutional matters, robbing its applicants of the right to appeal, and ousting the jurisdiction of the High Court and the Court of Appeal to make decisions on constitutional arguments, see: K. Anwar bin Hairudin and S. Qamar bin Qamar Siddique Bhatti, "The Court of Appeal's Decision in Muhamad Juzaili bin Mohd. Khamis & Ors v State Government of Negeri Sembilan & Ors - A Real Breakthrough in the Law", 45 (2) JMCL, (19 December 2018), see: <https://ejournal.um.edu.my/index.php/JMCL/article/download/20938/10655/>

³³¹ Office of the United Nations High Commissioner for Human Rights, Born Free and Equal, (Revised edition), page 44. Available at: <https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>

³³² Special UN and International Human Rights Experts, Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness" For International Day against Homophobia, Transphobia and Biphobia, 17 May 2016. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>

³³³ Malaysian AIDS Council, "Malaysian AIDS Council Denounces LGBT Conversion Therapy", (22 December 2018), available at: <https://www.mac.org.my/pdf/media-release/2018/22Dec2018-MALAYSIAN-AIDS-COUNCIL-DENOUNCES-LGBT-CONVERSION-THERAPY.pdf>

individual's sexual orientation, gender identity and/or expression ultimately amounts to "Conversion therapy".³³⁴

The existing criminalization of consensual relations between persons of the same gender breaches a State's obligations under international law, as Malaysia is a party to several international conventions, including the obligations to guarantee equality, non-discrimination, and privacy. As decided by the Human Rights Committee in 1994 in its decision in the case of *Toonen v Australia*, "consensual sexual activity in private is covered by the concept of privacy".

In regard to the criminalization of transgender and gender non-conforming persons, the UN Special Rapporteur on the right to health stated that the criminalization of different forms of gender identity and expression:

*"has reinforced negative societal attitudes and has led to serious human rights violations of the rights of this group of the population, including significant barriers in access to health care. Law enforcement officials arrest transgender women and subject them to various abuses, including humiliation in the media, and physical and verbal abuse"*³³⁵

Consensual same sex sexual relationships

Malaysia retains colonial, antiquated laws that criminalize both consensual and non-consensual same-sex sexual conduct under the heading of "unnatural offences".³³⁶ The Penal Code, under Section 377A-C, provides for the criminalization of consensual and non-consensual sexual acts "against the order of nature". Section 377C provides for "carnal intercourse against the order of nature without consent." These offences carry with it the maximum prison sentence of 20 years and whipping.³³⁷ In addition, Section 377D of the Penal Code criminalizes "outrages on decency", a broadly drafted section that criminalizes any act in public or private that is an act of "gross indecency with another person".

The effect of those criminal provisions is to place LGBT persons under a constant threat of "arrest, invasion of privacy, and extortion."³³⁸

According to a report by SUHAKAM, the Attorney General's Chambers and the Royal Malaysian Police have provided statistics indicating that, between 2010 and 2014, a total of 171 cases concerned charges under Section 377B of the Penal Code.³³⁹

³³⁴ "Conversion therapy" is used as an umbrella term to describe interventions of a wide-ranging nature, all of which are premised on the belief that a person's sexual orientation and gender identity, including gender expression, can and should be changed or suppressed when they do not fall under what other actors in a given setting and time perceive as the desirable norm, in particular when the person is lesbian, gay, bisexual, trans or gender diverse. Such practices are therefore consistently aimed at effecting a change from non-heterosexual to heterosexual and from trans or gender diverse to cisgender. Depending on the context, the term is used for a multitude of practices and methods, some of which are clandestine and therefore poorly documented, see UN Human Rights Council, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/44/53, para 17

³³⁵ Report of the Special Rapporteur on health, on a visit to Malaysia (A/HRC/29/33/Add.1), 2015, para. 86.

³³⁶ Section 377 criminalizes 'buggery with an animal', 377A provides for the crime of 'Carnal intercourse against the order of nature' and 377B its punishment, 377C for 'Committing carnal intercourse against the order of nature without consent, etc', 377 AC 'Sexual connection by object', 377D and E provides for acts of gross indecency and 'incitement of a child to an act of gross indecency'.

³³⁷ Section 377B. Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping; 377C. Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.

³³⁸ Queer Lapis, 'LGBTQ Legal Guide: What laws are out to catch you?', available at: <https://www.queerlapis.com/legal-resource-laws-part-1-laws/>

³³⁹ Study on discrimination against transgender persons based in Kuala Lumpur and Selangor (Right to Education, Employment, Healthcare, Housing and Dignity", Human Rights Commission of Malaysia (SUHAKAM), 2019, page 25. Available at: <https://www.suhakam.org.my/pusat-media/sumber/lain-lain/>

The “unnatural offences” provision in the Malaysian Penal Code has been most famously used to prosecute former Deputy Prime Minister and incumbent Member of Parliament, Anwar Ibrahim, who was convicted twice of “unnatural offences”. The local media “negatively portrayed” him as a “sodomite”, reinforcing negative attitudes toward men who have sex with men.³⁴⁰

These homophobic sentiments have continued to endure, as former party members, incumbent ministers have used his “immoral acts or sexual practices” as reasons they no longer wish to work with him,³⁴¹ despite themselves being accused of participation in video-tape recordings of same-sex sexual relations that underwent investigations under Section 377D.³⁴²

The deep homophobia that fuels these allegations, the stigma that dogs prominent politicians, and the negative attitudes of the general public towards homosexuality have led many LGBT persons to consciously conceal their sexual orientation and/or gender identity/or expression,³⁴³ with a lasting negative impact on their enjoyment of human rights.

