

Submission in the UPR review of Somalia

Legal and Statutory framework:

Somalia maintains criminal sanctions against sexual activity between consenting adults of the same sex.

The Penal Code, Decree No. 5/1962 provides:

Article 409 Homosexuality —Whoever (a) has carnal intercourse (b) with a person of the same sex shall be punished, where the act does not constitute a more serious crime, with imprisonment from three months to three years.

Article 410 Security Measures —A security measure may be added to a sentence for crimes referred to in Articles 407, 408, and 409.

In southern parts of Somalia, Sharia law may allow punishing homosexual acts with death penalty or flogging.

International human rights obligations:

Provisions against sexual activity between consenting adults have been found to constitute **a clear violation of international human rights law.**

In *Toonen v Australia*, the **UN Human Rights Committee** in March 1994 confirmed that laws criminalizing consensual same-sex activity violate both the right to privacy and the right to equality before the law without any discrimination, contrary to articles 17(1) and 2 of the International Covenant on Civil and Political Rights.¹

The Committee further considered that such laws interfere with privacy rights, whether or not they are actively enforced, and “run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention” by driving marginalised communities underground.

The UN Human Rights Committee has affirmed this position on many occasions, either urging States to repeal laws which criminalize consensual same-sex activity or commending them for bringing their legislation into conformity with the Covenant by repealing such provisions.² The United Nations Working Group on Arbitrary Detention has also found that arrests for consensual homosexual conduct are, by definition, human rights violations.

This position is consistent with other **regional and national jurisprudence**, including the principles enshrined in decisions of the European Court of Human Rights³ and of the Constitutional Court of South Africa.⁴

The UN Special Rapporteur on the right to the highest attainable standard of physical and mental health recently highlighted that laws criminalising sexual conduct between consenting adults impede HIV education and prevention efforts and are incompatible with the right to health, a position affirmed by UNAIDS.

¹ *Toonen v Australia*, CCPR/C/50/D/488/1992, April 4, 1994.

² See Human Rights Committee Concluding Observations: United States of America, A/50/40, October 3, 1995; Cyprus, CCPR/C/79/Add.88, April 6, 1998; Ecuador, CCPR/C/79/Add.92, August 18, 1998; Chile, CCPR/C/79/Add.104, March 30, 1999; Lesotho, CCPR/C/79/Add.106, April 8, 1999; Romania CCPR/C/79/Add.111, July 28, 1999; Australia, A/55/40, July 24, 2000; Egypt, CCPR/CO/76/EGY, November 28, 2002; Kenya, CCPR/CO/83/KEN, March 28, 2005; United States of America, CCPR/C/USA/CO/3, September 15, 2006; BARabdos, CCPR/C/BRB/CO/3, May 11, 2007; Chile, CCPR/C/CHL/CO/5, May 18, 2007.

³ *Dudgeon v United Kingdom*, Series A no. 45., 1981; *Norris v Ireland*, 1991; *Modinos v Cyprus*, 1993.

⁴ *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others*, 1998.

The Human Rights Committee has also found that the death penalty for homosexual acts is incompatible with the ICCPR:

“The imposition in the State party of the death penalty for offences which cannot be characterized as the most serious...as well as practices which should not be criminalised such as committing a third homosexual act and illicit sex, is incompatible with article 6 of the Covenant [...] The State party should ensure that the death penalty, if used at all, should be applicable only to the most serious crimes...and should be repealed for all other crimes.”⁵;

Also the UN **Commission on Human Rights** in 2005 in the Resolution on the death penalty found that the death penalty for homosexual acts is incompatible with human rights principles: “...ensure also that the notion of “most serious crimes” does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as...sexual relations between consenting adults...” The **UN General Assembly** has affirmed these principles, and called for a global moratorium on the death penalty. In December 2008, the UN General Assembly adopted a resolution on **extrajudicial, summary or arbitrary executions**, which condemned unlawful killings, including “all killings committed for any discriminatory reason, including sexual orientation”. The extrajudicial executions resolution has included “sexual orientation” as a protected ground since 2000.

States’ international obligations to respect the human rights of all persons, irrespective of sexual orientation and gender identity, were recently articulated in the “**Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity**”. The Principles were developed and unanimously adopted by a distinguished group of human rights experts, from diverse regions and backgrounds. These experts included judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, members of civil society and others.

Principle 2 of the Yogyakarta Principles affirms the right of all persons to equality before the law without discrimination on the basis of sexual orientation or gender identity, and specifically confirms the obligation of States to “repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity.”

Principle 6 of the Yogyakarta Principles affirms the right of all persons, regardless of sexual orientation or gender identity, to the enjoyment of privacy without arbitrary or unlawful interference, and confirms States’ obligation to “repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity.”⁶ The Principles also call on States to “ensure that criminal and other legal provisions of general application are not applied to *de facto* criminalise consensual sexual activity among persons of the same sex who are over the age of consent.”

The **UN High Commissioner for Human Rights**, Ms. Navanethem Pillay, in a statement to a High-level Meeting on Human Rights, Sexual Orientation and Gender Identity, United Nations (New York) Thursday, 18 December 2008, affirmed: “The principle of universality admits no exception. Human rights truly are the birthright of all human beings. (...) Sadly, ... there remain too many countries which continue to criminalize sexual relations between consenting adults of the same sex in defiance of established human rights law. Ironically many of these laws, like Apartheid laws that criminalized sexual relations between consenting adults of different races, are relics of the colonial era and are increasingly becoming recognized as anachronistic and as inconsistent both with international law and with traditional values of dignity, inclusion and respect for all... It is our task and our challenge to move beyond a debate on whether all human beings have rights – for such questions were long ago laid to rest by the Universal Declaration – and

⁵Human Rights Committee, Concluding observations of the Human Rights Committee: Sudan, U.N. Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para. 19

⁶ Available in all 6 UN languages at: www.yogyakartaprinciples.org.

instead to secure the climate for implementation... Those who are lesbian, gay or bisexual, those who are transgender, transsexual or intersex, are full and equal members of the human family, and are entitled to be treated as such.”

UN Secretary General Ban Ki-moon also underlined at a high-level parallel event held in conjunction with the Human Rights Council:

“Laws criminalizing people on grounds of sexual orientation and gender identity violate the principle of non-discrimination. They also fuel violence, help to legitimize homophobia and contribute to a climate of hate. No doubt deeply rooted cultural sensitivities can be aroused when we talk about sexual orientation. Social attitudes run deep and take time to change. But cultural considerations should not stand in the way of basic human rights.”

Recommendation:

We therefore recommend that the Human Rights Council, in its upcoming UPR review, urge Somalia to bring its laws into conformity with its international human rights obligations, by repealing all provisions which may be applied to criminalise sexual activity between consenting adults.

This information is submitted jointly by:

- **ARC International**, an NGO with a full-time presence in Geneva which engages with the UN Human Rights Council and related mechanisms to advance respect for human rights, including on the grounds of sexual orientation and gender identity.
- **ILGA** (International Lesbian, Gay, Bisexual, Trans and Intersex Association), a global association of over 600 lesbian, gay, bisexual, transgender and intersex (“LGBTI”) groups in over 110 countries
- **ILGA-Europe**, an NGO with ECOSOC consultative status that is recognized by the EU, COE and OSCE
- **Pan Africa ILGA**