

Criminalising Homosexuality and Working through International Organisations

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*.

We believe that the international community must stand firm against all forms of discrimination, including on the basis of sexual orientation and gender identity, and that we should all accept, respect and value diversity. This is why we and like-minded countries work through the UN to address discrimination and violence against LGBT&T people, and why we work with individual countries to review, revise and abolish discriminatory laws and policies.

United Kingdom
Foreign & Commonwealth Office,
12 March 2015¹

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 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.

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¹ FCO, Human Rights and Democracy Report 2014. Available at: <https://www.gov.uk/government/publications/human-rights-and-democracy-report-2014/human-rights-and-democracy-report-2014#chapter-iv-democracy>

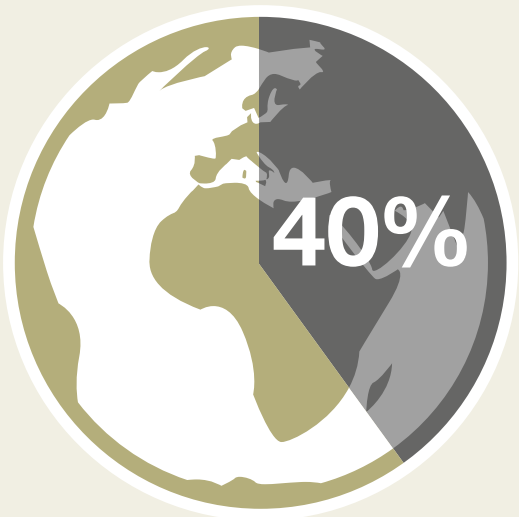
Scale of the problem

01. The criminalisation of homosexuality is a problem for the international community. 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



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>

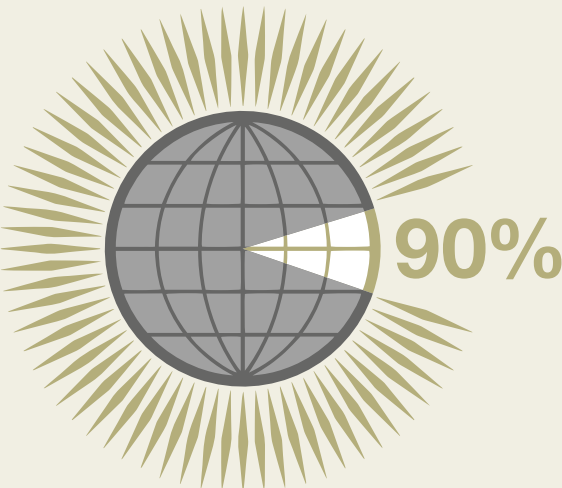
3 Based on estimates that between 3.7% and 11% of women will have a same-sex sexual experience in adulthood. Source, atn.3 above. Mosher estimates 11%; Gebhard estimates 3.7%. The total population of these 44 jurisdictions is 1.2 billion, with a female population of approximately 600 million.

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

These millions risk arrest, prosecution, imprisonment and, in some cases, execution.⁵

Laws that criminalise same-sex intimacy do more than outlaw certain sexual acts. These laws criminalise the LGBT identity. The full force of the state is used against LGBT people. This leaves LGBT people vulnerable to violence, abuse and harassment from state actors and non-state actors alike. At any point in time, it is estimated that 175,000 LGBT people will be in peril, seriously harmed or threatened with harm.⁶ It also shuts LGBT people out from employment, healthcare and fulfilling other socio-economic rights.

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.



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.

5 The death penalty is the maximum penalty in Iran, Mauritania, Saudi Arabia, Sudan and Yemen, and in some parts of Nigeria and Somalia. Additionally, Brunei Darussalam is phasing in its Syariah Penal Code Order (2013) between May 2014 and the end of 2016, which will apply the death penalty (stoning to death) for consensual same-sex sexual conduct.

6 Estimates from Organization for Refuge, Asylum & Migration (ORAM), *Opening Doors: A Global Survey of NGO Attitudes Towards LGBTI Refugees & Asylum Seekers*, June 2012. Available at: <http://www.oraminternational.org/images/stories/PDFs/oram-opening-doors.pdf>

As covered in other briefing notes in this series, criminalisation not only amounts to a serious breach of individuals' human rights. Criminalisation also offends against the rule of law, undermines democracy, boosts the transmission of HIV, hinders economic growth, reduces productivity, and amounts to a serious violation of international law. Yet, the criminalisation of homosexuality persists in all parts of the world other than Europe.

02. 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. Where only men are criminalised, lesbian and bisexual women and trans people suffer these effects too. There can never be a justification for this state-sanctioned persecution, no matter the cultural, religious or historical background in the criminalising country.

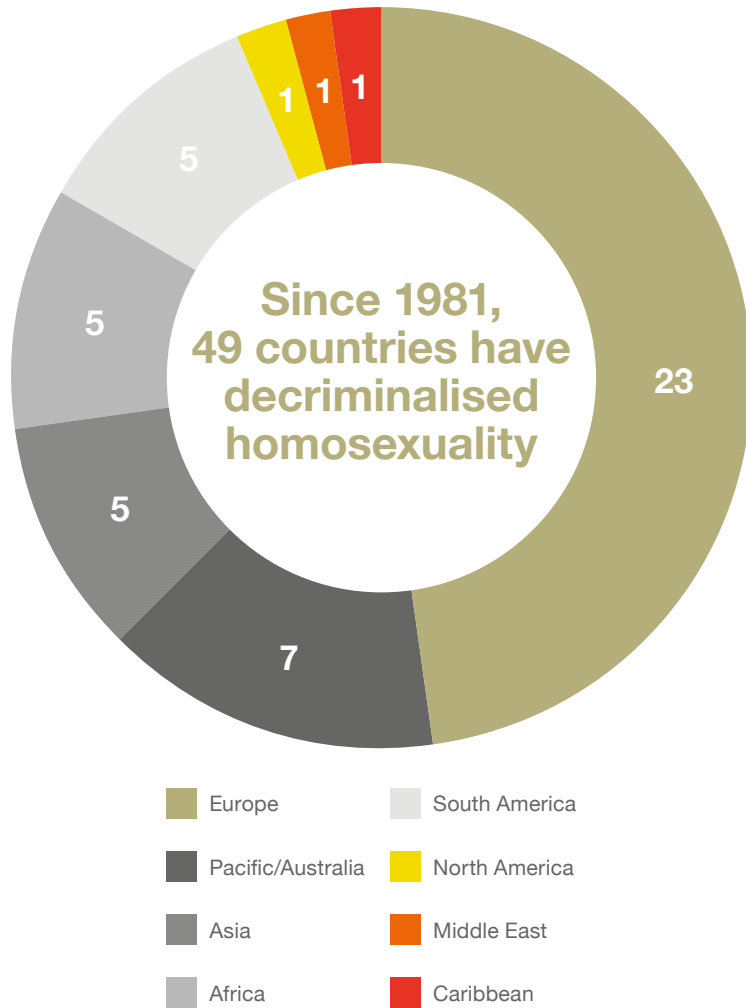
Overview

03. History shows that international organisations have been integral to bringing about the decriminalisation of homosexuality in domestic legal systems. The Council of Europe was of fundamental importance in making Europe a criminalisation-free continent. The United Nations has taken progressive steps to bring about change and is increasingly vocal on this issue. The United Nations now looks primed to act upon the content of its treaties and in accordance with its ethos and principles to help bring about decriminalisation. The European Union's stance on this issue is firm, but its influence can be applied more directly in the countries with which it trades or has cultural links. The Commonwealth could be a powerful vehicle for change if it acts strategically. Like-minded governments can work within these organisations to provide the external influence that is so often required to bring about the decriminalisation of homosexuality.
04. LGBT people are found in every population, but make-up a small percentage wherever they are found. Due to this thin spread, LGBT people often cannot coalesce to advocate for their rights. Criminalisation, persecution by the state, and social stigmatisation each create further barriers

to domestic LGBT groups being established. International organisations can fill this advocacy gap by ensuring that universal standards are indeed applied universally. International organisations have in the past, and must now and in the future, advocate for decriminalisation and enforce international human rights law and norms so as to end the criminalisation of homosexuality.

05. This briefing note starts by examining the role of the Council of Europe to show just how effective an international organisation can be on this issue. This note then looks at the United Nations, which has had some success in ending criminalisation, and has recently increased its efforts to promote decriminalisation. The note then looks at the European Union, which can use its political and economic clout to encourage reform outside of its membership. Finally, it looks at the Commonwealth, which can encourage reform within its own membership. Members of these organisations can exert their influence individually or collectively to end the criminalisation and persecution of LGBT people around the globe.

06. This note sets out the options that governments can use via their membership of international organisations to bring about the decriminalisation of homosexuality; it sets out the statements made by international organisations and parts thereof to help identify like-minded partners with whom governments can work.
07. Appendix 1 lists the 78 jurisdictions that criminalise homosexuality today, against their membership of various international organisations and treaties mentioned in this note. Through these organisations and treaties, pressure can be exerted to encourage, or even compel, decriminalisation. Appendix 2 lists the jurisdictions that have decriminalised since 1981 and demonstrates how important international organisations have been as the driving force behind decriminalisation.



The role of international organisations in the past

08. Since 1981, 49 jurisdictions have decriminalised homosexuality. Appendix 2 lists these jurisdictions and states under what influence, if any, they decriminalised. By far the biggest driver was membership of the Council of Europe. 20 members of the Council of Europe have decriminalised since 1981, 17 by repeal and three via judgments from the Strasbourg

Court. Additionally, three other European jurisdictions decriminalised due to the influence of the Council of Europe, namely Belarus, Kosovo and Northern Cyprus. The next biggest influences were the provision of technical assistance by UNAIDS and the World Health Organisation; additionally, the break-up of the USSR and the UN Universal Periodic Review process have provided catalysts for change, which each accounted for 2 to 4 jurisdictions.