With regard to Syariah criminal offences, a different law for every state penalizes same-sex sexual conduct, regardless of consent. The laws vary in every state and the definitions of the “offences” are either too vague or overbroad. The offences range from “*liwat*” (sexual conduct between men or anal sex), “*musahaqah*” (sexual conduct between women), sexual intercourse against the order of nature, either a gender-neutral provision, or provisions for sexual relations between persons of the same gender, or the attempt to commit “*liwat*”. For example, “*liwat*” in Perlis is defined as “sexual intercourse between males or between a male and female through the anus”, in Section 2 of the Enactment No. 4 of 1993, Criminal Offences in the Syarak Enactment 1991. In contrast, the offence of “*liwat*” in Kedah, is defined as “unusual sexual intercourse between a man and a man or between a man and a woman”, in Section 2 of the Enactment No. 9 of 1988, Syariah Criminal Code Enactment 1988. Meanwhile, a third state, Kelantan, defines the crime of sodomy, as “a man who having carnal intercourse with another man, or a man who having an anal intercourse with a woman is committing sodomy”, according to Section 14 of the Enactment No. 13 of 2015, Syariah Criminal Code (II) (1993) 2015. The differences between the definitions of the offences is also evident in the offence of “*Musahaqah*”, that criminalizes sexual relations between women.³⁴⁴

In addition, in several states, sexual intercourse “Against the order of nature” are crimes.³⁴⁵ These offences carry punishments which include fines to the maximum of RM5,000 (1236 USD), to three years of imprisonment and caning.

³⁴⁰ Page 2, Sin How Lim, Shan-Estelle Brown, Stacey A. Shaw, Adeeba Kamarulzaman, Frederick L. Altice & Chris Beyrer: “You Have to Keep Yourself Hidden: Perspectives From Malaysian Malay-Muslim Men Who Have Sex With Men on Policy, Network, Community, and Individual Influences on HIV Risk, Journal of Homosexuality, (11 October 2018), available at: <https://doi.org/10.1080/00918369.2018.1525946>

³⁴¹ Malaymail, ‘Azmin, in response to voters suit, claims Anwar’s ‘immoral sexual practice’ among reasons he quit PKR’, 30 Jan 2021, available at: <https://www.malaymail.com/news/malaysia/2021/01/30/azmin-in-response-to-voters-suit-claims-anwar-immoral-sexual-practice-amon/1945476>

³⁴² The Edge Markets, ‘Azmin video case not closed, says IGP’, 13 January 2020, available at: <https://www.theedgemarkets.com/article/azmin-video-case-not-closed-says-igp>

³⁴³ Page 11, Sin How Lim, Shan-Estelle Brown, Stacey A. Shaw, Adeeba Kamarulzaman, Frederick L. Altice & Chris Beyrer: “You Have to Keep Yourself Hidden: Perspectives From Malaysian Malay-Muslim Men Who Have Sex With Men on Policy, Network, Community, and Individual Influences on HIV Risk, Journal of Homosexuality, (11 October 2018), available at: <https://doi.org/10.1080/00918369.2018.1525946>

³⁴⁴ For example, the Terengganu definition for the crime of “*musahaqah*” means sexual relations between female person, defined as “any female person who commits *musahaqah*” carries with it a punishment of a fine not exceeding five thousand ringgit (one thousand three hundred dollars) or imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof, Section 30 of the Enactment No. 7 of 2001, Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001, whereas Section 15 of the Enactment No. 9 of 1988 Syariah Criminal Code Enactment 1988 defines the act as “any woman who willfully commits *musahaqah* with another woman shall be guilty of an offence”, but the maximum fine will only be five hundred ringgit (100 USD) or to imprisonment for a term not exceeding four months or to both. Note the differences in intention and the use of the word “willfully”.

