

Criminalising Homosexuality and International Human Rights Law

Corrigendum, 09 September 2016: Errors in the original text of these notes relating to the scale and impact of criminalisation of lesbian and bisexual women have been corrected as follows:

- On p. 6 of "Criminalising Homosexuality: Irreconcilable with Good Governance: Synopsis and our Recommendations";
- On p. 4 of "Criminalising Homosexuality and International Human Rights Law";
- On p. 4 of "Criminalising Homosexuality and Working through International Organisations"

For more detailed information on the topic of criminalisation of women, please see our report [*Breaking the Silence: Criminalisation of Lesbian and Bisexual Women and its Impacts*](#).

The criminalization of private, consensual sex between adults of the same sex breaches a State's obligations under international law, including the obligations to protect individual privacy and to guarantee non-discrimination.

The Office of the High Commissioner for Human Rights, September 2012¹

This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of foreign policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, whatever country it is in, is strictly not-for-profit.

Contents

| | |
|--|----|
| The scale of the problem | 4 |
| Overview | 6 |
| What is international law and when is it relevant? | 7 |
| Treaty law | 7 |
| The prohibition on discrimination | 12 |
| The right to dignity | 16 |
| The prohibition on inhuman and degrading treatment | 18 |
| A comparison of privacy and equality | 23 |
| Enforcing international human rights law in practice | 28 |
| Conclusions | 29 |
| Appendices | 32 |

¹ UN OHCHR, *Born Free and Equal - Sexual Orientation and Gender Identity in International Human Rights Law*, 14 September 2012, pp. 9 and 10.

The Scale of the problem

01. The criminalisation of homosexuality is a global problem that degrades millions of men and women. A snapshot is provided below:

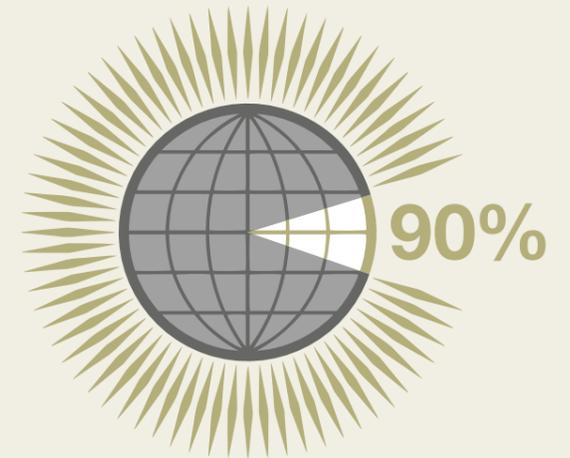
Same-sex intimacy between consenting adults in private is a crime in 78 jurisdictions. Of these, at least 44 jurisdictions criminalise female same-sex intimacy as well as male.

In the 78 jurisdictions that criminalise men, approximately 94 to 145 million men are or will be 'un-apprehended felons' during the course of their lifetimes for having a same-sex sexual experience.²

Likewise, in the 44 jurisdictions that criminalise women, approximately 22 to 66 million women are or will be 'un-apprehended felons'.³

Of these 2.9 billion people, an estimated 58 to 174 million will identify as LGBT now or when they reach adulthood.⁴

Criminalisation is largely a problem for the Commonwealth. Of the 2.9 billion who live where same-sex intimacy is a crime, 2.1 billion live in the Commonwealth (some three-quarters of the total). 90% of Commonwealth citizens live in a jurisdiction that criminalises. Criminalisation is a legacy of British colonial law.



Laws that criminalise same-sex intimacy do more than outlaw certain sexual acts. These laws criminalise the lesbian, gay, bisexual and transgender (LGBT) identity. Every aspect of a person's sense of self is criminalised, stigmatised and subject to feelings of shame. The full force of the state is used against LGBT people, so that society views them as worthless, deficient, sick, depraved. This leaves LGBT people vulnerable to violence, abuse and harassment from state actors and non-state actors alike, and shut out from employment, health care and other services. There can never be a justification for this state-sanctioned persecution, no matter the cultural, religious or historical background in the criminalising country



2.9 billion people live in these 78 jurisdictions (some 40% of the global population).

² Based on estimates that between 6.5% and 10% of men will have a same-sex sexual experience in adulthood. The 6.5% figure is for adult males aged 25 to 44, taken from: Mosher, W.D., Chandra, A., Jones, J., *Sexual Behavior and Selected Health Measures: Men and Women 15-44 Years of Age, United States, 2002*, Advance Data from Vital and Health Statistics (362): 2. Available at: <http://www.cdc.gov/nchs/data/ad/ad362.pdf>. The 10% figure is for taken from a re-analysis of *The Kinsey Data*, Gebhard, P.H. and Johnson, A.B (1979). Available at: <http://www.kinseyinstitute.org/resources/bib-homoprev.html>

³ Based on estimates that between 3.7% and 11% of women will have a same-sex sexual experience in adulthood. Source, at n. 3 above. Mosher estimates 11%; Gebhard estimates 3.7%. The total population of these 44 jurisdictions is 1.2 billion, with a female population of approximately 600 million.

⁴ Based on conservative to moderate estimates that 2% to 6% of the general adult population identifies as LGBT. In 2005, the UK Government estimated that 6% of the UK population is LG; in 2010, the UK Office of National Statistics found that 1.5% of UK adults openly identify as LGB; in 2013, the *US National Health Statistic Reports* found that 2.3% of US adults openly identify as LGB; in April 2011, the Williams Institute published estimates collated from multiple surveys that 3.5% of adults in the United States identify as LGB and 0.3% of adults as transgender.

Overview

03. Laws that criminalise homosexuality contravene international law. Criminalisation infringes upon the rights to privacy, non-discrimination and dignity, and may amount to inhuman and degrading treatment. These rights are included in various international and regional treaties, through which states have taken on binding obligations to uphold these rights for everyone within their jurisdiction. Additionally, they represent international norms and values to which all states should adhere, regardless of the treaties that they have ratified. After all, human rights treaties merely affirm existing rights that attach to each of us by virtue of our humanity. The fact that these rights are universal can be seen by their inclusion in the Universal Declaration of Human Rights produced under the auspices of the United Nations (UN), whose membership encompasses nearly all states and includes 76 out of the 78 jurisdictions that criminalise homosexuality.⁵ Criminalisation is also repugnant to the human rights protection contained in domestic constitutions and domestic laws.
04. The right to privacy protects all individuals from arbitrary interference from the state. There can be nothing more arbitrary than the state regulating the consensual sexual activity of adults in private and imposing criminal sanctions, especially in circumstances where other consenting adults are not criminalised for engaging in the same or comparable behaviour.
05. The prohibition on discrimination is universally recognised. It applies to everyone, including LGBT people. It is never justifiable for the state to single out a defined group, and impose on it criminal sanctions that do not apply to others.
06. The right to dignity interacts with other rights. It is not expressly found in all human rights treaties or domestic constitutions, but treating people with dignity is at the core of human rights law. The criminalisation of homosexuality does more than outlaw certain sexual acts, it criminalises an entire identity, ostracises a group from the rest of society, leaving LGBT people vulnerable to violence and harassment. There is no dignity in the state criminalising homosexuality.
07. The prohibition on inhuman and degrading treatment is absolute. Laws that criminalise homosexuality permit severe mistreatment of LGBT people by state and non-state actors alike. These laws facilitate inhuman and degrading treatment. There is also a growing understanding that the very existence of these laws amounts to inhuman and degrading treatment.

⁵ Two criminalising jurisdictions are not UN members, Gaza (a part of the Palestinian Territories, which has non-member observer status at the UN) and the Cook Islands (which is in a free association with New Zealand, albeit has full treaty-making capacity at the UN).

08. This briefing note analyses the rights referred to above and demonstrates why each is violated by the criminalisation of homosexuality. The note then goes on to compare the relative strengths of these rights and their ability to progress rights for LGBT people more generally. The UK, Europe and (until recently) the United States each grounded their recognition of the rights of LGBT people in privacy. Although any progress is welcome, the use of privacy has only slowly been able to bring about parity between LGBT people and the rest of society. In more recent times, countries like South Africa and Nepal have used the right to equality, which resulted in much more rapid and broader legal protection for LGBT people. This briefing then goes on to examine how international human rights law can be enforced in domestic courts.

What is international law and when is it relevant?

09. International law defines the legal responsibilities of states in their conduct with each other, and in their treatment of individuals within the state's jurisdiction. It encompasses a wide range of issues of international concern, including human rights. There are at least four sources of international law,⁶ but for the purposes of this note only treaty law is relevant. States are the subject of international human rights law, as it is they who take on obligations. Individual people are the object, as it is their human rights that are to be respected.

⁶ Article 38(1) of the Statute of the International Court of Justice lists the sources of international law as: 'a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

⁷ In addition, at least two other treaties will have specific application depending on the person seeking to uphold her or his rights. For lesbian and bisexual women, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) will be relevant. For those below the age of 18, for example in equal age of consent challenges, the Convention on the Rights of the Child (CRC) may have application.

Treaty law

10. In terms of the international law that forbids the criminalisation of homosexuality, multiple international human rights treaties have been ratified under the auspices of the UN and within regional organisations. These international treaties contain commitments to uphold human rights, each of which borrows heavily from the UN's Universal Declaration of Human Rights, 1948.
11. At the UN level, all of the main UN human rights treaties have relevance to the criminalisation of homosexuality, but two treaties are of particular importance to all LGBT people striving to assert their rights:
- a) The International Covenant on Civil and Political Rights (ICCPR).
 - b) The Convention Against Torture (UNCAT).⁷
12. At the regional level, there are various international treaties that impose obligations among neighbouring states. The obligations in these regional-level treaties are broadly the same as each other, and broadly the same as the UN-level treaties. These regional treaties are:
- a) The European Convention on Human Rights (ECHR).
 - b) The American Convention on Human Rights (American Convention).
 - c) The African Charter on Human and Peoples' Rights (African Charter).
 - d) The Revised Arab Charter on Human Rights (Arab Charter).
13. Appendix 1 to this note lists the international treaties ratified by countries that criminalise homosexuality.