20 members of the Council of Europe have decriminalised since 1981, as have three non-members in Europe (Belarus, Kosovo and Northern Cyprus)



The Council of Europe

The success of an international organisation

09. Europe is now a criminalisation-free continent due to the work of the Council of Europe. Its court, the European Court of Human Rights in Strasbourg, held in 1981 that the criminalisation of consensual same-sex intimacy breaches the right to privacy protected under the European Convention on Human Rights (ECHR).⁷
10. Since, the *Dudgeon* judgment in 1981, no fewer than 20 Council of Europe members have decriminalised (see Appendix 2). This process started with the few remaining Western European countries that criminalised homosexuality repealing their laws (such as Portugal in 1983 and Liechtenstein in 1989). The greatest influence of the Council of Europe came when it expanded in the 1990s into the former Communist states of Eastern Europe and the ex-Soviet Union. With this expansion, the Council of Europe's stance on decriminalisation spread east. It was a condition of membership that new states repeal their criminalising laws. Likewise,

The last European jurisdiction to decriminalise was Northern Cyprus in 2014.⁸

Russia's continued membership of the Council of Europe prevents it from passing laws that re-criminalise homosexuality, despite the regime of Vladimir Putin's attempt to limit LGBT rights severely in other respects. The Council of Europe and the Strasbourg Court have a continuing role to play in monitoring events in Russia and in enforcing the ECHR if these new laws amount to the re-criminalisation of homosexuality. The last European jurisdiction to decriminalise was Northern Cyprus in 2014.⁸ This action brought Northern Cyprus in line with the rest of Europe and ended criminalisation on this continent.

⁷ *Dudgeon v. United Kingdom*, 4 EHRR 149 (1981) (regarding Northern Ireland). This 1981 judgment in *Dudgeon v. the United Kingdom* concerned Northern Ireland's criminalising laws, under which the police questioned Mr Dudgeon. Seven years later, in *Norris v. Ireland*, [1988] ECHR 10581/83, the Strasbourg Court confirmed this finding and held that the right to privacy is breached even if the law is not enforced. Another five years later, in *Modinos v. Cyprus* (1993) No. 15070/89, the Strasbourg Court held that Cyprus violated the right to privacy notwithstanding an official moratorium on arrests and convictions.

⁸ Although not a member of the Council of Europe itself, the Council of Europe was used to apply pressure in this jurisdiction. The Human Dignity Trust represented the applicant in a case at the Strasbourg Court against Turkey, which is responsible for Northern Cyprus under international law. In January 2014, while awaiting directions from the Strasbourg Court, the Northern Cyprus Parliament repealed its laws criminalising homosexuality. For further information, see: <http://www.humandignitytrust.org/pages/OUR%20WORK/Cases/Northern%20Cyprus>

Other regional organisations

11. Today, other regional organisations can be used to encourage the decriminalisation of homosexuality among their member states.

The Organisation for Security and Co-operation in Europe

12. Although Europe is a criminalisation-free continent, one European-centred organisation has members situated in Central Asia that criminalise homosexuality: Turkmenistan and Uzbekistan, which are members of the Organisation for Security and Co-operation in Europe (OSCE). The OSCE must become a criminalisation-free organisation. Decriminalisation fits with the OSCE's mission and functions:

“ Respect for human rights and fundamental freedoms forms a key part of the OSCE's comprehensive security concept. The OSCE monitors the human rights situation in its 57 participating States.⁹

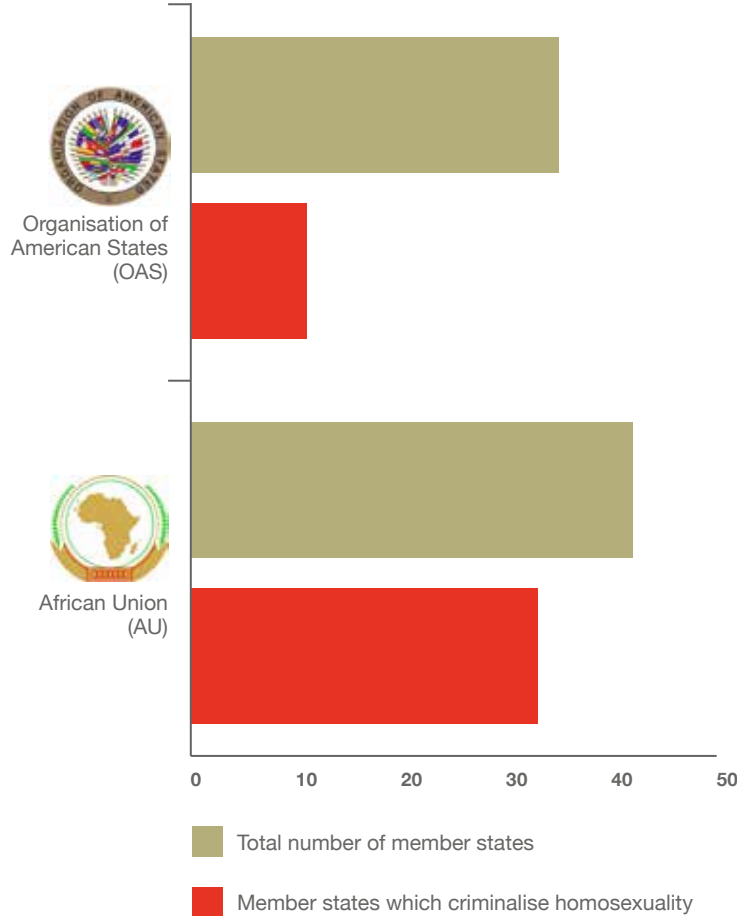
13. As is discussed in other briefing notes in this series, laws that criminalise homosexuality offend more than individual human rights. These laws are also a symptom of poor rule of law and a lack of democracy and other freedoms, and they have implications in times of conflict and natural disasters.¹⁰ That these laws persist on the statute books of OSCE members is a matter of concern for the OSCE. Advocating for the removal of these laws falls squarely within the OSCE's mission, whereby the pressure of the vast majority of the OSCE's members can be brought to bear on Turkmenistan and Uzbekistan. OSCE members can work actively to facilitate this, for example through its Office for Democratic Institutions and Human Rights.

⁹ See: <http://www.osce.org/what/human-rights>

¹⁰ For more information, see our briefing notes on *Criminalising Homosexuality and Democratic Values*, *Criminalising Homosexuality and the Rule of Law*, and *Criminalising Homosexuality and LGBT Rights in Times of Conflict, Violence and Natural Disasters*.

The Organisation of American States and the African Union

14. Organisations akin to the Council of Europe exist in the Americas and Africa, namely the Organisation of American States (OAS) and the African Union (AU).¹¹ Within the OAS's 35 member states, a minority of 11 criminalise (all of which are Commonwealth Caribbean nations, see Appendix 1, columns K and M). Again, the pressure of the vast majority of the OAS's members – including global players like the USA, Canada and Brazil – can be brought to bear on these Caribbean nations to encourage them to decriminalise homosexuality. Within the AU's 42 member states, 33 criminalise (the majority of which are in the Commonwealth or have an English-derived legal system).
15. Members of the OAS and AU can work within these organisations to bring about change from within. Non-members can assist too. The Council of Europe can share its experiences of decriminalisation. Additionally, given the historical connection between criminalisation and British colonial law, the UK may play a role by advising on the Westminster-derived, common law system of governance, perhaps working with Canada and South Africa in their respective regions.



¹¹ Asia has its own regional organisations, such as ASEAN, but unlike the Council of Europe, OAS and AU, they lack a binding human rights treaty and a human rights court or commission.

The United Nations

16. Unlike the Council of Europe, it is not a condition of United Nations (UN) membership to decriminalise, nor does the UN have a court like the Strasbourg Court where individuals can petition for breaches of human rights law. However, the UN's reach is global. All but two jurisdictions that criminalise homosexuality are members of the UN (Appendix, column B), namely, the Cook Islands and Gaza.¹²
17. Like other human rights issues, the criminalisation of homosexuality can be raised at the UN in two broad ways:
- a) **UN treaty mechanisms:** Various treaties have been agreed under the auspices of the UN. These treaties are entered into voluntarily; they are not a requirement of UN membership. In respect of human rights treaties like the International Covenant on Civil and Political Rights (ICCPR) and Convention against Torture (UNCAT), state-parties are subject to these treaties and individuals benefit from them. State-parties have taken on obligations to one another about how they will treat individuals in their jurisdiction. If these obligations are breached, the obligation to other state-parties is breached, and ordinarily these other state-parties may act upon the breach. In addition, treaty bodies monitor state-parties' implementation of the obligations contained in the treaty. The ICCPR's treaty body is the Human Rights Committee. The UNCAT's treaty body is the Committee Against Torture.

Where states choose to adhere to the individual complaint mechanisms provided for under the Optional Protocols to these treaties, individuals can petition these treaty bodies to allege that their human rights have been breached. These decisions are not court decisions, but nonetheless carry weight.

- b) **UN Charter mechanism:** Each UN member accepts to abide by the obligations contained in the UN Charter. The Charter establishes the constituent institutions of the UN: the Security Council, the General Assembly, the Secretariat, the International Court of Justice, and the Economic and Social Council. These institutions may, in turn, establish subsidiary bodies that can address human rights, for example the Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR). Both of these promote and protect human rights in all UN member states, regardless of treaty membership. The Human Rights Council also conducts a Universal Periodic Review, which assesses the human rights situations in all 193 UN member states, and thus 76 of the 78 criminalising jurisdictions.