³⁴⁵ See for example, Section 28, provides for the “Sexual intercourse against the order of nature” offence, under the Selangor Enactment No. 9 of 1995 Syariah Criminal Offences (Selangor) Enactment 1995, and Section 58, that provides for the offence of “unnatural acts” under the 1991 Syariah Criminal Enactment for Malacca

Box 1: Whipping or caning is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment

The practice of caning specifically, is a form of corporal punishment and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that:

“With regard to the jurisprudence of United Nations treaty bodies and the European Court, the mandate holder has found that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (see A/60/316 and A/67/279).”³⁴⁶

Legislation constantly exposes LGBT persons to the risk of long-term imprisonment, up to 20 years’ imprisonment upon conviction for a section 377 offence of the general criminal law (the Penal Code), caning or being whipped if convicted for an “offence” under the Syariah law. In the northern state of Terengganu, on 12 August 2018, the Terengganu Syariah High Court sentenced two Malaysian women to a fine of RM3,300 and six strokes of the cane for the crime of “*musahaqah*”.³⁴⁷ In November 2019, four men were caned for “attempting” “unnatural intercourse” in Selangor.³⁴⁸

Mounting legal challenges that call into question the validity of State religious legislation and calling for the protection of the human rights of LGBT persons is a Herculean task. Challenging laws on the basis of freedom of religion risks becoming life-threatening for some,³⁴⁹ and some groups consider any such challenge, a challenge to religion itself.³⁵⁰ In the most recent challenge to a Syariah enactment on “unnatural offences” in a Selangor court, the litigants’ identity had to be kept secret out of personal safety fears. Their lawyer elaborates:

“Because there is a risk of harassment by third parties if his name is revealed. Prominent figures have publicly questioned his motives in bringing this challenge. Even in a previous challenge on an Islamic provision on cross dressing, the applicants there were severely harassed.”³⁵¹

The successful legal challenge by the applicant in the abovementioned case in February 2021 has signified a resounding victory for constitutional supremacy and LGBT persons in the country and globally.³⁵² However, LGBT persons will continue carrying out their advocacy work under

³⁴⁶ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 5 March 2015, A/HRC/28/68, Para 45. Available at:

https://www.ohchr.org/en/hrbodies/hrc/regularsessions/session28/documents/a_hrc_28_68_e.doc

³⁴⁷ ICJ, Malaysia: ICJ condemns public caning of two women for alleged same sex relations, 4 September 2018. Available at:

<https://www.icj.org/malaysia-icj-condemns-public-caning-of-two-women-for-alleged-same-sex-relations/>

³⁴⁸ Amnesty International, Malaysia: Caning of four men is a terrible warning to LGBTI people, while more await trial, 18 November 2019. Available at:

<https://www.amnesty.org/en/latest/news/2019/11/malaysia-caning-of-four-men-is-a-terrible-warning-to-lgbti-people-while-more-await-trial/>

³⁴⁹ Asia News, Death threats against Lina Joy, fighting for her life and religious freedom, 29 August 2006. Available at:

<http://www.asianews.it/news-en/Death-threats-against-Lina-Joy,-fighting-for-her-life-and-religious-freedom-7065.html>

³⁵⁰ For example, conservative groups such as Malaysian Muslim Solidarity Movement (ISMA) have stated that LGBT people are challenging Syariah legislation and the institution of Islam itself. See: <https://isma.org.my/lgbt-kedaulatan-mahkamah-syariah-dan-institusi-agama/>

³⁵¹ According to the counsel for the litigant, S.Ananth, see more: NST, Man granted leave in unnatural sex case to commence constitutional challenge, 27 May 2020. Available at: <https://www.nst.com.my/news/crime-courts/2020/05/595735/man-granted-leave-unnatural-sex-case-commence-constitutional>

³⁵² review existing laws that criminalize LGBT persons.

challenging conditions, because these laws remain on the books until further action is taken by the courts and legislative houses.

As long as these laws exist, LGBT persons continue risk harsh sanctions for their sexual orientation, gender identity and expression. Laws that criminalize consensual same-sex sexual relations and expressions of gender identity will “give rise to a number of separate but interrelated human rights violations”,³⁵³ including violations of the prohibition on discrimination, the right to equality before the law, and the right to freedom from arbitrary detention. Under both customary international law and treaties to which Malaysia is a party,³⁵⁴ all branches of the States have legal obligations to guarantee, among others, the right to equality and freedom from discrimination, the right to liberty and security of person and freedom from torture and other cruel, inhuman or degrading treatment or punishment.

Another element of the legal system that greatly impacts the lives of Muslim LGBT persons are ‘fatwas’. “Linguistically, fatwa means ‘an answer to a question’; the question may be rhetorical or actual. The answer represents only the opinion of the person who offered it”, according to Dr. Maher Hathout.³⁵⁵

Although fatwas are said not to be “universally binding on all Muslims”³⁵⁶, fatwas, when promulgated in line with the Syariah state enactments are binding on Muslims in Malaysia.³⁵⁷ Fatwas have been issued on a range of issues and provide coercive guidelines to Muslims, from the status of the famous augmented reality mobile game released in 2016 called “Pokemon Go”³⁵⁸ to attendance of beauty pageants.³⁵⁹ This fatwa, in particular, has been used as a tool to target, harass, and crackdown on beauty pageant ‘themed’ dinners hosted by transgender persons in Malaysia and their allies. For example, in 2016 the Federal Territories Islamic Department (JAWI) raided a pageant-themed dinner held by transgender women on the basis that it “violated a fatwa against beauty pageants”.³⁶⁰ Transgender women and activists present at the event were detained,³⁶¹ giving rise to concern about the lawfulness of their arrest, detention and about the competence of the state to promulgate fatwas that fall within the ambit of criminal matters.