14. It is important to note at the outset that the international treaties discussed below apply to everyone within the signatory state's jurisdiction, and to the inclusion of LGBT people and all other groups. To give just one example of how this inclusivity is phrased, the Universal Declaration of Human Rights declares:

*Whereas recognition of the inherent dignity and of the **equal and inalienable rights of all members of the human family** is the foundation of freedom, justice and peace in the world...*

All human beings are born free and equal in dignity and rights. *They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind...⁸

The right to privacy

15. On multiple occasions the criminalisation of homosexuality has been found to violate the right to privacy. The right to privacy is contained in all of the treaties of international human rights law discussed in this note, except for the African Charter (see Appendix 2, where each treaty's privacy right is set out in full).
16. It is a common feature of these treaties that the state may interfere with one's privacy, but only if the interference is lawful and not arbitrary. Case law is consistent in concluding that the criminalisation of consensual same-sex intimacy amounts to an arbitrary interference with private life, and thus violates this right.

ICCPR

17. The Human Rights Committee is the treaty body that monitors and interprets the ICCPR. It has clearly and repeatedly stated that the criminalisation of homosexuality violates the right to privacy protected by Article 17 of the ICCPR. This determination was first made in 1994 in the case *Toonen v. Australia*. Mr Toonen was a leading member of the Tasmanian Gay Law Reform Group. He complained to the Human Rights Committee that Tasmanian law allowed 'police officers to investigate intimate aspects of his private life and to detain him if they have reason to believe that he is involved in sexual activities' with his long-term partner in the privacy of their own home.⁹ The Human Rights Committee was firm in its conclusion:

“ **Inasmuch as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of “privacy”.**¹⁰

The continued existence of the challenged provisions therefore continuously and directly “interferes” with the author’s privacy.

18. Since Toonen, it has been clear that all state-parties to the ICCPR have an obligation to repeal any laws that criminalise consensual same-sex sex between adults. In September 2012, the Office of the High Commissioner for Human Rights reiterated that the decriminalisation of homosexuality is an obligation under international law:

*The criminalization of private, consensual sex between adults of the same sex breaches a State’s obligations under international law, including the obligations to protect individual privacy and to guarantee non-discrimination. This has been the consistent position of United Nations human rights experts since 1994, when the Human Rights Committee decided Toonen v. Australia.*¹¹

19. Despite this unambiguous obligation, 58 parties to the ICCPR continue to criminalise homosexuality (see Appendix 1). Twenty-five of these state-parties allow individual complainants, like Mr Toonen, to petition the Human Rights Committee. The fact that criminalisation persists demonstrates the difficulty for individual applicants in accessing this process to protect their human rights. In particular, domestic remedies must be exhausted before the Human Rights Committee can be petitioned. In addition, applicants must come forward and, in doing so, declare their sexuality at the risk of arrest, violence and other harm. State-parties to the ICCPR, on the other hand, do not encounter these obstacles when bringing a state-to-state claim. Other state-parties are owed treaty obligations under the ICCPR. They should consider pursuing the state-to-state option to hold to account the 58 criminalising state-parties to the ICCPR that are flouting their obligations under international law.

58 parties to the ICCPR continue to criminalise homosexuality

ECHR

20. Like the Human Rights Committee, the European Court of Human Rights in Strasbourg has held that laws that criminalise homosexuality violate the right to privacy protected by Article 8 of the ECHR. This has been the consistent stance since the Strasbourg Court's judgment in 1981 in the case of *Dudgeon v. the United Kingdom*. Mr Dudgeon was a shipping clerk and gay rights activist living in Northern Ireland, which unlike the rest of the UK had not revised its criminalising laws. After Mr Dudgeon was interrogated by the police about his sexual activities, he petitioned the Strasbourg Court. The Strasbourg Court was as clear in its conclusion as the Human Rights Committee:

“ **[T]he maintenance in force of the impugned legislation constitutes a continuing interference with the applicant’s right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1... [T]he very existence of this legislation continuously and directly affects his private life: either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.**¹²

⁸ Universal Declaration of Human Rights, Preamble and Articles 1 and 2, respectively.

⁹ *Toonen v. Australia*, UN Human Rights Committee, Communication No. 488/1992, CCPR/C/50/d/488/1992, 31 March 1994 ('Toonen'), paras. 2.2 and 2.3.

¹⁰ *Ibid.*, para. 8.2.

¹¹ OHCHR, *Born Free and Equal - Sexual Orientation and Gender Identity in International Human Rights Law*, 14 September 2012, p. 30.

¹² *Dudgeon v United Kingdom*, 4 EHRR 149 (1981), para. 41.

21. In a subsequent case, *Norris v. Ireland*, the Strasbourg Court added that mere existence of the criminalising laws interferes with the right to privacy:

“ It is true that, unlike Mr Dudgeon, Mr Norris was not the subject of any police investigation. However, the Court’s finding in the Dudgeon case that there was an interference with the applicant’s right to respect for his private life was not dependent upon this additional factor... The Court therefore finds that the impugned legislation interferes with Mr Norris’s right to respect for his private life.¹³

22. In a further case, *Modinos v. Cyprus*, the Strasbourg Court found that the right to privacy is still violated, even where there is an official moratorium on bringing prosecutions:

“ It is true that since the Dudgeon judgment the [Cypriot] Attorney-General... has followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct on the basis that the relevant law is a dead letter. Nevertheless, it is apparent that this policy provides no guarantee that action will not be taken by a future Attorney-General to enforce the law... Against this background, the Court considers that the existence of the prohibition continuously and directly affects the applicant’s private life.¹⁴

23. In light of these decisions, Europe is now a criminalisation-free continent. All Council of Europe members must ratify and are subject to the ECHR. Since *Dudgeon*, no fewer than 20 Council of Europe members have decriminalised. These countries were compelled to decriminalise or lose their membership. The experience of the Council of Europe demonstrates the power of binding international human rights law that is accessible and actionable by individuals. The wide ripple effects of *Dudgeon* can be contrasted with *Toonen*, which has not had the same effect, as the right of individuals to petition the Human Rights Committee is more limited than that of the Strasbourg Court.

24. Looking beyond criminalisation, the right to privacy in the ECHR has been used by the Strasbourg Court to provide a remedy for other violations, for example:

- a) Discharge from the armed services based on sexual orientation.¹⁵
- b) The absence of state-sanctioned civil unions for same-sex couples.¹⁶

¹³ *Norris v. Ireland*, [1988] ECHR 10581/83, para. 38.

¹⁴ *Modinos v. Cyprus*, App. no. 15070/89, 22 April 1993, paras. 23 and 24.

¹⁵ *Smith & Grady v. the United Kingdom* 29 (1999) EHRR 493, 27 September 1999.

¹⁶ *Oliari and Others v. Italy*, [2015] ECHR 716, 21 July 2015.

American Convention

25. Unlike the Council of Europe and its ECHR, it is not a requirement that members of the Organisation of American States (OAS) ratify the American Convention. Although **11 countries that criminalise homosexuality are OAS members**, only four are parties to the American Convention (Barbados, Dominica, Grenada, and Jamaica, see Appendix 1).¹⁷ Of those, only one (Barbados) has given jurisdiction to the Inter-American Court of Human Rights to hear complaints from individual applicants. One other (Jamaica) has given jurisdiction to the Inter-American Commission on Human Rights to hear state-to-state claims. Due to the lack of coverage of this treaty in criminalising countries, there has not been a judgment specifically on the criminalisation of homosexuality as it relates to the American Convention.¹⁸ Again, contrasting the OAS with the Council of Europe shows the importance of a binding and accessible international treaty in bringing about decriminalisation.

26. However, from other cases on the American Convention, it is clear that the right to privacy contained therein is violated by the criminalisation of homosexuality. Both the Inter-American Court and the Inter-American Commission have made determinations on the right to privacy in the context of sexual orientation. Two cases best illustrate this.

27. In the case of *Atala Riffo and Daughters v. Chile*, the petitioner was denied child custody due to her being a lesbian. Ms Atala Riffo was a judge and mother of three daughters. She separated from her husband and reached a settlement with him that she would retain custody of their children. When Ms Atala Riffo ‘came out’ as a lesbian, her ex-husband sued for custody and was awarded it by the Chilean Supreme Court. The Inter-American Court held that the denial of custody on the basis of sexual orientation violated the right to privacy. The state’s conduct amounted to an arbitrary interference with Ms Atala Riffo’s private life.¹⁹

28. In the case of *Marta Lucia Alvarez Giraldo v. Colombia*, the petitioner was a lesbian who had been convicted of murder. Her heterosexual inmates were permitted conjugal visits from their male partners. She was not given the same privilege with her female partner. Ms Alvarez Giraldo alleged that the state’s refusal to permit her conjugal visits was due to her sexual orientation. The Inter-American Commission held that her complaint was admissible as Colombia’s conduct ‘could constitute an arbitrary or abusive interference with her private life’.²⁰

¹⁷ See: <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp>

¹⁸ Although opportunities for individual-to-state and state-to-state complaints are scant, helpful opinions could be sought from the Inter-American Commission: (a) By an individual applicant regarding a state-party’s compliance with its obligations under the American Convention, as provided for by Article 44 of the American Convention – any of Barbados, Dominica, Grenada, and Jamaica could be the target of this procedure; or (b) By any OAS member regarding the interpretation of human rights law applicable in the Americas, as provided for in Article 64 of the American Convention. These options will not have binding effect, but if they were used would confirm that the criminalisation of homosexuality violates the American Convention and other human rights law applicable in the Americas.

¹⁹ *Atala Riffo and Daughters v. Chile*, Case 12.502, Inter-American Court of Human Rights, 24 February 2012, para. 167.

²⁰ *Marta Lucia Alvarez Giraldo v. Colombia*, Case 11.656, Report No. 71/99 (Admissibility Decision), Inter-American Commission on Human Rights, 4 May 1999, at para. 21.

29. If the American Convention recognises that the right to privacy is violated by the denial of conjugal rights to incarcerated LGBT people, it must of necessity recognise a violation where all same-sex sexual intimacy is criminalised. The four criminalising state-parties to the American Convention cannot deny that they are in breach of their treaty obligations by their continued criminalisation of homosexuality.

The prohibition on discrimination

30. The right to non-discrimination is contained in all of the treaties of international human rights law referred to above, except the CAT (see Appendix 2 for full text of these rights). Each of these international human rights treaties lists 'prohibited grounds'. For example the ICCPR 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.

31. Neither sexual orientation nor gender identity is included in these lists. However, with the exception of the Arab Charter, these lists are not exhaustive. For each of the ICCPR, ECHR, American Convention and African Charter:

- Discrimination is prohibited on **any ground**.
- The grounds expressly listed **are examples only**.
- The references to 'other status', 'any other social condition' and 'any status' confirm that the list of prohibited grounds is **non-exhaustive**.