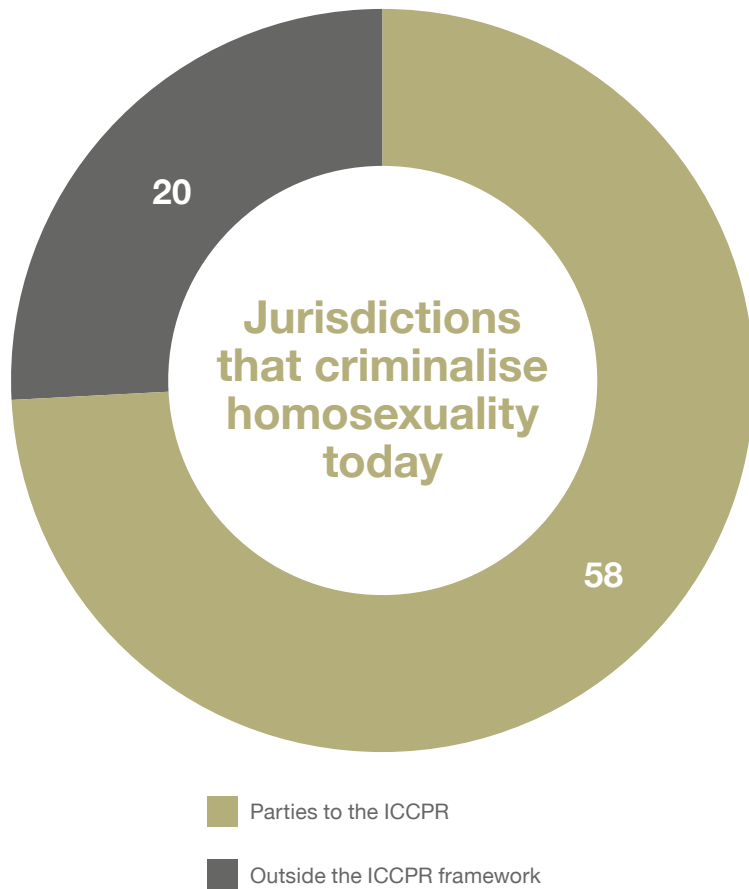
18. UN membership and treaty membership allow countries to play an integral role in using UN mechanisms to end criminalisation, persecution and violence against LGBT people across the globe.

¹² The Cook Islands is in a free association with New Zealand, albeit has full treaty-making capacity at the UN. Gaza is a part of the Palestinian Territories, which has non-member observer status at the UN. The other part of the Palestinian Territories, the West Bank, does not criminalise as its British-era laws were repealed during Jordan's occupation, whereas Gaza retains these British-era laws.

Treaty mechanisms

International Covenant on Civil and Political Rights (ICCPR) and Human Rights Committee

19. With 168 state parties, the International Covenant on Civil and Political Rights (ICCPR) is a lynchpin of the international human rights framework. The ICCPR is an international treaty under which state parties undertake obligations to promote, protect, respect and fulfil certain civil and political rights. Of the 78 jurisdictions that criminalise homosexuality today, 58 are parties to the ICCPR (Appendix 1, column C). It is clear that state parties' obligations under the ICCPR are incompatible with laws that criminalise consensual same-sex intimacy, as determined by the Human Rights Committee in its communication *Toonen v. Australia*.¹³ State parties to the ICCPR have a treaty obligation to repeal their laws that criminalise private, consensual same-sex intimacy. This obligation is owed to all other parties to the ICCPR.
20. The Human Rights Committee is the treaty body that interprets the ICCPR and monitors its implementation. Individuals may petition the Human Rights Committee if the state in question has ratified the ICCPR's Optional Protocol; 25 criminalising countries have done so (Appendix 1, column D). In theory, petitioners from these countries can use the Human Rights Committee to end the criminalisation of homosexuality. However, obstacles prevent this, in particular the need to exhaust domestic remedies, and that willing applicants will have to 'out' themselves with all the risks that this entails.



¹³ *Toonen v. Australia* (1994) Communication No. 488/1992, U.N. Doc-CCPR/C/50/D/488/1992 (1994). It is worth noting that 20 of these states ratified the ICCPR after *Toonen* was decided, when it was unquestionable that they were making a treaty commitment to the UK and all other state-parties not to criminalise homosexuality.

21. As such, other governments cannot rely on the ICCPR to be used like a magic wand to end the criminalisation of homosexuality. Someone has to be pro-active to make sure that it is being complied with. Other state parties can fill this role. The Human Rights Committee will hear state-to-state claims if both the referring and the referred states recognise its competence.¹⁴ Eight criminalising countries recognise competence: Algeria, The Gambia, Ghana, Guyana, Senegal, Sri Lanka, Tunisia and Zimbabwe (Appendix 1, column E). For some criminalising countries, a state-to-state referral may be the only effective method to have their criminalising laws scrutinised against international law. Given the decision in *Toonen*, in such a case the decision of the Human Rights Committee will predictably be in favour of decriminalisation. Like-minded countries should consider this option seriously. Making use of state-to-state claims does not amount to interference in the sovereign affairs of another country; these states have voluntarily ratified the ICCPR and voluntarily accepted the competence of the Human Rights Committee to consider compliance with it.

¹⁴ Art 41.

¹⁵ The sixth treaty body, the Committee on the Elimination of Racial Discrimination, only addresses the prohibited ground of race.

¹⁶ *Concluding Observations of the Committee against Torture: Egypt*, UN-Doc-CAT/s/XXIX/Misc.4 (2002), para. 5(e).

¹⁷ *CESCR General Comment No. 20*, UN-Doc-E/C.12/GC/20 (2009).

¹⁸ *Concluding Observations of the Committee on the Rights of the Child: (Isle of Man)*, UN-Doc-CRC/C/15/Add.134 (2000)

¹⁹ *Report of the Committee on the Elimination of Discrimination against Women*, UN-Doc-CEDAW/A/54/38 (1999)).

Other UN treaties and treaty bodies

22. The other UN-backed human rights treaties each have their own treaty body to interpret the treaty and monitor its implementation. Each of these treaty bodies has confirmed that their respective treaties protect LGBT people:¹⁵
- The Committee against Torture determined that its Convention against Torture protects against discriminatory treatment based on sexual orientation.¹⁶
 - The Committee on Economic, Social and Cultural Rights determined that the International Covenant on Economic and Social and Cultural Rights prohibits discrimination on the ground of sexual orientation;¹⁷
 - The Committee on the Rights of the Child determined that the Convention on the Rights of the Child prohibits different ages of consent for heterosexuals and homosexuals;¹⁸ and
 - The Committee on the Elimination of Discrimination Against Women called for the decriminalisation of same-sex intimacy between women.¹⁹

23. As such, it is well established that the UN-backed human rights treaties, which form the backbone of global human rights protection, prohibit the criminalisation of homosexuality. State parties to each of these treaties are owed obligations. Other state parties that criminalise homosexuality are in breach of their obligations by the continued existence of these criminal laws. As with the ICCPR, like-minded state parties can play their part in enforcing these treaty obligations.

24. In addition, for all treaties, like-minded countries can encourage non-state parties to ratify these treaties, encourage states to accept the competence of treaty bodies to hear complaints and, if and when appropriate, consider bringing state-to-state claims under these treaties.

UN Charter mechanisms

25. UN Charter mechanisms arise from mere membership of the UN, rather than ratification of a specific treaty. In that regard they have the benefit of encompassing almost all (76 out of the 78) jurisdictions that criminalise homosexuality (Appendix 1, column B).

Universal Periodic Review

26. Universal Periodic Review (UPR) examines the human rights records of all UN members. It is a state-driven process conducted within the Human Rights Council. The ultimate aim of this mechanism is to improve the human rights situation in all countries and address human rights violations wherever they occur.²⁰ UPR provides an opportunity to name and shame countries that criminalise, persecute and harass their LGBT populations.

27. UPR assesses the extent to which the country under examination respects human rights obligations contained in:

- a) The UN Charter.
- b) The Universal Declaration of Human Rights (UDHR).
- c) Human rights instruments (e.g. the ICCPR) to which the state is a party.
- d) Voluntary pledges and commitments made by the state.
- e) Applicable international humanitarian law.²¹

28. The UDHR protects the rights that are echoed in the ICCPR, such as privacy and non-discrimination. As determined by the Human Rights Committee in *Toonen*, laws that criminalise homosexuality violate these rights. The criminalisation of homosexuality is, therefore, very much a legitimate topic at UPR for each of the 76 UN members that continue to criminalise.

29. Criminalisation is, indeed, frequently raised at UPR, often with positive outcomes. At UPR, several countries have made commitments regarding their criminalising laws. For example, Palau,²² and São Tomé²³ made positive commitments to repeal and then did so. Four further countries have provided a positive commitment to repeal: Nauru,²⁴ Kiribati,²⁵ Seychelles²⁶ and Mauritius.²⁷ In addition Belize,²⁸ Guyana,²⁹ St Kitts & Nevis,³⁰ and Tonga³¹ provided positive responses to consider repeal. It is open to debate whether UPR by itself prompts countries to commit to decriminalise, but these public commitments made at UPR are tangible and difficult to backtrack from.

30. It must be noted, however, that UPR can result in entrenching criminalising laws. During UPR countries are confronted with a binary choice to 'support' or 'not support' recommendations. As such, UPR risks forcing criminalising countries to take a defensive position that supports their existing laws. The language used to recommend decriminalisation should be chosen carefully to avoid it becoming needlessly confrontational.

²² United Nations General Assembly, Report of the Working Group on the Universal Periodic Review-Palau, Addendum, A/HRC/18/5/Add.1, 28 July 2011, paras. 62.38-62.40 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/153/54/PDF/G1115354.pdf?OpenElement>

²³ *African Activist*, 'São Tomé and Príncipe set to decriminalise homosexuality', (14 February 2011) <http://www.africanactivist.org>

²⁴ United Nations General Assembly, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 Nauru, A/HRC/WG.6/23/NRU/1, 14 October 2015, paras. 37 and 61 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/237/21/PDF/G1523721.pdf?OpenElement>

²⁵ United Nations General Assembly, Report of the Working Group on the Universal Periodic Review Kiribati, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/15/3/Add.1 (30 September 2010); and United Nations General Assembly, Report of the Working Group on the Universal Periodic Review, Kiribati, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/29/5/Add.1, 1 July 2015, paras. 50, 51 <http://www.ohchr.org/EN/HRBodies/UPR/Pages/KISession21.aspx>

²⁶ United Nations General Assembly, Report of the Working Group on the Universal Periodic Review Seychelles, A/HRC/18/7 (11 July 2011) paras 58. 100.60 and 100.61 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/144/43/PDF/G1114443.pdf?OpenElement>

²⁷ United Nations General Assembly, Report of the Working Group on the Universal Periodic Review Mauritius, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HR/25/8/Add.1, 14 March 2014, para. 34.

