



**International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)**

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**Re: Draft Revised General Comment on the implementation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the context of article 22**

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is a worldwide federation of 1,200 member organisations from 125 countries campaigning for lesbian, gay, bisexual, trans and intersex (LGBTI) rights since 1978. ILGA is a representative voice of LGBTI civil society within the United Nations, operating through collaboration, engagement and support of its members and partners. It also provides support and guidance to member organizations in their engagement with the UN mechanisms, including with the Treaty Bodies such as the Committee Against Torture.

We welcome the progress that has been achieved in this field by the Committee against Torture such as including references to sexual orientation, gender identity and expression and sex characteristics (SOGIESC) in its concluding observations<sup>1</sup> and general comments, as well as its decisions on cases where complainants faced risk of torture because of their sexual orientation upon return to countries of origin.<sup>2</sup>

Therefore, we highly appreciate further possible developments, specifically the inclusion of sexual orientation and gender identity, among other indications of personal risk affecting the complainant, in paragraph 48(e) of the Draft Revised General Comment on the implementation of article 3 of the Convention in the context of article 22.

Welcoming this provision, we would like to suggest the following additions to the Draft Revised General Comment that would ensure more comprehensive reflection of risks of torture faced by lesbian, gay, bisexual, trans and intersex (LGBTI) persons in different countries throughout the world, as well as already existing practice and standards of different international institutions and bodies:

17. The Committee considers that severe pain or suffering cannot objectively be measured. It depends on the negative physical or mental repercussions that the infliction of violent acts has on each individual, taking into account all relevant circumstances of each case, including the duration of the treatment, the physical and/or mental effects, the sex, sexual orientation, gender identity, gender expression, sex characteristics, age and state of health and vulnerability of the victim.

30. In this connection, the Committee wishes to draw the attention of the States parties to some non-exhaustive pertinent examples of human rights situations which may constitute an indication of a risk of torture to which they should give consideration in their decisions for removal of a person from their territory and take them into account to apply the principle of “non-refoulement”. States parties should consider, in particular:

[...]

(p) Whether the person concerned would be deported to a State where there are allegations or evidence that the person has been or would be at risk of being subject to violations based on this person’s real or perceived sexual orientation, gender identity, gender expression or sex characteristics amounting to torture, such as criminalization of consensual same-sex relations between adults, or criminalization of particular forms of gender expression, or activities aimed at promoting human rights of lesbian, gay, bisexual, trans and intersex (LGBTI) persons, intrusive non-consensual forensic examinations as proof of same-sex sexual acts, hate crimes, corrective rapes, forced marriage, honour-based violence, conversion therapies, aggravated violence in detention, non-consent gender reassignment surgeries or medical interventions aimed at determination of sex without effective consent of the person affected.

## Annex I – Definitions

**Sexual orientation** – ‘Sexual orientation is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.’<sup>3</sup>

**Gender identity** – ‘Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.’<sup>4</sup>

**Gender expression** – ‘External manifestations of gender, expressed through one’s name, pronouns, clothing, haircut, behaviour, voice, or body characteristics. Society identifies these cues as masculine and feminine, although what is considered masculine and feminine changes over time and varies by culture. Typically, transgender people seek to make their gender expression align with their gender identity, rather than the sex they were assigned at birth.’<sup>5</sup>

**Sex characteristics** – ‘Include primary sex characteristics (eg, inner and outer genitalia and/or the chromosomal and hormonal structure) and secondary sex characteristics (eg, muscle mass, hair distribution and stature).’<sup>6</sup>

**Gay** – ‘Men who sexually, physically and romantically feel attracted to individuals of the same gender.’<sup>7</sup>

**Lesbian** – ‘Women who sexually, physically and romantically feel attracted to individuals of the same gender.’<sup>8</sup>

**Bisexual** – ‘Individuals who sexually, physically and romantically feel attracted to individuals of more than one gender.’<sup>9</sup>

**Trans** – ‘Trans people have a gender identity that is different from the gender assigned at birth. This includes people who might or might not undergo gender reassignment, as well as those who prefer or choose to present themselves differently from the expectations of the gender assigned to them at birth.’<sup>10</sup>

**Intersex** – ‘Intersex people are born with physical sex characteristics that do not fit medical norms for female or male bodies’ or as earlier defined ‘intersex people are born with physical, hormonal or genetic features that are neither wholly female nor wholly male; or a combination of female and male; or neither female nor male.’<sup>11</sup>