32. The courts and bodies interpreting the ICCPR, ECHR, American Convention and African Charter have each recognised that sexual orientation is included as a prohibited ground for discrimination.

ICCPR

33. The Human Rights Committee determined in *Toonen* that sexual orientation is included in Article 26 of the ICCPR.²¹ Likewise, concerning Cameroon's laws that criminalise homosexuality the Human Rights Committee stated:

*The Committee remains deeply concerned about the criminalization of consensual sexual acts between adults of the same sex ... As the Committee and other international human rights mechanisms have underlined, such criminalization violates the rights to privacy and freedom from discrimination enshrined in the [ICCPR] Covenant ... The State party should take immediate steps towards decriminalizing consensual sexual acts between adults of the same sex, in order to bring its law into conformity with the Covenant.*²²

34. As a consequence, all 58 state-parties to the ICCPR that criminalise homosexuality cannot deny that they are in breach of their obligations under this treaty.

ECHR

35. The Strasbourg Court in the case of *Salgueiro da Silva Mouta v. Portugal*, held that discrimination on the ground of sexual orientation is prohibited by Article 14 of the ECHR. This case concerned Mr da Silva Mouta being denied child custody rights due to his being gay. The Strasbourg Court concluded that:

“ [S]exual orientation [is] a concept which is undoubtedly covered by Article 14 of the [ECHR] Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words “any ground such as”.²³

36. In the ECHR system, discrimination on the ground of sexual orientation is permissible only in the strictest of circumstances. As stated by the Strasbourg Court in another case:

*On the one hand the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification.*²⁴

37. The Strasbourg Court has rich case law on non-discrimination on the ground of sexual orientation. It has held that this right was violated, for example, in the following instances:

- The refusal to grant adoption based on the sexual orientation of the adoptive parent.²⁵
- The failure to extend sickness insurance to a same-sex partner of an insured person.²⁶
- The placing of an LGBT prisoner in solitary confinement.²⁷
- The failure to grant civil unions to same-sex couples in circumstances where opposite-sex couple have access to the institution.²⁸
- The failure to protect LGBT people from violent attacks from the counter-demonstrators at a gay pride march, and a failure to investigate effectively the incident by establishing, in particular, the discriminatory motive behind the attacks.²⁹

²³ *Salgueiro da Silva Mouta v. Portugal* [1999] ECHR 176, 21 December 1999, para. 28.

²⁴ *Gas and Dubois v. France* (2014) 59 EHRR 22, para. 59.

²⁵ *E.B. v. France* (no. 43546/02), 22 January 2008.

²⁶ *P.B. and J.S. v. Austria* (no. 18984/02), 22 July 2010.

²⁷ *X. v. Turkey* (no. 24626/09), 9 October 2012.

²⁸ *Vallianatos v. Greece*, (no. 29281/09), 7 November 2013.

²⁹ *Identoba v. Georgia* (no. 73235/12), 12 May 2015.

²¹ *Toonen*, at n. 9 above, para. 8.7.

²² Concluding observations of the Human Rights Committee on Cameroon (CCPR/C/CMR/CO/4), at para. 12.

American Convention

38. Like its European counterpart, the American Convention clearly prohibits discrimination on the ground of sexual orientation. In the case of *Atala Riffo*, the Inter-American Court found that discrimination on the ground of sexual orientation violates the American Convention, holding that sexual orientation is included in Article 1(1)'s reference to 'other social condition'. Helpfully, in this case the Inter-American Court demonstrated the breadth of the right to non-discrimination for LGBT people, which can be referred to in future challenges:

*[T]he Inter-American Court establishes that the sexual orientation of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person's sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation.*³⁰

39. As a result, the four criminalising state-parties to the American Convention (Barbados, Dominica, Grenada, and Jamaica) cannot deny that they are in breach of their obligations under this treaty by their continued criminalisation of homosexuality.

African Convention

40. Likewise, the African Commission, in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, confirmed that the reference to 'other status' in Article 2 of the African Charter prohibits discrimination on the grounds sexual orientation. The African Commission observed that:

*Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the [African] Charter provides the foundation for the enjoyment of all human rights. As Shestack [an author to whom the Commission referred] has observed, equality and non-discrimination "are central to the human rights movement." The aim of this principle is to ensure **equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.***³¹

41. Of the 78 jurisdictions that criminalise homosexuality, 32 are parties to the African Charter (see Appendix 1). They too cannot deny that they are in breach of their obligations under this treaty by their continued criminalisation of homosexuality.

Other international treaties

42. It is uncontroversial among other UN treaty bodies responsible for interpreting international treaties that discrimination on the ground of sexual orientation is prohibited. For example:

- a) The Committee on Economic, Social and Cultural Rights determined that sexual orientation is implicitly included in Article 2(2) (non-discrimination) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).³²
- b) The Committee on the Rights of the Child determined that Article 2 (non-discrimination) of the Convention of the Rights of the Child prohibits different ages of consent for heterosexuals and homosexuals.³³
- c) The Committee on the Elimination of Discrimination Against Women has called for the decriminalisation of same-sex intimacy between women.³⁴
- d) The Committee on Torture determined that the Convention Against Torture protects against discriminatory treatment in prisons based on sexual orientation.³⁵

43. Further, the UN High Commissioner on Refugees declared that the Convention on Refugees must be interpreted as prohibiting discrimination based on sexual orientation.³⁶

44. Like the right to privacy, the prohibition on discrimination has been crucial in establishing LGBT rights. This right has more universal coverage than the right to privacy, as it is a standard provision in treaties and constitutions; and once it has been established that LGBT people enjoy equal status with other citizens, treating them in any discriminatory manner breaches this right. As such, the right to non-discrimination can be seen as more substantial than the right to privacy, as the latter risks carving out only small areas of private space where LGBT people are free to conduct themselves as they wish. Privacy and equality are compared in further detail below at paragraphs 69 and 80.

³⁰ *Atala Riffo*, at n. 19 above, para. 91, also see paras 83-92.

³¹ *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication 245/02, May 2006, para 169. See also, General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, para. 4.

³² *CESCR General Comment No. 20*, UN-Doc-E/C.12/GC/20/(2009), para. 32.

³³ *Concluding Observations of the Committee on the Rights of the Child: (Isle of Man)*, UN-Doc-CRC/C/15/Add.134, (2000), para. 22.

³⁴ *Report of the Committee on the Elimination of Discrimination against Women*, UN-Doc-CEDAW/A/54/38 (1999), paras. 127, 128.

³⁵ *Concluding Observations of the Committee against Torture: Egypt*, UN-Doc-CAT/s/XXIX/Misc.4 (2002), para. 5(e).

³⁶ *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN-Doc-HCR/GIP/12/09 (2012), para. 6.

The right to dignity

45. The right to dignity is contained in the substantive articles of the American Convention and the African Charter, and its importance is emphasised in the Preamble of the African Charter and Arab Charter (see Appendix 2 for full text).
46. Dignity is relevant to the criminalisation of homosexuality both as a standalone right and via its interplay with other substantive rights, such as privacy, non-discrimination, inhuman or degrading treatment, and the right to life. Dignity can be seen as the very essence of human rights treaties. In that regard, while the ECHR makes no reference to dignity in its Preamble or substantive Articles, the Strasbourg Court has declared on multiple occasions the importance of dignity when assessing breaches of the ECHR:

“ **The very essence of the [ECHR] Convention is respect for human dignity and human freedom.**³⁷
Any interference with human dignity strikes at the very essence of the Convention.³⁸

47. The interplay between dignity and other human rights was summed up in a court judgment from South Africa:
- Human dignity ... informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life... [W]here the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.*³⁹
48. Although this decision is from a domestic court, it nonetheless informs how dignity can be viewed as underpinning the rights contained in international human rights treaties. The indignity caused by the criminalisation of homosexuality animates the substantive human rights contained in international human rights treaties and further illustrates that these rights are violated.

³⁷ *Pretty v. the United Kingdom*, 24 EHRR (1997) 423, at para. 65.

³⁸ *Bouyid v. Belgium*, Grand Chamber decision (2015) *Application no. 23380/09*, para. 101.

³⁹ *Dawood v. Minister of Home Affairs* [2000] 5 Law Reports of the Commonwealth 147, 2000 (3) SA 936 (CC), para. 35.

49. Domestic court decisions specifically on the criminalisation of homosexuality have considered dignity in this way. The Constitutional Court of South Africa in striking down South Africa's anti-sodomy laws stated:

*Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human.*⁴⁰

50. The Court acknowledged that anti-gay laws do much more than merely prohibit certain sexual conduct:

*Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolic level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution...*⁴¹

⁴⁰ *National Coalition for Gay and Lesbian Equality and Anor v. Minister of Justice*, 6 BHR 127 (CCT 11/98), [1998], ZACC 15, 1998 (12) BCLR 1517 (CC), 9 October 1998 ("National Coalition"), para. 28.

⁴¹ *Ibid*, para. 36.

⁴² *Ibid*, paras. 28 and 36.

“ **Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution...**

*The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.*⁴²

51. The Supreme Court of the United States, in *Lawrence v. Texas*, also acknowledged that dignity is undermined by laws that criminalise homosexuality, even in the absence of an express constitutional right to dignity. In this case, the court held:

*When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres... The stigma this criminal statute imposes, moreover is not trivial... it remains a criminal offense with all that imports for the dignity of the persons charged.*⁴³

52. The Privy Council, which incidentally is the final court of appeal for 11 criminalising jurisdictions, has also emphasised the importance of dignity when applying the right of equality to LGBT people. In a case from Gibraltar concerning the denial of joint tenancies to couples unless they were ‘married to one another’ or ‘have a child in common’, the Privy Council stated.

*In this case, the criterion is one which this [lesbian] couple, unlike other unmarried couples, will never be able to meet... As Ackermann J put it in the South African Constitutional Court decision in National Coalition for Gay and Lesbian Equality v Minister of Home Affairs [2000] 4 LRC 292, at para 54, the impact of this denial “constitutes a crass, blunt, cruel and serious invasion of their dignity”.*⁴⁴

53. Similarly, again in the absence of an express right to dignity, the Court of Appeal in Hong Kong referred to dignity in a case challenging differing ages of consent for heterosexual and homosexual sex. In this case, *Leung v. Secretary for Justice*, the court stated that:

[T]he question before us in the present case affects the dignity of a section of society in a significant way...⁴⁵

54. These domestic decisions exemplify how dignity can inform the content of substantive human rights, including those contained in international treaties. There are many other court decisions on dignity on issues other than the criminalisation of homosexuality, which serve as further examples of how dignity animates substantive rights.⁴⁶

The prohibition on inhuman and degrading treatment

55. The prohibition on inhuman and degrading treatment has relevance to the criminalisation of homosexuality in two senses. First, there are strong legal arguments that targeting a person or group on account of an immutable characteristic amounts, in and of itself, to inhuman and degrading treatment (see the *East African Asians* case below). Laws that criminalise homosexuality do more than outlaw certain sexual acts. These laws criminalise a person’s identity and permit the full force of the state to suppress that identity.