²⁸ United Nations General Assembly, Report of the Working Group on the Universal Periodic Review Belize, Addendum, Views on Conclusions and/or Recommendations, voluntary commitments and replies presented by the State under review, A/HRC/12/4/Add.1, 18 September 2009, para. 28 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/156/96/PDF/G0915696.pdf?OpenElement>

²⁹ United Nations General Assembly, Report of the Working Group on the Universal Periodic Review Guyana, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/15/14/Add. 1, 13 September 2010, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/160/27/PDF/G1016027.pdf?OpenElement>

³⁰ United Nations General Assembly, Report of the Working Group on the Universal Periodic Review Saint Kitts and Nevis, A/HRC/17/12, 15 March 2011, para. 14, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/118/07/PDF/G1111807.pdf?OpenElement>

³¹ United Nations General Assembly, Report of the Working Group on the Universal Periodic Review Tonga, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/23/4/Add.1, 3 June 2013, para. 9, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/142/81/PDF/G1314281.pdf?OpenElement>

²⁰ As described by the OHCHR on the UPR homepage, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>

²¹ OHCHR, *Fact Sheet: Human Rights Council – Universal Periodic Review*, November 2008, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Documents/UPRFactSheetFinal.pdf>

Working with the Office of the High Commissioner for Human Rights and the Human Rights Council

31. The Office of the High Commissioner for Human Rights (OHCHR) and the Human Rights Council play an integral role in monitoring international human rights, both at UPR and otherwise. The OHCHR is a subsidiary body of the UN Secretariat, and the Human Rights Council is a subsidiary body of the General Assembly. Both now frequently make statements on LGBT rights, including to denounce laws that criminalise homosexuality. This development is significant, as it further isolates the 78 jurisdictions that criminalise homosexuality, and it allows non-criminalising countries to be vocal on this issue as their calls to decriminalise adhere to the core principles of the UN. The OHCHR and the Human Rights Council have worked in tandem to bring the issue of LGBT rights to the forefront of the UN's human rights work. The UN's stance is now unambiguous: UN members must decriminalise. Some recent initiatives and statements from the OHCHR and the Human Rights Council are summarised below:

a) In June 2011, the Human Rights Council adopted its first resolution on human rights, sexual orientation and gender identity.³² Its adoption paved the way for the first official UN report on this subject.

b) This report prepared by the UN Office of the High Commissioner for Human Rights included a set of recommendations addressed to UN member states designed to strengthen protection of the human rights of LGBT people. On the matter of laws that criminalise homosexuality, the report was clear:

“ The criminalization of private consensual homosexual acts violates an individual's rights to privacy and to non-discrimination and constitutes a breach of international human rights law.³³

Former High Commissioner for Human Rights, Navi Pillay, stated that the UN had reached ‘a new chapter’ by the inclusion of LGBT rights in its work.

c) In September 2012, the OHCHR released a booklet, *Born Free and Equal*, to set out the core obligations that UN member states have towards LGBT people, and to describe how UN mechanisms have applied international law in this context. Having regard to the issue of criminalisation, it stated:

“ 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*.³⁴

d) In July 2013, Navi Pillay launched a public information campaign designed to raise awareness of homophobic and transphobic violence and discrimination and promote greater respect for the rights of LGBT people everywhere.³⁵

e) In September 2014, a new High Commissioner was appointed, Zeid bin Ra'ad (Prince Zeid of Jordan). He too is vocal on this issue. In his opening remarks to the 29th Session of the Human Rights Council, Prince Zeid drew specific attention to a report on discrimination on grounds of sexual orientation and gender identity:

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.

“ There have been many recent advances in the protection of the rights of lesbian, gay, bisexual, transgender and intersex people – including the introduction of new anti-discrimination and hate crime laws; legal recognition of same-sex relationships; protection of intersex children; and changes that make it easier for transgender people to have their gender identity legally recognized. Even so, LGBT and intersex people in all regions face continuing, pervasive, violent abuse, harassment and discrimination, as our thematic report before this Council on this issue indicates. Far more must be done to end this damaging discrimination.³⁶

32. The UN's activities, via the OHCHR and the Human Rights Council, have rapidly evolved on the issue of LGBT rights. This was able to come about by the adoption of resolution 17/19 at the Human Rights Council. This resolution passed by a fine margin, 23 to 19 with 3 abstentions. It is important that like-minded countries keep up the momentum within the OHCHR and Human Rights Council. One way to do this, which is perhaps optimistic at this point in time, would be the appointment of a *Special Rapporteur on the Persecution and Criminalisation of LGBT People*. Special Rapporteurs are given a specific thematic or country mandate from the Human Rights Council.

³² Human Rights Council, *Resolution on human rights, sexual orientation and gender identity*, 14 July 2011, UN Doc. A/HRC/RES/17/19.

³³ OHCHR, *Report of the United Nations High Commissioner for Human Rights, Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity*, 17 November 2011, UN Doc. A/HRC/19/41, para. 41.

³⁴ *Ibid*, p. 30.

³⁵ All campaign materials are available through a dedicated website: www.unfe.org

³⁶ *Opening Statement to the 29th Session of the Human Rights Council by the High Commissioner for Human Rights*, 15 June 2015. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16074&LangID=E#sthash.4h8h5bwW.dpuf>

Human Rights Council complaints procedure

33. In addition to the public-facing Charter mechanisms referred to above, there is also a private, behind-closed-doors procedure for raising human rights violations, adopted by the Human Rights Council in June 2007 in resolution 5/1. The 5/1 process addresses consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances. It is accessible by individuals, groups, or non-governmental organisations that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations. This mechanism is mentioned for completeness; its use is unusual and unlikely on the issue of criminalising homosexuality.

Working through UN institutions and agencies to end criminalisation

34. The UN has five institutions: the General Assembly, the Security Council, the Secretariat, the International Court of Justice, and the Economic and Social Council. It also has 16 specialised agencies, such as the World Health Organisation, and multiple subsidiary bodies created by the institutions. The criminalisation of homosexuality touches upon the work of many of these institutions, agencies and bodies. Many of them have provided positive words on and encouragement to countries to decriminalise. Like-minded countries can work with these UN entities to help bring about global decriminalisation.

The General Assembly

35. Since 2003, the General Assembly has repeatedly called attention to killings targeted on the basis of sexual orientation or gender identity through its resolutions on extrajudicial, summary or arbitrary executions.³⁷ Going beyond condemning violence to advocating for substantive rights, the General Assembly's Fifth Committee rejected a resolution proposed by Russia to withdraw benefits from same-sex spouses of UN staff. This resolution was rejected by a margin of 77 to 44 with 36 abstentions, thus retaining equal benefits for all UN staff, regardless of sexual orientation.³⁸

36. These resolutions demonstrate that there is now a critical mass within UN member states to support pro-LGBT resolutions. Now that this critical mass exists, other pro-LGBT resolutions can be proposed with confidence that they will pass. This critical mass has increased in recent years. Even in 2008, when two opposing resolutions were considered in the General Assembly, the pro-LGBT camp had the backing of most countries. That year France and The Netherlands used the General Assembly to present a letter to the President of the General Assembly concerning the criminalisation of and violence against LGBT people. The letter was signed by 66 member states, who urged, among other things:

“States to take all the necessary measures, in particular legislative or administrative, to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties.”³⁹

³⁷ General Assembly resolutions – *Extrajudicial, summary or arbitrary executions*, A/RES/69/182 (30 January 2015), A/RES/67/168 (15 March 2015), A/RES/65/208 (30 March 2011), A/RES/63/182 (16 March 2009), A/RES/61/173 (19 December 2006), A/RES/59/197 (10 March 2005), A/RES/57/214 (25 February 2003).

³⁸ General Assembly, Fifth Committee, *Human Resources Management*, 21 December 2014, UN Doc. A/C.5/69/L.5, available at:

³⁹ Letter dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the UN addressed to the President of the General Assembly, UN-Doc-A/63/635, signed by 66 member states.

37. At the same session, a rival statement was read by Syria on behalf of 57 member states, which questioned ‘so-called notions’ of sexual orientation and gender identity, stating that they ‘have no legal foundation’, and expressing that:

“ [T]he notion of orientation spans a wide range of personal choices that expand way beyond the individual's sexual interest in copulatory behaviour with normal consenting adult human beings, thereby ushering in the social normalisation, and possibly legitimisation, of many deplorable acts including paedophilia.”⁴⁰

38. Between 2008 and 2014, the critical mass of pro-LGBT countries has grown from 60 to 77 (perhaps now more). This is not yet a majority of all the UN's 193 member states but, when abstentions are excluded, pro-LGBT members outnumber the anti-LGBT. This critical mass serves to isolate the remaining 76 UN member states that criminalise homosexuality. As momentum at the UN builds, diplomatic pressure can be increased via further resolutions or bilateral discussions.

The Security Council

39. At the Security Council small but significant steps have been taken. In August 2015, the Security Council held its first meeting on an LGBT issue, namely violence committed by ISIS against LGBT people in Iraq and Syria. The meeting was co-sponsored by the United States and Chile. Commenting on this private meeting, the US State Department published the following press release:

Between 2008 and 2014, the critical mass of pro-LGBT countries has grown from 60 to 77.