There are also a host of fatwas that explicitly prohibit homosexuality and gender non-conforming identities. The content of these fatwas is different in different states, therefore subjecting Muslim LGBT persons to a third, ever-changing layer of exclusion and erasure in every state.

³⁵³ Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal*, (Revised edition), page 40. Available at: <https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>

³⁵⁴ Malaysia is a party to the, CEDAW - Convention on the Elimination of All Forms of Discrimination against Women, CRC - Convention on the Rights of the Child, CRPD - Convention on the Rights of Persons with Disabilities.

³⁵⁵ Muslim Public Affairs Council, “Demystifying the Fatwa, by Dr. Maher Hathout”, (5 January 2003), available at: <https://www.mpac.org/issues/islamophobia/demystifying-the-fatwa1.php>

³⁵⁶ The Malaymail, “Pokemon Go and fatwas”, (7 August 2016), available at: <https://www.thestar.com.my/opinion/online-exclusive/a-humble-submission/2016/08/08/pokemon-go-and-fatwas/>

³⁵⁷ The Malaymail, “Pokemon Go and fatwas”, (7 August 2016), available at: <https://www.thestar.com.my/opinion/online-exclusive/a-humble-submission/2016/08/08/pokemon-go-and-fatwas>

³⁵⁸ On 1 August 2016, the Federated Territories of Malaysia’s Fatwa Committee issued a fatwa stating that both the augmented reality game “Pokemon Go” and a reference to the popular cartoon Pokemon were “not allowed for Muslims”, lawyers contend the constitutionality of the fatwa, see: The Malaymail, “Fatwa on ‘Pokemon Go’ is unconstitutional”, (9 August 2016), available at: <https://www.malaymail.com/news/what-you-think/2016/08/09/fatwa-on-pokemon-go-is-unconstitutional-surendrananth/1179341>

³⁵⁹ In Selangor, a fatwa has been created and gazetted in the year 1995, prohibiting the entry of Muslim women into any beauty pageants (11 May 1995), available at: <https://www.muftiselangor.gov.my/dasar-privasi/86-fatwa/sosial-syariah/103-fatwa-tentang-penyertaan-wanita-islam-dalam-pertandingan-ratu-cantika> similar fatwa was gazetted in the Federal Territories

³⁶⁰ The Malaymail, “JAWI raids transgender ‘beauty pageant’ for breaking fatwa”, (4 April 2016), available at: <https://www.malaymail.com/news/malaysia/2016/04/04/jawi-raids-transgender-beauty-pageant-for-breaking-fatwa/1093293>

³⁶¹ The Malaymail, “Siti Kasim sues JAWI, 14 officers over unlawful arrest, imprisonment in transgender even raid,” (12 September 2019), available at: <https://www.malaymail.com/news/malaysia/2019/09/12/siti-kasim-sues-jawi-14-officers-over-unlawful-arrest-imprisonment-in-trans/1789848>

The following are some examples of fatwas specifically targeting LGBT persons. In 1982, the National Council of Fatwa Committee issued a fatwa prohibiting sex reassignment surgery; this fatwa applies throughout the country.³⁶² In 2008, the same body issued a fatwa prohibiting a “Female who appears like male”.³⁶³ In its report on transgender persons in Kuala Lumpur and Selangor, the Malaysian National Human Rights Commission, SUHAKAM, noted that Muslim transgender persons will be “more vulnerable to open arrest by Religious Department for infringement of state Islamic laws”.³⁶⁴

Transgender and gender non-conforming identities are expressly penalized under state Syariah law. Each State has its own Syariah criminal enactments that set out their own unique definitions of what amounts to an unlawful same-sex relationship, “cross-dressing” and non-binary identity and expression. Under Syariah criminal enactments, the crime of “cross-dressing” is defined as a “male person posing as a woman” and in certain provisions, such as those found in the state of Perlis,³⁶⁵ the derogatory word for transgender women “pondan”³⁶⁶ is used in the state law to define this crime.

The National Human Rights Commission of Malaysia has also noted the prevalence of the use of minor offences provisions in the Penal Code and the Syariah Criminal Enactments against LGBT persons.³⁶⁷

The criminalization, stigmatization and lack of acceptance of transgender people, is fuelled by underlying notions that certain identities are “morally wrong”, and a sense that transgender people go against both “religious and cultural norms”.³⁶⁸ Access to legal gender recognition is administratively restricted and mired in harmful requirements, such as the obligation to have undergone surgery.³⁶⁹

In addition, for Muslim Malaysians, a legal gender marker change in national identity documents will only be allowed with an accompanying Syariah court declaration.³⁷⁰

Local transgender rights groups have reported continuous violence against transgender persons with little or no accountability. On 20 November 2020, Trans Remembrance Day 2020, trans-

