

Submission in the UPR review of: Botswana

Legal and Statutory framework:

Botswana maintains **criminal sanctions against consensual same-sex activity**. Botswana's *Penal Code, Chapter 08:01*, provides:

Section 164. Unnatural offences

"Any person who;

(a) has carnal knowledge of any person against the order of nature;

(b) has carnal knowledge of any animal; or

(c) permits any other person to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years."

Section 165. Attempts to commit unnatural offences

"Any person who attempts to commit any of the offences specified in section 164 is guilty of an offence and is liable to imprisonment for a term not exceeding five years."

Section 167. Indecent practices between persons

"Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence."

Botswana's international human rights obligations:

Criminal provisions against consensual same-sex activity 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 26 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

This position is consistent with other **regional and national jurisprudence**, including decisions of the European Court of Human Rights³ and of the Constitutional Court of South Africa,⁴ as well as with the core commitments to equality and non-discrimination enshrined in the *African Charter of Human and Peoples' Rights*.

States' international obligations to respect the human rights of all persons, irrespective of sexual orientation and gender identity, were recently articulated in the "**Yogyakarta**

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; Barbados, 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.

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, including Africa. 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."⁵

The **UN High Commissioner for Human Rights** has welcomed the Yogyakarta Principles as a "timely reminder" of the basic tenets of universality and non-discrimination, and noted that "respect for cultural diversity is insufficient to justify the existence of laws that violate the fundamental rights to life, security and privacy by criminalizing harmless private relations between consenting adults."⁶

Recommendation:

We therefore recommend that the Human Rights Council, in its upcoming review, urge Botswana to bring its legislation into conformity with its international human rights obligations by repealing all provisions which criminalise consensual same-sex activity.

This information is submitted jointly by:

- **ILGA** (International Lesbian and Gay Association), a global federation of over 600 lesbian, gay, bisexual, transgender and intersex ("LGBTI") groups in over 90 countries;
- **ILGA-Europe**, an NGO with ECOSOC consultative status that is recognized by the EU, COE and OSCE;
- **Pan African ILGA**, which brings together LGBTI activists from 20 countries in Africa and recently elected a board with representatives from all five African regions (Northern, Western, Central, Eastern and Southern): Algeria, Morocco, Senegal, Nigeria, Cameroon, Rwanda, Uganda, Kenya, Namibia, Mozambique and South Africa.
- **LeGaBiBo (Lesbians, Gays and Bisexuals of Botswana)**, whose main aim is to build an independent organisation that promotes the recognition, acceptance and equal protection of all human rights of the LGBTI community in Botswana and to integrate a legal, ethical and human rights dimension into the sexual, reproductive and health rights without discrimination;
- **International Gay and Lesbian Human Rights Commission**, a non-profit NGO with an African regional office which seeks to secure the full enjoyment of the human rights of all people and communities subject to discrimination or abuse on the basis of sexual orientation or expression, gender identity or expression, and/or HIV status;
- **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.

⁵ Available in all 6 UN languages at: www.yogyakartaprinciples.org

⁶ Statement of UN High Commissioner for Human Rights, Launch of the Yogyakarta Principles, 7 November, 2007, United Nations, New York.