56. Secondly, these laws give license to specific and acute abuses against LGBT people, which individually may amount to inhuman and degrading treatment. Examples include forced anal examinations while in police custody and the failure of the state to prevent non-state actors violating the rights of LGBT people. These violations are facilitated by criminalisation, as laws that criminalise homosexuality place LGBT people outside of other legal protection, leaving them vulnerable to harassment, violence and abuse by both state and non-state actors.

57. Inhuman and degrading treatment is prohibited by each of the treaties referred to above (see Appendix 2). The prohibition on inhuman and degrading treatment is absolute. States who are parties to these international human rights treaties have an obligation under international law to protect individuals from such inhuman or degrading treatment. This obligation includes the state refraining from carrying out such acts itself; in this regard criminal laws that are inhuman or degrade LGBT people form a part of the state’s conduct.

58. This obligation also requires the state to act to prevent violations by non-state actors, and to provide redress when they occur. The failure to investigate and bring to justice perpetrators is itself a breach of international human rights law.

ICCPR

59. The Human Rights Council, another entity in the UN distinct from the Human Rights Committee, has recognised that the mistreatment of LGBT people by states engages the ICCPR’s prohibition on inhuman and degrading treatment. In November 2011, the High Commissioner for Human Rights released a report on ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’, which contained a statement on states’ obligations under international law, including:

To prevent torture and other cruel, inhuman or degrading treatment on grounds of sexual orientation or gender identity

The right to be free from torture and other cruel, inhuman or degrading treatment is absolute. Article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights provide that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”⁴⁷

UNCAT and UN Special Rapporteurs

60. The treaty body that monitors and interprets that the UNCAT, the Committee against Torture warned about the risk of the UNCAT being violated as a result LGBT people being targeted:

[B]oth men and women and boys and girls may be subject to violations of the [UNCAT] Convention on the basis of their actual or perceived non-conformity with socially determined gender roles.⁴⁸

⁴³ *Lawrence v. Texas*, 539 US 558 (2003), p. 575.

⁴⁴ *Rodriguez v. Minister of Housing of the Government*, [2009] UKPC 52, para. 19.

⁴⁵ *Leung v. Secretary for Justice*, Civil Appeal No 317 of 2005, 20 September 2006, para. 29.

⁴⁶ Some of these court decisions are discussed on our website at: http://www.humandignitytrust.org/uploaded/Briefing_Notes/Series_1/Dignity_BN-FINAL.pdf

⁴⁷ UN Human Rights Council, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity – Report of the United Nations High Commissioner for Human Rights*, 17 November 2011, UN Doc. A/HRC/19/41, p. 6.

⁴⁸ Committee against Torture, General Comment No. 2, para. 22.

61. The UN Special Rapporteur on Torture has recommended that states must decriminalise same-sex relationships between consenting adults and repeal all laws that criminalise persons on the basis of their actual or perceived sexual orientation or gender identity or expression.⁴⁹ In his 2016 report on the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls, and LGBT people, he stated that:

*States fail in their duty to prevent torture and ill-treatment whenever their laws, policies or practices perpetuate harmful gender stereotypes in a manner that enables or authorizes, explicitly or implicitly, prohibited acts to be performed with impunity. States are complicit in violence against women and lesbian, gay, bisexual and transgender persons whenever they create and implement discriminatory laws that trap them in abusive circumstances.... A clear link exists between the criminalization of lesbian, gay, bisexual and transgender persons and homophobic and transphobic hate crimes, police abuse, community and family violence and stigmatization...Such laws foster a climate in which violence against lesbian, gay, bisexual and transgender persons by both State and non-State actors is condoned and met with impunity.*⁵⁰

62. Of particular concern in countries that criminalise homosexuality is the practice of forced anal examinations by authorities to obtain evidence for prosecutions. These examinations are used, notwithstanding that they have been described as ‘medically worthless’ and amount to torture or ill-treatment according to Committee against Torture and the Special Rapporteur on Torture.⁵¹ The Special Rapporteur on Torture and the Working Group on Arbitrary Detention have also held that the practice contravenes the prohibition on inhuman and degrading treatment.⁵²

63. Similarly, suspected lesbians have been subjected to sex identification tests and forced medical examinations to determine whether digital penetrative sex had occurred between them.⁵³ Other medical procedures breach the prohibition on inhuman and degrading treatment when they are forced or are otherwise involuntary; these include so-called ‘conversion therapy’, sterilisation and gender reassignment.⁵⁴ The laws that criminalise homosexuality occasion the use of these forced examinations and treatments.

49 See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 5 January 2016, UN Doc. A/HRC/31/57, para. 69.

50 *Ibid.*, paras. 10 and 15.

51 See the concluding observations of the Committee against Torture on Egypt, UN Doc. CAT/C/CR/29/4, paras. 5 (e) and 6 (k); See also UN Doc. A/56/156, para. 24; A/HRC/4/33/Add.1, para. 317; UN Doc. A/HRC/10/44/Add.4, para. 61; UN Doc. A/HRC/16/52/Add.1, para. 131; and UN Doc. A/HRC/16/47/Add.1, opinion no. 25/2009 (Egypt), paras. 24, 28-29; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 5 January 2016, UN Doc. A/HRC/31/57, para. 36.

52 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 1 February 2013, UN Doc A/HRC/22/53, paras. 76 and 79.

53 Fernandez, B., and Gomathy N.B., ‘The Nature of Violence Faced by Lesbian Women in India’ (2003), Centre on Violence Against Women: Mumbai pp. 50 to 59.

54 See A/HRC/22/53, paras. 76-79, 88, CRC/C/CHE/CO/2-4, paras. 42-43, CAT/C/DEU/CO/5, para. 20.

64. The Special Rapporteur on Torture has also highlighted allegations of mistreatment of prisoners and detainees on the basis of their sexual orientation or gender identity in his reports. In a 2016 report he wrote:

*Women, girls, and lesbian, gay, bisexual and transgender persons are at particular risk of torture and ill-treatment when deprived of liberty, both within criminal justice systems and other, non-penal settings. Structural and systemic shortcomings within criminal justice systems have a particularly negative impact on marginalized groups. Measures to protect and promote the rights and address the specific needs of female and lesbian, gay, bisexual and, transgender prisoners are required and cannot not be regarded as discriminatory.*⁵⁵

In 2001, he wrote:

*[I]t appears that members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations. Indeed, discrimination on grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place.*⁵⁶

55 See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 5 January 2016, UN Doc. A/HRC/31/57, para. 13.

56 Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/56/156), para. 19.

57 Reports of the Special Rapporteur on violence against women: E/CN.4/2006/61/Add.1, paras. 1 and 2; and A/HRC/4/34/Add.1, paras. 448-454.

58 Report of the Special Rapporteur on violence against women (A/HRC/17/26/Add.2), paras. 28-29.

65. The Special Rapporteur on Violence against Women has detailed allegations of ‘metis’ (a local term for trans women) in Nepal being beaten by police, who demand money and sex.⁵⁷ In one case in El Salvador, a transgender woman was detained in a cell with gang members where she was ‘raped more than 100 times, sometimes with the complicity of prison officials’.⁵⁸

American Convention

66. In May 2015, the Inter-American Commission of Human Rights issued a statement expressing concern about the treatment of LGBT people in custody, which advertently or inadvertently results in inhuman and degrading treatment perpetrated by state actors and/or non-state actors:

In recent months, the IACHR has received troubling information on instances of violence and inhuman and degrading treatment against LGBT persons or those perceived as such, in prisons, lock up facilities, police stations, and immigration detention centers. LGBT persons who are deprived of their liberty are at a heightened risk for sexual violence – including higher risk for multiple sexual assaults – and other acts of violence and discrimination at the hands of other persons deprived of liberty or custodial staff. According to a 2010 Report by the UN Special Rapporteur on Torture, LGBT persons are at the bottom of the informal hierarchy in detention facilities, which results in double or triple discrimination.

The IACHR has also received troubling information on the routine use of solitary confinement as a measure aimed at “protecting” LGBT individuals. The IACHR reiterates that solitary confinement should only be used in exceptional circumstances, for the shortest period possible and only as a last resort measure. Solitary confinement and similar forms of deprivation of human contact for a prolonged period of time may produce physical and mental irreversible damage, and amount to inhuman or degrading treatment. Sexual orientation and gender identity should not be used as criteria to subject persons to unduly prolonged solitary confinement. Persons deprived of liberty must not be penalized or punished due to prejudice and discrimination based on perceived or actual sexual orientation and gender identity.⁵⁹

African Charter

67. In May 2014, the African Commission released a 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. It contained the following:

Recalling that Article 2 of the African Charter on Human and Peoples’ Rights (the African Charter) prohibits discrimination of the individual on the basis of distinctions of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status;

Further recalling that Article 3 of the African Charter entitles every individual to equal protection of the law;

Noting that Articles 4 and 5 of the African Charter entitle every individual to respect of their life and the integrity of their person, and prohibit torture and other cruel, inhuman and degrading treatment or punishment;

Alarmed that 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;

Noting that such violence includes ‘corrective’ rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings and executions, forced disappearances, extortion and blackmail;

Further alarmed at the incidence of violence and human rights violations and abuses by State and non-State actors targeting human rights defenders and civil society organisations working on issues of sexual orientation or gender identity in Africa;

Deeply disturbed by the failure of law enforcement agencies to diligently investigate and prosecute perpetrators of violence and other human rights violations targeting persons on the basis of their imputed or real sexual orientation or gender identity;

1. Condemns the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity;

2. Specifically condemns the situation of systematic attacks by State and non-state actors against persons on the basis of their imputed or real sexual orientation or gender identity;

3. Calls on State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities; and

4. Strongly urges States to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.

ECHR

68. The Strasbourg Court has particularly well-developed case law in this area that can be applied to LGBT people. In the case of *East African Asians v. United Kingdom*, the issue at hand was a British law that denied immigration status to the husbands of British nationals on the ground that the husbands were East Africans of Asian origin.⁶⁰ The European Commission held that immigration measures that lowered a person’s rank, position or character as a result of an immutable characteristic discriminated on the basis of race. The Commission concluded that this could amount to degrading treatment provided it reached a minimum level of severity.