³⁶² Jabatan Kemajuan Islam Malaysia. *Kompilasi Pandangan Hukum, Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Ugama Islam Malaysia*. 2015. P. 101 - Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Ugama Islam Malaysia Kali Ke-4 yang bersidang pada 13-14 April 1982 telah membincangkan Pertukaran Jantina Daripada Lelaki Kepada Perempuan. Muzakarah telah memutuskan bahawa: Pertukaran jantina dari lelaki kepada perempuan atau sebaliknya melalui pembedahan adalah haram di segi syarak, (this fatwa can be translated to: the change of sex from man to woman or in the reverse through surgery is “haram”/forbidden)

³⁶³ Jabatan Kemajuan Islam Malaysia. *Kompilasi Pandangan Hukum, Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Ugama Islam Malaysia*. 2015. P. 219 - Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Ugama Islam Malaysia Kali Ke-83 yang bersidang pada 22- 24 Oktober 2008 telah membincangkan Hukum Wanita Menyerupai Lelaki (Pengkid). Muzakarah telah memutuskan bahawa pengkid, iaitu wanita yang berpenampilan dan mempunyai gerak laku serta naluri seksual seperti lelaki adalah haram di sisi agama. Muzakarah menggesa agar masyarakat Islam supaya memberi pendidikan dan tunjuk ajar yang sebaik-baiknya kepada anak-anak gadis khususnya dalam aspek berpakaian, perlakuan dan penampilan supaya gejala seumpama ini dapat dielakkan kerana ia adalah berlawanan dengan fitrah dan sunnatullah. (this fatwa can be translated to: “tomboys”, but use of the derogatory word “pengkid” is noted, women who appear as and have male sexual instincts are haram, and they must be educated and guided in the aspects of their actions , appearance, and dressing).

³⁶⁴ Page 22 of “Study on discrimination against transgender persons based in Kuala Lumpur and Selangor (Right to Education, Employment, Healthcare, Housing and Dignity”, Human Rights Commission of Malaysia (SUHAKAM), 2019, page 19. Available at: <https://www.suhakam.org.my/pusat-media/sumber/lain-lain/>

³⁶⁵ Section 7 ‘Pondan’, Negeri Perlis Enactment No. 4 of 1993 Criminal Offences in the Syarak Enactment 1991

³⁶⁶ Study on discrimination against transgender persons based in Kuala Lumpur and Selangor (Right to Education, Employment, Healthcare, Housing and Dignity’, Human Rights Commission of Malaysia (SUHAKAM), 2019, page 12. Available at: <https://www.suhakam.org.my/pusat-media/sumber/lain-lain/>

³⁶⁷ Study on discrimination against transgender persons based in Kuala Lumpur and Selangor (Right to Education, Employment, Healthcare, Housing and Dignity’, Human Rights Commission of Malaysia (SUHAKAM), 2019, page 25. Available at: <https://www.suhakam.org.my/pusat-media/sumber/lain-lain/>

³⁶⁸ Study on discrimination against transgender persons based in Kuala Lumpur and Selangor (Right to Education, Employment, Healthcare, Housing and Dignity’, Human Rights Commission of Malaysia (SUHAKAM), 2019, page 18. Available at: <https://www.suhakam.org.my/pusat-media/sumber/lain-lain/>

³⁶⁹ Id, Page 26.

³⁷⁰ Id, page 27, Paragraph 5.71 & 5.7.2 of the Arahan Jabatan Pendaftaran Negara Bil 9/2007.

rights group Justice for Sisters reported that there had been two murders of transwomen and at least four notable cases of recorded violence, perpetrated by families and the police against transgender persons.³⁷¹ Transgender women have reported abuse by police and religious law enforcement agencies during arrests.³⁷²

In Malaysia, the criminal laws are a tool for the police and religious state authorities to stop, search, arrest and harass people based on their real, perceived or imputed sexual orientation, gender identity and expression. To date, under the wide ambit of vaguely worded, state Syariah laws, religious state authorities have raided transgender beauty pageants,³⁷³ birthday parties³⁷⁴ and other private events³⁷⁵ on the purported justification of seeking to apprehend LGBT persons.

As a National Human Rights Commission report reveals, out of 100 respondents, 48 transgender respondents indicated that they had been arbitrarily stopped or questioned by police because of their gender identity, and 39 of them had been arrested by the police because of their gender identity.³⁷⁶ Transgender women have provided accounts of harrowing mistreatment following repeated arrests by religious state authorities and the police, including being beaten and kicked³⁷⁷ and having their heads shaved.³⁷⁸

C.4 Discrimination, Stigma, and COVID-19

During the COVID-19 pandemic, the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity and expression (UN Independent Expert on SOGIE) noted that, for LGBT persons, the laws that criminalize SOGIE created a “higher risk of police abuse and arbitrary arrest and detention during curfews”.³⁷⁹ UN Independent experts have spoken out against harmful, coercive practices that target LGBT persons during COVID-19 and noted that the pathologization of LGBT persons continue to be used as justifications for severe human rights violations.³⁸⁰

A rise in hate speech against LGBT persons

³⁷¹ For Trans Remembrance Day 2020, trans-rights group Justice for Sisters have found there have been two murders of transwomen and at least four notable cases of recorded violence, perpetrated by families and the police against transgender persons.