## Annex II – Principle of “non-refoulement” and SOGIESC

The **United Nations High Commissioner for Human Rights** emphasized that ‘*the refoulement of asylum seekers fleeing [...] persecution [owing to sexual orientation or gender identity] exposes them to the risk of violence, discrimination, criminalization and the death penalty*’<sup>12</sup> and recommended that States ensure ‘*that no one fleeing persecution on grounds of sexual orientation or gender identity is returned to a territory where his or her life or freedom would be threatened, [and] that asylum laws and policies recognize that persecution on account of sexual orientation or gender identity may be a valid basis for an asylum claim.*’<sup>13</sup>

The **Human Rights Committee** addressed the issue in its **review of Namibia** being concerned that persons requesting asylum on the basis of persecution for sexual orientation or gender identity may not be sufficiently protected against refoulement and call on the State party to include persecution based on sexual orientation and gender identity among the grounds for protection against refoulement.<sup>14</sup> Earlier, the Committee adopted its **views on individual communications** concerning cases when complainants were fearing persecution on the basis of their sexual orientation upon return to their countries of origin.<sup>15</sup>

The **Committee against Torture** also have made **decisions on cases** that addressed specifically risks of torture faced by the complainants because of their sexual orientation in light of the principle of “non-refoulement”.<sup>16</sup>

The **Committee on the Elimination of Racial Discrimination** in its **review of the Netherlands** expressed its concerns about cases of refoulement of asylum seekers fearing persecution because of their sexual orientation (arts. 2, 3 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination) and recommended that the State party take measures of protection with regard to LGBTI persons seeking asylum, because of their particular vulnerability.<sup>17</sup>

The **Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**, setting out its views on prevention of torture and other cruel, inhuman or degrading treatment or punishment towards LGBTI persons, noted that ‘*[LGBTI] migrants often suffer serious mental health effects of ill-treatment in their country of origin. As mental health treatment is virtually non-existent in migration facilities, symptoms are often aggravated and retraumatization often occurs. Those concerns extend to ill-treatment [...] and violation of the principle of non-refoulement.*’<sup>18</sup>

The **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment** in its report recalled that ‘*States are prohibited from returning anyone to a situation where there are substantial grounds to believe that the person may be subject to torture or ill-treatment*’ and added that ‘*the prohibition of refoulement is absolute and an important additional source of protection for [LGBT] persons who fear such treatment in their countries of origin.*’<sup>19</sup> He also called on all States to ‘*comply with the absolute prohibition of refoulement at all times, with special attention to prospective situations of gender-based discrimination and violence that [LGBTI] persons may face.*’<sup>20</sup>

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, alongside with other **Special Procedures** mandate holders, have addressed alleged risk of torture and ill-treatment for asylum seekers who were LGBT persons facing deportation, in several **communications**.<sup>21</sup>

Finally, the **Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity** includes Principle 23 – The Right to Seek Asylum. It is said that ‘*everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.*’ It is also recommended that States ‘*ensure that no person is removed, expelled or extradited to any state where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of that person’s sexual orientation or gender identity.*’