“ Today, members of the UN Security Council held their first Arria-formula meeting on Lesbian, Gay, Bisexual, and Transgender (LGBT) issues, particularly in the context of ISIL's crimes against LGBT individuals in Iraq and Syria. This historic event recognizes that the issue of LGBT rights has a place in the UN Security Council.

Around the world, the UN has documented thousands of cases of individuals killed or injured in brutal attacks simply because they are LGBT or perceived to be LGBT. This abhorrent practice is particularly widespread in ISIL-seized territory in Iraq and Syria, where these violent extremists proudly target and kill LGBT individuals or those accused of being so. No one should be harmed or have their basic human rights denied because of who they are and who they love.”⁴¹

⁴⁰ Reported by ARC International, available at: <http://www.sxpolitics.org/wp-content/uploads/2009/03/unga-statement-backgroundunder.pdf>

⁴¹ Press Statement, *UN Security Council Holds Inaugural Meeting on LGBT Issues*, US State Department, 24 August 2015, available at: <http://www.state.gov/r/pa/prs/ps/2015/08/246296.htm>

40. Permanent members of the Security Council and rotating non-permanent members can be encouraged that the Security Council has broken the ice on the topic of LGBT rights. Now that this willingness to act has been established, other pro-LGBT resolutions can be proposed.

The Secretariat

41. The current Secretary-General, Ban Ki-moon, has been a consistent and vocal supporter of LGBT rights. The Secretary-General is an ally with whom like-minded governments can work to bring about the decriminalisation of homosexuality. Some of the Secretary-General's statements on this issue are set out below. A point to note is how the Secretary-General's tone becomes less conciliatory towards criminalising countries as time progresses. His words move from considering LGBT people as a marginalised group who need protection, towards considering LGBT people as a normalised group who require equality. This shift in tone reflects the greater acceptance of LGBT rights at the UN and also a greater acceptance of LGBT equality across the globe.

42. In January 2011, he stated:

“ We must reject persecution of people because of their sexual orientation or gender identity who may be arrested, detained or executed for being lesbian, gay, bisexual or transgender.

They may not have popular or political support, but they deserve our support in safeguarding their fundamental human rights.

I understand that sexual orientation and gender identity raise sensitive cultural issues. But cultural practice cannot justify any violation of human rights.⁴²

43. In March and December 2012, respectively, the Secretary-General stated:

“ Today, I stand with you... and I call upon all countries and people to stand with you, too. A historic shift is under way. More States see the gravity of the problem. We must: Tackle the violence... decriminalize consensual same-sex relationships... ban discrimination... and educate the public.

It is an outrage that in our modern world, so many countries continue to criminalize people simply for loving another human being of the same sex.⁴³

44. In June 2015, the Secretary-General again called for decriminalisation and equated the movement for LGBT rights with women's rights and civil rights movements:

“ Millions of people, in every corner of the world, are forced to live in hiding, in fear of brutal violence, discrimination, even arrest and imprisonment, just because of who they are, or whom they love.

Today, I stand with them. With the bullied teen rejected by his parents. With the homeless transgender woman denied healthcare and employment. With the young couple jailed and tortured simply for loving one another. With the activist arrested for daring to stand up for human rights.

The abuses and indignity suffered by members of the LGBT community are an outrage – an affront to the values of the United Nations and to the very idea of universal human rights.

I consider the struggle to end these abuses to be a great cause on a par with the struggle to end discrimination against women and on the basis of race.

I am proud of our work to repeal discriminatory laws and to open people's hearts and minds to change.⁴⁴

Millions of people,
in every corner
of the world, are
forced to live in
hiding, in fear
of brutal violence,
discrimination,
even arrest and
imprisonment, just
because of who
they are, or whom
they love.

⁴² Ban Ki-moon, *Secretary-General's remarks to the Human Rights Council*, Geneva, 25 January 2011, available at: <http://www.un.org/sg/STATEMENTS/index.asp?nid=5051>

⁴³ Secretary-General Ban Ki Moon, respectively: *Video message to Human Rights Council meeting on violence and discrimination based on sexual orientation or gender identity*, Geneva, 7 March 2012; and *Leadership in the fight against homophobia*, New York, 11 December 2012; both available at: <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTSpeechesandstatements.aspx>

⁴⁴ Ban Ki-moon, *Secretary-General's Remarks at the UN Free & Equal Lunch [as delivered]*, San Francisco, 26 June 2015, available at: <http://www.un.org/sg/statements/index.asp?nid=8772>

The International Court of Justice

45. The use of the UN's fourth institution, the International Court of Justice (ICJ), at present remains a theoretical possibility. Although the ICJ has some jurisdiction to adjudicate breaches of international law, it is not active on the issue of laws that criminalise of homosexuality, nor LGBT rights more generally. It is possible for a state party to the ICJ to bring a claim against another state party for its breach of international law due to its criminalising legislation. At present, this would be ill advised. For completeness, Appendix 1, column I lists the criminalising countries who have given jurisdiction to the ICJ.
46. Another theoretical possibility is that a UN specialised agency requests an advisory opinion from the ICJ on the legality of laws that criminalise homosexuality. For the ICJ to have jurisdiction, the issue must raise 'legal questions arising within the scope of their activities'.⁴⁵ The World Health Organisation is perhaps best placed to request an advisory opinion due to the link between criminalisation and increased HIV rates.⁴⁶

47. This course of action is not recommended at this stage.

The Economic and Social Council

48. The fifth and final UN institution is the Economic and Social Council (ECOSOC). It is relevant to the extent that it has established subsidiary bodies whose work encompasses LGBT rights. Two subsidiary bodies of particular relevance are UNAIDS (discussed in the next section) and ECOSOC's Committee on NGOs.
49. Several LGBT groups have consultative status on the Committee on NGOs,⁴⁷ which gives them the opportunity to engage with other UN entities. Like-minded countries can work with this committee to encourage it to ensure that LGBT NGOs are able to acquire this status, and can also work with those organisations that already have status in terms of how then they might engage with the UN. They can also work to encourage NGOs who advocate for reform in criminalising countries to apply for consultative status, particularly from countries where it is difficult to operate an LGBT NGO domestically.

UN specialised agencies and subsidiary bodies

50. There are 16 specialised agencies that act as autonomous organisations linked to the UN through special agreements,⁴⁸ and the UN's institutions have themselves formed multiple subsidiary bodies. The OHCHR and the Human Rights Council, discussed above, are two such subsidiary bodies. Specialised agencies and subsidiary bodies do and can play a part in the decriminalisation of homosexuality. Like-minded countries can work with them.
51. In September 2015, in an unprecedented move, 12 UN specialised agencies and subsidiary bodies issued a joint statement on *Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People*.⁴⁹ The joint statement covered multiple themes, which overlap with the themes in the Human Dignity Trust's briefing notes in this series. These include the negative health and economic effects of criminalising homosexuality, human rights obligations, and that cultural and religious belief are no justification for criminal laws. These 12 entities identified how their work is engaged in the following ways:

Failure to uphold the human rights of LGBTI people and protect them against abuses such as violence and discriminatory laws and practices, constitute serious violations of international human rights law and have a far-reaching impact on society – contributing to increased vulnerability to ill health including HIV infection, social and economic exclusion, putting strain on families and communities, and impacting negatively on economic growth, decent work and progress towards achievement of the future Sustainable Development Goals.



States bear the primary duty under international law to protect everyone from discrimination and violence. These violations therefore require an urgent response by governments, parliaments, judiciaries and national human rights institutions.

*Community, religious and political leaders, workers' organizations, the private sector, health providers, civil society organizations and the media also have important roles to play. Human rights are universal – cultural, religious and moral practices and beliefs and social attitudes cannot be invoked to justify human rights violations against any group, including LGBTI persons.*⁵⁰

⁴⁵ UN Charter, Article 96(2).

⁴⁶ The link between criminalisation and HIV transmission is discussed in another note in this series, Criminalising Homosexuality and Public Health: Adverse Impacts on the Prevention and Treatment of HIV and AIDS

⁴⁷ For a full list, see: <http://csonet.org/content/documents/E-2014-INF-5%20Issued.pdf>

⁴⁸ For a full list, see <http://www.un.org/Overview/uninbrief/institutions.shtml>

⁴⁹ The 12 entities were: the International Labour Organization (ILO), OHCHR, UNAIDS, the United Nations Development Programme (UNDP), UNESCO, the United Nations Population Fund (UNFPA), the United Nations High Commissioner for Refugees (UNHCR), UNICEF, the United Nations Office on Drugs and Crime (UNODC), UN Women, the World Food Programme (WFP) and the WHO.

⁵⁰ Joint Statement, *Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People*, 29 September 2015, available at: http://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF

52. Furthermore, these 12 UN entities called for action from member states:

States should respect international human rights standards, including by reviewing, repealing and establishing a moratorium on the application of: Laws that criminalize same-sex conduct between consenting adults...

53. These 12 entities span the spectrum of the UN's work, demonstrating how the issue of criminalising homosexuality impacts LGBT people's lives in multiple ways and offends against the UN's ethos to its core.

Diplomacy at the UN

54. The paragraphs above set out the treaty and Charter mechanisms available at the UN. Of course, in addition to using these formal frameworks, governments and diplomats can work behind the scenes to bring about the decriminalisation of homosexuality.

55. The frequency and tone of comments coming from the UN on LGBT rights shows a hardening stance and growing intolerance towards laws that criminalise homosexuality. National representatives can raise the issue of criminalisation more vocally, more frequently, and more forcefully at the UN without deviating from the UN's stance on the issue. There is no need to shy away. Global opinion is on the side of decriminalisation.

These 12 entities span the spectrum of the UN's work, demonstrating how the issue of criminalising homosexuality impacts LGBT people's lives in multiple ways and offends against the UN's ethos to its core.