69. Similarly, in *Smith and Grady v. the United Kingdom*, the Strasbourg Court held that, in principle, bias in discharging gay men and lesbian women from the armed forces

could constitute degrading treatment if it attained the minimum level of severity, though this was not found on the facts of this case.⁶¹ As such, if this threshold is passed, singling out LGBT people on the basis of their identity can amount to inhuman and degrading treatment. As with other rights, inhuman and degrading treatment interacts with dignity. Completing the quote above at paragraph 46, which originated in *Bouyid v. Belgium*, a case concerning the mistreatment of a juvenile while in police custody:

*Any interference with human dignity strikes at the very essence of the Convention. For that reason any conduct by law-enforcement officers vis-à-vis an individual which diminishes human dignity constitutes a violation of [inhuman and degrading treatment protected by] Article 3 of the Convention.*⁶²

A comparison of privacy and equality

70. Different countries have taken different routes to establish LGBT rights. The rights to privacy and equality have both been used successfully to bring about decriminalisation. That said, the choice of right in which to ground decriminalisation has longer-term consequences for the progression of LGBT rights in that jurisdiction.

Privacy

71. Decriminalisation came about in the UK, Europe and the United States due to the acceptance that LGBT people have an inalienable private space in which to have sex and into which the state must not intrude. However, in reality the private physical space and metaphorical space granted to LGBT people using this privacy approach has invariably been restricted.

59 OAS, IACHR, Press Release, No. 053/15, 21 May 2015.

60 *East African Asians v. the United Kingdom*, (1973) 3 EHRR 76.

61 *Smith and Grady v. the United Kingdom*, (1999) 29 EHRR 493, para. 122.

62 *Bouyid v. Belgium*, Grand Chamber decision (2015) App. no. 23380/09, para. 101.

72. When England & Wales decriminalised male same-sex intimacy by legislative change in 1967, it did so on the basis of privacy. (Lesbian sex was never criminalised.) Henceforth, gay and bisexual men were allowed a private space in which to have sexual intimacy, so long as only two people were present, they were both 21 years of age or older, and it was in private. In effect, this provided a defence to prosecution. But consensual same-sex intimacy between adults remained a crime in all other circumstances; for example, it remained a crime where one partner was between 16 and 20 years old, another person was present (even in another room of a private house⁶³), or the sexual act took place in a public place. Full decriminalisation occurred only in 2003, when the offence of 'gross indecency' was repealed.

73. In the intervening 36 years between 1967 and 2003, around 30,000 gay and bisexual men were convicted for behaviour that would not have been a crime had their partner been a woman.⁶⁴

This number of convictions should be of little surprise. While homosexuality remained stigmatised by the criminal law and by society, gay and bisexual men lacked private spaces in which they could lawfully conduct sexual, intimate or emotional relationships. A licence to be intimate in one's own bedroom is of little use when societal homophobia and the law prevent gay and bisexual men from meeting, forming and maintaining relationships in

public. Further, making use of the private space where sex was legal might have required 'coming out' to the family, friends or flatmates with whom that space was shared. Even then, sex remained a crime if another was present somewhere else in the private residence. Gay sex was thus pushed into public places, where it remained unlawful and where gay and bisexual men remained vulnerable to arrest and abuse by both state and non-state actors.

74. Had an equality approach been taken, full decriminalisation would have been achieved at an earlier date. It would have been unlawful to treat LGBT people differently from the heterosexual majority. Not only would this have spared 30,000 gay and bisexual men from conviction, but it is likely stigmatisation would have ended sooner, thus lessening the emotional and psychological burden that LGBT people have faced over the past decades. It was not only gay and bisexual men who suffered from the incremental approach; lesbian and bisexual women, and trans men and women too continued to face stigma and discrimination in the absence of a right to equal treatment.

75. The graphic on the next page demonstrates the slow and incremental pace of change in England & Wales under the privacy route to LGBT rights. The red discs show how gay and bisexual men remained criminalised for conduct that was not a crime for heterosexuals. The blue discs show how LGBT people incrementally have been granted more rights. The green disc represents full equality; a position that England & Wales is approaching, but has not yet achieved.

Pre-1967: consensual intimacy between men is always a criminal offence, and no laws to protect sexual orientation. No space for the LGBT identity.

1967-2003: changes to criminal law via respect for privacy, but gay/bi men still criminalised.

- 1967: Partial decriminalisation of consensual intimacy between men. Defence to criminal law introduced, if two men, in private, and both 21 years of age or older. Other intimacy between men remains a criminal offence, and solicitation, public order offences and byelaws remain applicable in the prosecution of gay/bi men.
- 1994: Further decriminalisation. Age of consent reduced to 18 years.
- 2001: Further decriminalisation. Age of consent equalised with heterosexuals, at 16 years. Gay/bi men are still prosecuted for 'gross indecency' if group sex or sex not in private.
- 2003: Full decriminalisation, as 'gross indecency' repealed. This offence only ever applied to gay/bi men, never heterosexuals or women. There were 30,000 convictions for gross indecency between 1967-2003.

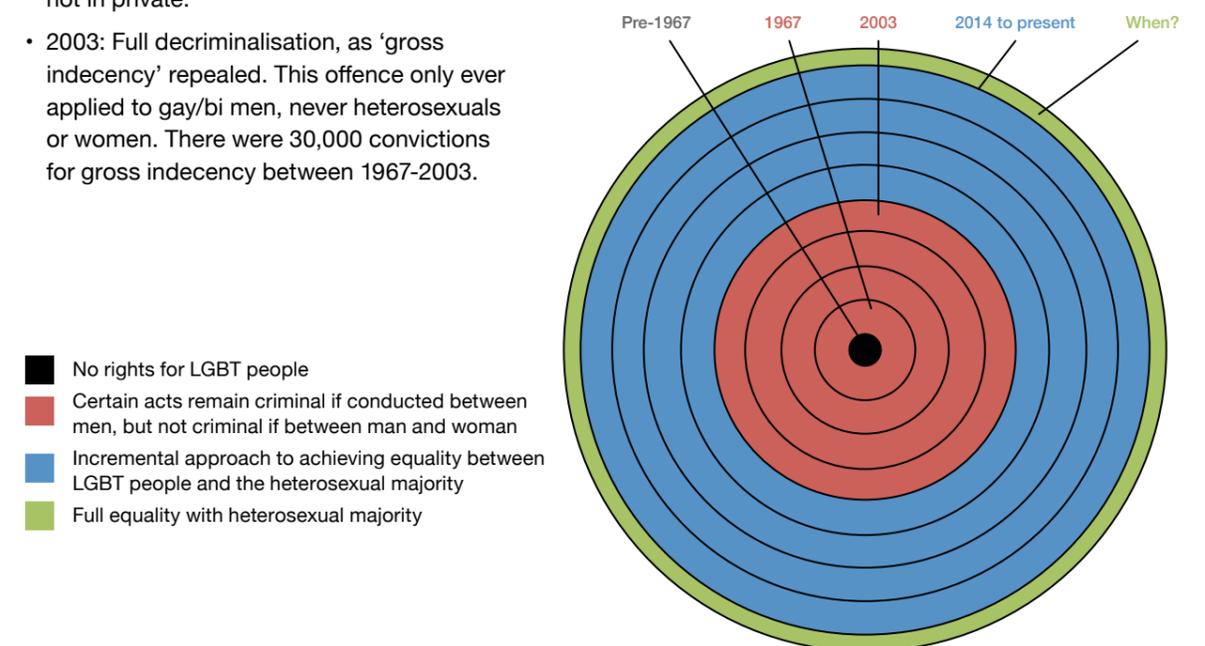
2003 to present: incremental steps towards equality (selected steps):

- 2003: Work-place discrimination outlawed. This is the first non-discrimination law to protect sexual orientation.
- 2003: Section 28 repealed.
- 2004: First state-sanctioned unions via civil partnership.
- 2007: Discrimination when providing goods and services outlawed.
- 2014: Marriage equality.

An alternative path: full equality recognised in law

A single law granting full equality with heterosexuals would have provided each right incrementally achieved since 1967. In England & Wales today, full equality still lacks (e.g. unequal pension rights for surviving spouses).

Figure 1: Parliament granting LGBT rights in England & Wales: the privacy



63 Source: http://www.petertatchell.net/lgbt_rights/criminalisation_of_gays/still_criminal.htm

64 Bedell, G., 'Coming out of the dark ages', *The Guardian*, 24 June 2007. Available at: <http://www.theguardian.com/society/2007/jun/24/communities.gayrights>

Equality

76. South Africa, on the other hand, drafted into its post-apartheid constitution a right to equality that protects against discrimination on the ground of sexual orientation. LGBT people became equal to others as soon as the constitution came into force, first in 1993 with the Interim Constitution and then continued in the permanent 1996 Constitution. In one legislative move, South Africa gave LGBT people the right to equal treatment in all regards, equivalent to the entire space in the green disc. In very rapid succession this space was filled with substantive rights via court cases and legislative change.⁶⁵

77. South Africa not only recognised the full array of LGBT rights in a shorter space of time than England & Wales, but also recognised certain rights years earlier than the UK did, e.g. work place discrimination five years earlier and same-sex marriage nine years earlier. South Africa achieved in nine years what took 47 years to achieve in England & Wales.

Figure 2: sexual orientation is recognised in law as a prohibited ground for discrimination: the equality approach to LGBT rights (below)



⁶⁵ National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others (CCT11/98) [1998] ZACC 15; Employment Equity Act, 1998; Du Toit and Another v. Minister for Welfare and Population Development and Others (CCT40/01) [2002] ZACC 20; Alteration of Sex Description and Sex Status Act, 2003; Minister of Home Affairs and Another v. Fourie and Another (CCT 60/04) [2005] ZACC 19; The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, also referred to as the Sexual Offences Act.

78. An added advantage to advocating for equality is that it moves the focus of the dialogue away from gay sex, a topic that can cause strong and adverse reactions in conservative societies. England & Wales' privacy approach was firmly rooted in gay sex. The law changed on an incremental basis to permit gay and bisexual men to have sex in more places, at a younger adult age, and finally with more than one partner at a time, until the catalogue of sexual proclivities that were legalised matched those that were legal for heterosexuals. The debates surrounding these changes in law, unsurprisingly, focused on the act of sex. Parliament, the media and the public had to debate how, where, using which body parts and with whom men should be permitted to have sex.