### Annex III – Forms of violence based on SOGIESC that could amount to torture

Forms of violence based on SOGIESC that could amount to torture	References
<p><b>Criminalization of consensual same-sex relations between adults</b></p> <p>As of May 2016, 73 states in the world criminalized same-sex sexual activity, including 45 where the law was applied to women as well as men. The number of UN States (or parts thereof) where the death penalty might have been applied for same-sex sexual acts stood at 13.<sup>22</sup></p>	<p>CAT: <a href="#">CAT/C/NAM/CO/2</a>, ¶¶ 30&amp;31; <a href="#">CAT/C/BDI/CO/2</a>, ¶ 23  SPT: <a href="#">CAT/C/57/4</a>, ¶ 57  SRonT: <a href="#">A/HRC/31/57</a>, ¶ 15; <a href="#">A/56/156</a>, ¶ 20</p>
<p><b>Criminalization of particular forms of gender expression or activities aimed at promoting human rights of LGBTI persons</b></p> <p>As of May 2016, 9 countries criminalized not same-sex sexual activities as such, but either particular forms of gender expression through “morality” laws (7 countries) or dissemination of information about SOGIE through “promotion”/“propaganda” laws (2 countries).<sup>23</sup></p>	<p>SRonT: <a href="#">A/HRC/31/57</a>, ¶ 15</p>
<p><b>Intrusive non-consensual forensic examinations as proof of same-sex sexual acts</b></p> <p>Some countries continue to subject persons suspected of homosexual conduct to anal examinations in order to “prove” their homosexuality. Such examinations have been described as “medically worthless” and condemned by a number of international bodies.<sup>24</sup></p>	<p>CAT: <a href="#">CAT/C/TUN/CO/3</a>, ¶¶ 41&amp;42  SRonT: <a href="#">A/HRC/31/57</a>, ¶ 36; <a href="#">A/HRC/22/53</a>, ¶ 79; <a href="#">A/56/156</a>, ¶ 24  UNHCHR: <a href="#">A/HRC/29/23</a>, ¶¶ 14&amp;37</p>
<p><b>Hate crimes</b></p> <p>Violence motivated by homophobia and transphobia is often particularly brutal, and in some instances characterized by levels of cruelty exceeding that of other hate crimes.<sup>25</sup> In many countries in the world, hate crimes against LGBTI persons are not registered, investigated and/or prosecuted by state authorities due to legislative shortcomings or discriminatory practices.</p>	<p>CAT: <a href="#">CAT/C/HND/CO/2</a>, ¶¶ 49&amp;50; <a href="#">CAT/C/MNG/CO/2</a>, ¶¶ 29&amp;30; <a href="#">CAT/C/ECU/CO/7</a>, ¶¶ 49&amp;50; <a href="#">CAT/C/NAM/CO/2</a>, ¶¶ 30&amp;31; <a href="#">CAT/C/COL/CO/5</a>, ¶¶ 26&amp;27; <a href="#">CAT/C/IRQ/CO/1</a>, ¶ 25; <a href="#">CAT/C/MKD/CO/3</a>, ¶ 13; <a href="#">CAT/C/SRB/CO/2</a>, ¶ 19; <a href="#">CAT/C/BDI/CO/2</a>, ¶ 23; <a href="#">CAT/C/HRV/CO/4-5</a>, ¶ 8; <a href="#">CAT/C/MNE/CO/2</a>, ¶ 23; <a href="#">CAT/C/SWE/CO/6-7</a>, ¶ 15; <a href="#">CAT/C/URY/CO/3</a>, ¶ 21  SPT: <a href="#">CAT/C/57/4</a>, ¶ 58  CRC: <a href="#">CRC/C/IRQ/CO/2-4</a>, ¶¶ 27&amp;28  SRonT: <a href="#">A/HRC/31/57</a>, ¶ 57</p>
<p><b>Corrective rapes</b></p> <p>Corrective rape is a term used to describe cases in which a person is raped to “cure” or “correct” a perceived or actual sexual orientation,<sup>26</sup> gender identity or gender expression.</p>	<p>SRonT: <a href="#">A/HRC/31/57</a>, ¶¶ 51&amp;57; <a href="#">A/56/156</a>, ¶ 17</p>
<p><b>Forced marriage</b></p> <p>Lesbian and bisexual women and trans persons may be forced into marriage by a family or community that hope that the marriage would “cure” them or would at least shelter the family from the shame it would bring upon the family.<sup>27</sup> When lesbian and bisexual women and trans persons have no choice but to marry, the sexual relationships with their husbands are often nothing short of marital rape.<sup>28</sup></p>	<p>SRonT: <a href="#">A/HRC/31/57</a>, ¶¶ 55&amp;57</p>