56. Also government should take note that statements at the UN demonstrate how advocacy on LGBT rights is evolving. The Secretary-General's comments above are particularly indicative of this evolution. The narrative of LGBT rights is increasingly focused on achieving equality. As such, pushing for the gradual expansion of privacy rights, as was the model in the UK between 1967 and 2003, is not necessarily the optimal route in the early 21st century. This privacy/equality debate is discussed in further detail in another note in this series, *Criminalising Homosexuality and International Human Rights Law*.

The European Union

57. It is firmly entrenched at the European Union (EU) that LGBT people enjoy equality with others. No EU member state criminalises homosexuality, nor could it. The EU Charter of Fundamental Rights includes sexual orientation as a prohibited ground for discrimination (Article 21). This legal framework protects LGBT people within the EU, yet there is much that the EU can do outside of its own borders too.

58. The EU is committed to including the human rights of LGBT people in its external work. In June 2013, the EU's Foreign Ministers adopted 'Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons'. The EU's position on LGBT rights is provided on the opening page of these guidelines:

“ The rights of LGBTI persons are protected under existing international human rights law, although specific action is often required in order to ensure the full enjoyment of human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. LGBTI persons have the same rights as all other individuals — no new human rights are created for them and none should be denied to them. The EU is committed to the principle of the universality of human rights and reaffirms that cultural, traditional or religious values cannot be invoked to justify any form of discrimination, including discrimination against LGBTI persons... The EU is particularly concerned that in some countries, sexual relations between consenting adults of the same sex are criminalised and are liable to be punished with imprisonment or with the death penalty.⁵¹

⁵¹ Council of the European Union, *Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons*, 24 June 2013, p. 1, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/137584.pdf

59. These guidelines aim to provide officials of the EU institutions and EU member states with assistance in their interactions with third countries, international organisations and civil society organisations, in order to promote and protect the human rights of LGBT people. The guidelines focus on diplomatic actions as means to progress LGBT rights overseas. While these guidelines are welcome, they must be acted upon consistently; erratic use suggests that the EU is willing to abandon LGBT rights if there is some 'greater' consideration.

60. Diplomatic dialogue is only one tool. The EU can apply pressure beyond spoken words. As the world's largest economic bloc, the EU possesses much potential to exert pressure on its trading partners. Of particular relevance is the Cotonou Agreement, signed in June 2000 by 78 African, Caribbean and Pacific countries and by the then-fifteen EU member states. The agreement was subsequently revised in 2010. An essential element of the Cotonou agreement is 'good governance', the violation of which may lead to the partial or complete suspension of development cooperation between the EU and the country in violation. The criminalisation of homosexuality amounts to a serious failure of good governance.⁵² It is legitimate that the EU raises this failure in the context of the treaty obligations contained in the

Cotonou Agreement and reconsiders the favourable trading arrangements granted to criminalising parties to the Cotonou Agreement (Appendix, column L). The current version of the Cotonou Agreement expires in 2020. When the negotiations for the next version take place, EU members can consider raising more forcefully the issue of criminalising homosexuality in the context of economic and trade benefits if and where decriminalisation occurs.

61. Further, the EU is equipped to respond strategically to acute breaches of human rights, included those against LGBT people. For instances, the Council of the EU is empowered to impose a range of sanctions to promote '*respect for the rule of law, human rights and international law*'.⁵³ The EU can also coordinate the response of its various member states, which can use their domestic tools in unison to maximise the effect. EU Commissioners can on behalf of all EU member states criticise governments who persecute their LGBT citizens. The EU did, indeed, respond to new laws passed in Nigeria, Uganda and The Gambia that further criminalised and persecuted LGBT people:

a) In March 2014, the European Parliament passed a non-binding resolution criticising new anti-gay laws in Nigeria and Uganda and calling on member countries to impose travel and visa bans on '*key individuals responsible for drafting and adopting*' the laws.⁵⁴ In December 2014, following the passing in The Gambia of a new anti-gay law, the European Union cut US\$186 million in aid to The Gambia.

b) Again in response to Uganda's new anti-gay law, the EU's High Representative, Catherine Ashton, highlighted the international human rights treaties ratified by Uganda that are violated by this new law:

“ **The European Union condemns the adoption of the Anti-Homosexuality Act by Uganda on 24 February. The EU fully shares the concerns expressed by the United Nations Secretary-General, the UN High Commissioner for Human Rights and by Nobel Peace Prize laureate Desmond Tutu. The EU is firmly committed to the promotion of human rights worldwide and denounces any discriminatory legislation. The EU will review how best to achieve this in Uganda in this changed context. The Anti-Homosexuality Act contradicts the international commitments of the Ugandan government to respect and protect the fundamental human rights of all its citizens. The EU calls upon Uganda to ensure equality before the law and non-discrimination in line with its obligations under international human rights law, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the African Charter of Human and Peoples' Rights.**⁵⁵

62. The use of travel bans directly targets those who are the source of state-sanctioned homophobia. Whereas economic sanctions may not personally affect these people, but do affect the citizenry, denying politicians the opportunity to visit the EU affects them directly.

⁵² As discussed our notes *Criminalising Homosexuality and the Rule of Law*, *Criminalising Homosexuality and Democratic Values*, and *Criminalising Homosexuality and International Human Rights Law*.

⁵³ European Delegation to the United Nations, 'Sanctions: Factsheet on EU restrictive measures', 4 March 2013, http://eu-un.europa.eu/articles/en/article_13226_en.htm

⁵⁴ Murwira, Z., 'African anti-gay stance touches storm', *The Herald* (online), 18 March 2014. Available at: <http://africanleadership.co.uk/uganda-faces-travel-ban-over-anti-gay-law/>

⁵⁵ European Union, *Declaration by the High Representative on behalf of the European Union concerning the Ugandan Anti-Homosexuality Act*, Brussels, 4 March 2014, 7267/1/14 REV 1

The Commonwealth



63. The criminalisation of homosexuality is a problem intimately connected with the Commonwealth. Of the 78 jurisdictions that currently criminalise consensual same-sex intimacy, 40 are Commonwealth members (Appendix, column M), which sadly accounts for the majority of the Commonwealth's total membership of 53. Of the Commonwealth's 2.3 billion citizens, 2.1 billion (or 90%) live in a country that criminalises. Three-quarters of all people who live in a criminalising jurisdiction live in the Commonwealth.⁵⁵ The concentration of criminalising countries in the Commonwealth is a result of their shared British colonial histories, during which time Britain imposed these laws. In addition to these 40 countries, several others inherited their laws from Britain (Appendix, column M).

The criminalisation of homosexuality is a problem intimately connected with the Commonwealth. Of the 78 jurisdictions that currently criminalise consensual same-sex intimacy, 40 are Commonwealth members, which sadly accounts for the majority of the Commonwealth's total membership of 53. Of the Commonwealth's 2.3 billion citizens, 2.1 billion (or 90%) live in a country that criminalises. Three-quarters of all people who live in a criminalising jurisdiction live in the Commonwealth.⁵⁶

⁵⁶ The 78 criminalising jurisdictions' total population is 2.87 billion, of which 2.09 billion are in the Commonwealth.

64. With the vast majority of Commonwealth countries criminalising, there is little prospect at present of bringing about change via weight in numbers. However, other strategies can be used, which may result in decriminalisation as a side-product rather than as a target itself. General legislative reform is one route. Among Commonwealth countries, laws that criminalise homosexuality are often contained within archaic criminal codes that reflect a Victorian approach to criminal justice. As well as criminalising consensual same-sex intimacy, these British-era laws frequently permit rape within marriage, provide inadequate protection of children from sexual predation, and do not recognise that a man can be raped. In many Commonwealth countries reform across the board of criminal laws, or specifically sexual offences laws, might result in the criminalisation of homosexuality quietly falling away.

65. Due to the common heritage, shared language and similar systems of law and government among its members, the Commonwealth is well placed to act as the focal point for drafting a model criminal code.

66. Legislative reform has been an effective way to bring about decriminalisation in the past. Most recently, in July 2015 Mozambique became the latest country to decriminalise via a new criminal code coming into force. The drafting of a model criminal code for the Commonwealth could prove a powerful and subtle way to bring about the decriminalisation of homosexuality. In doing so, it can also address other issues, such as protecting women and children from sexual abuse and sexual violence.

67. In December 2012, the members of the Commonwealth agreed the Charter of the Commonwealth, in which they reaffirm the values of the Commonwealth. These include democracy (Article 1), human rights for all without discrimination on any ground (Article 2), and the rule of law (Article 7). This Charter can provide a framework for reform and a guide to the content of model legislation. Commonwealth countries might wish to build on this Charter by advocating for the appointment of a Commonwealth Commissioner to work with Commonwealth members on human rights issues.

68. Outgoing Commonwealth Secretary-General Kamalesh Sharma has made progress, first by overseeing the agreement of the Charter of the Commonwealth. He has since acknowledged to the LGBT community that the Commonwealth *'continue[s] to work with national human rights institutions and parliaments, building capacities to further protect and promote equality and non-discrimination'*.⁵⁷ Encouragingly, at the 2015 Commonwealth Heads of Government Meeting in Malta, Secretary-General Sharma remarked that:

“ **We embrace difference, and that includes sexual identity. Discrimination and criminalisation in any form on grounds of sexual orientation is incompatible with our Commonwealth values.**”⁵⁸

69. With the appointment in November 2015 of the new Secretary-General, Patricia Scotland, there might be greater impetus within the Commonwealth Secretariat to build upon outgoing Secretary-General Sharma's comments and to address the issue of criminalising homosexuality.

11 of the 78 jurisdictions use the London-based Privy Council as their final court of appeal.

70. Additionally, it should also be borne in mind that Commonwealth countries are bound together by other institutions that display some characteristics of internationality. In particular, the legal systems of many Commonwealth countries remain intertwined, to varying degrees, with English law. 11 of the 78 jurisdictions use the London-based Privy Council as their final court of appeal (see Appendix, column M). The Privy Council may well have the opportunity to hear a case on the criminalisation of homosexuality. Further, the common law legal system is followed in almost all Commonwealth countries and some other criminalising countries too (see Appendix, column M). Court judgments from both the Privy Council and the English courts enrich this shared common law. The common law may offer an alternative way to show that laws that criminalise homosexuality are unlawful.