79. This mode of advancing LGBT rights provokes socially conservative opposition. Incremental change was allowed at the whim of the legislature, so long as the sexual act in question was not deemed too outrageous so as to require Parliament to uphold the criminal law so as to seemingly 'protect' gay and bisexual men from each other. For example, in 2000 the House of Lords voted down a Bill to equalise the age of consent. The Lords agreed to a series of amendments to allow same-sex couples to do certain acts at the age of 16, but maintained the age of consent for 'buggery' at 18.⁶⁶ The Government had to invoke the Parliament Acts to force the Bill through in order to meet its undertaking to the European Commission to equalise the age of consent.⁶⁷

80. The equality approach, on the other hand, need not focus on sex. Rather, its premise is that LGBT people have a legal right to be treated in the same manner as others. The focus is on the rights possessed by others in society and how those can be applied to all. Encouragingly, the nascent recognition of LGBT rights in Kenya and Botswana has embarked on the equality path. The Kenyan courts allowed the registration of an LGBT non-governmental organisation, as it recognised that the constitutional right to equality protects against discrimination on the ground of sexual orientation.⁶⁸ Similarly, the Botswanan courts allowed the registration of an LGBT non-governmental organisation as LGBT people are included in 'all persons in Botswana' so as to attract constitutional rights.⁶⁹ These may be early signs that an equality approach is forming in Kenya and Botswana, after which substantive rights will follow.

81. Of course, decriminalisation by any route would be a welcome development in any of the 78 jurisdictions that continue to criminalise homosexuality. Yet, it must be appreciated that the path chosen for decriminalisation – privacy or equality – produces different dialogues, and leads to different outcomes and timescales, and once a path is chosen a jurisdiction tends to stick to it. A short-term fix to decriminalisation on the privacy route may not produce the best results over the longer-term.

⁶⁶ Hansard, H.L., November 13, 2000, cols 21–2 and 62–6.

⁶⁷ For further analysis, see Laverack, P., LGBT-friendly Legislation and the House of Lords' use of "Wrecking Amendments", European Human Rights Law Review, Issue 2 2014, pp. 89 to 93.

⁶⁸ Eric Gitari v. NGO Board & 4 others, [2015], Petition 440 of 2013, The High Court of Kenya at Nairobi, paras. 132 to 137.

⁶⁹ Thuto Ramogoe & others v. the Attorney General of Botswana, [2014] MAHGB-000175-13, para. 32.

Enforcing international human rights law in practice

82. International human rights law is actionable at international courts or committees by both states and individuals. States can access the International Court of Justice, and both states and individuals can access regional courts/commissions or UN quasi-courts, but only if certain criteria are met. This topic is covered in detail in another briefing note in this series, *Criminalising Homosexuality and Working Through International Organisations*. State-to-state claims on human rights issues are extremely rare. Individual-to-state claims are of limited use because of the tremendous difficulties encountered in accessing this form of justice, for example the requirement first to exhaust domestic remedies. Bringing a claim at the international level is a last resort. Alternative routes to utilise international law must, therefore, be considered.
83. A quicker solution is to consider how to utilise international human rights law and norms at the domestic level. When considering whether international law binds directly in the domestic legal system, the most important question is whether the legal system imports the state's treaty obligations into domestic law. For example, in monist jurisdictions, international treaties ratified by the state automatically become a part of domestic law. Therefore, if the state has ratified an international human rights treaty, such as the ICCPR, the rights contained therein are actionable in the domestic courts (so long as judicial review of human rights matters is allowed).
84. In dualist states, an active step on the part of the legislature must be taken after ratification of the treaty in order to

incorporate the treaty into domestic law. In dualist states, each treaty must be incorporated by a specific Act of Parliament. A few dualist states, however, have tempered the strict separation of domestic law and international law by including in their constitutions a requirement that courts must 'consider' or 'have regard to' applicable international law.

85. Of the 78 jurisdictions that criminalise homosexuality, 14 are monist (see Appendix 3). All but one of these 14 monist states (Comoros) is a party to the ICCPR. The human rights protection contained in the ICCPR is a part of their domestic law. As demonstrated above, the rights contained in the ICCPR unambiguously prohibit the criminalisation of homosexuality. There should be no obstacle to enforcing international human rights law at the domestic level in these countries to bring about decriminalisation.
86. The constitutions of a further eight jurisdictions require the domestic decision-makers to 'respect', 'have regard to', etc, international law when interpreting domestic human rights protection (Belize, Malawi, Maldives, Papua New Guinea, Seychelles, Tuvalu, The Gambia, and Zimbabwe). Again, there should be no obstacle to giving direct effect to international human rights law at the domestic level to bring about the decriminalisation of homosexuality.
87. Even in dualist jurisdictions that do not give direct effect to international human rights law, the treaties and case law set out in this briefing note are of crucial relevance, as they provide an aid to interpret domestic human rights protection. As the Indian Supreme Court acknowledged:

*International law can be used to expand and give effect to fundamental rights guaranteed under our Constitution. This includes UDHR, ICCPR and ICESCR which have been ratified by India.*⁷⁰

88. However, it must also be acknowledged that international law will not always penetrate into the decision-making of national legislators and judges in domestic courts. The fact that it does not is critiqued in another briefing note in this series, *Criminalising Homosexuality and the Rule of Law*. In these circumstances, states that are owed obligations under these treaties can step in to help bring about decriminalisation. In recalcitrant jurisdictions, the only appropriate method for decriminalisation may be an inter-state action. State-parties to the ICCPR can bring a claim at the UN Human Rights Committee against criminalising state-parties for breach of their treaty obligations. This option is covered in detail in another briefing note in this series, *Criminalising Homosexuality and Working Through International Organisations*.

Conclusions

89. Laws that criminalise homosexuality contravene international law. International, regional and domestic courts around the world have repeatedly found that the criminalisation of homosexuality infringes the rights to privacy, non-discrimination and dignity, and may amount to inhuman and degrading treatment. Not only do these rights

represent international norms and values to which all states should adhere, but they represent binding obligations that states have taken on with regard to the treatment of people in their jurisdiction. Human rights law is about treating people with dignity and only infringing on their rights when it is justified and proportionate to do so. There can never be a justification for criminalising consensual same-sex intimacy between adults.

90. The millions of LGBT people in the 78 jurisdictions that criminalise homosexuality have a clear and unambiguous right under international law not to be criminalised.

There is no excuse for their continued persecution. While laws that criminalise homosexuality persist, international human rights law is left unobserved, inter-state obligations are being treated with contempt, and citizens suffer violations of basic and fundamental rights.

91. Individual applicants can seek to enforce their rights in their own domestic courts and seek redress at the international level. However, where this is not possible, other states must consider accessing state-to-state mechanisms to assert their treaty rights to end the criminalisation of homosexuality.
92. Both individual applicants and state-parties to treaties can draw upon the wealth of case law on LGBT rights to bring about the end of laws that criminalise homosexuality and persecute LGBT people across the globe.

⁷⁰ *Koushal v. NAZ Foundation*, Civil Appeal No.10972 of 2013, Supreme Court, 11 December 2013, para. 19.11.

Appendix 1: 78 criminalising jurisdictions' membership of international organisations

| | A | B | C | D | E | F | G | H | I | J |
|---|----------------------------|---------------------------------|---|---|-------------------------------|---|---|-------------------------|---|--------------------|
| 78 criminalising jurisdictions ⁷¹ (bold: women criminalised too) | UN Treaties and Mechanisms | | | | | | | | | Regional |
| | UN member | ICCPR state-party ⁷² | ICCPR: individual complaint ⁷³ | ICCPR: state-to-state complaint ⁷⁴ | CAT state-party ⁷⁵ | CAT: individual complaint ⁷⁶ | CAT: state-to-state complaint ⁷⁷ | ICJ state ⁷⁸ | OAS ⁷⁹ AU ⁸⁰ Arab Charter ⁸¹ | |
| 1. Afghanistan | Yes | Yes | No | No | Yes | No | No | No | No | No |
| 2. Algeria | Yes | Yes | Yes | Yes | Yes | Yes | Yes | No | No | AU, AC |
| 3. Angola | Yes | Yes | Yes | No | No | No | No | No | No | AU |
| 4. Antigua and Barbuda | Yes | No | No | No | Yes | No | No | No | No | OAS |
| 5. Bangladesh | Yes | Yes [^] | No | No | Yes | No | No | No | No | No |
| 6. Barbados | Yes | Yes | Yes | No | No | No | No | Yes | Yes | OAS [^] # |
| 7. Belize | Yes | Yes [^] | No | No | Yes | No | No | No | No | OAS |
| 8. Bhutan | Yes | No | No | No | No | No | No | No | No | No |
| 9. Botswana | Yes | Yes [^] | No | No | Yes | No | No | Yes | Yes | AU |
| 10. Brunei | Yes | No | No | No | No | No | No | No | No | No |
| 11. Burundi | Yes | Yes | No | No | Yes | Yes | No | No | No | AU |
| 12. Cameroon | Yes | Yes | Yes | No | Yes | Yes | Yes | Yes | Yes | AU |
| 13. Comoros | Yes | No [*] | No | No | No [*] | No | No | No | No | AU |
| 14. Cook Islands | No | No | No | No | No | No | No | No | No | No |
| 15. Dominica | Yes | Yes | No | No | No | No | No | Yes | Yes | OAS# |
| 16. Egypt | Yes | Yes | No | No | Yes | No | No | Yes | Yes | AU |
| 17. Eritrea | Yes | Yes [^] | No | No | Yes | No | No | No | No | AU |
| 18. Ethiopia | Yes | Yes | No | No | Yes | No | No | No | No | AU |
| 19. Gambia | Yes | Yes | Yes | Yes | No [*] | No | No | Yes | Yes | AU |
| 20. Gaza | No ^{**} | Yes ^{**} | No | No | Yes ^{**} | No | No | No | No | AC |
| 21. Ghana | Yes | Yes [^] | Yes | Yes | Yes | Yes | Yes | No | No | AU |
| 22. Grenada | Yes | Yes | No | No | No | No | No | No | No | OAS# |
| 23. Guinea | Yes | Yes | Yes | No | Yes | No | No | Yes | Yes | AU |

⁷⁰ *Koushal v. NAZ Foundation*, Civil Appeal No.10972 of 2013, Supreme Court, 11 December 2013, para. 19.11.

⁷¹ List of 78 criminalising jurisdictions in column A taken from: <http://www.humandignitytrust.org/pages/COUNTRY%20INFO/Criminalising%20Homosexuality>

⁷² <http://indicators.ohchr.org>

⁷³ I.e. the state-party has ratified the ICCPR's Optional Protocol. <http://indicators.ohchr.org>

⁷⁴ I.e. the state-party has consented under Article 41 of the ICCPR https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en

⁷⁵ <http://indicators.ohchr.org>

⁷⁶ I.e. the state-party has consented under Article 22 of the CAT https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en

⁷⁷ I.e. the state-party has consented under Article 21 of the CAT https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en

⁷⁸ <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3>

⁷⁹ American Convention and OAS membership: <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp>

⁸⁰ African Union (AU) http://www.au.int/en/member_states/countryprofiles

⁸¹ Arab Charter (AC).

| | A | B | C | D | E | F | G | H | I | J |
|---|----------------------------|---------------------------------|---|---|-------------------------------|---|---|-------------------------|---|--------------------|
| 78 criminalising jurisdictions ⁷¹ (bold: women criminalised too) | UN Treaties and Mechanisms | | | | | | | | | Regional |
| | UN member | ICCPR state-party ⁷² | ICCPR: individual complaint ⁷³ | ICCPR: state-to-state complaint ⁷⁴ | CAT state-party ⁷⁵ | CAT: individual complaint ⁷⁶ | CAT: state-to-state complaint ⁷⁷ | ICJ state ⁷⁸ | OAS ⁷⁹ AU ⁸⁰ Arab Charter ⁸¹ | |
| 24. Guyana | Yes | Yes | Yes | Yes | Yes | No | No | No | No | OAS |
| 25. India | Yes | Yes | No | No | No [*] | No | No | Yes | No | No |
| 26. Indonesia (S. Sumatra; Aceh) | Yes | Yes [^] | No | No | Yes | No | No | No | No | No |
| 27. Iran | Yes | Yes | No | No | No | No | No | No | No | No |
| 28. Iraq (unclear) | Yes | Yes | No | No | Yes | No | No | No | No | AC |
| 29. Jamaica | Yes | Yes | No | No | No | No | No | No | No | OAS [^] # |
| 30. Kenya | Yes | Yes | No | No | Yes | No | No | Yes | Yes | AU |
| 31. Kiribati | Yes | No | No | No | No | No | No | No | No | No |
| 32. Kuwait | Yes | Yes [^] | No | No | Yes | No | No | No | No | AC |
| 33. Lebanon | Yes | Yes | No | No | Yes | No | No | No | No | AC |
| 34. Liberia | Yes | Yes [^] | No [*] | No | Yes | No | No | Yes | Yes | AU |
| 35. Libya | Yes | Yes | Yes | No | Yes | No | No | No | No | AU |
| 36. Malawi | Yes | Yes | Yes | No | Yes | No | No | Yes | Yes | AU |
| 37. Malaysia | Yes | No | No | No | No | No | No | No | No | No |
| 38. Maldives | Yes | Yes [^] | Yes | No | Yes | No | No | No | No | No |
| 39. Mauritania | Yes | Yes [^] | No | No | Yes | No | No | No | No | AU |
| 40. Mauritius | Yes | Yes | Yes | No | Yes | No | No | Yes | Yes | AU |
| 41. Morocco | Yes | Yes | No | No | Yes | Yes | No | No | No | No |
| 42. Myanmar | Yes | No | No | No | No | No | No | No | No | No |
| 43. Namibia | Yes | Yes [^] | Yes | No | Yes | No | No | No | No | AU |
| 44. Nauru | Yes | No [*] | No [*] | No | Yes | No | No | No | No | No |
| 45. Nigeria | Yes | Yes | No | No | Yes | No | No | Yes | Yes | AU |
| 46. Oman | Yes | No | No | No | No | No | No | No | No | No |
| 47. Pakistan | Yes | Yes [^] | No | No | Yes | No | No | Yes | Yes | No |
| 48. Papua New Guinea | Yes | Yes [^] | No | No | No | No | No | No | No | No |
| 49. Qatar | Yes | No | No | No | Yes | No | No | No | No | AC |
| 50. St Kitts & Nevis | Yes | No | No | No | No | No | No | No | No | OAS |
| 51. St Lucia | Yes | No [^] | No | No | No | No | No | No | No | OAS |
| 52. St Vincent & Grenadines | Yes | Yes | Yes | No | Yes | No | No | No | No | OAS |
| 53. Samoa | Yes | Yes [^] | No | No | No | No | No | No | No | No |
| 54. Saudi Arabia | Yes | No | No | No | Yes | No | No | No | No | AC |

Appendix 1: 78 criminalising jurisdictions' membership of international organisations

| | A | B | C | D | E | F | G | H | I | J |
|---|----------------------------|---------------------------------|---|---|-------------------------------|---|---|-------------------------|---|----------|
| 78 criminalising jurisdictions ⁷¹ (bold: women criminalised too) | UN Treaties and Mechanisms | | | | | | | | | Regional |
| | UN member | ICCPR state-party ⁷² | ICCPR: individual complaint ⁷³ | ICCPR: state-to-state complaint ⁷⁴ | CAT state-party ⁷⁵ | CAT: individual complaint ⁷⁶ | CAT: state-to-state complaint ⁷⁷ | ICJ state ⁷⁸ | OAS ⁷⁹ AU ⁸⁰ Arab Charter ⁸¹ | |
| 55. Senegal | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | AU |
| 56. Seychelles | Yes | Yes | Yes | No | Yes | Yes | No | No | No | AU |
| 57. Sierra Leone | Yes | Yes [^] | Yes | No | Yes | No | No | No | No | AU |
| 58. Singapore | Yes | No | No | No | No | No | No | No | No | No |
| 59. Solomon Islands | Yes | No | No | No | No | No | No | No | No | No |
| 60. Somalia | Yes | Yes | Yes | No | Yes | No | No | Yes | AU | |
| 61. South Sudan | Yes | No | No | No | Yes | No | No | No | AU## | |
| 62. Sri Lanka | Yes | Yes | Yes | Yes | Yes | No | No | No | No | |
| 63. Sudan | Yes | Yes | No | No | No* | No | No | Yes | AU | |
| 64. Swaziland | Yes | Yes [^] | No | No | Yes | No | No | Yes | AU | |
| 65. Syria | Yes | Yes | No | No | Yes | No | No | No | AC | |
| 66. Tanzania | Yes | Yes | No | No | No | No | No | No | AU | |
| 67. Togo | Yes | Yes | Yes | No | Yes | Yes | Yes | Yes | AU | |
| 68. Tonga | Yes | No | No | No | No | No | No | No | No | |
| 69. Trinidad & Tobago | Yes | Yes | No | No | No | No | No | No | OAS | |
| 70. Tunisia | Yes | Yes | Yes | Yes | Yes | Yes | Yes | No | AU | |
| 71. Turkmenistan | Yes | Yes [^] | Yes | No | Yes | No | No | No | No | |
| 72. Tuvalu | Yes | No | No | No | No | No | No | No | No | |
| 73. Uganda | Yes | Yes [^] | Yes | No | Yes | No | Yes | Yes | AU | |
| 74. UAE | Yes | No | No | No | Yes | No | No | No | AC | |
| 75. Uzbekistan | Yes | Yes [^] | Yes | No | Yes | No | No | No | No | |
| 76. Yemen | Yes | Yes | No | No | Yes | No | No | No | AC | |
| 77. Zambia | Yes | Yes | Yes | No | Yes | No | No | No | AU | |
| 78. Zimbabwe | Yes | Yes | No | Yes | No | No | No | No | AU | |

* Signed, but not ratified.

** The State of Palestine has observer status at the UN. It has acceded to certain UN treaties. Within Palestine, the West Bank does not criminalise, Gaza does.

[^] Signed ICCPR after Toonen communication was released by HRC.

^{^^} Barbados recognises the jurisdiction of the Inter-American Court; Jamaica recognises the competence of the Inter-American Commission.⁸²

[#] Members of OAS that have ratified the American Convention on Human Rights.⁸³

^{##} Member of AU that have NOT ratified the African Charter on Human and Peoples' Rights.

⁸² <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp>

⁸³ <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp>

Appendix 2: relevant human rights provisions in international and regional treaties

| Treaty / Right | Statement that treaty applies to all |
|----------------------------|---|
| ICCPR | <p>Preamble:</p> <p>Considering that... the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, ... [T]hese rights derive from the inherent dignity of the human person, Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights...</p> |
| UNCAT | <p>Preamble:</p> <p>Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...</p> |
| ECHR | <p>Article 1:</p> <p>The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.</p> |
| American Convention | <p>Preamble:</p> <p>Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights...</p> |
| African Charter | <p>Article 2:</p> <p>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...</p> |
| Arab Charter | N/A |

Appendix 2: relevant human rights provisions in international and regional treaties

| Treaty / Right | Privacy |
|---------------------|--|
| ICCPR | <p>Article 17(1):</p> <p><i>No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.</i></p> |
| UNCAT | N/A |
| ECHR | <p>Article 8:</p> <ol style="list-style-type: none"> 1. <i>Everyone has the right to respect for his private and family life, his home and his correspondence.</i> 2. <i>There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.</i> |
| American Convention | <p>Article 11(2):</p> <p><i>No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.</i></p> |
| African Charter | N/A |
| Arab Charter | <p>Article 21:</p> <p><i>No one shall be subjected to arbitrary or unlawful interference with regard to his privacy, family, home or correspondence, nor to unlawful attacks on his honour or his reputation.</i></p> |

Appendix 2: relevant human rights provisions in international and regional treaties

| Treaty / Right | Prohibition on discrimination |
|---------------------|---|
| ICCPR | <p>Article 2(1):</p> <p><i>Each State Party... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</i></p> <p>Article 26:</p> <p><i>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.</i></p> |
| UNCAT | N/A |
| ECHR | <p>Article 14:</p> <p><i>The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.</i></p> |
| American Convention | <p>Article 1(1):</p> <p><i>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.</i></p> |
| African Charter | <p>Article 2:</p> <p><i>Every individual shall be entitled to the enjoyment of the rights and freedoms recognised 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 any status.</i></p> |
| Arab Charter | <p>Article 3(1):</p> <p><i>Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability.</i></p> |

Appendix 2: relevant human rights provisions in international and regional treaties

| Treaty / Right | Dignity |
|---------------------|--|
| ICCPR | N/A |
| UNCAT | N/A |
| ECHR | N/A |
| American Convention | Article 11(1) <i>Everyone has the right to have his honor respected and his dignity recognised.</i> |
| African Charter | Preamble: <i>[F]reedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.</i> Article 5: <i>Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment or treatment shall be prohibited.</i> |
| Arab Charter | Preamble: <i>Based on the faith of the Arab nation in the dignity of the human person whom God has exalted ever since the beginning of creation and in the fact that the Arab homeland is the cradle of religions and civilisations whose lofty human values affirm the human right to a decent life based on freedom, justice and equality.</i> |

Appendix 2: relevant human rights provisions in international and regional treaties

| Treaty / Right | Prohibition on inhuman and degrading treatment |
|---------------------|--|
| ICCPR | Article 7: <i>No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.</i> |
| UNCAT | Article 16(1): <i>Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.</i> |
| ECHR | Article 3: <i>No one shall be subjected to torture or to inhuman or degrading treatment or punishment.</i> |
| American Convention | Article 5(2): <i>No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.</i> |
| African Charter | Article 5: <i>Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.</i> |
| Arab Charter | Article 8: <ol style="list-style-type: none"> <i>No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment.</i> <i>Each State party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them. The commission of, or participation in, such acts shall be regarded as crimes that are punishable by law and not subject to any statute of limitations. Each State party shall guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation.</i> |

Appendix 3: legal frameworks in the 78 criminalising jurisdictions

| Jurisdiction | Legal system ⁸⁴ | Monist or dualist? ⁸⁵ | Jurisdiction | Legal system ⁸⁴ | Monist or dualist? ⁸⁵ |
|----------------------|----------------------------|----------------------------------|----------------|--------------------------------|----------------------------------|
| 1. Afghanistan | Mixed civil / Islamic | Unclear | 21. Ghana | Common law | Dualist |
| 2. Antigua & Barbuda | Common law | Dualist | 22. Grenada | Common law | Dualist |
| 3. Algeria | Mixed civil / Islamic | Monist | 23. Guinea | Civil law | Monist |
| 4. Angola | Civil law | Monist | 24. Guyana | Mixed civil / common | Dualist |
| 5. Bangladesh | Mixed common / Islamic | Dualist | 25. India | Common law | Dualist |
| 6. Barbados | Common law | Dualist | 26. Indonesia | Civil law | Dualist |
| 7. Belize | Common law | Dualist ⁸⁶ | 27. Iraq | Mixed civil / Islamic | Unclear |
| 8. Botswana | Mixed civil / common | Dualist | 28. Iran | Islamic law | Dualist |
| 9. Bhutan | Civil law | Unclear | 29. Jamaica | Common law | Dualist |
| 10. Brunei | Mixed common / Islamic | Dualist | 30. Kenya | Common law | Monist |
| 11. Burundi | Civil law | Unclear | 31. Kiribati | Common law | Dualist |
| 12. Cameroon | Mixed civil / common | Monist | 32. Kuwait | Mixed common / civil / Islamic | Dualist |
| 13. Comoros | Mixed civil / Islamic | Monist | 33. Lebanon | Civil law | Monist |
| 14. Cook Islands | Common law | Dualist | 34. Liberia | Common law | Dualist |
| 15. Dominica | Common law | Dualist | 35. Libya | Unclear | Unclear |
| 16. Egypt, | Mixed civil / Islamic | Unclear | 36. Malawi | Common law | Dualist ⁸⁸ |
| 17. Eritrea | Mixed civil / Islamic | Dualist | 37. Malaysia | Mixed common / Islamic | Dualist |
| 18. Ethiopia | Civil law | Monist | 38. Maldives | Mixed common / Islamic | Dualist ⁸⁹ |
| 19. The Gambia | Mixed common / Islamic | Dualist ⁸⁷ | 39. Mauritania | Mixed civil / Islamic | Monist |
| 20. Gaza | Unclear | Unclear | 40. Mauritius | Mixed civil / common | Dualist |

⁸⁴ Source: <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>

⁸⁵ Sources: Baik, T., *Emerging Regional Human Rights Systems in Asia*, 2012, Cambridge University Press; Child Rights International Network, *Access to Justice for Children: Challenging Violations of Children's Rights*, (2014-15). Available at: <https://www.crin.org/en/home/law/access>; Ferdinand, K., *Islam: State and Society*, 2002, Routledge; Francesch, L. G., *The African Human Rights Judicial System: Streamlining Structures and Domestication Mechanisms Viewed from the Foreign Affairs Power Perspective*, 2014, Cambridge Scholars Publishing; PacLII, 'Pacific Island Treaty Series: How Treaties become Law'. Available at: <http://www.pacilii.org/pits/en/domestication.shtml>; United Nations Development Programme, *Compendium of key documents relating to human rights and HIV in Eastern and Southern Africa*, 2008, Pretoria University Law Press; Viljoen, F., *International Human Rights Law in Africa*, 2012, Oxford University Press.

⁸⁶ Belize Constitution, 1981, Preamble E states: 'WHEREAS the People of Belize... require policies of state... with respect for international law and treaty obligations in the dealings among nations'.

⁸⁷ The Constitution of Republic of The Gambia, 1997, Article 216(3) regarding 'social objectives' states: 'The State, in pursuing policies under subsection (2) [regarding policies to protect the rights and freedoms of the disabled, the aged, children and other vulnerable members of society], ... shall be guided by international human rights instruments to which The Gambia is a signatory'.

⁸⁸ Constitution of the Republic of Malawi, 1994, Article 11(2) 'In interpreting the provisions of this Constitution a court of law shall... (c) where applicable, have regard to current norms of public international law and comparable foreign case law'.

⁸⁹ Constitution of the Republic of Maldives, 1998, Article 68: 'When interpreting and applying the rights and freedoms contained within this Chapter, a court or tribunal... shall consider international treaties to which the Maldives is a party'.

Appendix 3: legal frameworks in the 78 criminalising jurisdictions

| Jurisdiction | Legal system ⁸⁴ | Monist or dualist? ⁸⁵ | Jurisdiction | Legal system ⁸⁴ | Monist or dualist? ⁸⁵ |
|---------------------------------|----------------------------|----------------------------------|--------------------------|---|----------------------------------|
| 41. Morocco | Mixed civil / Islamic | Monist | 60. Somalia | Mixed civil / Islamic | Unclear |
| 42. Myanmar | Common law | Dualist | 61. South Sudan | Unclear (if like Sudan, mixed civil / common) | Dualist |
| 43. Namibia | Mixed civil / common | Monist | 62. Sri Lanka | Mixed civil / common | Dualist |
| 44. Nauru | Common law | Dualist | 63. Sudan | Mixed civil / common | Monist |
| 45. Nigeria | Mixed common / Islamic | Dualist | 64. Swaziland | Mixed civil / common | Dualist |
| 46. Oman | Mixed common / Islamic | Dualist | 65. Syria | Mixed civil / Islamic | Dualist |
| 47. Pakistan | Mixed common / Islamic | Dualist | 66. Tanzania | Common law | Dualist |
| 48. Papua New Guinea | Common law | Dualist ⁹⁰ | 67. Togo | Customary law | Unclear |
| 49. Qatar | Mixed civil / Islamic | Dualist | 68. Tonga | Common law | Dualist |
| 50. St Kitts | Common law | Dualist | 69. Trinidad | Common law | Dualist |
| 51. St Lucia | Common law | Dualist | 70. Tunisia | Mixed civil / Islamic | Monist |
| 52. St Vincent & the Grenadines | Common law | Dualist | 71. Turkmenistan | Mixed civil / Islamic | Unclear |
| 53. Samoa | Common law | Dualist | 72. Tuvalu | Common law | Dualist ⁹² |
| 54. Saudi Arabia | Islamic | Unclear | 73. Uganda | Common law | Dualist |
| 55. Senegal | Civil law | Monist | 74. United Arab Emirates | Mixed civil / Islamic | Unclear |
| 56. Seychelles | Mixed civil / common | Dualist ⁹¹ | 75. Uzbekistan | Civil law | Dualist |
| 57. Sierra Leone | Common law | Dualist | 76. Yemen | Mixed common / civil / Islamic | Dualist |
| 58. Singapore | Common law | Dualist | 77. Zambia | Common law | Dualist |
| 59. Solomon Islands | Common law | Dualist | 78. Zimbabwe | Mixed civil / common | Dualist ⁹³ |

* Dualist, but international human rights law must be considered.

⁹⁰ Article 39(3): 'For the purposes of determining whether or not any law, matter or thing is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, a court may have regard to— ... (e) judgements, reports and opinions of the International Court of Justice, the European Commission of Human Rights, the European Court of Human Rights and other international courts and tribunals dealing with human rights and fundamental freedoms, (f) previous laws, practices and judicial decisions and opinions in the country; and (g) laws, practices and judicial decisions and opinions in other countries.'

⁹¹ Constitution of Republic of Seychelles, 1993, Article 48, 'This Chapter shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provisions of this Chapter, take judicial note of – (a) the international instruments containing these obligations; (b) the reports and expression of views of bodies administering or enforcing these instruments; (c) the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms; (d) the Constitutions of other democratic states or nations and decisions of the courts of the states or nations in respect of their Constitutions'.

⁹² Constitution of Tuvalu, 1978, Article 15(5), 'In determining whether a law or act is reasonably justifiable in a democratic society that has a proper respect for human rights and dignity, a court may have regard to (b) law, practices and judicial decisions of other countries that the court reasonably regards as democratic; and (c) international conventions, declarations, recommendations and judicial decisions concerning human rights; and (d) any other matters that the court thinks relevant'.

⁹³ Zimbabwe's Constitution of 2013, Article 46(1): 'When interpreting this Chapter, a court, tribunal, forum or body-- ... (c) must take into account international law and all treaties and conventions to which Zimbabwe is a party'. The constitution in force in 2000 when the court in *Banana v. State* [2000] upheld Zimbabwe's criminalising law did not contain this or a similar provision.

Human Dignity Trust
November 2015

jonathancooper@humandignitytrust.org,
peterlaverack@humandignitytrust.org,
kapil@humandignitytrust.org

@JonathanCoopr
@peter_laverack
@HumanDignityT

#LGBTgoodgov

This briefing note was principally authored by Peter Laverack for the Human Dignity Trust

**HUMAN
DIGNITY
TRUST**