<p><b>Honour-based violence</b></p> <p>LGBTI persons become also victims of so-called “honour-based” violence, including “honour” killings, carried out against those seen by family or community members to have brought shame on a family, often for transgressing gender norms or for sexual behaviour, including actual or perceived sexual orientation and gender identity and expression.<sup>29</sup></p>	<p>SRonT: <a href="#">A/HRC/31/57</a>, ¶¶ 57, 59-60</p>
<p><b>Conversion therapies</b></p> <p>So-called “conversion therapy,” sometimes known as “reparative therapy,” is a range of dangerous and discredited practices (that could involve electric shock, medication, psychotherapy or “faith healings” and “casting-out demons” in religious settings), that falsely claim to change a person’s sexual orientation or gender identity or expression. Such practices have been rejected by every mainstream medical and mental health organization for decades, but due to continuing discrimination and societal bias against LGBT people, some practitioners continue to conduct conversion therapy. Minors are especially vulnerable, and conversion therapy can lead to depression, anxiety, drug use, homelessness, and suicide.<sup>30</sup></p>	<p>CAT: <a href="#">CAT/C/ECU/CO/7</a>, ¶¶ 49&amp;50; <a href="#">CAT/C/CHN/CO/5</a>, ¶¶ 55&amp;56</p> <p>SPT: <a href="#">CAT/C/57/4</a>, ¶¶ 68–69</p> <p>SRonT: <a href="#">A/HRC/31/57</a>, ¶ 48; <a href="#">A/56/156</a>, ¶ 24</p> <p>UNHCHR: <a href="#">A/HRC/29/23</a>, ¶¶ 14&amp;38</p>
<p><b>Aggravated violence in detention</b></p> <p>LGBTI 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 LGBTI detainees.<sup>31</sup></p>	<p>CAT: <a href="#">CAT/C/HND/CO/2</a>, ¶ 50; <a href="#">CAT/C/ARM/CO/4</a>, ¶¶ 31&amp;32; <a href="#">CAT/C/NAM/CO/2</a>, ¶¶ 30&amp;31; <a href="#">CAT/C/USA/CO/3-5</a>, ¶ 21</p> <p>SPT: <a href="#">CAT/C/57/4</a>, ¶¶ 60–66</p> <p>SRonT: <a href="#">A/HRC/31/57</a>, ¶¶ 13–15 &amp; 34–39; <a href="#">A/56/156</a>, ¶ 23</p>
<p><b>Non-consensual gender reassignment surgeries</b></p> <p>In many countries, transgender and often also intersex persons are required to undergo sterilization surgeries, including the removal of reproductive organs, sterilisation and genital reconstruction, that are frequently unwanted, as a prerequisite to receiving gender reassignment treatment or obtaining legal gender recognition (changing gender marker).<sup>32</sup></p>	<p>CAT: <a href="#">CAT/C/CHN-HKG/CO/5</a>, ¶¶ 28&amp;29</p> <p>SPT: <a href="#">CAT/C/57/4</a>, ¶ 68</p> <p>SRonT: <a href="#">A/HRC/31/57</a>, ¶¶ 48&amp;49</p>
<p><b>Medical interventions aimed at determination of sex without effective consent of the person affected</b></p> <p>In many countries, intersex infants, children and adolescents are subjected to medically unnecessary surgeries, hormonal treatments and other procedures in an attempt to forcibly change their appearance to be in line with societal expectations about female and male bodies. When, as is frequently the case, these procedures are performed without the full, free and informed consent of the person concerned, they amount to violations of fundamental human rights. Profound negative impacts of these often irreversible procedures have been reported, including permanent infertility, incontinence, loss of sexual sensation, causing life-long pain and severe psychological suffering, including depression and shame linked to attempts to hide and erase intersex traits.<sup>33</sup></p>	<p>CAT: <a href="#">CAT/C/FRA/CO/7</a>, ¶¶ 34&amp;35; <a href="#">CAT/C/AUT/CO/6</a>, ¶¶ 44&amp;45; <a href="#">CAT/C/CHN-HKG/CO/5</a>, ¶¶ 28&amp;29; <a href="#">CAT/C/DNK/CO/6-7</a>, ¶¶ 42&amp;43; <a href="#">CAT/C/CHE/CO/7</a>, ¶ 20</p> <p>SPT: <a href="#">CAT/C/57/4</a>, ¶¶ 68&amp;70</p> <p>SRonT: <a href="#">A/HRC/31/57</a>, ¶¶ 48&amp;50</p> <p>UNHCHR: <a href="#">A/HRC/29/23</a>, ¶¶ 14&amp;38</p>

CAT – Committee against Torture

SPT - Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CRC – Committee on the Rights of the Child

SRonT – Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

UNHCHR – United Nations High Commissioner for Human Rights

## Notes

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<sup>1</sup> See: International Lesbian, Gay, Bisexual, Trans and Intersex Association: Nolan H, [United Nations Treaty Bodies: References to sexual orientation, gender identity, gender expression and sex characteristics 2014](#) (Geneva: ILGA, September 2016); International Lesbian, Gay, Bisexual, Trans and Intersex Association: Nolan H, [United Nations Treaty Bodies: References to sexual orientation, gender identity, gender expression and sex characteristics 2015](#) (Geneva: ILGA, September 2016).

<sup>2</sup> Communication No. 338/2008, *Uttam Mondal v. Sweden*, decision of 23 May 2011, [CAT/C/46/D/338/2008](#) (deportation of complainant to Bangladesh, a homosexual person; prohibition of refoulement); Communication No. 562/2013, *J.K. v. Canada*, decision of 23 November 2015, [CAT/C/56/D/562/2013](#) (extradition to Uganda of a gay man; risk of torture upon return to country of origin).

<sup>3</sup> Definition adapted from the [Yogyakarta Principles](#) on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (2007), fn 1.