Conclusions

71. History shows that international organisations have been integral in bringing about the decriminalisation of homosexuality in domestic legal systems. Contemporary statements from various international organisations show that those who now push for decriminalisation will be on the right side of history. Like-minded governments can use their position within multiple international organisations to further the goal of decriminalising homosexuality across the globe.

72. The UN now looks primed to act upon the content of its treaties and in accordance with its ethos and principles to help bring about decriminalisation. Yet, it is states within the UN who provide the impetus for this. Like-minded governments must continue with their quiet diplomacy, but they must not forget that they are owed obligations under international law, which are being flouted by countries that criminalise homosexuality. In some instances, quiet diplomacy will not be sufficient. There are mechanisms at the UN level where more pro-active approaches can be taken. In particular, state-to-state claims at the Human Rights Committee may be the only viable solution to bring about change in some criminalising countries.

73. Likewise, the EU's stance on this issue could be firmer in practice to reflect the admirable principles codified at the EU. The EU and the Council of Europe have been crucial players in progressing LGBT rights in their immediate sphere of influence. The EU's influence can be applied strategically in other regions too, in particular in countries with which it trades or has cultural links. The EU's Cotonou Agreement is one tool that can be used to encourage compliance with human rights.

74. Similarly, the Commonwealth could be a powerful vehicle for change if it acts strategically. Recent statements from the Commonwealth are welcomed, and suggest that it will now engage with this issue if it is approached sensitively.

75. Had international organisations been silent in the past, many more than 78 jurisdictions could still criminalise today. This number will be reduced further and more rapidly only if pressure is felt from the international community.

⁵⁷ Letter dated 23 September 2014 to the Kaleidoscope Trust, Peter Tatchell Foundation and Equality Network. Available at: <http://kaleidoscopetrust.com/usr/library/documents/main/lgbt-human-rights-petition.pdf>

⁵⁸ The Commonwealth Equality Network, *PRESS RELEASE: Historic inclusion of LGBTI Rights in Commonwealth Discussions*. Available at: <https://www.thercs.org/assets/Press-Releases/25.11.15-Historic-Inclusion-of-LGBTI-Rights-in-Commonwealth-Discussions.pdf>

Appendix 1: 78 criminalising jurisdictions’ membership
of international organisations

	A	B	C	D	E	F	G	H	I	J	K	L	M
	78 criminalising jurisdictions ⁵⁹ (bold: women criminalised too)	UN Treaties and Mechanisms									Regional	EU	Other
		UN member	ICCPR state-party ⁶⁰	ICCPR: individual complaint ⁶¹	ICCPR: state-to-state complaint ⁶²	CAT state-party ⁶³	CAT: individual complaint ⁶⁴	CAT: state-to-state complaint ⁶⁵	ICJ state ⁶⁶	ICC state ⁶⁷	OAS ⁶⁸ AU ⁶⁹ member	Cotonou party ⁷⁰	Commonwealth member ⁷¹
1.	Afghanistan	Yes	Yes	No	No	Yes	No	No	No	Yes	No	No	No
2.	Algeria	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	AU	No	No
3.	Angola	Yes	Yes	Yes	No	No	No	No	No	No	AU	Yes	No
4.	Antigua and Barbuda	Yes	No	No	No	Yes	No	No	No	Yes	OAS	Yes	Yes++
5.	Bangladesh	Yes	Yes^	No	No	Yes	No	No	No	Yes	No	No	Yes
6.	Barbados	Yes	Yes	Yes	No	No	No	No	Yes	Yes	OAS^ ^ #	Yes	Yes
7.	Belize	Yes	Yes^	No	No	Yes	No	No	No	Yes	OAS	Yes	Yes
8.	Bhutan	Yes	No	No	No	No	No	No	No	No	No	No	No
9.	Botswana	Yes	Yes^	No	No	Yes	No	No	Yes	Yes	AU	Yes	Yes
10.	Brunei	Yes	No	No	No	No	No	No	No	No	No	No	Yes
11.	Burundi	Yes	Yes	No	No	Yes	Yes	No	No	Yes	AU	Yes	No
1.	Cameroon	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	No	AU	Yes	Yes
2.	Comoros	Yes	No*	No	No	No*	No	No	No	Yes	AU	Yes	No
3.	Cook Islands	No	No	No	No	No	No	No	No	Yes	No	Yes	No+ ++
4.	Dominica	Yes	Yes	No	No	No	No	No	Yes	Yes	OAS#	Yes	Yes
5.	Egypt	Yes	Yes	No	No	Yes	No	No	Yes	No	AU	No	No
6.	Eritrea	Yes	Yes^	No	No	Yes	No	No	No	No	AU	Yes	No
7.	Ethiopia	Yes	Yes	No	No	Yes	No	No	No	No	AU	Yes	No
8.	The Gambia	Yes	Yes	Yes	Yes	No*	No	No	Yes	Yes	AU	Yes	No+
9.	Gaza	No**	Yes**	No	No	Yes**	No	No	No	Yes**	No	No	No
10.	Ghana	Yes	Yes^	Yes	Yes	Yes	Yes	Yes	No	Yes	AU	Yes	Yes
11.	Grenada	Yes	Yes	No	No	No	No	No	No	Yes	OAS#	Yes	Yes++
12.	Guinea	Yes	Yes	Yes	No	Yes	No	No	Yes	Yes	AU	Yes	No

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

60 <http://indicators.ohchr.org>

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

62 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

63 <http://indicators.ohchr.org>

64 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

65 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

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

67 http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

68 http://www.oas.org/en/member_states/

69 http://www.au.int/en/member_states/countryprofiles

70 http://eeas.europa.eu/delegations/sierra_leone/eu_sierra_leone/political_relations/partnership_framework/acp_eu_agreement/index_en.htm

71 <http://www.commonwealthofnations.org>

Appendix 1: 78 criminalising jurisdictions’ membership
of international organisations

	A	B	C	D	E	F	G	H	I	J	K	L	M
	78 criminalising jurisdictions ⁵⁹ (bold: women criminalised too)	UN Treaties and Mechanisms									Regional	EU	Other
		UN member	ICCPR state-party ⁶⁰	ICCPR: individual complaint ⁶¹	ICCPR: state-to-state complaint ⁶²	CAT state-party ⁶³	CAT: individual complaint ⁶⁴	CAT: state-to-state complaint ⁶⁵	ICJ state ⁶⁶	ICC state ⁶⁷	OAS ⁶⁸ AU ⁶⁹ member	Cotonou party ⁷⁰	Commonwealth member ⁷¹
24.	Guyana	Yes	Yes	Yes	Yes	Yes	No	No	No	Yes	OAS	Yes	Yes
25.	India	Yes	Yes	No	No	No*	No	No	Yes	No	No	No	Yes
26.	Indonesia (S. Sumatra; Aceh)	Yes	Yes^	No	No	Yes	No	No	No	No	No	No	No
27.	Iran	Yes	Yes	No	No	No	No	No	No	No	No	No	No
28.	Iraq (unclear)	Yes	Yes	No	No	Yes	No	No	No	No	No	No	No
29.	Jamaica	Yes	Yes	No	No	No	No	No	No	No	OAS^^^ #	Yes	Yes++
30.	Kenya	Yes	Yes	No	No	Yes	No	No	Yes	Yes	AU	Yes	Yes
31.	Kiribati	Yes	No	No	No	No	No	No	No	No	No	Yes	Yes++
32.	Kuwait	Yes	Yes^	No	No	Yes	No	No	No	No	No	No	No+
33.	Lebanon	Yes	Yes	No	No	Yes	No	No	No	No	No	No	No
34.	Liberia	Yes	Yes^	No*	No	Yes	No	No	Yes	Yes	AU	Yes	No+
35.	Libya	Yes	Yes	Yes	No	Yes	No	No	No	No	AU	No	No
36.	Malawi	Yes	Yes	Yes	No	Yes	No	No	Yes	Yes	AU	Yes	Yes
37.	Malaysia	Yes	No	No	No	No	No	No	No	No	No	No	Yes
38.	Maldives	Yes	Yes^	Yes	No	Yes	No	No	No	Yes	No	No	Yes
39.	Mauritania	Yes	Yes^	No	No	Yes	No	No	No	No	AU	Yes	No
40.	Mauritius	Yes	Yes	Yes	No	Yes	No	No	Yes	Yes	AU	Yes	Yes++
41.	Morocco	Yes	Yes	No	No	Yes	Yes	No	No	No	No	No	No
42.	Myanmar	Yes	No	No	No	No	No	No	No	No	No	No	No+
43.	Namibia	Yes	Yes^	Yes	No	Yes	No	No	No	Yes	AU	Yes	Yes
44.	Nauru	Yes	No*	No*	No	Yes	No	No	No	Yes	No	Yes	Yes
45.	Nigeria	Yes	Yes	No	No	Yes	No	No	Yes	Yes	AU	Yes	Yes
46.	Oman	Yes	No	No	No	No	No	No	No	No	No	No	No+
47.	Pakistan	Yes	Yes^	No	No	Yes	No	No	Yes	No	No	No	Yes
48.	Papua New Guinea	Yes	Yes^	No	No	No	No	No	No	No	No	Yes	Yes
49.	Qatar	Yes	No	No	No	Yes	No	No	No	No	No	No	No
50.	St Kitts & Nevis	Yes	No	No	No	No	No	No	No	Yes	OAS	Yes	Yes++
51.	St Lucia	Yes	No^	No	No	No	No	No	No	Yes	OAS	Yes	Yes++
52.	St Vincent & Grenadines	Yes	Yes	Yes	No	Yes	No	No	No	Yes	OAS	Yes	Yes++



Appendix 1: 78 criminalising jurisdictions’ membership
of international organisations