³⁷² Human Rights Watch, Malaysia: “I’m scared to be a woman”, Human Rights Abuses Against Transgender People in Malaysia, September 2014. Available at: https://features.hrw.org/features/HRW_reports_2014/Im_Scared_to_Be_a_Woman/index.html

³⁷³ The Star, Jawi official recalls ‘extraordinary’ raid on transgender beauty pageant, 7 September 2018. Available at: <https://www.thestar.com.my/news/nation/2018/09/07/jawi-official-recalls-extraordinary-raid-on-transgender-beauty-pageant>

³⁷⁴ This situation has been documented for several human rights organizations. For instance, Human Rights Watch has reported: “On June 9, 2014, 16 transgender women and one child were arrested while attending a wedding in Jempol district, Negeri Sembilan. Islamic Religious Department officials raided the wedding party, held at a private home, and arrested the transwomen, several of whom were wedding planners, known locally as mak andam, while others were invited guests”. See: Human Rights Watch, Malaysia: “I’m scared to be a woman”, Human Rights Abuses Against Transgender People in Malaysia, September 2014. Available at: https://features.hrw.org/features/HRW_reports_2014/Im_Scared_to_Be_a_Woman/index.html

³⁷⁵ Queer Lapis, 11 men charged for attempting sex: what you need to know, 14 January 2020. Available at: <https://www.queerlapis.com/11-men-case-intro/>

³⁷⁶ Human Rights Commission of Malaysia (SUHAKAM), Study on discrimination against transgender persons based in Kuala Lumpur and Selangor (Right to Education, Employment, Healthcare, Housing and Dignity, 2019, page 5. Available at: <https://www.suhakam.org.my/pusat-media/sumber/lain-lain/>

³⁷⁷ Human Rights Watch, Malaysia: “I’m scared to be a woman”, Human Rights Abuses Against Transgender People in Malaysia, September 2014, Page 1. Available at: https://features.hrw.org/features/HRW_reports_2014/Im_Scared_to_Be_a_Woman/index.html

³⁷⁸ Human Rights Watch, Malaysia: “I’m scared to be a woman”, Human Rights Abuses Against Transgender People in Malaysia, September 2014, Page 1. Available at: https://features.hrw.org/features/HRW_reports_2014/Im_Scared_to_Be_a_Woman/index.html

³⁷⁹ Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, States must include LGBT community in COVID-19 response: The how and why from a UN expert (14 May 2020), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25889&LangID=E>

³⁸⁰ Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness – For International Day against Homophobia, Transphobia and Biphobia (17 May 2016), available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>

Malaysia's Minister in charge of religious affairs made a public call in July 2020 to religious state authorities to carry out "enforcement actions" against transgender persons that go beyond arrests and detentions, including forms of "religious education", making them undergo "conversion therapy" to ensure they "return to the right path."³⁸¹ This inflammatory statement rides on homophobia and transphobia and singles out LGBT persons to be targets of arrests, detention, violence, and potential conversion therapy, grounded in discriminatory behaviour, in breach of Malaysia's international obligations.³⁸²

A second example can be seen in the proposal of amendments to the Syariah Courts (Criminal Jurisdiction) Act (Act 355) by the Deputy Minister for Religious Affairs, in the Prime Minister's Office, allowing for harsher sentences for LGBT persons.³⁸³ It is critical to note that these suggestions were made during a proclamation of emergency, placing LGBT persons in a more dangerous state, as these laws could be promulgated without the full scrutiny of the houses of Parliament.³⁸⁴

The impact of increased hate speech, combined with stigma and criminalization, discourages LGBT persons to access public spaces during the pandemic. For example, the continued harassment and intimidation of transgender woman and successful entrepreneur, Nur Sajat, who was hunted by a total of 122 religious state personnel for the failure to attend a Syariah High Court proceedings.³⁸⁵ She has faced enormous amount of vitriol, harassment, and threats by both State and non-State actors.³⁸⁶

Increased violence against LGBT persons

The international community has recognized that in the context of COVID-19 LGBT persons face an increased risk of violence.³⁸⁷ One example in Malaysia is the enforcement of "Movement Control Orders" and their permutations, which are "Stay-at-home" restrictions, imposed with the aim of combatting COVID-19. However, such restrictions may leave LGBT persons, especially young LGBT persons, unable to leave hostile environments, with unsupportive family members, or co-habitants. This exposes them to possible violence, or "anxiety and depression".³⁸⁸

LGBT persons in Malaysia have told their personal stories to Queer Lapis, a queer-friendly collective based in the country. They have shared harrowing stories of being treated badly at home after losing their livelihoods, of being forced into marriage, and exposure to physical violence in their own homes.³⁸⁹

³⁸¹ International Commission of Jurists, Malaysia: Minister's order to take action against the transgender community must be revoked (15 July 2020), available at : <https://www.icj.org/malaysia-ministers-order-to-take-action-against-the-transgendercommunity-must-be-revoked/>.