<sup>4</sup> Yogyakarta Principles (2007), fn 2.

<sup>5</sup> GLAAD, [Media Reference Guide – Transgender Issues](#).

<sup>6</sup> ARC International, the International Bar Association and the International Lesbian, Gay, Bisexual, Trans and Intersex Association, [Sexual Orientation, Gender Identity and Expression, and Sex Characteristics at the Universal Periodic Review](#) (November 2016), p. 15.

<sup>7</sup> Definition adapted from the Yogyakarta Principles.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Transgender Europe: Richard Köhler, Julia Ehrt, [Legal Gender Recognition in Europe](#) (November 2016), p. 9.

<sup>11</sup> Organisation Intersex International Australia, [What is intersex?](#)

<sup>12</sup> *Discrimination and violence against individuals based on their sexual orientation and gender identity*, Report of the Office of the United Nations High Commissioner for Human Rights, Human Rights Council, 29<sup>th</sup> session, [A/HRC/29/23](#), ¶ 65.

<sup>13</sup> Ibid, ¶ 78(i).

<sup>14</sup> HRCtee, Concluding observations, Namibia (2016), [CCPR/C/NAM/CO/2](#), ¶¶ 35&36.

<sup>15</sup> See Communication No. 2149/2012, *M.I. v. Sweden*, views of 25 July 2013 (deportation of a lesbian to Bangladesh; risk of torture and other cruel, inhuman or degrading treatment or punishment upon return to country of origin; prohibition of refoulement), [CCPR/C/108/D/2149/2012](#); Communication No. 1833/2008, *X v. Sweden*, views of 1 November 2011 (deportation of an alleged bisexual person to Afghanistan; risk of torture and death upon return to country of origin), [CCPR/C/103/D/1833/2008](#).

<sup>16</sup> See fn 2.

<sup>17</sup> CERD, Concluding observations, Netherlands (2015), [CERD/C/NLD/CO/19-21](#), ¶¶ 33&34.

<sup>18</sup> Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Committee against Torture, 57<sup>th</sup> session, [CAT/C/57/4](#), ¶ 67.

<sup>19</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 5 January 2016, Human Rights Council, 31<sup>st</sup> session, [A/HRC/31/57](#), ¶ 33.

<sup>20</sup> Ibid, ¶ 70.

<sup>21</sup> See eg UA 13/03/2012, Case No. NLD 1/2012, Torture (alleged risk of torture and ill-treatment for asylum seeker, a young gay man fearing persecution in Uganda, facing deportation); JUA 19/08/2011, Case No. USA 15/2011, Health; Migrants; Torture; Violence against women (alleged torture and ill-treatment towards 16 gay and transgender individuals in immigration facilities, including reported lack of protection from persecution and respect for the principle of non-refoulement for those who risk torture if returned to their home countries on account of their sexual orientation, gender identity or HIV status); UA 23/02/2011, Case No. GBR 1/2011, Torture (alleged risk of torture for asylum seeker, a national of Burundi gay man, facing deportation).

<sup>22</sup> International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A., [State Sponsored Homophobia 2016: A world survey of sexual orientation laws: criminalisation, protection and recognition](#) (Geneva; ILGA, May 2016).

<sup>23</sup> Ibid.

<sup>24</sup> *Discrimination and violence against individuals based on their sexual orientation and gender identity*, [A/HRC/29/23](#), ¶ 37.

<sup>25</sup> Ibid, ¶ 23.

<sup>26</sup> International Gay and Lesbian Human Rights Commission, [Equal and Indivisible: Crafting Inclusive Shadow Reports for CEDAW](#) (2013), p. 39.

<sup>27</sup> See National Center for Lesbian Rights, [The challenges to successful lesbian asylum claims](#), p. 5.

<sup>28</sup> International Gay and Lesbian Human Rights Commission, [Equal and Indivisible: Crafting Inclusive Shadow Reports for CEDAW](#) (2013), p. 26.

<sup>29</sup> *Discrimination and violence against individuals based on their sexual orientation and gender identity*, [A/HRC/29/23](#), ¶ 30.

<sup>30</sup> See eg Human Rights Campaign, [The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity](#).

<sup>31</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, [A/HRC/31/57](#), ¶ 13.

<sup>32</sup> See eg OHCHR, UN-Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO: [Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement](#) (2014), p. 7.

<sup>33</sup> Intersex Awareness Day – Wednesday 26 October, [End violence and harmful medical practices on intersex children and adults. UN and regional experts urge.](#)