	A	B	C	D	E	F	G	H	I	J	K	L	M
		UN Treaties and Mechanisms									Regional	EU	Other
		UN member	ICCPR state-party ⁶⁰	ICCPR: individual complaint ⁶¹	ICCPR: state-to-state complaint ⁶²	CAT state-party ⁶³	CAT: individual complaint ⁶⁴	CAT: state-to-state complaint ⁶⁵	ICJ state ⁶⁶	ICC state ⁶⁷	OAS ⁶⁸ AU ⁶⁹ member	Cotonou party ⁷⁰	Commonwealth member ⁷¹
53.	Samoa	Yes	Yes^	No	No	No	No	No	No	Yes	No	Yes	Yes
54.	Saudi Arabia	Yes	No	No	No	Yes	No	No	No	No	No	No	No
55.	Senegal	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	AU	Yes	No
56.	Seychelles	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	AU	Yes	Yes
57.	Sierra Leone	Yes	Yes^	Yes	No	Yes	No	No	No	Yes	AU	Yes	Yes
58.	Singapore	Yes	No	No	No	No	No	No	No	No	No	No	Yes
59.	Solomon Islands	Yes	No	No	No	No	No	No	No	No	No	Yes	Yes
60.	Somalia	Yes	Yes	Yes	No	Yes	No	No	Yes	No	AU	Yes	No
61.	South Sudan	Yes	No	No	No	Yes	No	No	No	No	AU##	No	No
62.	Sri Lanka	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No	No	Yes
63.	Sudan	Yes	Yes	No	No	No*	No	No	Yes	No	AU	Yes	No+
64.	Swaziland	Yes	Yes^	No	No	Yes	No	No	Yes	No	AU	Yes	Yes
65.	Syria	Yes	Yes	No	No	Yes	No	No	No	No	No	No	No
66.	Tanzania	Yes	Yes	No	No	No	No	No	No	Yes	AU	Yes	Yes
67.	Togo	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	No	AU	Yes	No
68.	Tonga	Yes	No	No	No	No	No	No	No	No	No	Yes	Yes
69.	Trinidad & Tobago	Yes	Yes	No	No	No	No	No	No	Yes	OAS	Yes	Yes++
70.	Tunisia	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	AU	No	No
71.	Turkmenistan	Yes	Yes^	Yes	No	Yes	No	No	No	No	No	No	No
72.	Tuvalu	Yes	No	No	No	No	No	No	No	No	No	Yes	Yes++
73.	Uganda	Yes	Yes^	Yes	No	Yes	No	Yes	Yes	Yes	AU	Yes	Yes
74.	UAE	Yes	No	No	No	Yes	No	No	No	No	No	No	No
75.	Uzbekistan	Yes	Yes^	Yes	No	Yes	No	No	No	No	No	No	No
76.	Yemen	Yes	Yes	No	No	Yes	No	No	No	No	No	No	No+
77.	Zambia	Yes	Yes	Yes	No	Yes	No	No	No	Yes	AU	Yes	Yes
78.	Zimbabwe	Yes	Yes	No	Yes	No	No	No	No	No	AU	Yes	No+

* 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 of Human Rights; Jamaica recognises the competence of the Inter-American Commission on Human Rights.⁷²
+ Countries with common law mixed common law legal systems derived from English law, but not members of the Commonwealth.⁷³
++ Judicial Committee of the Privy Council, based in London with UK judges, is the final court of appeal. (In Kiribati, criminalisation is unlikely to fall under the Privy Council's jurisdiction.)⁷⁴
Members of OAS that have ratified the American Convention on Human Rights.⁷⁵
Members of AU that have NOT ratified the African Charter on Human and Peoples' Rights
72 <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp>
73 <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>
74 <https://www.jcpc.uk/about/role-of-the-jcpc.html#Commonwealth>
75 <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp>

Appendix 2: Jurisdictions that have decriminalised
homosexuality since 1981

	Country	Methods and of repeal and external influences			
		Voluntary influence		Litigation to strike down law or force repeal	
		Year	External influence	YearYear	Ground of litigstion (and external influence)
1.	Mozambique	2015	Inter-governmental		
2.	Palau	2014	UPR and USA		
3.	Sao Tome	2014	UPR		
4.	Northern Cyprus	2014	Strasbourg Court ⁷⁶ and EU provided impetus		
5.	Lesotho	2012	None		
6.	Nicaragua	2008	None		
7.	Panama	2008	Unclear ⁷⁷		
8.	Nepal			2007 ⁷⁸	Equality
9.	Tokelau	2007	UNAIDS/WHO ⁷⁹		
10.	Vanuatu	2007	UNAIDS/WHO	2005 ⁸⁰	Equality and privacy
11.	Fiji				
12.	Marshall Islands	2005	UNAIDS/WHO		
13.	Armenia	2003	Council of Europe ⁸¹		Privacy
14.	United States			2003 ⁸²	Privacy
15.	Azerbaijan	2000	Council of Europe		
16.	Georgia	2000	Council of Europe		
17.	Chile	1999	None		
18.	UK Overseas Territories	2000-01	Pressure from UK		

 Yellow shading indicates overt external influence that forced or facilitated decriminalisation
 Orange shading indicates no known external influence.

76 A case against Turkey, which is responsible for Northern Cyprus under international law, was commenced at the European Court of Human Right. In response, Northern Cyprus repealed.
77 *Pink News* reported that the ‘ban on gay sex was found to be inconsistent with international human rights treaties that Panama has signed, as well as the Panamanian Constitution’ and that ‘sexual preference’ was already recognised in government health policy. See: <http://www.pinknews.co.uk/2008/08/14/gay-sex-becomes-legal-in-panama/>
78 *Pant v. Nepal Government, Office of the Prime Minister and Council of Ministers*, NJA Law Journal 2008, 262.
79 In 2007 the UNAIDS Secretariat and UNDP reviewed the legislation of 15 Pacific Island countries relevant to HIV issues, including discrimination, ethics, access to treatment and privacy and confidentiality. The Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu were included in this project. See: <http://www.unaids.org/en/resources/presscentre/featurestories/2010/march/20100304fiji>
80 *McCoskar v. The State*, Criminal Appeals HAA0085 & 86 of 2005, 26 August 2005. Law remained in place until it was repealed in 2010.
81 For an analysis of the effect of the Council of Europe on decriminalisation in Europe, see Noble, B., ‘Decriminalising sex between men: former USSR’ in, Goodall, K.E. and Mallcoh, M.S. (eds), *Building Justice in Post-transition Europe: Processes of Criminalisation*, Routledge (2013).
82 *Lawrence v. Texas* (2003) 539 US 558.

Appendix 2: Jurisdictions that have decriminalised
homosexuality since 1981

	Country	Methods and of repeal and external influences			
		Voluntary influence		Litigation to strike down law or force repeal	
		Year	External influence	YearYear	Ground of litigstion (and external influence)
19.	Kazakhstan ⁸³	1998	Break-up of USSR		
20.	Kyrgyzstan	1998	Break-up of USSR		
21.	South Africa			1998 ⁸⁴	Equality, privacy and dignity
22.	Tajikistan	1998	Break-up of USSR		
23.	Cyprus			1998 ⁸⁵	Privacy (Strasbourg Court judgment)
24.	Bosnia & Herzegovina	1998- 2001	Council of Europe		
25.	China	1997	None		
26.	Ecuador			1997 ⁸⁶	?
27.	Macedonia	1996	Council of Europe		
28.	Romania	1996	Council of Europe		
29.	Albania	1995	Council of Europe		
30.	Moldova	1995	Council of Europe		
31.	Australia (Tasmania)			1994 ⁸⁷	Privacy (Human Rights Committee decision)
32.	Belarus	1994	Council of Europe ⁸⁸		
33.	Kosovo	1994	Council of Europe		
34.	Serbia	1994	Council of Europe		

⁸³ For an analysis of decriminalisation in the non-Council of Europe, Ex-Soviet Republics of Kazakhstan, Kyrgyzstan and Tajikistan, see Noble, at n. 81 above. These countries replaced their Soviet-era criminal codes upon independence.

⁸⁴ *National Coalition for Gay and Lesbian Equality v. Minister of Justice* CCT 11/98.

⁸⁵ *Modinos v. Cyprus* (Application No. 15070/89).

⁸⁶ *Constitutional Tribunal Case No. 111-97-TC*.

⁸⁷ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), 31 March 1994. Tasmania’s criminalising law was repealed three years later in 1997.

⁸⁸ Belarus is not a member of the Council of Europe, but was granted ‘guest status’ in 1992, which in all other cases has led to full membership.

Appendix 2: Jurisdictions that have decriminalised
homosexuality since 1981

	Country	Methods and of repeal and external influences			
		Voluntary influence		Litigation to strike down law or force repeal	
		Year	External influence	YearYear	Ground of litigstion (and external influence)
34.	Serbia	1994	Council of Europe		
35.	Guinea-Bissau	1993	None		
36.	Lithuania	1993	Council of Europe		
37.	Russia	1993	Council of Europe		
38.	Estonia	1992	Council of Europe		
39.	Latvia	1992	Council of Europe		
40.	Ukraine	1991	Council of Europe		
41.	Bahamas	1991	None		
42.	Andorra	1990	Council of Europe		
43.	Liechtenstein	1989	Council of Europe		
44.	Israel	1988	None		
45.	Ireland			1993 ⁸⁹	Privacy (Strasbourg Court judgment)
46.	New Zealand	1986	None		
47.	Portugal	1983	Council of Europe		
48.	Columbia	1981	None		
49.	United Kingdom (Northern Ireland)			1981 ⁹⁰	Privacy (Strasbourg Court judgment)

⁸⁹ *Norris v. Ireland*, [1988] ECHR 22. Ireland’s criminalising law was repealed five years later in 1993.

⁹⁰ *Dudgeon v. UK* A 45 (1982) 4 EHRR 149.

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