³⁸² Malaysia is a party to the following UN Conventions: the CEDAW - Convention on the Elimination of All Forms of Discrimination against Women, CRC - Convention on the Rights of the Child, CRPD - Convention on the Rights of Persons with Disabilities

³⁸³ Human Rights Watch, Malaysia: "Government Steps up Attacks on LGBT", (25 January 2021), available at: <https://www.hrw.org/news/2021/01/25/malaysia-government-steps-attacks-lgbt-people#>

³⁸⁴ Malaysia was placed in a state of emergency on 12 January 2021, Parliament has been suspended with the Prime Minister and cabinet gaining powers to make laws and approve expenditures without a parliamentary sitting, Reuters, "Explainer: Why a state of emergency raises concerns in Malaysia", (12 January 2021), available at: <https://www.reuters.com/article/us-healthcare-coronavirus-malaysia-emerg-idUSKBN29H1HE>

³⁸⁵ Malaymail, "Assigning 122 Islamic enforcers for Nur Sajat witchhunt overzealous, says transgender rights group", (27 February 2021), available at: <https://www.malaymail.com/news/malaysia/2021/02/27/assigning-122-islamic-enforcers-for-nur-sajat-witchhunt-overzealous-says-tr/1953276>

³⁸⁶ "Screenshots from a video released on Jan 6 shows Nur Sajat crying in distress when she was detained over an alleged offence from February 2018", for more, read: Free Malaysia Today, "LGBT activists express concern over arrest warrant for Nur Sajat", (23 February 2021), available at: <https://www.freemalaysiatoday.com/category/nation/2021/02/23/lgbt-activists-express-concern-over-arrest-warrant-for-nur-sajat/>

³⁸⁷ Office of the United Nations High Commissioner for Human Rights,, COVID-19 and The Human Rights of LGBTI People (17 April 2020), available at: <https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf>

³⁸⁸ Office of the United Nations High Commissioner for Human Rights,, COVID-19 and The Human Rights of LGBTI People (17 April 2020), available at: <https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf>

³⁸⁹ On 5 April 2020, Queer-friendly collective, Queer Lapis interviewed several individuals about their personal experiences of violence and aggression when they were forced to stay at home with their families during the Movement Control Orders in

The story of Mohammad in Penang:

“I’m treated like a piece of garbage at home,” says Mohammad*, a research assistant in Penang who ended up living with his family after losing his job. “My entire life has ground to a halt, and no one can protect us from our homophobic parents that are taking advantage of the isolation to hurt us,” said Mohammad.³⁹⁰

The story of Noor:

Noor, a lesbian woman in university, when forced to return home during the pandemic discovered that her family had been arranging her marriage without her knowledge or consent. After being made to meet potential suitors, she was physically abused by her family for disagreeing with what they had done.

“I have a bruise on my left arm from my mum’s grip, and when I complained about her hurting me, she tightened her hold even more without batting an eye,” Noor says. “No one cares in this country because I’m invisible, and now my family is subduing me, and I just can’t breathe anymore.”³⁹¹

Access to food, aid and rehabilitation requirements

During the first wave of COVID-19, food aid was provided by the government to people who were most in need, this included indigenous people, the homeless, and LGBT persons who were part of the urban population living in poverty. NGOs were required to intervene to ensure adequate access to food.³⁹² Transgender women, such as Nisha Ayub were actively involved in providing support to transgender people, as well as the urban population living in poverty in Kuala Lumpur, Malaysia through community-based welfare aid programmes.

However, the rules for food distributions changed, leading to the exclusion of NGOs, with only the police, army and related personnel continuing to be involved. LGBT groups raised concern about this change and the lack of consultation with LGBT persons. This is because LGBT persons, according to Nisha would not approach authority figures when attempting to access food or aid, because of extreme discrimination and stigma.³⁹³ In another more insidious examples, LGBT activists observed that when LGBT persons sought assistance, government officers would encourage them to join “rehabilitation programmes” aimed at changing their sexual orientation, gender identity and/or expression.

“During the COVID-19 pandemic, humanitarian aid that is provided to LGBTQ people has been couched in ‘rehabilitative’ terms, targeting LGBTQ people who have participated in

Malaysia (MCO), which did not allow them to leave the house to curb the transmission of COVID-19 and leaving the house was only possible under strict, essential reasons. The names of the interviewees were changed to protect their identities. To see the full piece, please read: Queer Lapis, “Under MCO, Malaysian queer people face family violence at home”, (5 April 2020), available at: <https://www.queerlapis.com/violence-under-mco/>

³⁹⁰ Queer Lapis, “Under MCO, Malaysian queer people face family violence at home”, (5 April 2020), available at: <https://www.queerlapis.com/violence-under-mco/>

³⁹¹ Queer Lapis, “Under MCO, Malaysian queer people face family violence at home”, (5 April 2020), available at: <https://www.queerlapis.com/violence-under-mco/>

³⁹² Queer Lapis, “The Trans Women at the Frontline,” (accessed on 2 February 2021), available at: <https://www.queerlapis.com/the-trans-women-at-the-frontline/>, see also: V Tan, Isolated and short of supplies, Malaysia’s indigenous groups depend on aid to ride out movement control order, (12 April 2020), available at: <https://www.channelnewsasia.com/news/asia/covid19-malaysia-orang-asli-food-shortage-ngos-12647956>.

³⁹³ Queer Lapis, “The Trans Women at the Frontline,” (accessed on 2 February 2021), available at: <https://www.queerlapis.com/the-trans-women-at-the-frontline/>

'rehabilitation programmes' (camp Mukkayam)³⁹⁴, incentivizing the need to change and 'conform' as a method to receive aid."³⁹⁵

Transgender women in East Malaysia, especially those working in the informal sector, have been negatively affected enormously, with many among them losing their jobs. They have therefore been "left without a stable income". Sabah-based LGBT organizations have started collective efforts to fundraise to help LGBT persons facing hardship.³⁹⁶

C.5 Recommendations

In light of the concerns identified above, the Malaysian authorities should take at least the following measures to improve the human rights situation of LGBT persons:

- Decriminalize same-sex consensual conduct and abolish all laws that criminalize sexual orientation and gender diverse identities as these laws threaten the safety and security of LGBT people and also detrimentally affect the ability of LGBT persons to enjoy human rights without discrimination.
- Abolish provisions that provide for the use of corporal punishment (whipping and caning).
- Refrain from expressing or endorsing hateful sentiments that either expressly or impliedly target or discriminate against LGBT persons.
- Take active measures to combat hatred and discrimination by individuals and groups. This may include coordinating engagements between LGBT persons with religious and customary leaders.
- A de-pathologization approach must urgently be adopted by Malaysian healthcare providers, legislators and people providing public services in line with the guidance of the World Health Organization, recognizing that homosexuality and being transgender are not mental illnesses and should not be treated in this manner.
- Prohibit by law coercive medical practices, including purported "conversion therapies", that target LGBT persons and take measures to prevent, investigate and prosecute all forms of forced, coercive and otherwise involuntary treatments and procedures on LGBT persons.
- Take proactive measures to remove all barriers, either in law and/or in practice that prevent LGBT persons from accessing healthcare services, goods and facilities, including those relating to COVID-19. The authorities should take proactive measures to ensure that LGBT persons are able to access all COVID-19 healthcare, services, goods and facilities without discrimination.
- Ensure that aid and support is provided to LGBT persons who need them without abusive pre-requisites, including the attendance of "conversion therapy" courses.

³⁹⁴ As mentioned above, Camp Mukkayam is a "programme that involves three-day residential camps for LGBTQ+ individuals organised by the Islamic Development Department (JAKIM), a government body. According to the government's National Strategic Plan for Ending AIDS, a goal of the programme is "giving spiritual awareness through religious approach (tauhid) to face the challenges of life and abandon the practice of unnatural sex.", see: <https://www.article19.org/resources/malaysia-end-harassment-of-critic-of-governments-stance-on-lgbtq-issues/>

³⁹⁵ ICJ Interview, November 2020, Thilaga Sulathireh, Justice for Sisters

³⁹⁶ Queer Lapis, LGBTQ Sabahans Help Each Other Survive COVID-19, Politics and Isolation, November 2020. Available at: <https://www.queerlapis.com/lgbtq-sabahans-help-each-other-survive-covid-19-politics-isolation/>

Commission Members

March 2021 (for an updated list, please visit www.icj.org/commission)

President:

Prof. Robert Goldman, United States

Vice-Presidents:

Prof. Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee:

Justice Sir Nicolas Bratza, UK

Dame Silvia Cartwright, New Zealand

(Chair) Ms Roberta Clarke, Barbados-Canada

Mr. Shawan Jabarin, Palestine

Ms Hina Jilani, Pakistan

Justice Sanji Monageng, Botswana

Mr Belisário dos Santos Júnior, Brazil

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Chinara Aidarbekova, Kyrgyzstan

Justice Adolfo Azcuna, Philippines

Ms Hadeel Abdel Aziz, Jordan

Mr Reed Brody, United States

Justice Azhar Cachalia, South Africa

Prof. Miguel Carbonell, Mexico

Justice Moses Chinhengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

Mr Marzen Darwish, Syria

Mr Gamal Eid, Egypt

Mr Roberto Garretón, Chile

Ms Nahla Haidar El Addal, Lebanon

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Ms Imrana Jalal, Fiji

Justice Kalthoum Kennou, Tunisia

Ms Jamesina Essie L. King, Sierra Leone

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Justice Yvonne Mokgoro, South Africa

Justice Tamara Morschakova, Russia

Justice Willly Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John Lawrence O'Meally, Australia

Ms Mikiko Otani, Japan

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Victor Rodriguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Mr Michael Sfard, Israel

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms Ambiga Sreenevasan, Malaysia

Justice Marwan Tashani, Libya

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia

