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# **Sexual Orientation, Gender Identity and Expression, and Sex Characteristics at the Universal Periodic Review**

**November 2016**



# Partner organisations

## ARC International

Since 2003, ARC International has been advocating for the advancement of lesbian, gay, bisexual and transgender (LGBT) people's human rights at the international level. Registered in Canada, but also with an office in Geneva, ARC has played a key role in advancing LGBT issues within the United Nations (UN) human rights system. It was closely involved in the development of the Yogyakarta Principles in the application of international human rights law in relation to sexual orientation and gender identity.

ARC seeks to facilitate strategic planning around LGBT issues internationally through a key focus on strengthening global networks, producing inside knowledge and critical analysis to assist with implementation of human rights norms and using its consultative status with the UN to enhance access to UN mechanisms. ARC has been successful in engaging UN mechanisms around sexual orientation and gender identity issues while also bringing international support to the work of non-governmental organisations (NGOs) in countries around the world.

## International Bar Association's Human Rights Institute (IBAHRI)

Established in 1947, the International Bar Association (IBA) is the world's leading organisation of international legal practitioners, bar associations and law societies. The International Bar Association's Human Rights Institute (IBAHRI), an autonomous and financially independent entity, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

The IBAHRI holds that when the legal profession is not able to function independently or effectively, this gives rise to human rights violations, impunity and injustice. A leading institution in international fact-finding, the IBAHRI produces expert reports with key recommendations, delivering timely and reliable information on human rights and the legal profession. It supports lawyers and judges who are arbitrarily harassed, intimidated or arrested through advocacy and trial monitoring and provides human rights training and technical assistance for legal practitioners and institutions, building their capacity to effectively promote and protect human rights under a just rule of law.

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

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the world federation of national and local organisations dedicated to achieving equal rights for lesbian, gay, bisexual, trans and intersex (LGBTI) people. ILGA is an umbrella organisation of more than 1200 member organisations presented in six different regions: ILGA-Asia, ILGA-Europe, ILGA-LAC

(Latin America and the Caribbean), ILGA North-America, ILGA-Oceania (Aotearoa/New Zealand, Australia and Pacific Islands) and Pan Africa ILGA.

Established in 1978, ILGA enjoys consultative status at the UN Economic and Social Council (ECOSOC). As the only global federation of LGBTI organisations, ILGA voices its agenda in various United Nations fora. ILGA gives visibility to the struggles of its members lobbying at the Human Rights Council, helping them in questioning their government's record on LGBTI rights in the frame of the Universal Periodic Review and provides support and guidance to member organisations in their engagement with the treaty bodies and special procedures.

## Acknowledgements

This report was written by ARC International Research and Information Officer, Dodo Karsay; IBAHRI Senior Fellow and UN Liaison, Helene Ramos Dos Santos; and ILGA UN Programme Officer, Diana Carolina Prado Mosquera. The writing, development and publication of this report were overseen and supported by Eka Iakobishvili, IBAHRI Programme Lawyer. IBAHRI Director, Phillip Tahmindjis; ARC Executive Director, Kimberley Vance; ARC Geneva Director, Arvind Narrain; ILGA UN Programme and Advocacy Manager, André Du Plessis; and IBAHRI Senior Programme Lawyer, Muluka Miti-Drummond have collectively contributed to editing the report.

The IBAHRI would also like to thank interns Abigail West and Alison Wong for their assistance in compiling research data and sections of this report. ARC International would like to thank Jack Byrne and Katalin Csik for their support in research methodology as well as Professor Fanny Gomez and students Dunia Tegegn, Tyler R Bridegan and Xirong Wang at the Sexual Orientation, Gender Identity, Bodily Diversity and International Human Rights Legal Clinic at Georgetown University for their research work.

Finally, ARC International, the IBAHRI and ILGA would like to thank all individuals and stakeholders who were consulted via telephone, face-to-face interviews or questionnaires for contributing their time to the compiling of data for this report.

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# Acronyms

ACHPR	African Commission on Human and Peoples' Rights
CAT	Committee Against Torture
CCPR	Convention on Civil and Political Rights
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Committee on the Rights of the Child
CRPD	Committee on the Rights of Persons with Disabilities
CSO	civil society organisations
CTA	call to action
ECHR	European Court of Human Rights
ECOSOC	Economic and Social Council
EEG	Eastern European Group
FOE/FOAA	freedoms of expression/freedom of opinion, assembly and association
GRULAC	Group of Latin American and Caribbean Countries
HRCtee	Human Rights Committee
HRD	human rights defender
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
IBA	International Bar Association
IBAHRI	International Bar Association's Human Rights Institute
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
INGO	international non-governmental organisation
L/G/B/T/I	lesbian/gay/bisexual/trans/intersex

NGO	non-governmental organisation
NHRI	national human rights institution
OHCHR	Office of the High Commissioner for Human Rights
SMART	specific, measurable, achievable, realistic and time-bound
S/O/GIE/I/SC	sexual orientation/gender identity/gender expression/intersex/sex characteristics
STJ	<i>Superior Tribunal de Justiça</i>
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council <sup>1</sup>
UPR	Universal Periodic Review
WEOG	Western European and Others Group

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<sup>1</sup> This is not an official United Nations acronym but is used throughout this report to refer to the United Nations Human Rights Council.

# Definitions

The report follows the definitions provided by the Yogyakarta Principles and other documents, especially:

**Bisexual** – Individuals who sexually, physically and romantically feel attracted to individuals of more than one gender.<sup>2</sup>

**Cisgender** – People who are not transgender/trans persons. Cisgender persons' gender identity corresponds with the sex that was assigned to them at birth.<sup>3</sup>

**Gay** – Men who sexually, physically and romantically feel attracted to individuals of the same gender.<sup>4</sup>

**Gender expression (GE)** – 'External manifestations of gender, expressed through one's name, pronouns, clothing, haircut, behavior, 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>

**Gender identity (GI)** – '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>6</sup>

**Gender non-conforming** – 'People whose gender expression is different from conventional expectations of masculinity and femininity... not all gender non-conforming people identify as transgender; nor are all transgender people gender non-conforming... genderqueer or gender-fluid or non-binary describe a person who does not identify with the male/female binary but somewhere outside or between. Some genderqueer people use neutral pronouns like "they" and "them".'<sup>7</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>8</sup>

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2 Definition adapted from the Yogyakarta Principles. Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity ('Yogyakarta Principles') (2007), fn 1. The Principles were developed and unanimously adopted by a distinguished group of human rights experts, from diverse regions and backgrounds, including judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, NGOs and others. The Rapporteur of the process, Professor Michael O'Flaherty, has made immense contributions to the drafting and revision of the Yogyakarta Principles. The Principles are available at: [www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org) accessed 9 September 2016.

3 GLAAD Media Reference Guide – Transgender Issues [www.glaad.org/reference/transgender](http://www.glaad.org/reference/transgender) accessed 9 September 2016.

4 Definition adapted from the Yogyakarta Principles.

5 See n3 above.

6 Yogyakarta Principles (2007), fn 2. See n 2 above.

7 See n3 above.

8 Organisation Intersex International Australia, 'What is intersex?' <https://oii.org.au/18106/what-is-intersex> accessed 9 September 2016.

**Lesbian** – Women who sexually, physically and romantically feel attracted to individuals of the same gender.<sup>9</sup>

**Polysexual** – ‘Individuals who may be attracted to some gender variant people but not have the capability or desire to be with some others’.<sup>10</sup>

**Queer** – Queer can refer to people who are not heterosexual/straight or cisgender or who do not see themselves as belonging to the socially accepted binary categories of sexual orientation and gender identity; rather, queer people see both as a spectrum and identities as fluid. Queer theory challenges heteronormative and cisnormative social norms concerning sexuality and gender, and claims that binary categories are social constructions. Traditionally a pejorative term, queer has been reclaimed by some LGBTQ people to describe themselves. Queer is also used by some as an umbrella term for LGBTQ people.<sup>11</sup>

**Sex characteristics (SC)** – 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).

**Sexual orientation (SO)** – ‘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>12</sup>

**Transgender** – ‘An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe themselves using one or more of a wide variety of terms – including *transgender*. Many transgender people are prescribed hormones by their doctors to change their bodies. Some undergo surgery as well. But not all transgender people can or will take those steps, and a transgender identity is not dependent upon medical procedures.’<sup>13</sup>

Concepts and acronyms, such as SOGI, SOGIE, SOGIESC, LGBT or LGBTI are used throughout the report in a way that is context-specific. For instance, SOGI or LGBT are only used when civil society submissions, state recommendations, UN reports or other documents did not specifically address GE, SC or intersex issues.

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9 Definition adapted from the Yogyakarta Principles.

10 STOP-Homophobia.com [www.stop-homophobia.com/pansexuality.htm](http://www.stop-homophobia.com/pansexuality.htm) accessed 9 September 2016.

11 The definition is based on the one used by ILGA-Europe and GLAAD. For more information see ILGA-Europe at <http://old.ilga-europe.org/home/publications/glossary> and GLAAD at [www.glaad.org/reference/lbg](http://www.glaad.org/reference/lbg).

12 See n2 above.

13 See n3 above.

## Executive summary

This report provides an overview on how the Universal Periodic Review (UPR) has shaped the protection of the rights of lesbian, gay, bisexual, trans and intersex (LGBTI) persons to date. It also addresses the challenges and the ways to try and turn the UPR into a greater mechanism to protect the rights of LGBTI persons on the ground.

As highlighted by a number of human rights defenders, the UPR is an investment into long-term change. While it may not be the best tool for immediate change, it can start the ongoing processes at the national level and open up new avenues for engaging governments on issues related to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC). Over its first two cycles, the UPR has positively evolved as a truly multi-stakeholder process. Both states and civil society have gone through a learning process in order to work not only with their respective peers, but also together. As the UPR enters into its third cycle, expectations arise as the impact of the process on the ground starts to unfold.

The report has been developed in a period of transition for the protection of the rights of LGBTI persons at the international level. A new United Nations (UN) independent expert has just been appointed with the task of advancing the protection of individuals at risk of violence and discrimination on the basis of sexual orientation and gender identity. Concomitantly, the Yogyakarta Principles – which constitute the main international instrument spelling out human rights from a SOGIESC perspective – will soon celebrate their tenth anniversary. An addendum to the Principles is currently being developed by civil society, which will allow them to take stock of the most recent legal developments at international and national levels.

Against this backdrop, the report provides an assessment of the UPR on the protection of LGBTI persons from a threefold perspective. It looks successively at the content of, and acceptance gained by, the UPR recommendations on SOGIESC issues (Chapter 2); civil society participation at the UPR (Chapter 3); and the impact of the UPR on the international legal framework protecting the rights of LGBTI persons (Chapter 4).

Keeping in mind that the UPR was only set up eight years ago, the overall picture looks promising. More and more SOGIESC and LGBTI recommendations have been made over the 22 UPR sessions considered here. If SOGIESC issues are not in the top list of issues addressed, a great percentage of countries putting the LGBTI community in a critical situation have been addressed. More than half of the recommendations made between 2008 and 2015 are close to qualifying as specific, measurable, achievable, relevant and time-bound (SMART) recommendations. Recommended calls to action (CTA) mostly lie in law reform and, to a lesser extent, in awareness-raising and training measures. Great emphasis has been placed on the principle of non-discrimination, the right to security, freedom from arbitrary detention and the right to privacy, through the decriminalisation of consensual same-sex sexual relationships. Most remarkably, the recommendations related to the right to found a family, addressing both partnerships and the right to adopt, constitute the fourth main category of rights addressed.



From a legal perspective, the UPR has not only consolidated the contained international recommendations made by other international, regional and national mechanisms. It has also triggered unprecedented political traction for the recognition of the right to found a family, with the recognition of the diversity of 'family'. It constitutes, in that respect, the most progressive arena for the protection of the LGBTI community at the international level.

From a civil society perspective, the UPR has been a crucial platform to make visible a wide array of human rights violations against LGBTI persons worldwide and to hold states to account. Civil society has claimed space for SOGIESC issues by making submissions, presenting oral interventions, and advocating with governments, embassies and missions. One in every ten civil society submissions in the UPR has included SOGIESC issues, which signals a truly impressive level of engagement. The presence of LGBTI groups in these processes has also been significant, including local LGBTI groups which can take ownership of the recommendations and follow up on the ground. Civil society recommendations have had a really strong impact on state recommendations and they have been reaffirmed in great numbers. At the same time, the report highlights the main shortcomings and challenges ahead for the UPR to gain impact on the ground.

The limited number of recommendations specifically addressing the death penalty based on sexual orientation and the quasi-absence of recommendations addressing torture and other cruel, inhuman or degrading treatment committed against LGBTI persons remain among the most striking gaps in the UPR recommendations. So is the extremely low level of acceptance of decriminalisation of consensual same-sex relationships, with less than six per cent committing to do so, as well as the absence of reference to children and youths in the SOGIESC recommendations.

A number of issues remain to be specifically addressed at the UPR, like gender identity, expression and sex characteristics. It is particularly concerning that states have only made a handful of recommendations on trans issues, despite the abundance of civil society recommendations. Some of the recommendations still use inadequate and offensive language, such as 'transgendered'. If some recommendations have addressed various aspects of economic and social rights, these recommendations remain too few. As to states under review, they rarely report on SOGIESC or LGBTI issues in their national report and infrequently answer the more detailed questions put forward on these topics.

In addition, a common challenge facing all topics at the UPR is the implementation phase. SOGIESC recommendations are no exception here. Civil society has often taken upon itself to monitor the practice of these plans, while in some countries they are part of the state monitoring mechanism. Civil society has also encouraged cooperation with the government, to ensure that they are aware of SOGIESC issues and what steps they need to take. However, more will need to be done to foster the eventual impact. The UPR has a key role in disseminating information on good practices and implementation measures in order to foster a ripple effect. To date, much of the information on positive steps taken is not available.

Overall, the calls to action by recommending states have been rather similar from one country to another and focused on the 'what' to achieve rather than the 'how'. Every country has a different background and a distinct situation. Strategic litigation and advocacy taking place at country level should go hand-in-hand in order to foster SMART recommendations at the UPR. The legal basis of

the UPR recommendations and especially reference to the Yogyakarta Principles will be key in order to provide legal strength and further content to the recommendations and serve the monitoring phase. Key stakeholders like the legal and medical professions will need to be further addressed in the recommendations and involved in their implementation. Civil society inputs need to be considered as a primary source of recommendations for recommending states. Meetings with civil society have demonstrated that these are good opportunities to increase understanding of what is happening in a country and what type of recommendations are most useful.

Those are some of the key observations nurturing the recommendations made below to recommending states, states under review, civil society, legal professions and international legal organisations.

## **Recommendations**

### *1. Recommendations to recommending states*

1. To continue or start making recommendations that are specific, measurable, achievable, realistic and time-bound (SMART) and call for states under review to act in consultation with the LGBTI community.
2. To address not only ‘what’ to achieve, but also ‘how’ to achieve it.
3. To address in their recommendations: sexual orientation, gender identity and expression and sex characteristics (SOGIESC) issues, as well as – both collectively and as individual sub-groups – lesbian, gay, bisexual, trans and intersex individuals, including children.
4. To make sure that the recommendations are in line with terminology used by SOGIESC human rights defenders, using accurate and precise language when referring to SOGIESC or LGBTI issues.
5. To explicitly mention the national, regional and/or international legal basis supporting the recommendations.
6. To make country-specific recommendations, keeping in mind the reality and background of every country.
7. To use the UPR as a forum to address structural root causes responsible for violence and discrimination on the grounds of SOGIESC.
8. To more systematically address the need for states to monitor and collect data on discrimination and violence against LGBTI persons.
9. To ask for the training of key stakeholders on SOGIESC issues, such as legal and health professionals.
10. To change the narrative on LGBTI persons by sharing SOGIESC good practices and the benefits of diversity.

11. To coordinate with other recommending states to ensure that the whole spectrum of SOGIESC issues are covered.
12. To follow up recommendations made with local embassies.
13. To continue engaging in dialogue with states under review.
14. To continue a dialogue with civil society when making recommendations.

## *II. Recommendations to states under review*

1. To hold a dialogue with civil society before presenting the UPR and before deciding (accepting or noting) on the proposed recommendations.
2. To accept SOGIESC recommendations.
3. To note all recommendations that jeopardise the diverse forms of family.
4. To implement SOGIESC recommendations by making them a part of the human rights action plan and/or human rights public policy.
5. To monitor SOGIESC issues in the country and ensure that implementation is carried out in close consultation and with the active participation of civil society, including key stakeholders such as legal and health professionals.
6. To ensure that LGBTI and SOGIESC human rights defenders are not subject to reprisals.
7. To include the developments on SOGIESC and LGBTI issues in their national report.
8. To report on the progress of the recommendations through a voluntary mid-term report that would include the progress on the implementation of SOGIESC recommendations.

## *III. Recommendations to civil society*

### **A. TO NATIONAL NGOs**

1. To build ownership of the UPR process within the LGBTI community through community level consultations and processes.
2. To consider the UPR as a primarily domestic process.
3. To continue making civil society submissions and provide states with solid, evidence-based information.
4. To prepare for the next UPR of a country no later than six months before the deadline for submission of the CSO report.
5. To work in coalitions to ensure that civil society groups are broader in their approach.
6. To propose SMART recommendations to recommending states.

7. To identify three priority advocacy messages with recommending states, based on the identified priorities of each recommending state.
8. To garner support from the international non-governmental organisation (INGO) that best fits one's purposes.
9. To pursue advocacy on multiple fronts at both national and international levels.
10. To consider the UPR advocacy as complementary to other UN and regional mechanisms.
11. To stay committed to the UPR in conjunction with other international recommendations.
12. To see the UPR as an investment in long-term change.

#### **B. TO INTERNATIONAL NGOS**

1. To keep supporting local human rights defenders in all phases of the UPR.
2. To consider reallocating funding to better support domestic advocacy work.
3. To continue ensuring that local civil society actors take the lead on the UPR work.
4. To encourage and support NGO engagement with regional mechanisms in addition to UPR engagement.
5. To make sure that strategic information is easily accessible and available to NGOs.
6. To facilitate capacity-building in Geneva on SOGIESC issues for the missions in order to separately appraise the human rights issues of each of the different groups (L/G/B/T/I).
7. To provide more targeted support to trans and intersex groups engaging with the UPR.

### ***IV. Recommendations to legal professionals and professional legal associations***

#### **A. IN ORDER TO ASSIST IN THE IMPLEMENTATION OF THE UPR RECOMMENDATIONS**

1. To organise and attend training on the principles of equality and non-discrimination and LGBTI issues as part of continuous legal education for all legal professionals.
2. To assist in training communities, law enforcement officers, judges and members of the government on the principles of universality, equality and non-discrimination.
3. To engage in strategic litigation for the protection of LGBTI persons, taking into account international norms and recommendations.
4. To foster legal debate on the legal protection of LGBTI persons, taking into account international norms and recommendations.

## B. IN ORDER TO MEANINGFULLY ENGAGE IN THE UPR AND PREPARE RECOMMENDATIONS

1. To engage with human rights defenders to coordinate strategic advocacy and litigation on SOGIESC issues, in order to propose strong recommendations to recommending states.
2. To organise regional legal symposia in order to exchange with peers from neighbouring countries on good practices for protecting the rights of LGBTI persons.

## Terms of reference, scope and structure of the report

### *I. Terms of reference*

The terms of reference of the report are:

1. To assess the extent to which the UPR complements the current international human rights standards, as set out by the Yogyakarta Principles.
2. To assess civil society engagement and the impact of civil society recommendations on the recommendations made by states at the UPR.
3. To assess the impact of the SOGIESC recommendations and challenges in their implementation on the ground, with a particular focus on the role of the legal profession.
4. To develop recommendations addressing states, civil society and the legal profession in order to strengthen the role of the UPR in advancing the rights of LGBTI persons.

### *II. Methodology*

The methodology used for the research project included a dual process of desk research and consultation through surveys and interviews.

- Desk research: UPR recommendations related to SOGIESC issues were extracted from the UPR Info database, using both topic and keywords searches. There were 85 keywords used in order to gather a comprehensive set of recommendations related to SOGIESC issues. In order to assess ways in which the UPR has advanced human rights of LGBTI persons so far, the UPR recommendations were classified by CTA using the Yogyakarta Principles as a reference framework. The table in Annex 1 presents the list of CTA addressed at the UPR and the corresponding Yogyakarta Principles and articles of the main international treaties. In parallel, a comparative analysis between civil society submissions and UPR recommendations was prepared, in cooperation with the Sexual Orientation, Gender Identity, Bodily Diversity and International Human Rights Law Practicum Seminar at Georgetown University.
- Survey and interviews: an online survey on civil society engagement and the implementation of the UPR SOGIESC recommendations provided a range of 64 responses. The survey was complemented by a number of in-depth interviews with representatives of national or local trans and LGBTI organisations (12), lawyers (11), states (7), international NGOs (2) and UN staff (1). For a detailed breakdown of the participants' background and identities, see Annex 2.

- The participating organisations tried to ensure a balance of interviewees with regards to identities, regions and experiences.

### *III. Scope and limitations*

#### A. THEMATIC SCOPE

The report analyses the recommendations addressing:

- The rights of LGBTI persons.
- Sexual orientation (SO), gender identity (GI), gender expression (GE) and sex characteristics (SC).
- The protection of the family.

#### B. UPR SESSIONS

The report covers Cycles 1 and 2 of the UPR, through to the 22nd session, from 2008 to 2015.

#### C. GEOGRAPHIC SCOPE

The report aims to provide an overview of the impact of the UPR recommendations and obstacles encountered in their implementation in the different regional groups: Africa, Asia-Pacific, Eastern European Group (EEG), the Latin American and Caribbean Group (GRULAC) and the Western European and Others Group (WEOG). For a geographical spread of survey respondents and interviewees by region and country, see Annex 2.

#### D. LIMITATIONS

There are a number of limitations to account for:

- a number of respondents and interviewees started their UPR work in Cycle 2 and their states were still undergoing the review at the time of our research. They were not in a position to comment on the adopted recommendations and the level of implementation;
- the research was conducted during a particularly busy period for SOGIESC advocates: the 32nd session of the Human Rights Council. This may have resulted in some key human rights defenders who engage with the UPR and state representatives not being available to participate in the interviews;
- the survey and the interviews were available only in English and Spanish;
- the number of survey respondents and interviewees places a limit on how general the conclusions can be. This report is more indicative of the key trends and experiences over the two cycles;
- a sizeable group of survey respondents skipped the second half of survey questions, which further limits the conclusions; and

- the participating organisations tried to ensure a balance of interviewees with regards to identities, regions and experiences. However, some gaps remain.

#### *IV. Structure of the report*

The report provides an assessment of the current level of protection of LGBTI persons recommended at the level of the UPR. It also addresses challenges and ways to turn the UPR into an efficient mechanism to protect the rights of LGBTI persons on the ground.

**Chapter 1** – introduces the UPR and the main human rights challenges from a SOGIESC perspective.

**Chapter 2** – provides an overview of the UPR recommendations in relation to SOGIESC issues. It provides disaggregated statistics as to the number, specificity and focus of these recommendations. Statistics are provided by UPR cycle and geographical region.

**Chapter 3** – accounts for civil society engagement, including civil society strategies deployed at the UPR and their impact. It also discusses common challenges.

**Chapter 4** – assesses the impact of the UPR recommendations on the international legal framework. While the UPR recommendations are not legally binding, they are driven by states. As such, they have great potential to shape the development of international human rights law.

**Chapter 5** – provides a number of country examples in order to contextualise successes and challenges in the implementation of the UPR recommendations.

**Chapter 6** – in light of the findings of the report, identifies a number of recommendations addressed to states, civil society organisations (CSOs) and legal professionals in order to strengthen the impact of the UPR in the protection of SOGIESC.

# Illustrative human rights violations faced by LGBTI persons

- Lesbian** ‘... lesbians or women perceived to be lesbian are targeted for murder or “corrective” rapes in which a victim is chosen based on her real or perceived identity’. (South Africa, Cycle 2)
- ‘... the State still did not comply with its obligations to respect, protect and safeguard the rights of lesbians, who were subjected to discrimination, violence and inhuman and degrading treatment. The law allowed family members or legal representatives to send a person to a rehabilitation center on the grounds that they had problems with addiction, thus making it possible to intern lesbians without their consent’. (Ecuador, Cycle 2)
- Gay** ‘Article 319.3 of the Penal Code of Senegal says... anyone who commits an indecent act or act against nature with an individual of his sex... This provision serves the police [with a] base to conduct arbitrary arrests and illegal detentions, often orchestrated without any due process and in violation of the right to privacy. Moreover, these last four years have been particularly tough for the gay community in Senegal’. (Senegal, Cycle 2)
- Bisexual** ‘Older bisexual women, lesbians and couples experience a stark income gap that is the result of years of living at the intersection of compounding inequality caused by occupational segregation, pay inequality, increased caregiving responsibilities that take women out of the workforce, and discrimination based on sexual orientation... After living a lifetime experiencing discrimination based on sex and sexual orientation, these lesbian and bisexual women are increasingly vulnerable and dependent upon federal benefits’. (US, Cycle 2)
- ‘Lesbians, bisexual women, and transgender men face violence, rape, psychological abuse, and confinement and stigmatization in Kyrgyzstan. Abuses may happen at the hands of strangers or family members. Social prejudice and silence mean that survivors find little practical hope of government protection. Police themselves sometimes abuse lesbian and bisexual women and transgender men, and harass organisations that defend their basic rights’. (Kyrgyzstan, Cycle 1)
- Trans** ‘Transgender persons are discriminated against in Section 153 of the Summary Jurisdiction (Offences) Act 8, because it establishes as an offence a man [who] appears in female attire or a woman in male attire... Frequently, cross-dressers are attacked in the streets, especially at night. Police have been accused by cross-dressers of harassment and physical violence. Transgender sex workers mentioned that many police also rape and brutalise them and even extort sexual favours from them. Most of the cases are not reported to the police, due to the lack of confidence in their response and reaction’. (Guyana, Cycle 1)



‘Many trans women in the Philippines face great difficulty in securing gainful employment... Because of this, many trans women in the Philippines are forced into illegal activities like prostitution to survive. Others revert back to niche industries that traditionally employ them such as the entertainment, fashion and beauty salon industries in spite of holding college degrees that over qualify them for such work. Some who are able to secure jobs in call centers, considered the country’s sunshine industry, do so to the detriment of their gender identity and expression. Many call centers have “no-crossdressing” policies that target only transgender women and forbid trans women employees from accessing the facilities of the gender they identify as (eg, female toilets, changing rooms, etc). There are some call centers that have, in fact, blatant discriminatory policies and explicitly do not hire transwomen applicants’. (Philippines, Cycle 2)

‘... First of all there is still a requirement that a person undergoes a complete castration in order to get the correct legal gender’. (Norway, Cycle 2)

**Intersex**

‘A surgical approach to deal with those presenting as “intersex” became standard practice in the 1970s. Genital-normalising treatment, involving both surgery and hormone therapy is, however, often medically unnecessary, not always consistent with the person’s gender identity, poses severe risks for sexual and reproductive health and is often performed without free and fully informed consent’. (New Zealand, Cycle 2)

‘Intersex children have been exposed to non-medically based surgery, which may cause in later life serious mental or physical complications. There is also only very limited support or counseling to the parents of intersex children. So far, no comprehensive, high-quality data on the experiences of intersex persons of the treatment has been gathered’. (Finland, Cycle 2)

# Chapter 1: Introduction

It has been a long journey between the first reference to sexual orientation by the international human rights mechanisms in the early 1990s<sup>14</sup> to the eventual 2016 appointment of an independent expert on the protection against violence and discrimination based on sexual orientation and gender identity.<sup>15</sup> In continuing this journey, it is crucial that states recognise that SOGIESC are intrinsic components of each of us; that we are all equal in our diversity; and that no one should be subject to discrimination or violence on any of these grounds.

At a time when a majority of states claim to value the principles of equality and non-discrimination in the enjoyment of all human rights by their citizens, the evidence has grown of violence committed on the grounds of sexual orientation, gender identity and expression and sex characteristics.<sup>16</sup> The challenge in putting these too-little-understood realities into words increases the sensitive character of the dialogue.

Over this period, the international human rights system has continued to evolve. Created in 2006, the UPR provides a peer-to-peer review mechanism of states' human rights performance. Complementary to independent expert bodies, such as treaty bodies and special procedures, this intergovernmental mechanism has been designed to provide international human rights recommendations with political traction.

In a 2014 survey carried out by ARC International, the LGBTI human rights defenders interviewed were found to consider the UPR process to be one of the most useful United Nations mechanisms. The mechanism was seen as 'allowing far more space for sexual orientation and gender identity (SOGI) issues than any other [international] mechanism and generally providing great opportunities for civil society to engage governments and influence recommendations'.<sup>17</sup>

Against this backdrop, and in preparation for the third cycle of the UPR, the aim of this report is two-fold. First, it aims to assess the extent to which the UPR has, to date, assisted in advancing human rights of LGBTI persons. Secondly, it addresses the challenges encountered in the acceptance and implementation of the UPR recommendations.

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14 See for instance, UNCHR, 'Report of the Special Rapporteur on economic, social and cultural rights, Danilo Türk' (1992) UN Doc E/CN.4/Sub.2/1992/16, para 185: 'To apply discrimination-oriented criteria... it will be necessary to devote increased attention to areas of discriminatory behaviour generally ignored at the international level, in particular the grounds of social status, income level, medical status, age, property and sexual orientation.'

15 UNHRC, 'Protection against violence and discrimination based on sexual orientation and gender identity' (2016) UN Doc A/HRC/RES/32.2.

16 UNHRC, 'Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity' (2015) UN Doc A/HRC/29/23; UNHRC, 'Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity' (2011) UN Doc A/HRC/19/41.

17 Dodo Karsay, *How far has SOGII advocacy come at the UN and where is it heading?* (ARC International 2014), 3.

## 1.1. UPR: a unique human rights mechanism

There are several factors that make the UPR a unique mechanism. Firstly, the UPR is founded on the principle of universality: *all* 193 states are reviewed in an equal manner and the review covers *all* human rights. This is different from the state review by the treaty bodies, which only covers rights outlined in one specific treaty. Therefore the range of issues covered in the UPR are vast, and include refugees and asylum seekers; democracy and rule of law; corruption; the death penalty; torture and ill-treatment; health, education and employment; women's and children's rights; sexual and reproductive rights; the rights of indigenous people, persons with disabilities, racial and ethnic minorities; and many others. Sexual orientation, gender identity and expression and sex characteristics simply take their place alongside other rights.

Secondly, as a peer-review of states by other states, some have expressed an opinion that the UPR is a particularly appropriate channel to make recommendations on the often-sensitive topic of LGBTI persons:

'Since this one is a very controversial issue, we believe that the UPR is the best platform for us to address concerns on this in every country... this is the moment that every country in a non-selective and non-politicised way is open to hear the concerns of the international community and interact with other countries. It is a peer review: everyone is subject to the same procedure, no matter how powerful you are, it does not matter. Every country goes through the same process and is reviewed based on the same issues. We believe that the review is the best platform to raise these concerns in a cooperative way, without raising these kind of defensive reactions that could not lead to the outcome that we expected.' (GRULAC recommending state)

Thirdly, the UPR is periodic and occurs in five-year cycles,<sup>18</sup> following a four-step process:

1. A national report submitted by the state under review itself; a summary of stakeholders' submissions (civil society, academic institutions and national human rights institutions – NHRIs) prepared by the Office of the High Commissioner of Human Rights (OHCHR); and a summary of UN information on the state prepared by the OHCHR are prepared.
2. There is a Working Group session in Geneva,<sup>19</sup> where the state under review presents its perspectives on human rights and holds an 'interactive dialogue' with its peers, going through a series of interventions by governments making recommendations to the state under review. The recommendations received are compiled into a report and the state under review considers them.
3. A few months later, the outcome of the review is adopted during a regular session of the UN Human Rights Council (UNHRC)<sup>20</sup> and the state under review publicly announces whether it 'accepts' or 'notes' each of the recommendations received.<sup>21</sup>

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18 See sessions and calendars at: [www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx](http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx) accessed 9 September 2016.

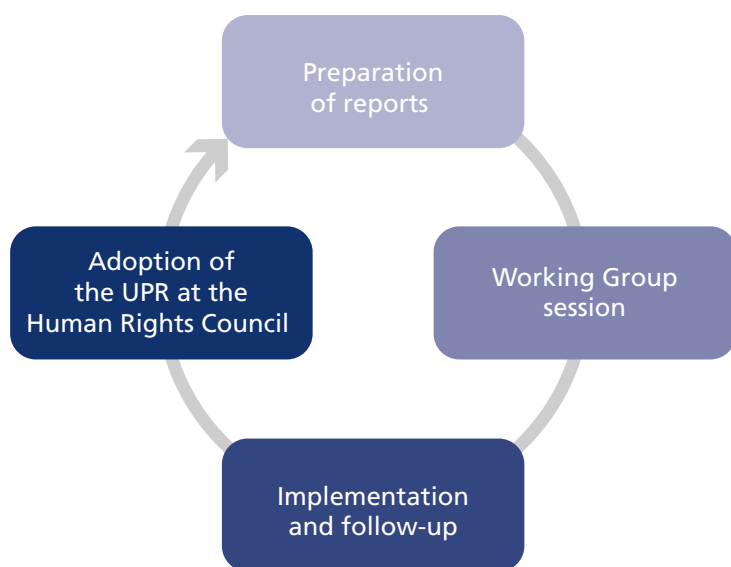
19 The Working Group session is composed of all UN members and the President.

20 Regular sessions of the UNHRC take place three times a year.

21 While it is not formally possible to reject a recommendation, 'noting' is often interpreted in that light. Throughout the different sessions, states have diversified their responses, eg, 'in progress of implementation' for those recommendations that states consider to have already been or are being implemented. Another response by the state is 'partially accepted': in practice, the Secretariat of the Human Rights Council considers these recommendations as 'noted'.

4. Lastly, the all-important phase of the implementation and follow-up on the recommendations begins. This vital phase gives civil society and other stakeholders the opportunity to urge the government to fulfil its promises and monitor progress. Ideally, a state under review will have implemented some of its recommendations before the next cycle begins and will have reported on it by presenting a voluntary mid-term report. However, practice has shown that states sometimes do not report on progress made on all recommendations, either in the voluntary mid-term report or in their next UPR report.

Figure 1: stages of the UPR process



The total number of recommendations made at the UPR is impressive. Over the 22 UPR sessions considered here, states have made 46,584 recommendations on more than 55 different topics. Of these, a total of 1,110 recommendations have been on SOGIESC issues – nearly 2.5 per cent of all those made. On the list of the top issues addressed at the UPR,<sup>22</sup> SOGIESC ranks in 24th position. However, it is noteworthy that more than 150 countries of all regions have received SOGIESC recommendations.

## 1.2. The international legal framework protecting the rights of LGBTI persons

The UPR was set up as a new mechanism aimed at fostering the implementation of states' human rights obligations. As presented in the following paragraphs, by the time the UPR started the interpretation of these obligations had been consolidated by international human rights experts, notwithstanding the polarisation of states around the topic.

<sup>22</sup> List of the five top issues at the UPR: 1. international instruments (20.69 per cent); 2. women's rights (18.41 per cent); 3. rights of the child (17.22 per cent); 4. justice (7.9 per cent); 5. torture and other CID treatment (7.51 per cent). Source: UPR info statistics [www.upr-info.org](http://www.upr-info.org) accessed 9 September 2016.

### 1.2.1. International legal developments for the protection of LGBTI persons

At the core of the international human rights law framework are the principles of equality and human dignity. The 1948 Universal Declaration of Human Rights enshrined in its preamble the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family’ as the ‘foundation of freedom, justice and peace in the world’. All human rights instruments are to be read and interpreted in light of these underlying principles.

Intrinsically linked to these principles, the principle of non-discrimination is embodied in the Charter of the United Nations; the Universal Declaration of Human Rights; and all the core human rights treaties.<sup>23</sup> The specific grounds for discrimination referred to in these instruments are not exhaustive.<sup>24</sup> The drafters intentionally left the grounds of discrimination open by using the phrase ‘other status’.

Sexual orientation and gender identity – like disability, age and health status – have progressively been added to the list of prohibited grounds by treaty bodies, charged with the interpretation of these instruments. Most notably, in 1994, the Human Rights Committee (HRCtee) spelled out in the *Toonen* case<sup>25</sup> the principle of non-discrimination on the ground of sexual orientation. In the general comments<sup>26</sup> adopted since then, the Committee on Economic, Social and Cultural Rights (CESCR);<sup>27</sup> the Committee on the Rights of the Child (CRC);<sup>28</sup> the Committee Against Torture (CAT);<sup>29</sup> and the Committee on the Elimination of Discrimination against Women (CEDAW)<sup>30</sup> explicitly included the prohibited grounds of sexual orientation and gender identity in the implementation and interpretation of the treaty they are respectively tasked to monitor.

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23 Universal Declaration of Human Rights (Art 1); International Covenant on Civil and Political Rights (Art 26); International Covenant on Economic, Social and Cultural Rights (Art 2); Convention on the Elimination of all Forms of Discrimination against Women (Art 1); International Convention on the Elimination of all Forms of Racial Discrimination (Art 1.1); Convention on the Rights of the Child (Art 2); and Convention on the Rights of Persons with Disabilities (Art 2).

24 See n16 above.

25 *Toonen v Australia* Human Rights Committee (31 March 1994) Communication no 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

26 General comments are defined as ‘a treaty body’s interpretation of the content of human rights provisions, on thematic issues or its methods of work. General comments often seek to clarify the reporting duties of state parties with respect to certain provisions and suggest approaches to implementing treaty provisions. Also called “general recommendation” (CERD & CEDAW)’. See *Glossary of treaty body terminology* [www2.ohchr.org/english/bodies/treaty/glossary.htm](http://www2.ohchr.org/english/bodies/treaty/glossary.htm) accessed 9 September 2016.

27 CESCR, ‘General Comment n 22: Right to sexual and reproductive health’ (Art 12) (2016) UN Doc E/C.12/GC/22, para 9. CESCR, ‘General Comment n 20: Non-discrimination in economic, social and cultural Rights (Art 2, para 2)’ (2009) UN Doc E/C.12/GC/20, para 32. CESCR, ‘General Comment n 19: Right to Social Security (Art 9)’ (2008) UN Doc E/C.12/GC/19, para 29. CESCR, ‘General Comment n 15: Right to Water (Arts 11 and 12)’ (2002) UN Doc, E/C.12/2002/11, para 13. CESCR, ‘General Comment n 14: Right to the highest attainable standard of health (Art 12)’ (2000) UN Doc E/C.12/2000/4, para 18. CESCR, ‘General Comment n 18: Right to Work (Art 6)’ (2006) UN Doc E/C.12/GC/18, para 12.

28 CRC, ‘General Comment n 13: Right of the child to freedom from all forms of violence’ (2011) UN doc CRC/C/GC/13, para 72. CRC, ‘General Comment n 4: Adolescent health and development in the context of the Convention on the Rights of the Child’ (2003) UN Doc CRC/GC/2003/4. CRC, ‘General Comment n 3: HIV/AIDS and the rights of the child’ (2003) UN Doc CRC/GC/2003/1.

29 CAT, ‘General Comment n 3 (Art 14)’ (2012) UN Doc CAT/C/GC/3, para 8.

30 CEDAW, ‘General Recommendation n 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (2010) UN Doc CEDAW/C/GC/28, para 18. CEDAW, ‘General recommendation n 27 on older women and protection of their human rights’ (2010) UN Doc CEDAW/C/2010/47/GC.1, para 13.

In so doing, the Committees align the interpretation of the core international treaties with the growing amount of national<sup>31</sup> and regional<sup>32</sup> jurisprudence protecting the rights of LGBTI persons. Looking only at regional and international legal instruments, a number of soft law<sup>33</sup> instruments were adopted, especially in Europe.<sup>34</sup> However, it is only in 2013 that the concepts of ‘sexual orientation’, ‘gender identity’ and ‘gender expression’ were altogether incorporated for the first time in a legally binding instrument, the Inter-American Convention against all Forms of Discrimination and Intolerance.<sup>35</sup>

At the political level, the process has been more hectic. In 2003, the Brazilian government presented to the Human Rights Commission<sup>36</sup> a draft resolution on sexual orientation and human rights. The proposal stirred a debate that became highly contentious, with particular opposition from the Organisation of Islamic Cooperation (then Organisation of the Islamic Conference – OIC). The vote was postponed until the 2004 session of the Commission and Brazil eventually withdrew the resolution. In 2005, 32 states made the first-ever joint statement on sexual orientation and human rights in the Commission on Human Rights.<sup>37</sup>

In 2006, in the context of a fragmented international framework and well-documented patterns of abuses, a number of distinguished human rights experts met in Yogyakarta, Indonesia. These experts consolidated into one document 29 principles built on the interpretation of international human rights law as it applies to people of diverse sexual orientations and gender identities. The Yogyakarta Principles (the ‘Principles’)<sup>38</sup> unfold the implications of the principle of non-discrimination on a comprehensive range of rights, from the most referred to by treaty bodies, such as the right to security, to the less referred to, such as the right to found a family.

Since the development of the Yogyakarta Principles, the political process has continued to unfold. In 2006, 2008 and 2011, three further joint statements were made on sexual orientation, gender

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31 See for instance: STJ–6, Resp No 395.904, Relator: Min. Hélio Quaglia Barbosa, 12 Dec 2005, para 2.2 138 (Brazil). Corte Constitucional, 16 Apr 2008, sent C-336/08 (paras 5.6–5.8); Corte Constitucional, 3 Oct 2007, sent C-811/07 (part 5); Corte Constitucional, 7 Feb 2007, sent C-075/07 (Dr Rodrigo Escobar Gil, dissenting opinion, part 6); Corte Constitucional, 15 May 2005, sent C-373/02 (Colombia). *Pant v Nepal*, Writ No 917 of the Year 2064 BS (2007 AD) (Nepal). *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) at 11, 23 (South Africa). Juzgado de Primera Instancia No 1 en lo Contencioso Administrativo del Departamento Judicial de La Plata [1a Inst], 9/3/2005 ‘Y, E. A. C/ Caja Pervisión y Seguro Médico de la Provincia de Buenos Aires S/ Amparo,’ [www.scba.gov.ar/falloscompl/Infojuba/ContenciosoEsp2/412.doc](http://www.scba.gov.ar/falloscompl/Infojuba/ContenciosoEsp2/412.doc) accessed 9 September 2016 (Argentina).

32 See for instance, *Karen Atala Riffo & daughters v Chile* (Merits, Reparations and Costs Judgment) IACtHR, Series C No 239 (24 February 2012); *Homero Flor Freire v Ecuador*, (Merits report n 81/13), IACHR Case 12.743 (4 November 2014); *Angel Alberto Duque v Colombia*, (Merits Report n 5/14) IACHR Case 12,841 (2 April 2014); *Kozak v Poland* App no 13102/02 (ECHR, 2 March 2010); *Antonio Mata Estevez v Spain*, App no 56501/00 (ECHR, 10 May 2001); *Fernando dos Santos Couto v Portugal*, App no 31874/07 (ECHR, 21 September 2010); *Dudgeon v the United Kingdom*, App no 7525/76 (ECHR, 22 October 1981); and *ADT v the United Kingdom*, App no 35765/97 (ECHR, 31 July 2000). For a comprehensive overview, see Frédéric Edel, *Case law of the European Court of Human Rights relating to discrimination on grounds of sexual orientation or gender identity* (Council of Europe 2015).

33 Soft law can be defined as ‘normative provisions contained in non-binding texts’. See Dinah Shelton, ed, *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (OUP 2000), 292. For instance, most resolutions and declarations of the UN General Assembly, statements, principles, codes of conduct, codes of practice, action plans etc, are soft law instruments.

34 See for instance, 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’ (Luxembourg 2013).

35 Organisation of American States, Inter-American Convention against all Forms of Discrimination and Intolerance (adopted 5 June 2013, not yet entered into force) A-69, Art 1, para 1: ‘Discrimination may be based on nationality; age; sex; sexual orientation; gender identity and expression; language; religion; cultural identity; political opinions or opinions of any kind; social origin; socioeconomic status; educational level; migrant, refugee, repatriate, stateless or internally displaced status; disability; genetic trait; mental or physical health condition, including infectious-contagious condition and debilitating psychological condition; or any other condition’.

36 The UN Commission on Human Rights was a governmental body created in 1946 and tasked with addressing human rights issues and developing standards for states on the matter. It was replaced in 2006 by the UNHRC.

37 Joint statement on sexual orientation and human rights delivered by New Zealand on behalf of 32 states, Commission on Human Rights, March 2005.

38 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (2007).

identity and human rights, supported respectively by 54, 67 and 85 states.<sup>39</sup> These proposals built a momentum for the first SOGI resolution at the Human Rights Council in 2011.<sup>40</sup> This was followed by two consecutive resolutions at the Human Rights Council in 2014<sup>41</sup> and 2016.<sup>42</sup> The latter established the mandate of an ‘independent expert’ on matters of protection against violence and discrimination on the basis of sexual orientation and gender identity.

### 1.2.2. *The unique role of the Yogyakarta Principles in international law*

The Yogyakarta Principles are not as legally binding on states as a treaty would be. Rather, the Principles aim to be a restatement of existing, binding international law. The Principles are just an articulation of rights already held in international law. The Principles may qualify as ‘the teachings of the most highly qualified publicists of the various nations’ and constitute as such, ‘subsidiary means for the determination of rules of law’.<sup>43</sup>

In choosing to employ gender-neutral language, the Principles apply to all people, whether they choose an identity within a binary gender framework or outside of it. The Principles provide comprehensive guidance about the level of protection that states should apply to LGBTI persons. Although the drafters of the Yogyakarta Principles did not specifically address the rights of intersex people, the Principles do identify the right to be free from medical abuses.<sup>44</sup>

From a civil society perspective, the Yogyakarta Principles are a benchmark for the international protection of human rights in relation to SOGIESC. They occupy a unique role as a soft law instrument. At a different scale and with no legal force, a few international statements and declarations were made from the different groups of the LGBTI community. For instance, the 1996 Montreal Declaration was one of the first international declarations from the trans community. In 2013, during The Third International Intersex Forum in Malta, 34 human rights defenders, representing 30 intersex organisations from all continents, adopted a call to action (the ‘Malta statement’).

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39 Joint statement on human rights violations based on sexual orientation and gender identity delivered by Norway on behalf of 54 States, Human Rights Council, December 2006. Joint statement on sexual orientation, gender identity and human rights delivered by Argentina on behalf of 67 states at the UN General Assembly, 2008. Joint statement on sexual orientation, gender identity and human rights delivered by Colombia on behalf of 85 states, Human Rights Council, 2006.

40 UNHRC, ‘Human rights, sexual orientation and gender identity’ (2011) UN Doc A/HRC/RES/17/19. Resolution 17/19 expressed grave concern and acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity. The resolution was passed by a vote of 23 to 19 with three abstentions. It requested the OHCHR to prepare a study on discrimination based on SOGI (December 2011) and a panel discussion (March 2012).

41 UNHRC, ‘Human rights, sexual orientation and gender identity’ (2014) UN Doc A/HRC/RES/27/32. Resolution 27/32 was adopted by a vote of 21 to 14 with seven abstentions. It called on the OHCHR to update its 2011 report with a view to sharing good practices and ways to overcome violence and discrimination on the basis of sexual orientation and gender identity. The report was published in 2015.

42 UNHRC, ‘Protection against violence and discrimination based on sexual orientation and gender identity’ (2016) UN Doc A/HRC/RES/32.2. Resolution 32/2 was adopted by a vote of 23 to 18 with six abstentions. The 2014 and 2016 Resolutions were preceded by two civil society joint statements, which were supported by 500 and 628 NGOs representing all regions.

43 Statute of the International Court of Justice, Art 38.1: ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply... d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’

44 Sheila Quinn, *An Activist’s Guide to The Yogyakarta Principles* (2010), 24-25 [www.ypinaction.org/files/02/85/Activists\\_Guide\\_English\\_nov\\_14\\_2010.pdf](http://www.ypinaction.org/files/02/85/Activists_Guide_English_nov_14_2010.pdf) accessed 9 September 2016.

The Yogyakarta Principles have been referred to at international and regional levels,<sup>45</sup> as well as in national courts, especially in Asia.<sup>46</sup> The Indian<sup>47</sup> and Nepalese<sup>48</sup> landmark decisions highlighted what may well be the greatest success of the Yogyakarta Principles: confirming the integration of the term ‘gender identity’ into international law and the language of human rights.<sup>49</sup>

Given the status of the instrument in all spheres, it is in light of the Yogyakarta Principles that the present report assesses the UPR recommendations related to SOGIESC.

### 1.3. The UPR: an entry point for SOGIESC issues?

At the time the UPR was launched in 2008, the Yogyakarta Principles had just been endorsed (2007). However, the introduction of SOGIESC topics into the UPR has not been easy. In the very first session of the UPR in 2008, seven countries<sup>50</sup> out of the 16<sup>51</sup> that were reviewed received SOGI recommendations.<sup>52</sup> According to one of the INGOs already active at the UPR at that time, the recommendations put to Ecuador were not well received by some states:

‘... I remember the very first time when a sexual orientation recommendation was made to Ecuador. Egypt went ballistic... and the debate carried on late into the evening that they “will never accept any report that includes these words” and almost blocked the adoption of the report because it included a sexual orientation recommendation. And Ecuador said: “this is our report, our UPR process, these are issues we have worked in the past, are working on now and want to work on in the future and we feel comfortable with this recommendation in our report and it should not be struck out”. The recommendation got in. Now in every UPR report there is a paragraph saying that the recommendations in this report are the views of the states proposing them and do not reflect the official position of the Human Rights Council. And that was added by Egypt to make clear that SOGI recommendations should not be seen as endorsement by the Human Rights Council.’<sup>53</sup> (Representative from a human rights INGO – cisgender gay man)

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45 See for instance, UN High Commissioner for Refugees, *Handbook for the protection of women and girls* (UNHCR 2008), 72. At regional level, see *Karen Atala Ruffo & daughters v Chile* (Merits, Reparations and Costs Judgment) IACtHR, Series C No 239 (24 February 2012), paras 87 and 94.

46 See for instance, *Khaki v Rawalpindi*, Supreme Court of Pakistan (12 December 2009). The Supreme Court of Pakistan, following in the footsteps of Nepal, ordered that social security programmes be extended to *hijra* (transgender) Pakistanis, and that the census take a registry of them for this purpose <http://icj2.wpengine.com/wp-content/uploads/2012/07/Khaki-v-Rawalpindi-Supreme-Court-of-Pakistan.pdf> accessed 9 September 2016.

47 *Naz Foundation v Government of NCT of Delhi* (2 July 2009) WP(C) No 7455/2001 (India), 43–44. The Delhi High Court, the court of appeals for India’s capital region relied on the Yogyakarta Principles to rule as to the unconstitutionality of India’s sodomy law.

48 *Pant v Nepal*, Writ No 917 of the Year 2064 BS (2007 AD) (Nepal). When the Supreme Court of Nepal was considering an LGBT rights case, it requested an amicus brief about the Yogyakarta Principles. The decision not only overturned Nepal’s sodomy law but also instituted broad anti-discrimination provisions on the basis of sexual orientation and gender identity, including the creation of a ‘third sex’ for identity documents. It also resulted in a follow-up decision 11 months later ordering the creation of a committee to study legalising same-sex marriage.

49 David Brown, ‘Making room for sexual orientation and gender identity in international human rights law: an introduction to the Yogyakarta principles’ (2010) 4 Michigan Journal of International Law 31, 821–879, 873.

50 Czech Republic, Ecuador, Finland, the Netherlands, Poland and South Africa.

51 Algeria, Argentina, Bahrain, Brazil, Czech Republic, Ecuador, Finland, India, Indonesia, Morocco, the Netherlands, Philippines, Poland, South Africa, Tunisia and UK.

52 The first voluntary pledge on SOGIESC issues was made by Ecuador in the 1st UPR session: ‘In the area of persons with different sexual orientation, implementation of a national system to guarantee equality and non-discrimination’.

53 Other states have agreed on this same point. This is reaffirmed by: ‘Egypt, on behalf of the African Group, argued that it is a violation of the sovereign rights of States to create the impression that all members of the Working Group agree to a recommendation proposed by one State... Thus, the idea that a recommendation should be attributed to a State proposing it was widely accepted, not least because it appeared to be a “brilliant” solution to handling some quite sensitive recommendations on which delegations do not see each other eye to eye, such as the question of sexual orientation’. Allehone Mulugeta Abebe, ‘Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council’ (2009) 9(1) Human Rights Law Review 1, 35.



This is certainly one of the challenges of the UPR system. The UPR tends to be seen as a highly political process, whereby some states seek to impose their own value systems on other countries. At the same time, some states may use the process as a way to non-politicise the issue.

Against this backdrop, the following chapters shed light on the concrete contribution of the mechanism to SOGIESC issues.

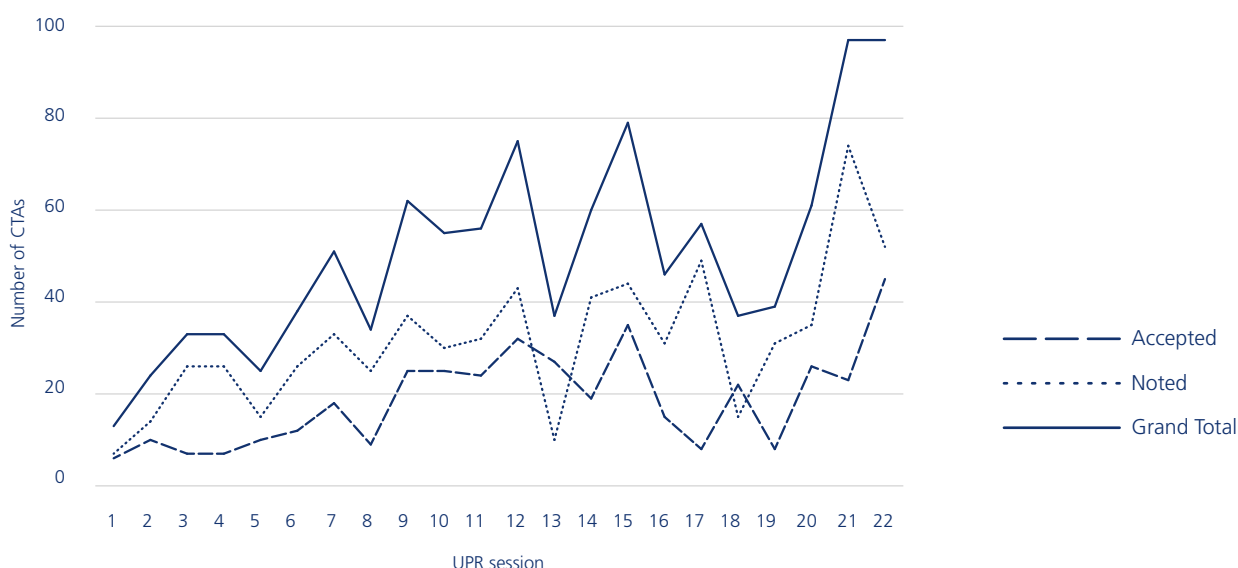
## Chapter 2: State Recommendations and Responses

This chapter presents the recommendations related to SOGIESC and responses made by states during the first two cycles of the UPR, from session one to session 22.<sup>54</sup> Firstly, it takes a closer look at the states under review, emphasising the number of SOGIESC recommendations received; the type of recommendations received; and the responses to these recommendations. Then, it analyses the role that the recommending states have had in the process.

### 2.1. Number of recommendations received

Over eight years, 46,584 recommendations have been made at the UPR.<sup>55</sup> Of these 1,110 were SOGIESC-specific and were made to 158 states under review from all regions.<sup>56</sup> There has been a stark increase in the number of SOGIESC-related recommendations made. For example, during session one in 2008, seven states under review received 13 recommendations. In contrast, during session 22 in 2015, 11 states received 97 recommendations. In Cycle 1 a total of 499 recommendations were made. Since the beginning of Cycle 2 and up until session 22 there have already been 610 SOGIESC recommendations. Based on current trends there will have been an increase of more than 70 per cent in SOGIESC recommendations from the first session of Cycle 1 to the last of Cycle 2. The graph below presents the overall progression in the number of SOGIESC recommendations being made, though the number can vary widely from session to session.<sup>57</sup>

Figure 2: evolution of the SOGIESC recommendations at the UPR (Sessions 1–22)



54 UPR recommendations were extracted using the UPR Info database that includes the classification of the recommendations according to the state under review; the recommending state; the regional group and/or organisation of the state; the recommendation itself; the response by the state under review; the action category; and the UPR session. The recommendations were then classified by group (L, G, B, T and/or I); grounds ('sexual orientation', 'gender identity', 'gender expression' or 'sex characteristics'); the type of obligation put on states (to respect, protect, fulfil). A fourth category was added for hostile recommendations from a SOGIESC perspective; the Yogyakarta Principles under which the recommendation falls; the action recommended to the state under review (a 'call to action') and the international legal basis used in the recommendation.

55 Source: UPR Info database, [www.upr-info.org/database](http://www.upr-info.org/database) accessed 9 September 2016. Data extracted from Sessions 1 to 22.

56 There have also been 12 additional voluntary pledges by states on SOGIESC issues. Voluntary pledges are voluntary commitments that the states make during the Working Group session.

57 An analysis of why there is a variation from session to session is outside the scope of this research, but is presumably due to a combination of other factors such as the mix of states being reviewed at each session and the level of advocacy conducted by civil society to encourage recommendations.

Across regions there is significant variance in both the number of recommendations received and also the percentage of states receiving a recommendation.

Table 1: number of SOGIESC recommendations at the UPR per region

Regional group	Number of states in regional group	Number of states receiving SOGIESC recommendations	Proportion of states in region receiving SOGIESC recommendations	SOGIESC recommendations received	Average number of recommendations received per state under review
Africa	54	40	74 per cent	325	8.13
Asia	53	41	77 per cent	199	4.85
EEG	23	22	96 per cent	215	9.77
GRULAC	33	31	94 per cent	272	8.77
WEOG	30	24	86 per cent	99	4.13
Grand Total	193	158		1,110	7.13*

\* 7.13 is not part of the grand total; it is the average score.

Even though all the regional groups received recommendations, more than 40 countries from Africa and Asia are still to receive their first.

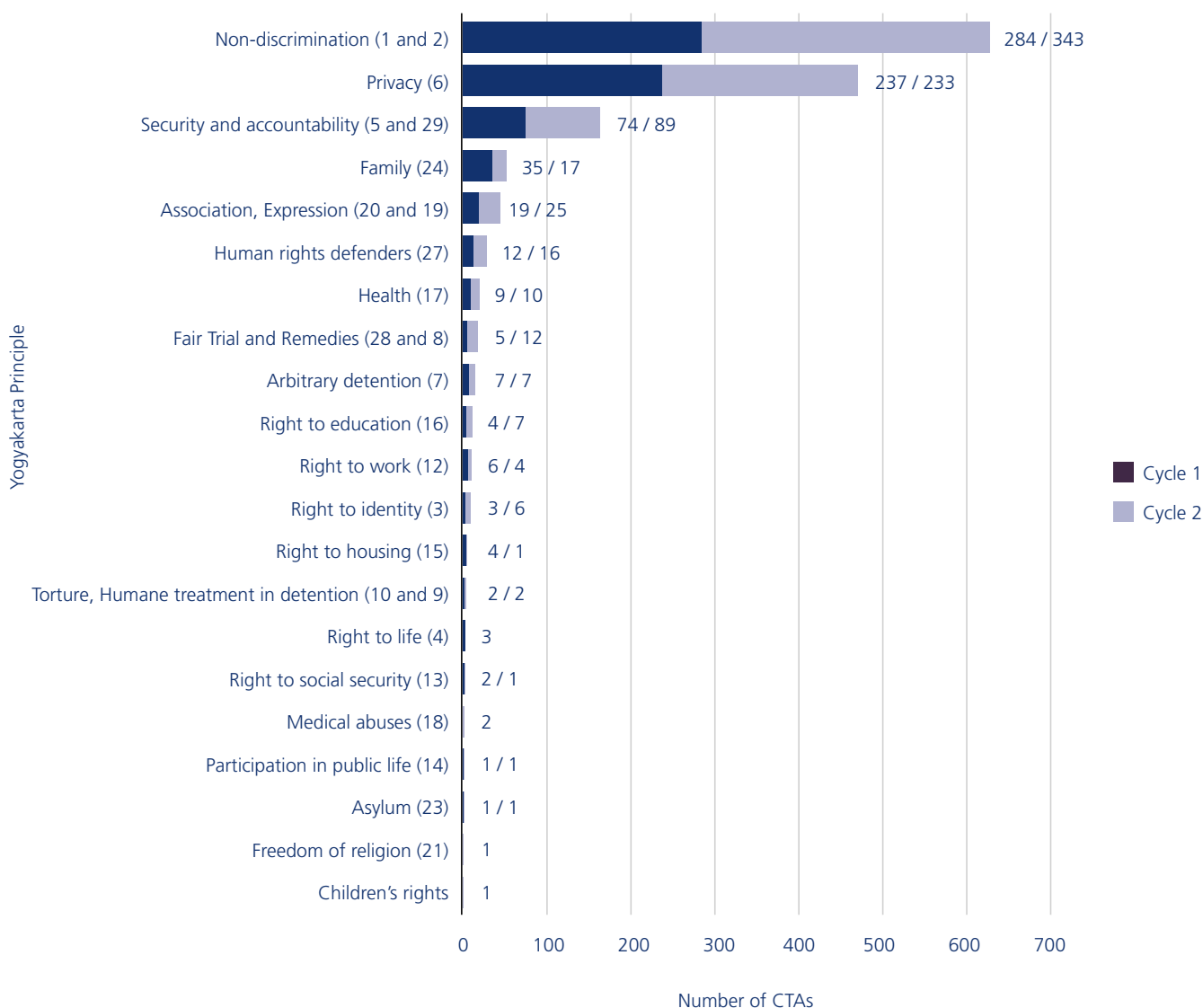
## 2.2. Content of the recommendations

This report classifies SOGIESC recommendations into 58 different Calls to Action (CTAs), identified using the Yogyakarta Principles. Out of 1,110 recommendations, 1,488 CTAs were made by states. Annex 1 provides the list of CTAs with regard to each of the Principles.

### 2.2.1. Classification of the recommendations by rights, using the Yogyakarta Principles

As mentioned earlier, the 29 Yogyakarta Principles cover a wide range of international human rights issues of relevance to LGBTI persons. Throughout both UPR cycles, 12 of the 29 principles have received special attention. Thirteen other principles have been hardly addressed, with less than ten CTAs. Four principles – namely, the right to protection from all forms of exploitation, sales and trafficking of human beings (Principle 11); the right to freedom of movement (Principle 22); the right to an adequate standard of living (Principle 14); and the right to participate in cultural life (Principle 26) – have not been addressed at all.

Figure 3: number of CTAs/Yogyakarta Principles



The three top-priority topics addressed were the principle of non-discrimination, the right to security and the right to privacy, through the decriminalisation of same-sex relationships.

Since the inception of the UPR in 2008, there appear to be 60 states that received direct recommendations to decriminalise same-sex sexual relations between consenting adults. Five states (Seychelles, São Tomé & Príncipe, Palau, Nauru and Mozambique) announced changes to their penal codes around the period of their second UPR reviews between 2014 and 2016 (bringing the number of criminalising states from 77 in 2014 to 72 in 2016).

Conversely, among the 13 states that have the death penalty for same-sex acts,<sup>58</sup> only Iraq, Mauritania, Nigeria and Qatar have received a specific recommendation to abolish the death penalty on the grounds of SOGI.<sup>59</sup> Afghanistan, Iran, Iraq, Pakistan, Qatar, Somalia, Sudan, Syria, United Arab Emirates and Yemen have received general recommendations on abolition of the death penalty.

58 Aengus Carroll, *State Sponsored Homophobia Report* (ILGA 2016), 37.

59 12 states in northern Nigeria apply the death penalty. For further information, see *ibid.*

Saudi Arabia has been the only state that has not received either a general or specific recommendation in this regard.

There are a number of reasons that may explain why certain issues are not, or not commonly, addressed by recommending states. First, states routinely make recommendations that are in line with their foreign policy priorities. Civil society may be raising issues that are different from these priorities, but they are often met with a lack of flexibility in this regard:

‘I had a conversation with two staff members of embassies in Singapore and they say that they recognise there are many issues that need to be addressed, but at the international level and the country level it is very hard for them to domestically justify raising issues other than on criminalisation.’ (Bryan Choong, Oogachaga & Pink Dot joint team, Singapore – cisgender gay man)

‘... I remember that we met [WEOG country], but they said immediately that their key priorities are working with our government about women and children’s rights. It is like they closed the door. But it challenged us to try. For example, I suddenly picked up my passport and showed them, but said “I identify as intersex and as a female also”. And I said “the current situation is that our government defined me as a male, which is an issue with my passport”. Even if we did not receive any recommendation, we changed the way diplomats see our country.’ (Nada Chaiyajit, Togetherness for Equality and Action, LGBTI representative of the Thai CSO Coalition for the UPR – intersex transwoman)

Secondly, states might be reluctant to recommend actions to states under review that they have not implemented themselves:

‘We do not ask for things that have not been accomplished in our domestic law.’ (WEOG recommending state)

This approach can create a vicious cycle whereby issues with which states have a bad record will continue to be unaddressed. In particular, this has been the case with trans and intersex issues:

‘One thing we get from states in relation to gender identity issues is that their own laws are not perfect and they do not feel they can hold other states to account on issues they have not yet addressed. That is a bit of a flawed premise, because it means the issues only a few states have addressed will become a repeating, systemic problem that nobody is raising, because nobody has got it right. So the most marginalised will get the least attention. So what we tried to recommend to states is that the premise of the UPR is that nobody’s human rights record is perfect; that everybody is striving to do better. So it is perfectly fine for a state to say “look we have challenges working on this ourselves, but we are working on it and would like to know what you are doing, too”.’ (Representative of an human rights INGO – cisgender gay man)

Thirdly, states may prefer to have a standard recommendation:

‘I have still been frustrated that even when NGOs submit nuanced recommendations, states would come out with one standard line that “we recommend that you decriminalise or include these grounds in anti-discrimination law”. States still tend to go for the easier recommendations or those that are more familiar to them, like decriminalisation, rather than access to healthcare or

discrimination in education or other contexts. One thing we are encouraging is that if states are serious about putting more focus on implementation in the third cycle, then they have to be as concrete as possible in terms of how they frame the recommendations. We propose using specific, measurable, achievable, relevant and time-bound (SMART) recommendations'. (Representative of an human rights INGO – cisgender gay man)

Fourthly, some recommending states have a long-term strategy in mind and may want to stick to the steps they envisioned when putting forward recommendations:

'My discussion with... diplomats has suggested that focussing on the legal framework and the protection of basic individual rights for LGBT people is a political strategy, as anti-discriminatory laws are seen as a first step before changing attitudes and tolerance in society. In short, demands for the individual safety of persons regardless of their sexual preferences is easier to promote than initiatives that might be interpreted as "pro-gay" such as information campaigns or positive rights, eg, the right to marry.'<sup>60</sup>

Fifthly, states may not have received any suggested SOGIESC recommendations from civil society, their local embassy and/or other stakeholders. As states are heavily reliant on information from civil society when it comes to these issues, this may also result in no recommendations being made (see Chapter 3).

Sixthly, states might have received the suggestion from civil society not to address a specific issue; ie, some countries are not at the stage where a specific law will be repealed, therefore civil society suggests having specific SOGIESC recommendations on other issues, which will create an atmosphere that will eventually lead to the repeal or modification of the law in question.

'There are not thematic priorities as such, but where there exists criminalisation, that is something that we tend to recommend on, but equally and based on the suggestions and recommendations that are provided to us by civil society. If, for example, civil society tells us that making a recommendation on decriminalisation is not going to be as helpful as another recommendation – like on training – then we will take also that into consideration.' (WEOG recommending state)

Seventhly, some recommending states have committed to make just two recommendations per country<sup>61</sup> and finally, when there is an urgent matter, such as a coup d'état or a refugee crisis, states will most likely give priority to those issues rather than SOGIESC.

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60 Mari Dahl Schlanbusch, *Sexual Orientation and Gender Identity Rights in the Universal Periodic Review* (School of Global Studies, University of Gothenburg and others 2013), 41.

61 Joint Statement on the Universal Periodic Review (2012). Item 6, General Debate. Human Rights Council, session 19.

### 2.2.2. Quality of the SOGIESC recommendations

UPR recommendations should be SMART. More than 80 UN member states have committed themselves to make SMART recommendations in order to have greater potential for effective implementation and impact on the ground.<sup>62</sup>

UPR Info classifies the recommendations in five different types of actions, based on the action verb<sup>63</sup> used by states:

1. minimal action;<sup>64</sup>
2. continuing action;<sup>65</sup>
3. considering action;<sup>66</sup>
4. general action;<sup>67</sup> and
5. specific action.<sup>68</sup>

Following the UPR Info classification, one third of all UPR recommendations qualify as specific (type 5). The number of specific SOGIESC-related recommendations is much higher, at 55 per cent. This means that regardless of the relatively poor levels of implementation,<sup>69</sup> more than half of them are possible to measure, implement and follow up. Unfortunately, according to the survey 45 per cent of the respondents have noted that their government has taken no action to implement SOGIESC recommendations.

The classification of the recommendations by CTAs made in preparation for this report confirms and refines this overview.

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62 Joint Statement on the Universal Periodic Review (2013). Item 6, General Debate. Human Rights Council, session 22.

63 An action verb refers to the verb indicating the main action recommended to the state under review: eg, ensure that rights of LGBTI persons are respected or consider the revision of the law.

64 Example of an action 1 recommendation: UK recommended Sweden to '[s]hare national best practice and policies on ensuring non-discrimination, including proposals such as to include sexual orientations in the Constitution, with states and relevant international organisations'.

65 Example of an action 2 recommendation: Thailand recommended Guyana to '[c]ontinue its effort in eliminating discrimination against LGBT [persons] starting with the review of its legislation'.

66 Example of an action 3 recommendation: Mexico recommended Malawi to '[c]ompletely overhaul the legal system to ensure the compliance of the Constitution and all other domestic legislation with international human rights obligations and standards and, in this regard, amend and/or derogate all legal provisions, including customary law, which result in discrimination, especially on the basis of sexual orientation'.

67 Example of an action 4 recommendation: the Netherlands recommended Romania to '[a]dopt appropriate measures to counter discrimination of LGBT people and to develop policies in order to integrate existing legislation against discrimination at various societal levels in Romania'.

68 Example of an action 5 recommendation: Colombia recommended Belize to '[a]djust immigration laws to international standards to which Belize is a party, to avoid discrimination against vulnerable groups in particular persons with cognitive disabilities and LGBT'.

69 See Chapter 5.

Table 2: top 10 CTAs at the UPR

Call to action (CTA)	No of CTAs
Decriminalising consensual same-sex relationships (specific recommendation)	294
Adopting measures preventing non-discrimination and/or violence against LGBTI persons (general recommendation)	172
Adopting anti-discrimination law protecting LGBTI persons (specific recommendation)	211
Abrogating, repealing or reviewing discriminating/restrictive laws against LGBTI persons (general recommendation)	158
Adopting awareness-raising and education measures on LGBTI persons and SOGIESC issues (general recommendation)	54
Investigating and prosecuting authors of crimes committed against LGBTI persons	68
Adopting hate crime or hate speech legislation/legislative measures to guarantee the security of LGBTI persons (specific recommendation)	47
Adopting laws in order to address discrimination and violence against LGBTI persons (specific recommendation)	38
Training of law enforcement officers and/or judicial officers on LGBTI persons on SOGIESC issues	36
Strengthening recognition and implementation of international instruments protecting the rights of LGBTI persons and/or related to SOGIESC (specific recommendation)	27

For a general overview, the recommendations that have been made during both cycles have produced:

- **General recommendations:** 468 CTAs addressed in general terms the universal enjoyment of human rights, equality and non-discrimination and protection from violence for the protection of LGBTI persons. Among the wide spectrum of recommendations addressing violence against LGBTI persons, recommending states have, for instance, called upon the state under review to ‘strengthen protection for LGBT persons’, or ‘combat discrimination or violence based on sexual orientation and gender identity’. Also, in general terms, states under review were recommended inter alia to investigate and prosecute the authors of crimes committed against LGBTI persons (68 CTAs) or ‘take steps’, ‘strengthen’ and ‘adopt norms’ to bolster freedom of association and expression of LGBTI persons (39 CTAs). These recommendations did not propose any specific measures to combat discrimination, ensure equal treatment or prevent violence against LGBTI persons. Such recommendations are not SMART and are difficult to implement and monitor.
- **Robust and SMART recommendations:** more than one third of the CTAs addressed a specific action. For instance, specific recommendations have been made to ‘amend the Criminal Code to explicitly prohibit incitement to hatred, violence or discrimination against persons on the basis of sexual orientation and gender identity’ (Ireland to Cyprus); or ‘adopt an anti-discrimination law that would ensure equal treatment and non-discrimination on any grounds, including sexual orientation and gender identity’ (Slovenia to Poland).
- Another example is recommendations that are country-specific; eg, ‘Ensure the safety [of the LGBTI persons] during public events such as the Belgrade Parade’ (Austria to Serbia); ‘Facilitate the registration and activities of NGOs specialised in issues of sexual orientation and gender identity’ (Spain to Mozambique). Such relevant and specific recommendations are useful for civil society to make the state accountable and improve the specific human rights situation in the country.



- The recommendations on economic and social rights – despite being very few – addressed a number of economic and social challenges faced by LGBTI persons, such as the right to ensure non-discrimination in access to employment (nine CTAs); ensure protection in the workplace (one CTA); ensure non-discrimination in access to adequate housing and prevent forced evictions, as well as the threat of forced evictions, on the basis of sexual orientation and gender identity (five CTAs).

Table 3: examples of links between the Yogyakarta Principles and the UPR recommendations

Principle 17: Right to the highest attainable standard of health	Principle 10: Right to freedom from torture and cruel, inhuman or degrading treatment or punishment	Principle 24: Right to security
<ul style="list-style-type: none"> <li>• ‘Take all necessary measures to ensure enjoyment to the highest attainable standard of health, without discrimination on the basis of sexual orientation or gender identity.’ Portugal to Swaziland</li> <li>• ‘Treat equally same-sex relationships with opposite-sex relationships, including the right to equal consideration for adoption and access to reproductive medicine.’ The Netherlands to Austria</li> </ul>	<ul style="list-style-type: none"> <li>• ‘Ensure, in accordance with articles 5 and 7 of the ICCPR [International Covenant on Civil and Political Rights], freedom from torture, while in detention, for all, regardless also of sexual orientation.’ Denmark to Iran</li> <li>• ‘Launch an awareness raising programme on protection of enjoyment of human rights by persons of minority sexual orientation and gender identity for law enforcement personnel as part of a wider comprehensive campaign to prevent and punish any acts of ill-treatment in detention against persons perceived as belonging to these groups.’ Czech Republic to Romania</li> </ul>	<ul style="list-style-type: none"> <li>• ‘Amend the Criminal Law to recognize hate speech against lesbian, gay, bisexual and transgender persons.’ Norway to Latvia</li> <li>• ‘Implement policies and programs that promote tolerance and non-discrimination against LGBTI persons and to guarantee the compliance with the current norms in order to punish offences and violence motivated by prejudices.’ Uruguay to Honduras</li> </ul>

#### ADDRESSING THE ‘WHAT’ AND THE ‘HOW’

Notwithstanding a very limited number of recommendations that can be implemented directly; for example, ‘free all persons imprisoned on the grounds of their sexual orientation’,<sup>70</sup> most recommendations will leave a greater or lesser margin of appreciation to the state under review in the implementation of these principles. In the case of the SOGIESC recommendations, it is noticeable that a great number of the UPR recommendations do suggest a specific type of action. Recommending states have thus referred primarily to law reform. To a lesser extent, they have called for the state under review to adopt awareness-raising campaigns or training programmes or develop a social dialogue (133 CTAs). Sporadically, states have recommended collecting data on abuses; establishing a monitoring mechanism for violations against LGBTI persons; or allocating financial resources in investigation authorities. Such implementation and monitoring measures are likely to foster the realisation of the rights on the ground, for example, ‘Adopt comprehensive law on non-discrimination based on international human rights standards, including gender identity and expression, and sexual orientation, which would enhance and specify the protection provided in article 321 of the Penal Code, and *which would create an independent body to promote non-discrimination and equality, and monitor compliance with this law by public and private actors*’ [emphasis added]. (Ireland to Honduras)

70 Belgium to Senegal.

### States have used human rights language and referred to human rights instruments

Referring to recommendations made by prior human rights mechanisms and mentioning the relevant international standards provides legal strength and further content to a recommendation. The Yogyakarta Principles in particular provide key benchmarks for the implementation of the recommendations. As further analysed below,<sup>71</sup> only seven per cent of the recommendations refer to either international law in general terms or a specific instrument. Among them, the Yogyakarta Principles were referred to only 17 times in Cycle 1 and twice in Cycle 2, for example; ‘Apply the Yogyakarta Principles as a guide for new policies in the area of lesbian, gay, bisexual and transgender rights’ (the Netherlands to Serbia).

‘The fact that the Yogyakarta Principles are mentioned in one of the recommendations made to our country is important and valuable. We as civil society have used these principles in the past: it is a benchmark that the state can use and it is useful for us when engaging with the state.’ (Rossina Guerrero Vasquez, PROMSEX, Peru – cisgender straight woman)

### States have integrated human rights principles into the recommendations

Among core human rights principles, non-discrimination and accountability have been central to the SOGIESC recommendations that have been made by states at the UPR. Conversely, too few recommendations have addressed the participation of the LGBTI community in, for instance, the development of a national action plan against discrimination or the debate on law reform. For example, ‘Draft and adopt a countrywide anti-discrimination strategy, in close cooperation with all relevant stakeholders, including with regard to sexual orientation and gender identity, and the Roma community’ (Germany to Bosnia-Herzegovina); and ‘Draft, in consultation with civil society, and adopt a law on gender identity for transgender persons in which their right to identity is recognised among other civil and political rights’ (Spain to El Salvador).

### States have addressed the duty-bearers, rights-holders and key stakeholders

In order to address both the ‘what’ and the ‘how’, a human rights-based approach directs recommending states to identify ‘who’ is addressed; ie, rights-holders, duty-bearers and key stakeholders. To date, some attention has been brought by recommending states to the key stakeholders, such as law enforcement officers and legal professionals. Conversely, very little attention has been brought to health professionals. For example, ‘Adopt all necessary measures to reduce prejudice and discrimination against the LGBT community, including through the training of the police, prosecutors and judges to respond effectively to violence against LGBT activists and to ensure the adequate protection of LGBT persons in the workplace’ (Ireland to Serbia); and ‘Continue innovative education programs recognising sexual diversity and adopt a health policy that further enhances awareness on, and the sensitising of, sexual orientation and gender issues amongst health personnel’ (the Netherlands to Uruguay).

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71 See Chapter 4.

## 2.3. Classification of the recommendations by groups (LGBTI) and grounds (SOGIESC)

UPR recommendations were classified by group (L, G, B, T and/or I) and ground ('sexual orientation', 'gender identity', 'gender expression' or 'sex characteristics'). The analysis below includes only the number of recommendations that explicitly addressed the group(s) or ground(s).

### 2.3.1. General trends by cycle

Overall, we see a clear trend in the evolution of terminology. There has been a gradual shift from 'LGBT' to 'LGBTI' and a growing number of recommendations on the particular issues faced by LGBTI persons. While it is commendable that states are extending the scope of their recommendations to trans and intersex people, we often see a clustering of 'LGBTI persons' as one homogenous group. Issues relating to specific groups, namely L, G, B, T or I have been scarcely addressed. This results in certain groups, particularly trans and intersex people, being left off the radar. Broad LGBTI/SOGIE(SC) recommendations may not always be useful or effective in addressing the issues that trans and intersex people face.

Figure 4: reference to groups (LGBTI) in the UPR recommendations by UPR Cycle

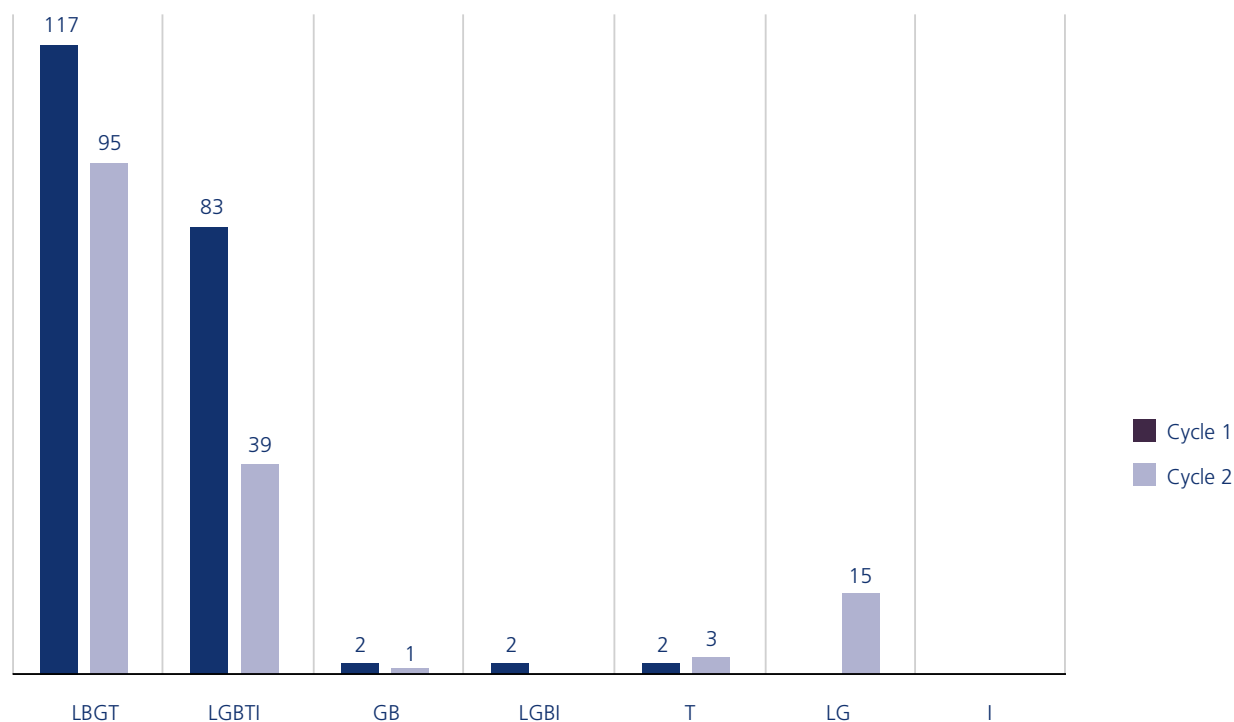
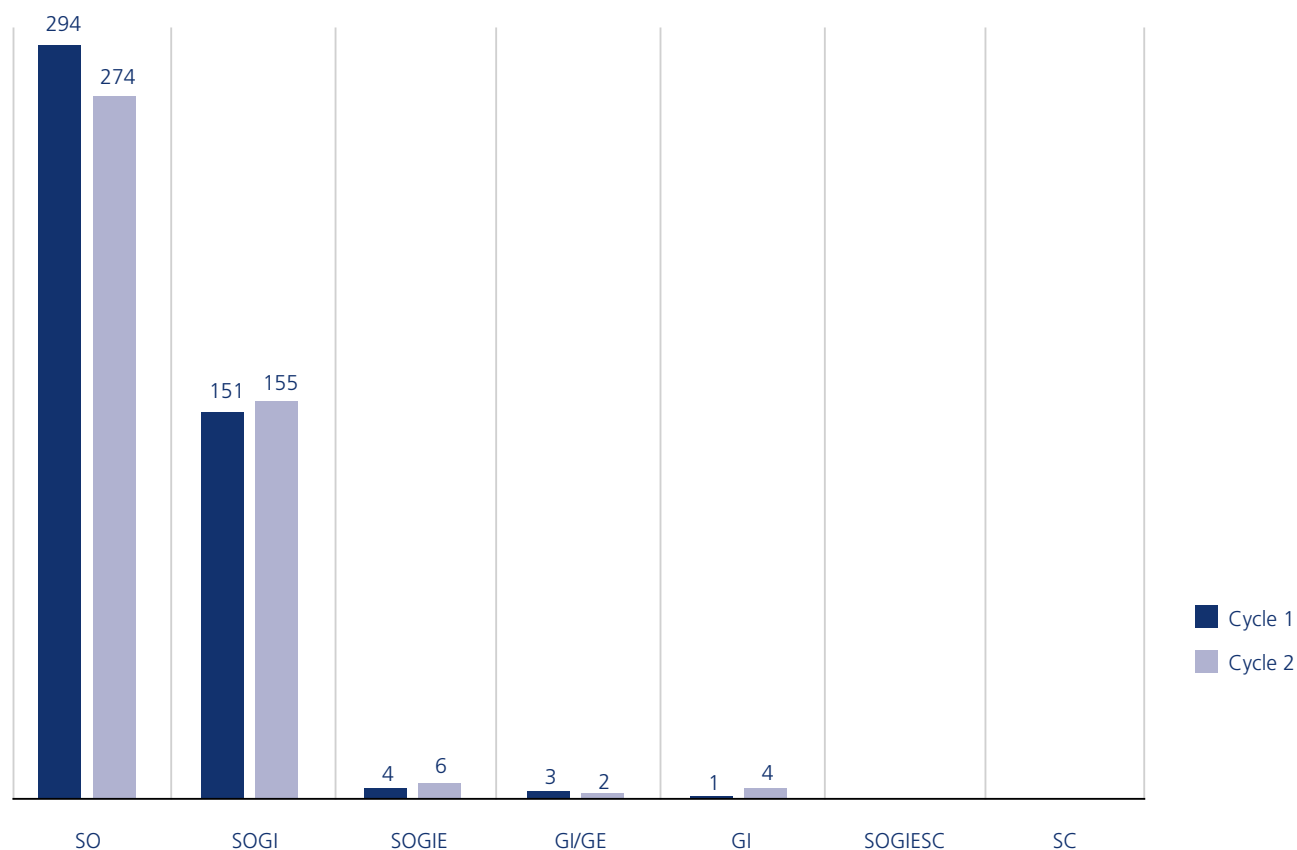


Figure 5: reference to grounds (SOGIESC) in the UPR recommendations by UPR Cycle



There is an obvious need to increase the number of recommendations that specifically discuss issues relevant for trans and intersex people.

### 2.3.2. Gender identity, expression and trans issues

During the first two UPR cycles, only ten recommendations were specifically about gender identity and/or gender identity and expression.<sup>72</sup> Although it is commendable that legal gender recognition was raised in the few gender identity recommendations, this one issue is hardly representative of the global movement.

<sup>72</sup> The two following recommendations were made in Cycle 1: New Zealand to Germany: 'Modify promptly the law on transsexuality to facilitate registration of a change of gender on official documents, without requiring transsexuals to divorce, in line with the decision of the Constitutional Court'; Spain to Costa Rica 'Bearing in mind the protective and advanced nature of the legislation against discrimination, intensify measures intended to protect free sexual orientation and sexual identity through specific educational initiatives and awareness-raising for all society, to facilitate documentation for transsexual people in line with their identity and to guarantee access to public services without discrimination'. The following recommendations were made in Cycle 2: Australia to Poland: 'Adopt regulations recognising the rights of same-sex couples and of self-defined gender or transgender persons'; Spain to El Salvador: 'Draft, in consultation with civil society, and adopt a law on gender identity for transgender persons in which their right to identity is recognised among other civil and political rights'; Madagascar to Honduras: 'Adopt a law on gender identity allowing legal recognition in the national register of persons in accordance with their sexual orientation and image of the persons concerned'; Denmark to Honduras: 'Ensure that the Gender Identity Law that is currently before Congress is adopted and implemented'; Luxemburg to United Kingdom, 'include "gender reassignment" as a ground for protection in domestic anti-discrimination legislation'; Greece to Spain 'Incorporate in the legislation the combat against discrimination based on gender identity or expression'; Belgium to Norway 'protect gender identity and expression under anti-discriminatory laws and policies'; Poland to United Kingdom 'Recognise gender identity as possible ground for discrimination and gender identity and sexual orientation as an aggravating circumstance for hate crime'; Iceland to Iran 'Outlaw forced or coerced sterilization, sex reassignment surgeries and reparative therapies imposed without free and informed consent'; France to the Netherlands 'Take further measures to combat discrimination in the labour market and combat in particular discrimination based on ethnic origin and discrimination targeting transgender people'.

No specific obstacles to access to legal gender recognition encountered by trans persons have been addressed; for example, requirements such as forced sterilisation, mandatory divorce, psychiatric diagnosis and forced psychiatric institutionalisation for the purpose of diagnosis.

‘The government has not followed up on its commitment to engage with our communities on SOGII/SOGIESC issues. Many of our recommendations were about trans or intersex issues. Because [WEOG country] had recently introduced marriage equality it was congratulated on this with no comments made about much higher priority human rights issues for our communities. Other countries appeared reluctant to hold [WEOG country] to account in areas where they too have been slow to address human rights violations against intersex or trans people.’ (Queer trans man in the WEOG region)

Another shortcoming has been the lack of consistency in the terminology used when referring to gender identity and expression. For instance, states have used terms such as ‘transgendered’,<sup>73</sup> ‘transvestite’,<sup>74</sup> ‘transsexuality’,<sup>75</sup> ‘transgender’ and ‘trans people’. The acceptable terms are ‘trans’ and ‘transgender’, both of which are umbrella terms. ‘Transgendered’ is incorrect and inappropriate to use. ‘Transvestite’ and ‘transsexual’ refer to particular subgroups, which may be used within some trans communities, but they are terms used by trans people themselves and not appropriate language for a UPR recommendation. Trans communities may also use different terms, particularly in GRULAC and Asia Pacific countries. It is important that UPR recommendations reflect the terminology used by trans human rights defenders in their contributions.

### 2.3.3. Sex characteristics and intersex issues

Even though stakeholders’ submissions have addressed recommendations on intersex issues,<sup>76</sup> intersex people have only been mentioned as part of ‘LGBTI’. To date, there has been no standalone recommendation on SC issues.

‘SOGIESC recommendations could be more useful for my country if they addressed trans and intersex issues specifically rather than being focused primarily on general LGBTI issues.’ (Queer trans man in the WEOG region)

The very first time that intersex people were included in a recommendation was during Cycle 1 in the fourth UPR session:

‘I do not believe that our government is interested in implementing existing national recommendations on respecting the bodily autonomy of intersex people. The UPR process did not lead to any countries mentioning intersex, thought to be because so few states tackle intersex issues any better... One of the challenges we faced during our engagement was the lack of attention to intersex bodily autonomy issues and the persistent framing of intersex as

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73 Cycle 1: Canada to Turkey: ‘Take steps to eliminate any discrimination in the enjoyment of all human rights by lesbian, gay, bisexual and transgendered LGBT individuals, including by ensuring that their right to freedom of association is fully respected’.

74 Cycle 1: Slovenia to Ecuador: ‘Implement measures to combat discrimination on the ground of sexual orientation and gender identity, as well as other human rights violations against the gay, lesbian, bisexual, transsexual and transvestite community’.

75 Cycle 1: New Zealand to Germany: ‘Modify promptly the law on transsexuality to facilitate registration of a change of gender on official documents, without requiring transsexuals to divorce, in line with the decision of the Constitutional Court’.

76 In Cycle 1, organisations from at least ten different countries asked for intersex recommendations, this includes countries such as Bosnia and Herzegovina and Finland and for Cycle 2, countries including Costa Rica.

a gender identity issue. One of the lessons learned throughout the UPR engagement was that governments are not keen to address intersex human rights issues, and NGOs – including LGBTI NGOs – are not keen to address intersex human rights issues.’ (Intersex human rights defender in the WEOG region)

To tackle the lack of intersex and sex characteristics recommendations, states should address intersex bodily autonomy issues as a different issue from gender identity and address it as a human rights issue.

As a result of the above, one of the major gaps that the UPR has when it comes to SOGIESC issues and LGBTI persons is that there are not many specific recommendations for gender identity or sex characteristics, including legal gender recognition of trans people, or prohibition of coerced genital surgeries on intersex children. There are multiple reasons for this to happen. First, in Cycle I there were more gay and lesbian human rights defenders making advocacy in Geneva and talking with states.

‘I think it depends a lot on who engages in the UPR process. During the first UPR cycle a lot of the lobbying was led by gay men, therefore sexual orientation was the thing. The answer is who is leading the lobbying and with the second cycle we saw more and more transgender women coming to Geneva and engaging in the lobbying, so then you had more balance.’ (Emilie Pradichit, Asia Director of UPR Info Asia Regional Office)

Secondly, intersex and trans organisations don’t have as many resources as organisations that work on LGBTI issues more broadly:

‘The UPR requires specific resources and funding to support advocacy at the UPR because it is resource intensive. Organisations working specifically on gender identity and expression and sex characteristics have fewer resources than organisations that are more generalist or that work specifically on sexual orientation. That is also an obstacle and a challenge. Until recently, there has been less attention to advocacy on gender identity and expression and sex characteristics by generalist organisations – that has also been a challenge.’ (Officer of a UN body)

Thirdly, the current situation of a state is also a factor taken into account when making recommendations. If, for example, a state has a good record on making SOGIESC or LGBTI recommendations but in domestic law it has a poor record on gender identity issues, it is more likely that a state will not make a recommendation in this regard:

‘We cannot make recommendations to other countries if we have not reached a specific point internally.’ (GRULAC recommending state)

Fourthly, it is not uncommon for governments to have a vague understanding of SOGIESC concepts and issues generally. As a result, they may have an even poorer understanding of gender identity, gender expression and sex characteristics issues:

‘Geneva missions and local embassies had very little knowledge about intersex and trans-specific human rights issues. The UPR process is less likely to be leading on trans and intersex issues (and can reinforce the status quo). Hopefully this will improve as more countries make advances on issues such as prohibiting coerced surgeries on intersex infants enabling bodily autonomy, and

implementing legal gender recognition based solely on a person's self-defined gender identity.'  
(Queer trans man in the WEOG region)

Fifthly, some states might think that a concept, for example 'gender expression', is vague and that it has not been defined by the Yogyakarta Principles or by any of the reports of the OHCHR, so they won't raise those specific issues in an international arena.

#### *2.3.4. The protection of the family versus the protection of the rights of LGBTI persons*

The fourth most frequently addressed topic was on the right to found a family. Concomitantly, a number of states have made recommendations that are either openly or obliquely hostile to LGBTI persons and their right to found a family.<sup>77</sup>

Principally, though not exclusively, these have focused on the protection of the family. Such recommendations have been made by Algeria, Bahrain, Bangladesh, Belarus, Holy See, Indonesia, Iran, Libya, Morocco and Syria in Cycle 1. In Cycle 2, additional states have started making recommendations in that sense, namely Egypt,<sup>78</sup> Eritrea, Kuwait, Malaysia, Russian Federation, Tajikistan, Uganda, United Arab Emirates and Uzbekistan. Examples include a recommendation made by the Holy See to Brazil to: 'Protect the natural family and marriage, formed by a husband and a wife, as a basic cell of society as it provides the best conditions for raising children.'

The remaining recommendations have targeted the right to found a family, ranging from using general expressions such as 'traditional family values in a society',<sup>79</sup> to more restrictive expressions such as 'protection of the family as the natural and fundamental group unit of society based on the stable relationship between a man and a woman' or sought to protect the concept of family: 'Provide, in accordance with its obligations under international human rights instruments, effective protection for the family as the fundamental and natural unit of society'.<sup>80</sup>

Some have also referred to concepts such as 'socioeconomic aspirations of its people',<sup>81</sup> or have been more specific, such as: 'stop propaganda on relations between same-sex couples at the state level... and bring up the issue of adoption of children by same-sex couples to the public consideration'.<sup>82</sup>

These recommendations are hostile to the rights of LGBTI persons. By using words such as 'husband' and 'wife', or by saying that children should be raised by a marriage that comes from a husband and a wife because this environment provides the 'best conditions' for raising children, goes against the possibility that, for example, same-sex couples can also constitute a family.

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77 Besides the recommendations on protection of the family, there has been one recommendation that it is also hostile for the rights of LGBTI persons: During session 2 of Cycle 1, Bangladesh made a recommendation to Tonga to 'continue to criminalise consensual same-sex, which is outside the purview of universally accepted human rights norms, according to Tonga's national legislation'. The representative of Bangladesh also said that: 'The purpose of the UPR was not to impose the values of one society on another and noted that if the traditional society of Tonga does not permit consensual sex between two men or two women, one should refrain from imposing this on them, as it is outside the purview of universally accepted human rights norms'. As of yet, there is no treaty obliging Tonga to do otherwise. This recommendation is not only outside of the objectives of the UPR – which is to improve the situation of human rights – but it also contravenes the acknowledgment that the treaty bodies have had in this regard.

78 Egypt made the highest number of hostile recommendations (21), accounting for almost 35 per cent of such recommendations in Cycle 2. See Chapter 4.

79 See, eg, Bangladesh's recommendation to Costa Rica, session 19.

80 See, eg, Egypt's recommendations to, inter alia, Bosnia and Herzegovina, Cambodia, Italy, Kazakhstan, Malta and New Zealand (all Cycle 2).

81 See, eg, Bangladesh's recommendation to Egypt, session 20.

82 Belarus' recommendation to France, session 15.

Principle 24 of the Yogyakarta Principles states that ‘everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members’.

Along the same vein, the CRC stated that:

‘The Committee recognises that “family” here refers to a variety of arrangements that can provide for young children’s care, nurturance and development, including the nuclear family, the extended family and other traditional and other community-based arrangements, provided that these are consistent with children’s rights and best interests... The Committee notes that in practice family patterns are variable and changing in many regions, as is the availability of informal networks of support for parents, with an overall trend towards greater diversity in family size, parental roles and arrangements for bringing up children.’

The Inter-American Court of Human Rights (IACtHR) argues that these types of recommendations undermine family diversity.<sup>83</sup> When it comes to the imposition of a single concept of family – such as the ones that these 20 countries are trying to include in their recommendations – the IACtHR states that this ‘... should be analysed not only as a possible interference with private life... but also because of the impact it may have on a family unit’.<sup>84</sup>

There have been 84 hostile recommendations of this type, with a 24 per cent increase from Cycle 1 to Cycle 2. Sixty-five have been accepted and 19 have been noted. Some progressive states that have accepted these types of recommendations have stated that they interpret them as including diverse family forms and that they will implement or continue to implement the recommendations in those terms.

## 2.4. Classification of the recommendations by level of acceptance

Of the 1,110 SOGIESC recommendations received, 413 have been accepted and 697 noted. This rate is relatively low in comparison to the overall acceptance rate of UPR recommendations, which is 74 per cent.

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83 The Romanian Constitutional Court has approved a citizen’s initiative that might change the constitutional definition of family to essentially prevent any future recognition of same-sex relationships, and this may be the way Romania plans to implement the recommendation. ILGA EUROPE, *Romanian Court Gives Green Light to Constitutional Referendum Proposing Discrimination against Same-sex Couples* (ILGA Europe 2016).

84 *Karen Atala Riffo & Daughters v Chile* (Merits, Reparations and Costs Judgment). IACtHR, Series C No 239 (24 February 2012), para 176.

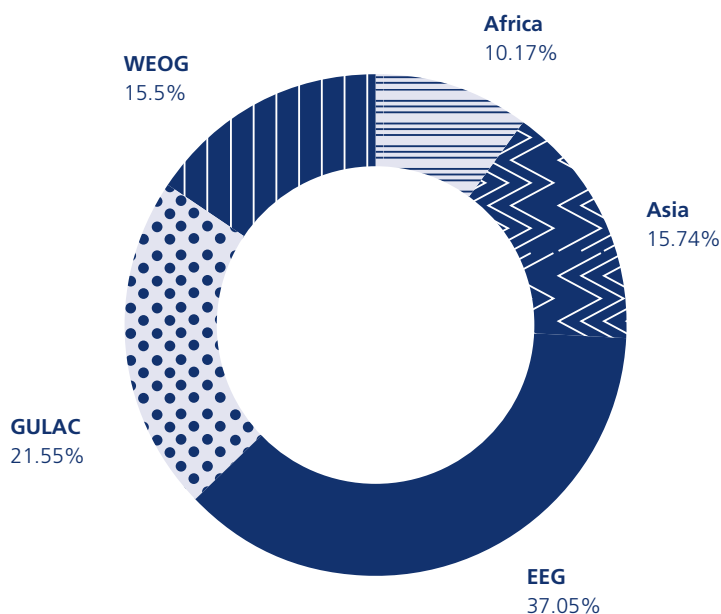


Figure 6: percentage of SOGIESC recommendations accepted and noted at the UPR



2.4.1. Ratio of accepted and noted recommendations by regional groups

Figure 7: percentage of accepted SOGIESC recommendations by regional groups



It is commendable that 108 of the 162 states under review that have received a SOGIESC recommendation have accepted at least one, and 50 states have noted all of their recommendations. Another positive trend is that noting some SOGIESC recommendations has not prevented states under review from accepting others. Further, 78 states under review have accepted more than one SOGIESC recommendation. With 17 accepted recommendations, Mongolia has accepted most SOGIESC recommendations, followed by Serbia and Honduras with 15 each.

Most states do not appear to take a blanket approach to either accepting or noting SOGIESC recommendations.

‘That shows that there is openness to dialogue; that most states are open to accepting at least some recommendations. The idea of the UPR is to try to find entry points where states can voluntarily commit to implementing certain measures, to address human rights issues, so in that sense it is important to note that more than two-thirds of states that received SOGI-related recommendations accepted at least one of them. That is also important to highlight, and not just the ratio.’ (Officer of a UN body)

Recommendations on investigation and/or prosecution of crimes committed, for example by law enforcement officers, have the highest rate of acceptance, at 70 per cent.<sup>85</sup> Sixty-three per cent of recommendations calling for awareness-raising/education programmes on LGBTI/SOGIESC have also been accepted. Recommendations on decriminalisation have the lowest rate of acceptance, at only 5.95 per cent, corresponding to 15 countries.<sup>86</sup>

Forty per cent of recommendations that called for adopting anti-discrimination laws protecting LGBTI persons have been accepted. This may, therefore, be considered as an entry point for states where criminalisation is still on the horizon. However, it appears that only states that were planning to decriminalise same-sex relationships, such as Nauru, have also accepted anti-discrimination laws recommendations. Two notable exceptions are Kenya and Liberia, which have simultaneously received an anti-discrimination law and a decriminalisation recommendation, and have noted both.

States have also mentioned that noted recommendations are frustrating:

‘[But] this is the process. We must understand that this will take a long time... We can talk to the state under review bilaterally in a space of confidentiality. We can build trust. We believe in this process and we are talking about an issue. We have 193 countries and this is a difficult issue for every one of them, even in our country. At least we are raising those concerns. We are opening up a space for dialogue. We are creating momentum for even more dialogue and we can take advantage of this. This is why the UPR is so important, because this is the space where we can openly raise these concerns, register them and afterwards we can simply talk about those with all countries. It is frustrating, but it always gives us hope, because we know that is going to be a long process, but the process is on its way. A few years ago, you would not have this kind of opportunity to do this in a constructive way; now we have this structure, this mechanism, and it provides us with some hope.’ (GRULAC recommending state)

Civil society has also agreed that states should accept more SOGIESC recommendations, but regardless of the response of the state, civil society has used recommendations, statements or responses made by the state under review to achieve their goals or to find entry points with their own government:

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85 For example, this type of recommendation includes: US to Antigua and Barbuda: ‘Condemn acts of violence and human rights violations committed against persons because of their sexual orientation or gender identity and ensure adequate protection for those human rights defenders who work on the rights of LGBT persons’; Australia to Iraq: ‘Ensure all reports of human rights violations including those against religious and homosexuals, are investigated and prosecuted’; or Canada to St Lucia: ‘Ensure that thorough investigations of allegations of acts of violence committed against individuals because of their sexual orientation or identity are promptly conducted’.

86 Chile, Guyana, India, Lithuania, Mongolia, Nauru, Palau, Peru, Russian Federation, Samoa, São Tomé and Príncipe, Seychelles, Solomon Islands, Turkey and Ukraine.

‘We will do advocacy on the recommendations anyway, even though they were noted by the previous government. We have talked to many members of this new government and they seemed to be open-minded. Last year, we did a lot of advocacy with them and they were supportive.’ (Hla Myat Tun, Colors Rainbow, Myanmar – cisgender gay man)

‘We will try to do advocacy even if the government just noted the recommendations. We will use the points we raised to do advocacy with the government. We do not expect them to suddenly change their position overnight. It would not happen. We want to take the next few years to make changes though, so that in the future when we decide to talk about 377A [Section of the Singapore penal code criminalising sex between mutually consenting adult men], it will not sound like it came out of nowhere.’ (Bryan Choong, Oogachaga & Pink Dot joint team, Singapore – cisgender gay man)

## 2.5. Recommending states

There has been a stark increase in the number of recommending states, from 35 in Cycle 1 up to 47 in Cycle 2. The vast majority of recommendations were made by the WEOG states (70 per cent), followed by EEG (17 per cent), GRULAC (13 per cent) and Africa and Asia (with approximately 0.5 per cent). Unfortunately, as the number of SOGIESC recommending states has increased, so have the number of states who have been making hostile recommendations against LGBTI persons for the first time.

Table 4: number of SOGIESC recommendations made by regional groups

Recommending regional groups (number of countries per region)	Number of states in the regional group	Number of states from the region making SOGIESC recommendations	Number of recommendations made by the region	Average number of recommendations made by recommending states
Africa (54)	54	2	4	2
Asia-Pacific (53)	53	2	4	2
EEG (23)	23	11	142	12.9
GRULAC (33)	33	9	185	20.6
WEOG (28)	28	23	775	33.7
<b>Grand total</b>	<b>191</b>	<b>47</b>	<b>1110</b>	<b>23.6</b>

The top ten SOGIESC recommending states (in order of number of recommendations made) are: Argentina, Canada, Czech Republic, France, the Netherlands, Norway, Spain, Slovenia, Sweden and the US. In Cycle 1, the Czech Republic made the most recommendations (53). In Cycle 2, Argentina has so far made the most (47). With 97, Canada is the state that has made the most SOGIESC recommendations during all of the UPR to date.

In conclusion, the UPR has provided a key opportunity to advance the rights of LGBTI persons. Throughout the UPR sessions there has been a stark increase in the number of SOGIESC recommendations and in the number of states making recommendations. While there are good examples of SMART SOGIESC recommendations, states still need to improve in this regard,

otherwise the state under review won't be able to implement the recommendation and civil society won't be able to follow up on it.

Recommending states have also increased their commitments on SOGIESC issues and have mentioned in the recommendations the Yogyakarta Principles; the different regional or universal decisions; the recommendations of treaty bodies; or even special procedures. By doing so, the UPR mechanism strengthens the international human rights framework relating to SOGIESC. The more states refer to SOGIESC and LGBTI individuals while participating in the UPR, the greater the chance of these standards being applied and implemented by other countries.<sup>87</sup>

However, there have been some shortcomings of the UPR process in relation to SOGIESC issues. One of the main shortcomings in this area has been its failure to adequately address issues related to gender identity, gender expression and sex characteristics. When those grounds have been addressed, they have been clustered as LGBTI or SOGIE/SOGIESC. Issues faced by trans people, such as forced sterilisation, transphobic violence and murders or pathologisation, and issues effecting intersex people, such as coerced surgeries performed on intersex children, are very different from those faced by lesbian, gay or bisexual communities. As such, they need to be specifically outlined and addressed at the UPR.

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87 See Chapter 4.

## Chapter 3: Civil Society Engagement and Impact

‘Without civil society contributions there would be no engagement on almost any issues in the UPR. Their participation is absolutely essential.’ (Officer of a UN body)

This chapter provides an overview of the strategies used and the challenges involved in civil society engagement. It also assesses the impact of civil society recommendations on recommending states as reflected by issues that were brought up in the UPR cycles.

Civil society engagement is essential for ensuring that recommending states have a solid and factual basis to make recommendations to states under review and that those recommendations reflect and respond to the actual situation and needs of LGBTI persons in the country. Because of its unique features, the UPR has been a particularly important international platform for human rights defenders to raise SOGIESC issues.<sup>88</sup> It has given a voice to LGBTI communities worldwide. In 2014, ARC International conducted research to assess SOGIESC advocacy at the UN. The study showed that the UPR was one of the most-used UN mechanisms by SOGIESC advocates: 95 per cent of respondents have engaged with it. Eighty-one per cent of survey respondents also felt that the UPR was the most useful UN mechanism supporting their work.<sup>89</sup>

The following paragraphs successively assess the successes and challenges faced in civil society engagement at the UPR and the impact of this on the drafting of the UPR recommendations.

### 3.1. Civil society engagement

#### 3.1.1. A steadily growing engagement

Civil society engagement with SOGIESC issues has steadily grown over the first two cycles.<sup>90</sup> Five hundred and twenty-seven submissions on SOGIESC issues make up 11 per cent of the 4,832 civil society reports ever submitted in the UPR process, which signals strong civil society engagement. Yet, only 2.5 per cent of all UPR recommendations have been about SOGIESC issues (see Chapter 2).

At the first UPR session in 2008, civil society had already made 23 submissions on SOGIESC issues, putting forward recommendations for 15 of the 16 states that were reviewed.<sup>91</sup>

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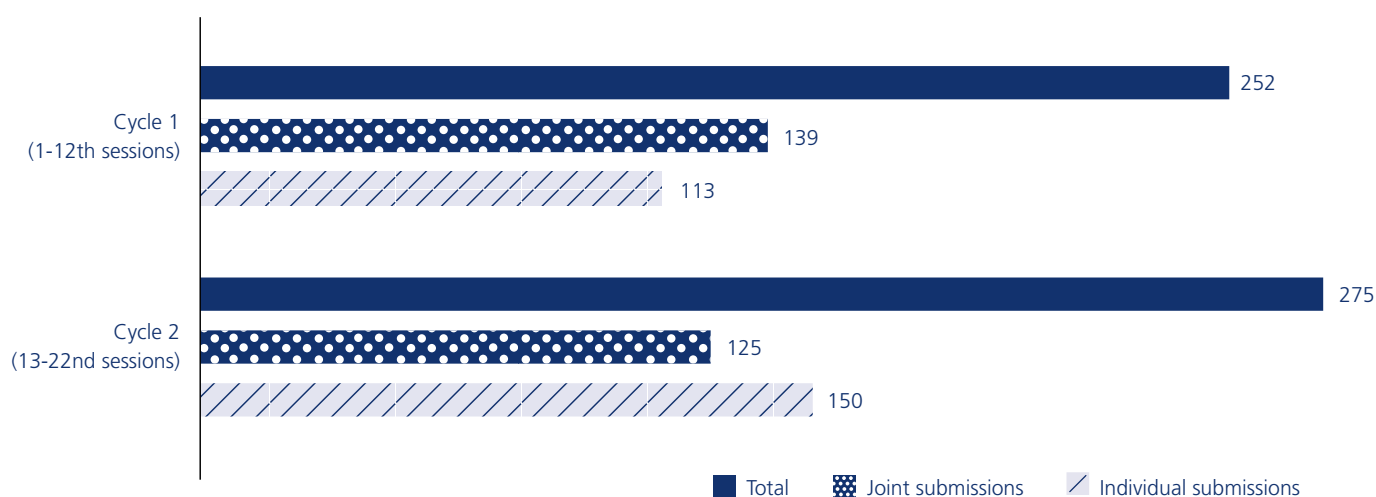
88 See Chapter at 1.1. and 1.2.

89 Dodo Karsay, *How far has SOGI advocacy come at the UN and where is it heading?* (ARC International 2014).

90 This report covers the first 22 UPR sessions, including with regards to civil society submissions made. During this period, 141 countries were reviewed. The number of submissions during the 13th–22nd sessions in Cycle 2 have already outnumbered those in Cycle 1. The total number of submissions in Cycle 2 will be much higher, and could be almost double the number of submissions in Cycle 1.

91 The Netherlands was the only state during the first session that did not have a SOGIESC submission as part of its stakeholder reports.

Figure 8: the number of individual and joint civil society submissions on SOGIESC issues



The average number of SOGIESC submissions per state review has increased from 1.3 in Cycle 1 to two in Cycle 2. However, there is a relative decrease in the ratio of countries where civil society made a SOGIESC submission. This means that civil society submitted more reports, but on fewer countries. The number of recommendations per country has increased though, possibly reflecting that there was significantly more local-level engagement in Cycle 2 and submissions were most likely to elaborate in detail on the various SOGIESC issues in-country.

International LGBTI and human rights organisations<sup>92</sup> have played a key role in putting SOGIESC issues on the radar and they have been engaged with the process since the early days of the UPR. In Cycle 1, organisations such as ARC International, COC Netherlands, ILGA-Europe, ILGA World, Pan Africa ILGA and OutRight Action International (then the International Gay and Lesbian Human Rights Commission) made joint submissions on over 40 countries where no local civil society actors had done so. These submissions were virtually the same in how they were worded and all routinely focused on criminalisation.<sup>93</sup> The vast number of these submissions may explain why the right to privacy was the second-most-addressed SOGIESC issue by states during Cycle 1 (see Chapter 2). The same international actors, along with Action Canada, Amnesty International, the Canadian HIV/AIDS Legal Network, Human Rights Watch, Sexual Rights Initiative and many others, made oral interventions during the adoption of reports concerning 110 states under review. In 17 of those states there were no civil society submissions on SOGIESC issues, so raising them in Geneva at the UPR ‘outcome of the country’ stage was a valuable contribution for commencing a dialogue.

In Cycle 2, there was a significant change in how LGBTI INGOs participated in the process. They made no joint submissions on criminalisation, but instead prioritised supporting local groups in their engagement and provided financial and technical support to them. Financial support increased the capacity of local groups to conduct research and community outreach programmes, write a submission and travel to Geneva to continue advocacy. Technical support focused on the ins and outs of UPR work, including submissions, advocacy strategies with missions in Geneva and with embassies in-country, as well as follow-up and implementation. Some UN agencies, embassies and

92 Throughout this chapter, ‘human rights organisation’ stands for an organisation that does not have SOGIESC issues as a sole focus.

93 Gradually, ILGA World continued ILGA-Europe’s advocacy efforts in Geneva.

NHRIs have also been acting in a supporting role, most commonly in the reporting and follow-up and implementation phase.

Therefore, it was common that a state that had at least one SOGIESC submission in Cycle 1 did not have any in Cycle 2 – predominantly in the Africa and Asia Pacific regions.<sup>94</sup> There are 22 states where civil society has never made a submission inclusive of SOGIESC issues, almost all of which are also in the Africa and Asia Pacific regions.<sup>95</sup> However, in half of these cases INGOs made an oral statement during the adoption of the state’s UPR report. Throughout the first 22 sessions, there were only 11 states that did not make a civil society submission or conduct oral intervention explicitly mentioning SOGIESC issues.<sup>96</sup>

## ORGANISATIONS AND COALITIONS

Local and international LGBTI groups have had a strong presence and role in formulating civil society SOGIESC recommendations – mostly through joint submissions. One in every four individual submissions and two in every three joint submissions were written by, or with the involvement of, LGBTI or L, G, LBT, LG, T or TI groups – most of them in WEOG and GRULAC states.<sup>97</sup> Joint or coalition submissions inclusive of SOGIESC issues have been slightly more common than those sent by individual organisations (see Chapter 3.2). When making a joint submission, local LGBTI groups collaborated with a variety of partners, including local and international human rights groups or LGBTI groups. In some cases, they made multiple submissions, possibly to ensure that their issues received enough attention.<sup>98</sup> Overall, the engagement of local LGBTI groups in the UPR process has been visible and steady, which is essential for ensuring that rights bearers have ownership of the process and undertake effective follow-up work later.

In Cycle 1, LGBTI INGOs submitted a large number of joint submissions together, but in Cycle 2 they prepared most of their reports in collaboration with local LGBTI groups.

International human rights groups have also had a strong presence, having made the highest number of individual submissions (for instance Amnesty International, Article 19, the Commonwealth Human Rights Initiative, Equal Rights Trust, Frontline Defenders, Human Rights Watch, Sexual Rights Initiative and others).

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94 Algeria, Angola, Bahrain, Benin, Bhutan, Brunei Darussalam, Central African Republic, Republic of the Congo, Croatia, Cyprus, Ethiopia, Guinea, Kazakhstan, Democratic People’s Republic of Korea, Morocco, Qatar, San Marino and Tonga.

95 Afghanistan, Andorra, Burkina Faso, Chad, Comoros, Djibouti, Equatorial Guinea, Gabon, Guinea-Bissau, Israel, Jordan, Democratic People’s Republic of Korea, Liechtenstein, Luxembourg, Madagascar, Mali, Saudi Arabia, Timor Leste, Tuvalu, United Arab Emirates and Yemen.

96 Andorra, Djibouti, Gabon, Guinea-Bissau, Jordan, Democratic People’s Republic of Korea, Luxembourg, Madagascar, Mali, Saudi Arabia and United Arab Emirates.

97 Some examples include trans organisations in Colombia (Cycle 1), the Philippines, Poland and the UK (all Cycle 2); trans and intersex organisations in Germany and New Zealand (Cycle 2); and lesbian organisations in Peru (both cycles).

98 For instance, in Cycle 2 the Jamaica forum for Lesbians, All-Sexuals and Gays (J-FLAG) made an individual submission and a joint one with Sexual Rights Initiative.

Table 5: individual civil society submissions inclusive of SOGIESC issues

Individual submissions							
Type of organisation	Local LGBTI	Local human rights	International LGBTI	International human rights	Human rights group from another country	Other	Total
Cycle 1	35	17	2	55	-	4	113
Cycle 2	26	10	3	71	35	5	150

Table 6: joint civil society submissions inclusive of SOGIESC issues

Joint submissions										
Type of coalition	Local LGBTI	Local LGBTI/ local human rights	Local LGBTI/ international LGBTI	Local LGBTI/ International human rights	Local human rights	Local human rights/ international human rights	International LGBTI	International human rights	Other	Total
Cycle 1	8	20	16	-	22	11	49	6	7	139
Cycle 2	17	32	13	19	22	15	-	6	1	125

#### TOPICS ADDRESSED

Broader LGBTI or LGBT submissions often tended to focus on issues that primarily affect lesbian, gay and bisexual people, such as the criminalisation of same-sex relationships; registered partnership and marriage; adoption by same-sex couples; and others. In these broader submissions, gender identity (and occasionally gender expression) were only included when civil society called for comprehensive anti-discrimination legislation. However, in some cases such recommendations omitted gender identity and expression as grounds of discrimination.<sup>99</sup> Sex characteristics were only mentioned a few times in anti-discrimination recommendations.

A significant 15 per cent of civil society recommendations were specifically about trans issues, addressing hate crimes; police violence; legal gender recognition; access to hormones and surgeries; discrimination in healthcare, employment and education; sex work; HIV/AIDS; and others.<sup>100</sup> These recommendations covered the particular situation of trans people in a total of 51 state reviews over the two cycles, often articulating these human rights violations in multiple submissions.<sup>101</sup> Recommendations on sex characteristics issues were far scarcer, with a total of 30 submissions.

99 For instance, Amnesty International made individual submissions on the Bahamas and Ghana (Cycle 2), calling for anti-discrimination legislation that is inclusive of sexual orientation; Human Rights First made a similar submission on Ukraine (Cycle 2); the International Center for Advocates Against Discrimination (ICAAD) made an individual submission on Italy, raising the issue of homophobia only (Cycle 2).

100 This number does not include general recommendations about homophobia and transphobia, and issues clustered as 'LGBT', 'LGBTI', etc.

101 There were 25 in Cycle 1 and 27 in Cycle 2.



Lesbian, trans and intersex organisations have made numerous individual submissions to highlight GIE and SC issues, and have also collaborated with local and international LGBTI and/or human rights groups.<sup>102</sup> These submissions often included a firmer analysis of the human rights situation and formulated clear recommendations for states under review.

#### CLAIMING SPACE

Over the first two cycles, civil society strategies became increasingly diversified and sophisticated. Since the very first UPR session, civil society has made strong and consistent efforts to claim space for SOGIESC issues. Local and international LGBTI and human rights groups have made one submission after the other, advocated governments, embassies and missions, and spoken in Geneva, all in an effort to make SOGIESC-based human rights violations visible and to hold states accountable. Civil society has made the violations that LGBTI persons face on the ground visible in 182 of the 193 UN states. This is a tremendous achievement.<sup>103</sup>

#### COMMUNITY OWNERSHIP

A crucial strategy among local and national NGOs has been to create community ownership of recommendations that are put forward in their UPR advocacy work. For instance, during the first review of a country in the Africa region, the local LGBTI community was not part of the engagement process; it was international organisations that submitted information. The state under review received three SOGIESC recommendations but there was no meaningful follow-up process carried forward by local human rights defenders. Engagement in Cycle 2 started with a rethinking of engagement at the local level, whereby LGBTI human rights defenders informed various segments of their community about the UPR process, brought them together from the different regions for consultation and jointly formulated their recommendations:

‘Community engagement is vital, because the community actually understands... the issues that need to be addressed in a UPR report rather than someone sitting at their laptop and writing about what other people need. Community engagement can create ownership of the issues and the community can be the number one advocate on their issues.’ (Gay and intersex human rights defender in the Africa region)

#### THE UPR AS A DOMESTIC PROCESS

Another important strategy was to ensure that UPR work forms part of civil society’s advocacy strategy and as such is interlinked with domestic processes, feeds into and builds on ongoing national level work. This means that civil society needs to actively engage in all phases of the review process at both national and international levels. Civil society has used its UPR submissions and interventions to reiterate recommendations previously presented to the government. When their state received useful SOGIESC recommendations they were used in ongoing national advocacy work.

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102 For instance, trans organisations made individual submissions in Colombia (Cycle 1); Germany, New Zealand, the Philippines, Poland and the UK (Cycle 2); and intersex organisations in Finland and New Zealand (Cycle 2). Trans groups formed coalitions in local LGBTI organisations in Malaysia and Mexico (Cycle 2), local human rights organisations in Chile and international LGBTI groups in the Netherlands (Cycle 2).

103 There have been no submissions or oral interventions in 11 states to date: Andorra, Djibouti, Gabon, Guinea-Bissau, Jordan, Democratic People’s Republic of Korea, Luxembourg, Madagascar, Mali, Saudi Arabia and United Arab Emirates.

In the joint submission we looked back at what we have done so far, what the key issues we need to propose to the government are and we picked those. For example, we tried to advocate for the government to legislate same-sex marriage in the past and the government tried to work with us. So that is why we included this issue. Another issue is gender recognition for trans and intersex people. We had some local NGOs who keep working on this issue and conduct research. So when we looked at what we have on our own table – some major pieces of work that people in our community realised as one of the major problems we faced – we collected the information to put in the joint submission.’ (Nada Chaiyajit, Togetherness for Equality and Action, LGBTI representative of the Thai CSO Coalition for the UPR – intersex transwoman)

‘The biggest lesson for me from the first Cycle was that the UPR has to be a domestic process to be meaningful. What happens in Geneva can be facilitative but the actual organising and the opportunities to move things forward are about the domestic engagement... The review provides an opening for engaging the state around human rights at home.’ (Rossina Guerrero Vasquez, PROMSEX, Peru – cisgender straight woman)

## COALITION-BUILDING

Interviewees highlighted that working in coalitions has also been a crucial strategy used by civil society. In some countries, coalitions were in place before the UPR; in others, the UPR helped strengthen and expand existing ones and/or helped to create new ones.

A common form of coalition work involved submitting joint submissions with other LGBTI or human rights groups. Being part of a larger civil society coalition at country level can convey the message to the government that the situation and needs of LGBTI persons are widely recognised as valid human rights concerns. It reassures recommending states that there is agreement across the board about the need to address these issues. Some groups – primarily trans groups – chose to submit both their individual report as well as join up with a bigger coalition. This avenue ensured that they could elaborate on their issues in detail and also benefit from the joint engagement.

‘To have a report on general human rights issues include a section on the rights of LGBTI people, or to have a report on the situation of LGBTI people, I think that both are necessary and the reason is because inclusion in the general report does not allow for the full exploration of the issues... At the same time, it is critical that the situation of LGBT and intersex people is not treated in isolation from the broader human rights situation, so it is really important to build those alliances and work in collaboration with other broader coalitions of human rights organisations, to ensure that in the broader reports there is also a mention of the situation of LGBT and intersex people. It is also critical for the follow-up.’ (Officer of a UN body)

Some highlighted the importance of coalition building with regional and international NGOs, as these organisations can further increase credibility and legitimacy and can be an alternative option if in-country coalitions are non-existent or are unwelcoming to LGBTI groups.

## INCLUSIVE, INTERSECTIONAL AND CROSS-SECTIONAL WORK

Ensuring that engagement is inclusive, intersectional and cross-sectional; that it reflects the needs of various segments of the community; and that it ties in with other human rights concerns was another important strategy for many CSOs. Cooperation between LGBTI groups and organisations advocating for women's rights, children's rights, migrants and refugees, sex workers, drug users, HIV/AIDS groups, etc, could ensure that submissions highlight a great array of needs in the community and beyond. This collaboration builds solidarity and can make everyone's advocacy stronger. Some examples in the Africa, Asia and Caribbean regions were particularly useful, as illustrated by the example of Myanmar.

'We divided ourselves into three clusters on LGBT, women's and children's rights that relate to each other too. We covered each other's issues; for instance, within LGBT we talk about lesbian and trans women, and LGBT children and youth. We discussed how we are going to link each other's issues to our own to make the call stronger. We know each other's issues generally – we learned them. When we have a meeting in Geneva, some of the meetings overlap, so we bring each other's issues along. For instance, I bring women's rights or children's rights or ethnic minority issues along with LGBT issues. That is how we connect to each other and become very powerful.' (Hla Myat Tun, Colors Rainbow, Myanmar – cisgender gay man)

## ADVOCACY ON MULTIPLE FRONTS

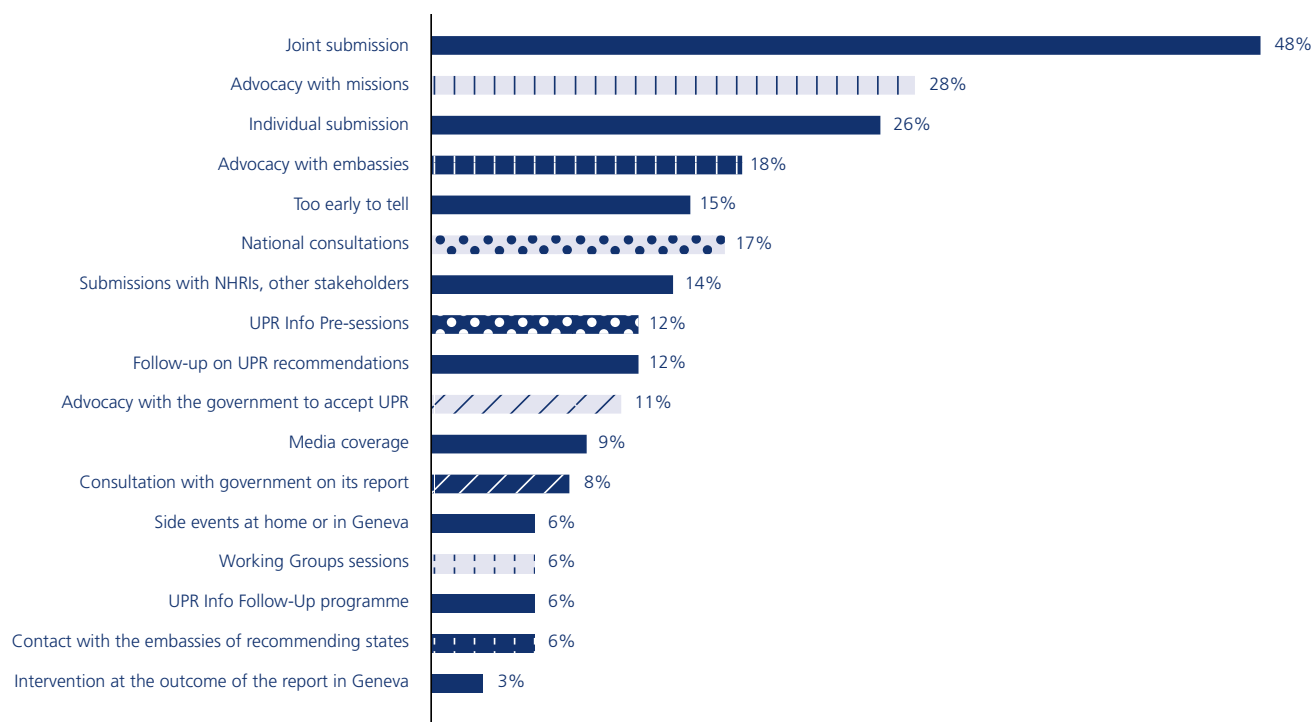
Civil society organisations recognise that UPR advocacy work needs to be carried out on multiple fronts. They have targeted their governments; embassies in their countries; missions in Geneva; and cooperated with other stakeholders such as UN agencies, NHRIs and the media. An important change in Cycle 2 was that UPR Pre-sessions are organised by UPR Info. Previously, human rights defenders came to Geneva during the Working Group sessions, where they had no real influence on the state recommendations. States already had their statements prepared. Pre-sessions are now organised earlier in the cycle and civil society can have its own space for advocacy with missions. They receive considerable support from INGOs in joining the Pre-sessions and preparing their advocacy materials.

Some human rights defenders have had extensive engagement with embassies based in their countries and missions in Geneva, having as many as 20–30 meetings with the various states prior to the review. INGOs have been supportive in this process and have shared tools and strategies with local human rights defenders, for instance on which states they could approach and what angles they could take, or how best to prioritise issues and convey concise advocacy messages.

Civil society has commonly engaged with embassies and missions very strategically when putting forward their requests, taking into account their previous recommendations to the country; their SOGIESC recommendations to other countries; as well as their own SOGIESC record at country level. Some human rights defenders targeted their advocacy to ensure that their governments receive recommendations from countries other than Global North countries.

'One of our goals was to get recommendations from GRULAC rather than WEOG states, because our government will dismiss those.' (Cisgender gay human rights defender in the GRULAC region)

Figure 9: percentage of survey respondents who included a particular form of engagement in their top three most effective forms of UPR engagement in their work



## SETTING ADVOCACY PRIORITIES

A common strategy was to prioritise some of the issues that were highlighted in the submissions. In some countries, these priorities were set up as part of a community consultation; in others, the decision-making was more centralised. However, coalition work posed some risks: in some countries SOGIESC issues were completely excluded when a bigger coalition identified its priorities (see Chapter 1.2).

NGOs routinely prepared brief two-page factsheets highlighting their priorities, which proved to be useful in meetings with embassies and missions, particularly during UPR Info Pre-sessions and the UPR advocacy weeks. These brief summaries heavily relied on longer submissions and were an effective way to ensure that missions learned about the most important issues and recommendations. Stories, anecdotes, numbers and figures were common elements of advocacy work.

## COLLABORATION WITH THE STATE

In instances where a state has been ready to enter into a dialogue with civil society, human rights defenders have often chosen a collaborative – instead of an adversarial – approach to engage with their government. Many informed them of their planned submission, shared their reports and recommendations, sensitised them on SOGIESC issues and supported them in the implementation phase. This approach was viewed as productive by those states as well.

‘Governments’ priorities will always be different from NGOs, hence the need to understand government priorities and find ways of including everyone.’ (Lesbian respondent from the Africa region)

‘We thought it was very important to have this process before we met in Geneva, so it was not the first time they saw us. We had a transparent process that included sharing with them our shadow report, the recommendations we were going to ask... Finally, we agreed that the recommendations are good for the state and for civil society. We need to stop the feeling that civil society wants to boycott the state, this was important because despite being an organisation that demands and complains, we can also show that we can have a collaborative approach.’ (Rossina Guerrero Vasquez, PROMSEX, Peru – cisgender straight woman)

‘We also involved the government in the whole process. Before we did community consultation, we met them to get their opinion and to gather some technical expertise. We told them that this was our plan and said we will make references to national documents and guidelines... Having the government’s perspective when we talk about LGBT issues was a lesson we learned. Also, the global debate put the government into thinking that we are mostly thinking about same-sex marriage rather than thinking about the other fundamental human rights needs. That is something we learned after we met with our ambassador in Geneva.’ (Gay intersex human rights defender in the Africa region)

#### REGIONAL MECHANISMS AND THE UPR

Some interviewees noted the importance of engaging with regional mechanisms parallel to their work with the UPR, as these are additional entry points for engaging the state on SOGIESC issues. In the African context, where SOGIESC-relevant UN standards may be met with more criticism, civil society has found it helpful to complement its UPR work through engaging with the African Commission on Human and People’s Rights. Some noted that their government may assign more value and weight to recommendations that arise in a context similar to theirs and seem less of an imposition.

‘We carry a responsibility to work at a regional level on the continent. When I invest in the African Commission and my government gets reminded again at the UN, it means that this NGO/INGO is serious about what they are doing. We cannot be selective in ways we keep the government accountable.’ (Gender non-conforming lesbian human rights defender in the Africa region)

#### USING SOCIAL MEDIA, ILLUSTRATIONS AND VIDEOS

In some countries, civil society has found innovative and creative ways to engage. Human rights defenders in Singapore used comics to illustrate the impact of criminalisation and to make the broader LGBT community aware of ongoing UPR advocacy. Others used social media or videos.

Figure 10: illustration by the Oogachaga and Pink Dot joint team, Singapore

## Censorship on LGBT information



We know that a lot of people in our community – and by and large people in Singapore – do not have the culture of reading very long texts... We knew that if we just published a report online, it would not be appealing for people to read further. So we decided that instead of just putting up text, our key intention is that people understand that there are dots that we need to join. So we used six illustrated situations to help people understand the process of joining the dots. It was cost-effective because we knew that pictures are easier to share. We did not have money to make a video, so we settled for illustrations, which were done pro bono by a local illustrator. Having a social media campaign that ties workplace discrimination to Section 377A helped people to join the dots and understand the impact of Section 377A and its effect on other social policies.<sup>104</sup> (Bryan Choong, Oogachaga & Pink Dot joint team, Singapore – cisgender gay man)

‘It really helped that our coalition started from people who could work well together and included creative skills so that we were able to create and edit short videos to promote our submission to other NGOs through social media – and could make a last-minute video to show at the UN.’ (Trans man in the WEOG region)

### REFERENCING NON-SOGIESC RECOMMENDATIONS

As Chapter 2 revealed, UPR recommendations often exclude SOGIESC issues or only highlight some of the concerns identified by civil society. Therefore, SOGIESC human rights defenders have also used non-SOGIESC-specific recommendations in their follow-up and implementation work, arguing that they are relevant for SOGIESC issues. Survey respondents scored the frequency of this strategy a 2.6 on a scale of one to five (five being ‘often using such recommendations’).

‘Recommendations on domestic violence, gender-based violence, gender equality, HIV/AIDS, trafficking and other related recommendations have been helpful for us to address intersectionality and interdependence, indivisibility and interrelatedness of human rights issues as a whole.’ (Hla Myat Tun, Colors Rainbow, Myanmar – cisgender gay man)

<sup>104</sup> Section 377A of the Singapore penal code criminalises sex between mutually consenting adult men.

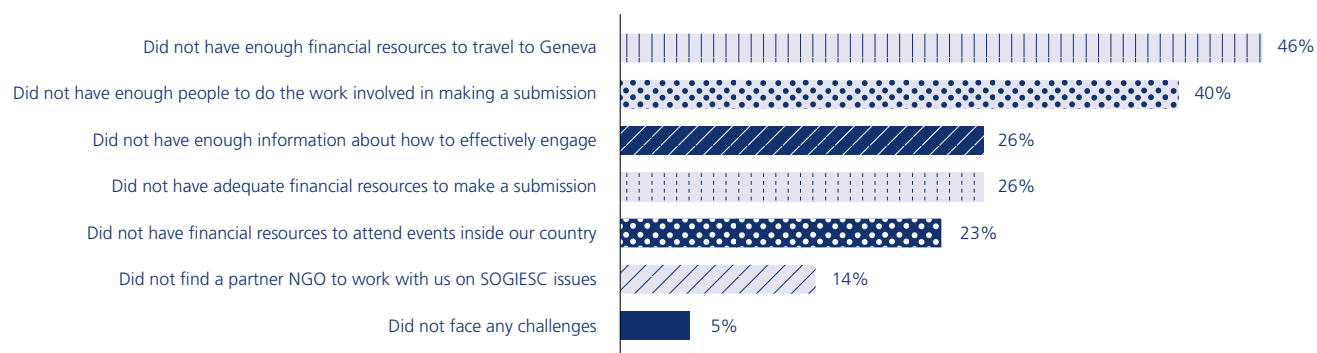
Other thematic areas have included torture and ill-treatment, accountability, women’s rights, freedom of assembly, vulnerability of marginalised groups, recommendations on NHRIs and/or national human rights plans.

### 3.1.2. Challenges to a more efficient engagement

#### LACK OF FINANCIAL AND HUMAN RESOURCES

Despite the recognition that the bulk of UPR work needs to take place at the national level, there is very little funding available for local NGOs to pursue this work. Most of those who were interviewed reported that their work was voluntary and survey responses echoed similar concerns. Travelling to Geneva is also financially impossible for many SOGIESC advocates. Given that human rights defenders can greatly influence the recommendations during the UPR Info Pre-sessions, this is a significant gap in representational groups present for these UPR Info Pre-sessions. It particularly affects groups that have had less funding for UN work, including trans and intersex groups.

Figure 11: survey respondents were asked about the key challenges they faced during their UPR engagement and could choose more than one category



Additionally, many interviewees and 40 per cent of survey respondents noted that they did not have enough people who were equipped to do UPR work and available to complete the work involved in making a submission in their countries. Many voiced a need for further capacity-building and resourcing to ensure that their UPR engagement is sustainable.

‘No one was able to provide support or contribution in the drafting process. I was the one who had to lead on it and cooperate with the international group... We are just building up the LGBT community, so it was a challenge.’ (Hla Myat Tun, Colors Rainbow, Myanmar – cisgender gay man)

Some urged international LGBTI and human rights organisations and funders to continue funding advocacy in Geneva, but also to allocate funding towards national-level work. Some recommended that INGOs reprioritise their work areas and continue their engagement with local partners after the Geneva phase of the review comes to an end. Others noted that INGOs should also boost and encourage engagement with regional mechanisms as these can strengthen UN work, as well as potentially being a more effective avenue to raise SOGIESC issues in hostile states.

One interviewee suggested that it may be more efficient if INGOs came to local communities and trained a group of human rights defenders instead of one person being flown into Geneva from the same budget.

#### CONFLICTS IN COALITIONS

LGBTI groups in larger human rights coalitions have faced marginalisation and their issues have been often dismissed. Some trans respondents who were working with a broader LGBTI coalition also stated that they were considering making individual submissions and more independent advocacy, so that their particular issues receive ample attention.

‘We presented a report with a coalition and we also made an individual report, which covered several topics not necessarily shared by other local NGOs... What was accepted to be included in [the coalition] report was sexual and reproductive health in general of children and adolescents, but the issues of reproductive rights of women and equality and non-discrimination of LGBT individuals was not included, so we decided to make another report that addressed these issues.’ (Rossina Guerrero Vasquez, PROMSEX, Peru – cisgender straight woman)

‘We are trying to make sure that the voices of the smaller LGBT movement are heard – when we come together in this big group, sometimes our issues are subdued and sidelined by the bigger, established NGOs. A typical example was the previous civil society submission; we were consulted, but eventually our statement was left out altogether.’ (Sulique Waqa, Haus of Khameleon, Fiji – transgender woman)

#### LACK OF GIESC ISSUES ADDRESSED

A significant 15 per cent of civil society recommendations have focused on trans issues. However, there is still more progress to be made to ensure that broader LGB(TI) submissions discuss gender identity and expression issues in detail. Sex characteristics issues have rarely been raised in civil society submissions, which is of concern. Trans and intersex groups have historically had significantly fewer resources than larger LGB(TI) groups and therefore had less access to UN spaces. It is important that their participation is duly funded so they can better influence the final UPR recommendations.

‘NGOs, including LGBTI NGOs, are not keen to address intersex human rights issues.’ (Non-binary intersex respondent in the Asia-Pacific region)

‘Each NGO has their own agenda prioritised and even though there are joint reports submitted, you might be dismissed or overseen.’ (Trans human rights defender in the WEOG region)

#### LACK OF DIALOGUE WITH THE GOVERNMENT

The UPR has been an important tool for starting a dialogue, even in states where there was previously no discussion around SOGIESC issues between the government and civil society. However, the government may not be willing to cooperate with civil society in the follow-up and implementation phase and SOGIESC recommendations may remain an empty promise (see Chapter 5.3).



In some countries human rights defenders expose themselves to serious risk if they raise SOGIESC issues publicly, either at home or in Geneva. In some countries the government has also tried to hinder civil society by shrinking the space they can operate in.

‘In the past, there has been a lot of crackdown on women’s rights and human rights movements by the state. There was the emergency regulation, when we were not allowed to meet anywhere in public and talk about politics publically and we had to apply for a permit, which was a hindrance for our organising of the UPR.’ (Sulique Waqa, Haus of Khameleon, Fiji – transgender woman)

Further challenges that were mentioned by survey respondents included a general distrust of international mechanisms by local human rights defenders; language issues; and people being denied visas when applying to travel to Geneva.

## **3.2. The impact of civil society submissions on state recommendations**

Since the very first UPR session, SOGIESC issues have been consistently raised in civil society submissions, covering a wide range of topics including criminalisation; hate crimes and hate speech; discrimination in healthcare, employment and education; freedom of assembly and association; same-sex marriage and adoption; corrective rape; police violence and detention; legal gender recognition, violence and discrimination faced by trans people; access to transition-related care; coerced surgeries performed on intersex children; and many others.

Civil society has influenced UPR recommendations on SOGIESC issues in numerous ways. Civil society has made hundreds of written submissions, met with embassies in their country and undertaken advocacy missions in Geneva. Some of their inputs were formal and public; others informal, confidential or anonymous. States have heavily relied on these contributions but have also received guidance from the capital.

To date, civil society submissions are the only area where both the UN and NGOs such as ARC International, ILGA or UPR have completed ongoing documentation. It is, therefore, difficult to draw conclusions about the overall impact of civil society engagement because a number of inputs are not available to assess. For instance, human rights defenders have routinely prepared two-page factsheets and shared them with missions during the UPR Info Pre-sessions and/or the UPR advocacy weeks in Geneva. These may have had a significant impact on how missions have formulated their recommendations, but there is no factual evidence available. It could be an important contribution if INGOs could better track such inputs.

### ***3.2.1. States reaffirm recommendations made in civil society submissions***

Looking at civil society submissions, it is clear that they have had considerable influence on UPR recommendations addressing SOGIESC issues. In the vast majority of states that received a SOGIESC recommendation (82 per cent), civil society made its voice heard on these issues.

Table 7: the number of civil society submissions and recommendations on SOGIESC issues for the states that received SOGIESC recommendations

	States where there were civil society submissions on SOGIESC issues	Civil society submissions on SOGIESC issues	Civil society recommendations on SOGIESC issues
Cycle 1	117	196	655
Cycle 2	82	209	994

Sixty-seven per cent of state recommendations were fully reflective and an additional seven per cent were partially reflective of the concerns that civil society raised – most of them on criminalisation or discrimination. This is an impressive outcome of civil society submissions and it also signals the willingness of states to listen to civil society. However, a significant proportion of recommendations had no foundation in civil society submissions, suggesting that states presumably received contributions in other ways, as mentioned above.

Table 8: the number of state recommendations on SOGIESC issues in light of civil society recommendations articulated in submissions

	Fully reflective of recommendations in civil society submissions	Partially reflective**	Not reflective	No civil society recommendation	Total
Cycle 1	314	30	126	29	499
Cycle 2	432	43	64	71	610

\*\* 'Partially reflective' means that only part of the recommendation was picked up by states or that civil society made very specific recommendations, which later translated into a very general and/or rather vague state recommendation.

### 3.2.2. State recommendations fall short of addressing trans and intersex issues

Despite having received 250 trans-specific recommendations, recommending states have made only ten gender-identity-specific recommendations to date, in a total of ten countries (see Chapter 2). This may be because organisations pushing for trans-focused recommendations may not have the resources to continue their advocacy work in Geneva. Therefore, their recommendations may fall through the cracks. It may be that the priority recommendations that civil society articulates during UPR Info Pre-sessions and/or UPR advocacy weeks exclude those that are specifically about trans issues.

For instance, during Norway's first review, civil society made one submission. This was prepared by a local trans organisation who had made nine recommendations about legal gender recognition, access to hormones and surgeries. However, states made one SOGIESC recommendation to Norway, which was about lesbian and gay young people. Further, in Kuwait's first review, human rights defenders made 15 recommendations, all of which mentioned trans issues and 14 were explicitly about the criminalisation of trans people, legal gender recognition, training on trans issues, access to surgeries, hormones and psychological support. Yet, the one state recommendation was about decriminalising same-sex relations.

Civil society has made 30 recommendations on intersex issues, predominantly about surgeries and gender markers. None of these were picked up due to there having been no state recommendations on intersex issues to date (see Chapter 2).

### 3.2.3. States focus on a small portion of topics raised in civil society submissions

There was a considerable number of recommendations made by civil society in their submissions that states did not pick up. To reiterate, this may be because of how other contributions influenced them, for instance: briefings during UPR Info Pre-sessions and/or UPR advocacy weeks, informal inputs from human rights defenders or guidance from the capital.

In Cycle 1, 70 per cent of civil society recommendations – and in Cycle 2, 68 per cent – were not reaffirmed by states. Most commonly, states chose to make recommendations on discrimination or criminalisation (see Chapter 2), but did not pick up on the nuanced issues that civil society described in detail. For instance, in Cycle 1, civil society made two submissions on Malawi, highlighting very specific recommendations on criminalisation; discrimination; training for lawyers, judicial officers and police; conducting research; providing financial and technical support to NGOs; and access to justice. Yet, of the 15 state recommendations, all were about discrimination and/or criminalisation and none about the other topics. During the second review of Bangladesh, civil society made four submissions and 16 recommendations covering criminalisation as well as training, HIV/AIDS, sexual violence, sex education, research, freedom of association, transition-related care and discrimination faced by trans people. Yet, states made only one recommendation, which was on criminalisation.

Table 9: the number of civil society recommendations on SOGIESC issues in light of the extent to which states reaffirmed them (in states that received at least one SOGIESC recommendation)

Cycle	Civil society recommendations			
	Reaffirmed by recommending states	Partially reaffirmed	Not reaffirmed	Total
Cycle 1	158	35	462	655
Cycle 2	239	76	679	994

Another trend has been that states often articulate relatively soft recommendations, even when civil society highlights more pressing issues. For instance, in some cases civil society submitted information about murders or forced anal examinations, but states made general recommendations on discrimination. In Cameroon’s second cycle review, civil society submitted information about anal examinations but these were left unaddressed. During Colombia’s first review, advocates made four submissions and 18 recommendations, many of which were about violent hate crimes against LGBTI persons – particularly against trans women – forced disappearances and extrajudicial killings. Yet states made just one SOGIESC recommendation to Colombia, which was about awareness-raising campaigns.

### *3.2.4. States formulate general recommendations despite specific calls in civil society submissions*

As noted in Chapter 2, there is acknowledgment across the board that both state (and therefore also civil society) UPR recommendations should follow the SMART criteria. NGOs may not have always put forward recommendations that fulfil all of the SMART criteria, but many submissions include specific calls for improving the human rights situation. These are often picked up as general recommendations by states, which leaves space for improvement. For instance, civil society made seven submissions and 35 recommendations during the second review of the US. Many of these were specific calls about discrimination in healthcare, housing, employment and education.<sup>105</sup> Yet, the US received two general recommendations on discrimination.<sup>106</sup>

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105 For instance, ‘The federal government has the power to prohibit discrimination in hospitals, urgent care, clinics and nursing homes and assisted living facilities through regulatory policy making. The Department of Health and Human Services should evaluate existing nondiscrimination protections that bind healthcare providers and ensure that LGBT people are included alongside other protected classes’; ‘Federal and state governments should prohibit employment discrimination on the basis of sexual orientation or gender identity in both the public and private sectors’; ‘As broadly as possible, Executive Branch agencies should clarify that existing federal statutory bans on sex discrimination cover discrimination based on gender identity as well as discrimination based on a failure to conform to stereotypical notions of masculinity or femininity’; ‘The US Department of Education should issue comprehensive guidance on the scope of protections for LGBT students under Title IX of the Education Amendments of 1972, which prohibits sex discrimination in any education program or activity receiving Federal financial assistance.’

106 South Africa to the US: ‘Heighten efforts to promote non-discrimination of any kind, including discrimination on the basis of sexual orientation and gender identity’; Israel to the US: ‘Keep promoting progress in lesbian, gay, bisexual, transgender and intersex issues, especially in preventing discrimination based on gender or sexual orientation.’

# Chapter 4: Comparison Between the UPR SOGIESC Recommendations and the International Law Protecting the Rights of LGBTI Persons

The present chapter assesses the role of the UPR in consolidating the international legal framework to SOGIESC issues.

UPR recommendations have no legal force as such; rather, they are commitments taken up by the executive. One of the UPR's key and foremost features lies in the fact that it gives political traction to international human rights norms and recommendations. The UPR places states as the primary actors in the process of human rights monitoring of their peers.

Presented as the 'missing political component' in the UN human rights system, the peer reviewing process is expected to remake what is incomplete and restructure what is imprecise in UN scrutiny and coverage of human rights performance by countries.<sup>107</sup> Thus, the UPR was initially conceived to pull 'together all the findings of the numerous UN treaty bodies, special procedures and other mechanisms created in the past 10 to 30 years or so to implement, with a country-specific focus, the human rights norms the United Nations has drafted and adopted'.<sup>108</sup>

As presented in the introduction to this report, a number of regional and international human rights mechanisms have interpreted regional and international instruments so as to integrate sexual orientation and gender identity as prohibited grounds of discrimination. Besides, the Yogyakarta Principles constitute a soft law instrument with a major role insofar as it provides comprehensive articulation of states' human rights obligations from a SOGIESC perspective.

This chapter introduces the international law-making process through which the repetition by states of the same norms over time consolidates the legal force of these norms. It then focuses on the impact of the UPR on international law by assessing when the UPR has either consolidated or gone beyond or below the standards of protection granted by other international human rights mechanisms.

## 4.1. The value of repetition in international law

Recommendations made at the UPR reflect the recommending states' key priorities and concerns. The UPR is based on the international human rights obligations of the state under review. In contrast to the UN treaty bodies, which may only scrutinise human rights records of states that are parties to the relevant treaty, the UPR subjects every member of the UN to review. Up until now, every state has presented a report and thereby recognised and reaffirmed the legitimacy of the UPR process. Further, the UPR to some extent also reflects what the international community *perceives*

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107 Felice Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' (2007) 7(1) Human Rights Law Review 109–139, 113; see Kofi Annan (2004) Addendum to 'In larger freedom, Human Rights Council: Explanatory note by the Secretary-General', 23 May 2005, UN Doc A/59/2005/Add.1.

108 *Ibid*, Felice Gaer.

as international obligations. As such, the UPR may play a role not only in the implementation of international law but also in the law-making process at national and international levels.

First, the UPR has strong potential to strengthen the implementation of international instruments and recommendations. The more states refer to various human rights instruments when making recommendations, the greater the possibility that the substance of these standards will be applied and implemented by governments for their countries. By referring to international norms and recommendations, states thoroughly familiarise themselves with their provisions. This puts them in a position where they are able to facilitate the implementation of these norms both domestically and internationally. A key issue in this respect is the repetition of the Yogyakarta Principles at the UPR, thus confirming the endorsement of the instrument by states. This issue is assessed below.

In addition, the UPR can be instrumental in addressing all national, regional and international human rights obligations together. For instance, Canada reminded Cameroon of its obligations under the International Covenant on Civil and Political Rights (ICCPR) but also the African Charter on Human and Peoples' Rights<sup>109</sup> (the African Charter), in order to call for the decriminalisation of consensual same-sex sexual activities. Cameroon responded that 'the position adopted in domestic legislation [which criminalises same-sex sexual activities] finds support in the provisions of article 29 (2) of the Universal Declaration on Human Rights and article 29 (7) of the African Charter, which represent safeguard clauses that can be invoked by any democratic society in accordance with its moral characteristics'. The country advanced the same argument during the second review in 2013. However, the African Commission on Human and Peoples' Rights (ACHPR) has now taken a clear stand for the protection of LGBTI persons with the adoption of the 2014 resolution on sexual orientation and gender identity.<sup>110</sup> While more and more recommendations build on international, regional and national recommendations and national practice, the possibilities for countries to resort to the exception of cultural diversity to justify their position will increasingly shrink.

Secondly, by shedding light on state practice, the UPR provides concrete examples of implementation of the rights listed in the Yogyakarta Principles. On the one hand, states under review may draw attention to the good practices in their country. For instance, when Ireland presented its national report, the Minister of Justice highlighted that:

'Notwithstanding the impact of the financial crisis that we have experienced in recent years, we continued to make substantial progress domestically on human rights and equality of treatment issues since 2011. The single most important development in this regard since the first cycle is the adoption by the Irish people by referendum of an amendment to our constitution to provide for same-sex marriage. This hugely symbolic step, providing for the recognition of, and respect for, the equality of our LGBTI fellow citizens is a hugely important legal change. It also represents a milestone of world significance on the journey to equal rights for LGBTI people, in that Ireland is the first sovereign country to make the journey to marriage equality by popular vote. On 22

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109 Canada to Cameroon (2009): 'Amend its Criminal Code to abolish the criminalisation of homosexual acts to conform to the provisions of the ICCPR, particularly articles 2 and 26, and the provisions of the African Charter of Human Rights and Peoples' Rights.'

110 ACHPR, 'Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity' (2014) ACHPR/RES/275, para 4: 'The African Commission... strongly urges States to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.'

May 2015, the people of Ireland decided by a strong majority that the Irish Constitution would be amended to enable persons to marry without distinction as to their sex. This has been given effect by the Marriage Act 2015, which has opened the institution of marriage to same-sex couples from 16 November 2016. Protections for religious bodies have also been reiterated, in that the Act provides that neither religious bodies nor religious solemnisers can be compelled to perform marriages. Ireland has also been at the forefront of introducing self-determined gender recognition, through the passing of the Gender Recognition Act 2015. The Act allows adults to determine their own gender without recourse to medical or psychological opinion. It also provides for the preferred gender of a person to be fully recognised by the State for all purposes. Children between the ages of 16 and 18 may apply for a Gender Recognition Certificate with court approval.<sup>111</sup>

On the other hand, most of the recommending states make recommendations that are already implemented in their own system, for instance, in the case of recommendations about same-sex couples. Only states recognising equal rights to different and same-sex couples have made recommendations in that sense to states under review. In that case, states are in a strategic position to share the merits of their own practice. However, this should not be a reason for states to self-restrain and not address issues that could be, for instance, under discussion in their own country. Recommending states could also make reference to a good practice identified by a special rapporteur in order to address an issue specific to the state under review:

‘To keep an open mind, it would be great if there could be positive consultations of examples of ‘how’. One hundred and seven states of all regions have accepted these recommendations, so highlighting positive examples from the same region of the state under review and highlighting positive examples of dialogue might make it easier for some states to engage and accept some recommendations, and also to implement and follow through with them in practice.’ (Officer of a UN body)

Finally, in theory the ripple effect of the UPR could, in the long term, affect the development and consolidation of international customary norms. Customary international law is a source of international law emerging from consensus among states exhibited by widespread conduct (states’ practice) and a discernible sense of obligation (states’ *opinio juris*).<sup>112</sup> If a significant number of states continuously refer to the same international norm over a longer period of time in their recommendations; if those recommendations have close to a perfect acceptance rate; if they are indeed implemented by the state under review; and if the next cycles of the UPR do not change the established dynamics, then ‘the national reports on the situation of human rights in the country would be excellent and unprecedented primary sources to gauge the state’s *opinio juris* on human rights’.<sup>113</sup> The international customary law-making process could therefore provide for the provisions of the Yogyakarta Principles to carry the same legal force as a treaty.

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111 Remarks from Frances Fitzgerald, the Minister of Justice and Equality of Ireland. UPR, 25th session (2016).

112 For a definition of customary international law as a source of international law, see in particular the Statute of the International Court of Justice, Art 38.1 b) defining international custom as ‘evidence of a general practice accepted as law’. See also, International Court of Justice (ICJ), Continental Shelf case (*Libyan Arab Jamahiriya v Malta*), judgment, 3 June 1985, ICJ Reports 1985, 29–30, para 27.

113 Elvira Domínguez Redondo, ‘The Universal Periodic Review – Is There Life Beyond Naming and Shaming in Human Rights Implementation?’ (2012) 4 New Zealand Law Review 34.

In light of the above and the current practice at the UPR, the following paragraphs successively consider the consolidation of international instruments and recommendations from UN human rights mechanisms with UPR recommendations.

## 4.2. The legal basis of the SOGIESC recommendations at the UPR

During the UPR process, states are entitled to refer to a wide range of human rights instruments, including legally binding treaties and non-binding standards. Pursuant to Resolution 5.1 (2007), which established the UPR process, states may review other states' human rights records 'on the basis of (a) the Charter of the United Nations; (b) the Universal Declaration of Human Rights; (c) human rights instruments to which a state is party; (d) voluntary pledges and commitments made by states, including those undertaken when presenting their candidatures for election to the Human Rights Council; and (e) applicable international humanitarian law'.<sup>114</sup>

In practice, when examining UPR recommendations, only rarely do states explicitly point to the legal basis of their recommendations. When they have done so, they have referred not only to binding treaties, but also to a number of soft law instruments such as the Bangkok Rules on women in detention.

In the case of SOGI issues, around seven per cent of the 52 recommendations have an explicit legal basis.

Table 10: legal bases of the SOGIESC recommendations at the UPR

Legal references		Number of CTAs
<b>General legal references</b>	For example, 'in line with international standards'; 'in accordance with international treaties establishing guarantees of fundamental human rights and freedoms'	34
<b>Specific legal references</b>	Universal Declaration on Human Rights	2
	Articles 2, 17 and 26 ICCPR (7) and Second Optional Protocol to the Covenant on Civil and Political Rights (1) and multiple human rights conventions (2)	10
	Country-specific recommendations of the Human Rights Committee (Burundi and Jamaica, St Vincent and the Grenadines, Turkmenistan) or the Committee on the rights of the Child (Slovenia)	6
	Report of the High Commissioner on Human Rights	3
	United Nations General Assembly Declaration of 18 December 2008 regarding human rights, sexual orientation and gender identity	6
	Yogyakarta Principles	19
	Recommendations of the Special Rapporteur on extreme poverty (Mongolia)	1
	African Charter on Human and Peoples' Rights	1
'EU standards' (1), European Convention on Human Rights (1), the Resolution of the Committee of Ministers of the Council of Europe on measures to combat discrimination based on sexual orientation or gender identity (1), Council of the European Union Asylum Qualification Directive (1)	4	

<sup>114</sup> UNHRC, 'Institution-building of the United Nations Human Rights Council' (18 June 2007 HRC) UN Doc A/HRC/RES/5/1, para 1.



The choice of instrument referred to has seemingly been contextual, and no systematic pattern can be induced from the recommendations made in the 22 sessions under scrutiny. Just after their adoption the Yogyakarta Principles were referred to in 17 recommendations during UPR Cycle 1. Conversely, the Principles were hardly mentioned during Cycle 2 (two recommendations). The fact that states distanced themselves from the Yogyakarta Principles limited the potential of the UPR for consolidating and reinforcing their content. It is through continuous and repetitive referencing of a particular norm that the UPR can create a ripple effect.

In the case of the Yogyakarta Principles, it is conceivable that if drafters had omitted just a few of the most controversial elements – such as the right to adoption by same-sex couples and the right to artificial insemination – more states, especially the states demonstrating openness to SOGIESC issues, may have been willing to refer to them.<sup>115</sup> At the same time, the multiple international sources used by recommending states evidence the wide legal basis that SOGIESC recommendations have. A reference to regional instruments or positioning reduces the geographical scope of the ‘cultural diversity’ exception, which some states try to invoke in order to avoid accepting recommendations.

Besides the reference to international legal instruments, some UPR recommendations repeat the recommendations made by the UN treaty bodies. This is the focus of the next section.

### **4.3. Comparative analysis between recommendations made at the UPR and recommendations made by other UN human rights mechanisms**

As mentioned above, repetition by states of the same norms consolidates their legal force at an international level. The UPR was set up in order to consolidate the recommendations made by the other human rights mechanisms. Three major trends are described here, where the UPR recommendations have either corroborated, fallen below or gone beyond the level of protection granted by other international UN human rights mechanisms.

The analysis is undertaken at a general level, looking at all 1,110 recommendations related to SOGIESC issues made at the UPR in comparison with the main recommendations made by UN treaty bodies and UN special procedures over the last decade.<sup>116</sup> It is important to note that the present analysis does not intend to compare the recommendations made at the UPR and by other UN human rights mechanisms on a country-by-country basis.

In relation to this, it is noteworthy that in a great number of cases the UPR not only complements, but rather substitutes other international mechanisms. This is the case for states under review with a particularly poor record in either ratifying international instruments or reporting to international human rights mechanisms. In those cases, the UPR may be the main or only dialogue on human rights in which the state is taking part at the international level.

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115 David Brown, ‘Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: an Introduction to the Yogyakarta Principles’ (2010) 4 Michigan Journal of International Law 31, 821-879, 876.

116 From 2010 to 2015, the Universal Human Rights Index provides a list of 285 recommendations of the treaty bodies related to LGBTI persons. The SOGI database of the International Commission of Jurists contains 423 references to special procedures reports.

### 4.3.1. UPR recommendations consolidating the level of protection granted by other human rights mechanisms

As presented in Chapter 2, the majority of the UPR recommendations addressed the principle of non-discrimination. As a general principle of international law, the principle of non-discrimination guides the implementation of all the rights recognised in international human rights treaties. However, treaty bodies and states at the UPR have been very careful in the application of the principle to only a select number of rights. Similarly, states have mostly addressed legal and judicial practices within the criminal justice system – that is, the decriminalisation of consensual same-sex relationships and the criminalisation of violence based on sexual orientation or gender identity.

#### NON-DISCRIMINATION BASED ON SEXUAL ORIENTATION, GENDER IDENTITY AND SEX CHARACTERISTICS

A number of treaty bodies – namely the CAT, the CCPR, CEDAW, the CESCR and the CRC – have interpreted the non-discrimination clause as including sexual orientation and gender identity in the list of prohibited grounds.<sup>117</sup> While the number of general comments – including the two prohibited grounds – increased, the treaty bodies have progressively intertwined gender identity and sexual orientation in their recommendations to states during the country reviews. The Yogyakarta Principles start by reiterating the principle of universality, equality and non-discrimination based on sexual orientation and gender identity.

Conversely, treaty bodies have only recently started to address sex characteristics through the harmful practice of medically unnecessary surgical or other procedures on intersex children without informed consent;<sup>118</sup> sexual abuses in detention;<sup>119</sup> sexual exploitation of intersex children;<sup>120</sup> the impact of hate speech on LGBTI children in the context of the anti-propaganda law;<sup>121</sup> and discrimination in healthcare, employment and education of LGBTI children or children from families formed of such persons.<sup>122</sup> It is only in 2016 that the CESCR has for the first time outlined in a general comment that ‘sex characteristics’ are another prohibited ground of discrimination under the International Covenant on Economic, Social and Cultural Rights (IECSR).<sup>123</sup>

A general trend at the UPR has been the repetition of the evolution witnessed at the level of the treaty bodies. States have progressively referred to sexual orientation *and* gender identity. Besides general recommendations invoking equality and/or non-discrimination in general terms, recommending states have also resorted extensively to specific recommendations. Thus, 211 CTAs called for the integration of the principle of non-discrimination on the grounds of SOGI in the constitution, or the adoption of ‘legislative measures’ or ‘anti-discrimination law’ protecting LGBTI persons. The fact that

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117 See n 27, 28, 29 and 30 above.

118 CAT, ‘Concluding observations on the report of Germany’ (2011) UN Doc CAT/C/DEU/CO/5, para 20. CRC, ‘Concluding observations on the combined second to fourth periodic reports of Switzerland of the Committee on the Rights of the Child’ (2015) UN Doc CRC/C/CHE/CO/2-4, paras 42–43.

119 CAT, ‘Concluding observations on the combined third to fifth periodic reports of the United States of America’ (2014) UN Doc CAT/C/USA/CO/3-5, para 21.

120 CRC, ‘Concluding observations on the report submitted by India under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography or the Committee on the Rights of the Child’ (2014) UN Doc CRC/C/OPSC/IND/CO/1, para 21.

121 CRC, ‘Concluding observations on the combined fourth and fifth periodic reports of the Russian Federation’ (2014) UN Doc CRC/C/RUS/CO/4-5, paras 24–25.

122 CRC, ‘Concluding observations on the fourth periodic report of Eritrea’ (2015) UN Doc CRC/C/ERI/CO/4, para 24.

123 CESCR, ‘General Comment n 22: Right to sexual and reproductive health (Art 12)’ (2016) UN Doc E/C.12/GC/22.

recommending states have not yet addressed issues specific to intersex people at the UPR may be due, in part, to the time discrepancy in echoing the position of other human rights mechanisms.

Turning to states' acceptance and implementation on the ground, slightly more than half of the recommendations addressing the principle of non-discrimination in *general* terms have been accepted by states. Then 40 per cent of the recommendations calling for a *specific* action, such as a law reform in order to integrate the principle, were accepted. The rates of acceptance of general and specific recommendations were relatively close.

In terms of impact on the ground, the UPR may have facilitated the adoption of new legislation at country level in some cases.<sup>124</sup> Fourteen countries currently recognise<sup>125</sup> the principle of non-discrimination based on sexual orientation in their constitution. Some, like Ecuador, included both sexual orientation and gender identity.<sup>126</sup> In some other countries, the principle has been recognised by either legislation<sup>127</sup> or constitutional courts.<sup>128</sup> In the context of ongoing evolution at country level, the UPR may not have been the most influential factor in these processes. However, its contribution no doubt reflects the state's growing support for the principle.

Conversely, it is noteworthy that treaty bodies and states have both poorly addressed the legal recognition of self-defined gender identity. In legal terms, access to legal gender recognition is the exact correlation of the principle of non-discrimination based on gender identity. Because gender identity, unlike sexual orientation, forms part of our legal identity, any change in gender markers based on self-determination should be acknowledged in law. Trans people should not be required to undergo forced sterilisation, divorce or psychiatric diagnosis for this change to happen.<sup>129</sup> Notwithstanding this correlation, the treaty bodies have addressed the issues in only a few instances.<sup>130</sup> Similarly, recommending states at the UPR have been very careful in their recommendations.<sup>131</sup>

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124 See, for instance, the adoption of the Law on Prohibition of Discrimination in Montenegro in April 2014 ('Art 19 Discrimination on the basis of gender identity and sexual orientation') [www.legislationline.org/topics/country/57/topic/84](http://www.legislationline.org/topics/country/57/topic/84) accessed 9 September 2016.

125 See n 58 above, 44: Nepal, South Africa (2015), Thailand (2007), Bolivia (2009), some parts of Argentina, some states of Brazil, British Virgin Islands, Canada, Ecuador, Finland, Mexico (2014), Kosovo (2008), Malta (2014), Portugal (2004), Slovenia (2009), Sweden (2003), Switzerland (2000), Fiji and some states in Germany (2013).

126 The country's new Constitution - passed by referendum in September 2008 - also encompasses same-sex couples' rights. The Constitution legalised same-sex civil unions, which first took place in October 2009. The document also prohibits discrimination based on sexual orientation and gender identity. However, it bans same-sex marriage as well as adoption of children by same-sex couples. Transgender persons have been able to change their sex on national identity cards by requesting the change in court. Congress is debating a reform to the country's federal ID law and whether to allow people to choose which gender to put on identification.

127 See for instance, Albanian Law 10221 on protection from discrimination of 4 February 2010: Albania was praised by the CEDAW as 'one of the few state parties to the CEDAW that expressly prohibit discrimination, inter alia, on the grounds of gender, gender identity and sexual orientation'.

128 STJ-6, Resp No 395.904, Relator: Min. Hélio Quaglia Barbosa, 12 December 2005, s 2.2 138 (Brazil). Corte Constitucional, 16 April 2008, sent C-336/08 (paras 5.6-5.8); Corte Constitucional, 3 October 2007, sent C-811/07 (part 5); Corte Constitucional, 7 February 2007, sent C-075/07 (Dr Rodrigo Escobar Gil, dissenting opinion, part 6); Corte Constitucional, 15 May 2005, sent C-373/02 (fn 33). *Pant v Nepal*, Writ No 917 of the Year 2064 BS (2007 AD) (Nepal). *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) at 11, 23 (SA). YEAC/ *Caja Pervisión y Seguro Médico de la Provincia de Buenos Aires S/ Amparo*, 2005, Juzgado de Primera Instancia No 1 en lo Contencioso Administrativo del Departamento Judicial de La Plata [1a Inst], 9 March 2005 (Argentina) [www.scba.gov.ar/falloscompl/Infojuba/ContenciosoEsp2/412.doc](http://www.scba.gov.ar/falloscompl/Infojuba/ContenciosoEsp2/412.doc) accessed 9 September 2016.

129 Jean T Theilen, 'Depathologisation of Transgenderism and International Human Rights Law' (2014) *Human Rights Law Review* 14, 327-342.

130 CEDAW, 'Concluding observations on the seventh periodic report of Belgium' (2014) UN Doc CEDAW/C/BEL/CO/7, para 44. HRCtee, 'Concluding observations on the seventh periodic report of Ukraine' (2013) UN Doc CCPR/C/UKR/CO/7, para 10. HRCtee, 'Concluding observations on the fourth periodic report of Ireland' (2014) UN Doc CCPR/C/IRL/CO/4, para 7. CESCR, 'Concluding observations on the second periodic report of Lithuania' (2014) UN Doc E/C.12/LTU/CO/2, para 8. CEDAW, 'Concluding observations on the combined fourth and fifth periodic reports of Georgia' (2014) UN Doc CEDAW/C/GEO/CO/4-5.

131 Only six countries received the recommendation to adopt a law on gender identity (El Salvador; Honduras), recognising self-defined gender or transgender persons (Poland), or to facilitate documentation for transsexual people (Costa Rica; Germany); and allowing a medical gender change to be reflected in a person's identity documents (Kuwait).

Under the right to privacy, Yogyakarta Principle 6 outlines state obligations to repeal laws that criminalise consensual same-sex sexual activity; to ensure people have the right to choose how, when and to whom they reveal information relating to their sexual orientation and/or gender identity; and to strike out any laws that prohibit or criminalise expression of some gender identities.

The HRCtee has recognised that the criminalisation of consensual same-sex sexual activity breaches the right to privacy (Article 17.1 ICCPR); the principle of non-discrimination (Article 2 ICCPR); and the principle of equality before the law (Article 26 ICCPR).<sup>132</sup> The call for decriminalising same-sex relationships at the UPR confirms a number of national and international jurisprudence invalidating the role of criminal law in regulating private and consensual same-sex relationships.<sup>133</sup> The justification from a human rights law perspective is that, in this case, public order or morality cannot override the individual fundamental rights of dignity and privacy. The HRCtee<sup>134</sup> and the IACHR<sup>135</sup> have affirmed that the existence of such laws violates the state's human rights obligations, even if they are not enforced in practice.

Over the first eight years of state-by-state review, 60 of the 78 countries criminalising same-sex relationships at the beginning of the UPR have received one or several recommendations to decriminalise. Only 15 countries have accepted one of these recommendations (25 per cent).<sup>136</sup> Among them only five states – Mozambique, Nauru, Palau, Seychelles and São Tomé and Príncipe – have revised their criminal code to date. While on the face of it the situation has not changed much, the UPR has opened a breach and broken down the block of criminalising countries into three groups. The first group of states has committed to repeal laws criminalising same-sex (sexual) relationships. The second group has committed to engage in the discussion towards law reform in the future. This is the case with Suriname, which responded that decriminalisation 'had the Government's attention' and the 'main course of action would be to initiate a general discussion on that sensitive issue, involving all actors in society, including religious organisations and LGBT platform groups and individuals'. The consultation was still to take place at the time of the second review of the country.<sup>137</sup> However, a number of provisions had been adopted to protect LGBTI persons, including the criminalisation of defamation based on sexual orientation. The third group

132 *Toonen v Australia* Human Rights Committee (31 March 1994) Communication no 488/1992, UN Doc CCPR/C/50/D/488/1992. See also: HRCtee, Concluding observations of the Human Rights Committee – Togo (2011) UN Doc CCPR/C/TGO/CO/4.

133 See n 31 and 32 above.

134 See n 132 above, *Toonen v Australia*. See also HRCtee, Concluding observations of the Human Rights Committee – Togo (2011) UN Doc CCPR/C/TGO/CO/4, para 14: 'The Committee remains concerned about the criminalisation of sexual relations between consenting adults of the same sex, punishable by 1 to 3 years of imprisonment and a fine of up to 500,000 CFA francs under article 88 of the current Criminal Code. As pointed out by the Committee and other international human rights bodies, such criminalisation violates the rights to privacy and to protection against discrimination set out in the Covenant. The Committee's concerns are not allayed by the information furnished by the State party that the provision in question is not applied in practice or by its statement that it is important to change mindsets before modifying the law in this regard (arts 2, 9, 17 and 26).'

135 *Angel Alberto Duque v Colombia*, (Merits Report n 5/14) IACHR Case 12,841 (2 April 2014). IACHR Press Release No 57/14 'May, 17 – International Day Against Homophobia and Transphobia (IDAHO-T)' 15 May 2014 [www.oas.org/en/iachr/media\\_center/PReleases/2014/057.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/057.asp) accessed 9 September 2016. See for example, IACHR Press Release No 79/13 'IACHR Expresses Concern about Mob Attacks, Police Abuse and other Forms of Violence against LGBTI Persons' 24 October 2013 [www.oas.org/en/iachr/media\\_center/PReleases/2013/079.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/079.asp) accessed 9 September 2016. See also Press Release No 109/10, 'IACHR concludes its 140th period of sessions' [www.cidh.org/Comunicados/English/2010/109-10eng.htm](http://www.cidh.org/Comunicados/English/2010/109-10eng.htm) accessed 9 September 2016.

136 Chile, Guyana, India, Lithuania, Mongolia, Nauru, Palau, Peru, Russian Federation, Samoa, São Tomé and Príncipe, Seychelles, Solomon Islands, Turkey and Ukraine.

137 The consultation process was to start in July 2016, beginning with faith-based organisations.

resisted any recommendation to decriminalise and indicated a desire to retain the status quo and preserve discriminatory criminal legislation.

While some of the commitments are stronger than others and the full impact of these commitments to review has yet to be seen, the UPR has definitely engaged in a universal debate. It places countries with legislation in blatant contradiction with international law into a position of ‘political obligation’ to justify themselves.

However, rather than opening up the debate, some countries have shifted attitudes towards repression. For instance, in 2015 Kyrgyzstan accepted the recommendation from Brazil to ensure that national legislation conform to international human rights standards on non-discrimination regarding SOGIE. And yet, just eight months later parliament voted almost unanimously (90 to two) in favour of a Bill to penalise promotion of ‘non-traditional’ sexual orientation.<sup>138</sup>

The recommendation of Bangladesh to Tonga demonstrates another form of resistance at the UPR. Bangladesh recommended that Tonga continue to criminalise same-sex relationships. In support of its recommendation, Bangladesh commented that ‘[t]he purpose of the UPR is not to impose the values of one society on another’ and that, ‘if the traditional society of Tonga does not permit consensual sex between two men or two women, one should refrain from imposing this on them, as it is outside the purview of universally accepted human rights norms’.<sup>139</sup> Currently, there is no treaty obliging Tonga to do otherwise.

Of the 72 criminalising countries remaining,<sup>140</sup> fewer and fewer can now affirm that such criminalisation is not in violation of human rights. Rather, these criminalising countries advance the notion that the criminalisation of same-sex relationships is justified by the values of their societies. The UPR constitutes a key arena to address this narrative. The issues to address are that of universality, equality and non-discrimination as the underlying principles of human rights. These principles are at the core of human rights and human rights are at the core of the social contract enshrined in constitutions. As such, these principles cannot be subject to derogation or referendum.<sup>141</sup> As mentioned by an international UPR expert:

‘Resisting states are part of the international community and the UN. They have accepted that everyone is born free and equal, as guaranteed under the Universal Declaration of Human Rights (UDHR) and the UN Charter. So always using the argument of religion and the fact that society is not ready is not a justification to note recommendations on LGBTI. LGBTI individuals do exist and resisting states cannot continue to ignore them. States have to face the reality that the LGBTI community is part of society; this is natural, this is beautiful and they have to face it. States need to act according to international standards and obligations and that is also why it is important that LGBTI human rights defenders engage in the UPR process and show inclusiveness and acceptance.’ (Emilie Pradichit, Asia Director of UPR Info Asia Regional Office)

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138 See n 58 above, 22.

139 Bangladesh statement during the UPR Working Group session. Wednesday 14 May 2008.

140 See n 58 above, 11.

141 See Chapter 5.3.

The principle of non-discrimination produces positive obligations, among which is the obligation expressed in both Yogyakarta Principles 5 and 29 to ensure that all acts of violence towards LGBTI persons are promptly and effectively investigated, prosecuted and punished and that all victims are provided with redress. The CAT, the CEDAW, the CRC and the HRCtee have all addressed the issue in their concluding observations.<sup>142</sup>

Non-discrimination and criminalisation of discrimination and violence are two sides of the same coin. A laissez-faire attitude vis-à-vis homophobic crimes, including from law enforcement officers, is a convenient way out for states. The call for criminalisation of violence on the grounds of sexual orientation and gender identity constitutes a key recommendation. With 163 CTAs calling for criminalisation and investigation of violence committed against LGBTI persons, the UPR has sent a clear signal about states' correlated obligations between non-discrimination and the criminalisation of violence. It is the recommendation with the highest level of acceptance, at 70 per cent.<sup>143</sup>

As evidenced in both the recent report by the OHCHR and the report by the IACHR,<sup>144</sup> the fight against impunity remains a major challenge on the ground around the world. If the UPR creates momentum on the issue of impunity, it could further tackle the question of 'how' to address it. Forty-one recommendations addressed to 30 countries called for the training of law enforcement officers and/or lawyers; however only one Asian<sup>145</sup> country and seven African<sup>146</sup> countries received this recommendation. Then only 13 countries<sup>147</sup> received a recommendation focusing on access to justice and effective remedies<sup>148</sup> or protection of the victims;<sup>149</sup> while reporting to the police remains the most problematic stage for effectively accessing remedies. For instance, in 2014 the CAT called for Uruguay to 'adopt the legislative measures concerning hate crimes that are necessary to deter violence directed at people because of their sexual orientation or gender identity and *establish effective systems for reporting* this type of violence so that the perpetrators of such acts can be investigated, put on trial and punished' [emphasis added].<sup>150</sup>

Conversely, while largely addressed in general at the UPR,<sup>151</sup> torture and ill-treatment have not been referred to in instances affecting LGBTI persons. Practices – most often institutionalised – such as

142 See for instance, CAT, 'Concluding observations on the report of Mongolia' (2011) UN Doc CAT/C/MNG/CO/1: 'The state should establish effective policing, enforcement and complaints mechanisms with a view to ensuring prompt, thorough and impartial investigations into allegations of attacks against persons on the basis of their sexual orientation or gender identity in line with the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity'.

143 See Chapter 2.

144 UNHRC, 'Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity' (2015) UN Doc A/HRC/29/23; UNHRC, 'Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity' (2011) UN Doc A/HRC/19/41. IACHR/OAS, 'Report on Violence against LGBTI Persons in the Americas' (2015) OAS/Ser.L/V/II.rev.I.

145 Bangladesh.

146 Benin, Equatorial Guinea, Ghana, Republic of the Congo, Senegal and South Africa.

147 Bolivia, Costa Rica, Dominica, El Salvador, Gambia, Guyana, Honduras, Kazakhstan, Kyrgyzstan, Marshall Islands, South Africa, United Arab Emirates and Uruguay.

148 For example, Norway to Uruguay: 'Adopt necessary legislative and administrative measures to guarantee the security of LGBT persons and facilitate their access to justice and legal assistance.'

149 France to South Africa: 'Develop programs to prevent discrimination based on sexual orientation and gender identity, to punish violence of this kind and ensure that victims receive appropriate support.'

150 CAT, 'Concluding observations on the third periodic report of Uruguay' (2014) UN Doc CAT/C/URY/CO/3, para 21 (b)

151 UPR Info, *Beyond Promises* (UPR Info 2014), 26.

forced anal examinations;<sup>152</sup> abuses in police stations, detention centres and prisons;<sup>153</sup> or forced sterilisation of transgender persons<sup>154</sup> and surgeries on intersex children – have been addressed by some treaty bodies, the Special Rapporteur on Torture and the Special Rapporteur on the Right to Health.<sup>155</sup> It is noteworthy that 159 states have ratified the Convention against Torture.

Further, provisional measures have rarely been used at the UPR. Only three states, namely Argentina, France and Germany, called for a de facto moratorium on convictions and only five states called for the release of prisoners condemned on the basis of their sexual orientation.

Finally, recommending states only sporadically called upon the state under review to monitor abuses committed against LGBTI persons, collect data on abuses or allocate financial resources towards these ends.

#### FREEDOMS OF ASSOCIATION, ASSEMBLY AND EXPRESSION

Concluding observations from the HRCtee that deal with the freedom of association, assembly and expression of LGBTI persons have until recently been sporadic.<sup>156</sup> This stands in sharp contrast with the reports of the Special Rapporteur on Human Rights Defenders, the Special Rapporteur on Freedom of Association and Assembly and the Special Rapporteur on Freedom of Expression, who have, to date, referred to the issue 156, 22 and 45 times respectively in their reports.<sup>157</sup> All three rapporteurs have acknowledged the strong restrictions placed on the expression and manifestation of sexual orientation and gender identity in many countries. This repression often stems from legislation addressing public security or the so-called anti-propaganda legislation, criminalising all forms of expression of, and assembly about, SOGIESC issues. It also stems from all types of criminal legislation targeting LGBTI persons insofar as they indirectly impact on these fundamental freedoms.

Despite the limited number of recommendations, the fact that freedoms of association, assembly and expression come as the fifth topic addressed at the UPR provides support to the recognition of the fundamental freedoms of the LGBTI community. Forty-four CTAs addressed the freedom of assembly, association and expression (Yogyakarta Principle 19 and 20) and 28 CTAs addressed the protection of human rights defenders working on LGBTI issues (Yogyakarta Principle 27).

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152 UNHRC, 'Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity' (2011) UN Doc A/HRC/19/41, para 37. UNHRC, 'Report of the Special Rapporteur on Torture, Juan E Méndez' (2013) UN Doc A/HRC/22/53, para 79.

153 CAT, 'Concluding observations on the report of Paraguay' (2011) UN Doc CAT/C/PRY/CO/4-6. The CAT has expressed serious concerns both about physical and moral violence against LGBTI persons, especially in detention both from inmates and prison guards. UNHRC, 'Interim report of the Special Rapporteur on torture, Juan Méndez' (2011) UN Doc A/66/268, para 69.

154 UNHRC, 'Report of the Special Rapporteur on torture, Juan E Méndez' (2013) UN Doc A/HRC/22/53, para 88.

155 CAT, 'Concluding observations on the third periodic report of Uruguay' (2014) UN Doc CAT/C/URY/CO/3.

156 In 2014, the HRCtee recommended to Burundi, Georgia, Latvia and Togo to recognise the rights of LGBT persons to freedom of expression, freedom of association and/or assembly.

157 Source: ICJ SOGI database [www.icj.org/advanced-search-for-sogi-un-database](http://www.icj.org/advanced-search-for-sogi-un-database) accessed 9 September 2016.

### 4.3.2. UPR recommendations below the level of protection granted by other human rights mechanisms

As mentioned in Chapter 2, the UPR recommendations have not addressed all of the Yogyakarta Principles and some, such as humane treatment in detention and freedom from torture, have been addressed sporadically. Neither have all the groups of the LGBTI community been addressed in an equal manner. As mentioned above, the UPR also tends to echo the recommendations made by other mechanisms.

UPR recommendations tend to focus on the processes of criminalisation and decriminalisation, as a matter of priority and, as stated above,<sup>158</sup> this may partly justify the rather low number of recommendations addressing economic, social and cultural rights. However, some gaps remain, which are striking when compared to international recommendations made by other human rights mechanisms. The discussion here will focus on two issues that illustrate current gaps at the UPR.

First, regarding the right to health, the special rapporteurs<sup>159</sup> – and, to a much lesser extent, the treaty bodies<sup>160</sup> – have addressed the interlinkages between stigmatisation of LGBTI persons and discrimination in access to healthcare and HIV prevalence. At the UPR, recommendations have been made in order to protect, guarantee and ensure the right to health of LGBTI persons; ensure equal access to health services with no discrimination based on SOGIESC; raise awareness and develop education on LGBTI issues in health policy; develop programmes to respond to the HIV/AIDS-related needs of sexually active gay men; ensure access to reproductive medicine for LGBTI persons; and ensure access to abortion for LGBTI persons.

While it may be striking that HIV policies are not addressed more and that trans people are not mentioned in HIV-related recommendations, it is noteworthy that some LGBTI human rights defenders have been reluctant to advance advocacy based on the right to health. Due to the risk of conflation between LGBTI persons and HIV-positive people, the fear of double stigmatisation justified the right to health not being chosen as an entry point:

‘In the GRULAC region, civil society did choose not to address LGBTI issues through the health sector as it would generate a double stigmatisation and only foster the conflation between the LGBTI community and HIV infected people, as well as sex workers. In other words, more bad than good would come from using the right to health as an entry point.’ (Maurice Tomlinson, lawyer, Jamaica – cisgender gay man)

Besides HIV policies, one may note that some measures that relate to the right to physical, mental and moral integrity and the prohibition of torture and inhuman treatment could have been more carefully addressed through the right to health and measures addressing health professionals. A number of repressive measures against LGBTI persons stand at the interface between the medical and the criminal spheres. These drifts encompass the use of forced anal exams as evidence of same-

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158 See Chapter 2.

159 ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt’ (2003) UN Doc E/CN.4/2003/58, para 60; ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt’ (2004) UN Doc E/CN.4/2004/49; ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover’ (2010) UN Doc A/HRC/14/20.

160 CESCR, ‘Concluding observations on the combined third and fourth periodic reports of Jamaica’ (2013) UN Doc E/C.12/JAM/CO/3-4.



sex relationships amenable to courts; the disclosure to the government of the sexual orientation of HIV-infected people by health professionals; and the qualification of transgender people as having a medical condition or a disease. A response to these malpractices requires the training of both the medical and legal professions. The fact that transgender people are classified as having a disease in some countries and the fact that psychiatric diagnosis is required for changing legal gender identity constitutes a majorly oppressive environment for transgender people. The ‘depathologisation’ or ‘demedicalisation’ of the meaning of transgender is a strong advocacy point in countries such as Russia. It calls for the declassification of transgender as a disease and implies inter alia that no psychiatric diagnosis for changing legal gender identity be required.

Secondly, among groups usually considered as vulnerable, very little attention has been paid to children, either directly or indirectly, through the right to education (11 CTAs). States institutionalising homophobia and transphobia have been creative in developing educational measures in schools to curb diversity and repress so-called ‘deviant’ behaviours. CSOs have made a number of recommendations addressing children and youths, including punishing discriminatory behaviour on the part of educators towards gay, bisexual and transgender children<sup>161</sup> by ‘establishing training programs for kindergarten and school staff regarding trans children’,<sup>162</sup> or looking to ‘develop and implement a mechanism to protect the confidentiality of LGBT victims of domestic violence, especially of LBT women and LGBT children if they apply to public authorities for assistance’.<sup>163</sup>

While awareness-raising measures, education programmes and training activities have been mentioned in 133 CTAs, children’s rights – such as the right to information and sexual education;<sup>164</sup> the need for protection of LGBTI children; or blatant violations of children’s rights, such as ‘rehabilitation’ courses and camps – have only once been mentioned as such at the UPR.<sup>165</sup> These are also missing in the Yogyakarta Principles and constitute a major gap in the current international legal framework. Against this backdrop, CESCR and CRC in particular are clearly positively inclined to examine the scope of nondiscrimination provisions regarding LGBTI children.<sup>166</sup> The Special Rapporteur on the Right to Health has flagged that laws that restrict information about sexual and reproductive health and censor discussions of homosexuality in the classroom fuel stigma and discrimination of vulnerable minorities.<sup>167</sup> The Special Rapporteur on Torture has flagged the particular risk of ill treatment and torture for LGBTI children deprived of liberty.<sup>168</sup> Both the Special

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161 Recommendation made to Belize.

162 Recommendation made to Germany.

163 Recommendation made to Kyrgyzstan.

164 UNGA, ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover’ (2009), UN Doc A/64/272.

165 Netherlands to Kyrgyzstan: ‘Adopt and implement legislation ensuring effective protection of LGBT people, inter alia on the prohibition of discrimination and hate crimes, a confidential complaints mechanism and protection of LGBT *minors*’ [emphasis added].

166 The CRC recognises the principle of non-discrimination and the need for the protection of children, in particular displaced children; children with disabilities; children living with HIV/AIDS; lesbian, gay, bisexual, transgender and intersex children; and children living in rural, remote and marginalised urban areas. See for instance, CRC, ‘Concluding observations on the combined third to fifth periodic reports of the Dominican Republic’ (2015) UN Doc CRC/C/DOM/CO/3-5 (CRC, 2015). See also, CRC, ‘Concluding observations on the combined fourth and fifth periodic reports of Colombia’ (2015) UN Doc CRC/C/COL/CO/4-5.

167 UNGA, ‘Interim report of the Special Rapporteur on the right of health, Anand Grover’ (2011) UN Doc A/66/254, para 59.

168 UNHRC, ‘Report of the Special Rapporteur on torture, Juan E Méndez’ (2015) UN Doc A/HRC/28/68, para 86 (g).

Rapporteur on Torture and more recently the CAT have prohibited unnecessary medical surgical procedures during infancy or childhood for intersex children.<sup>169</sup>

#### *4.3.3. UPR recommendations above the level of protection granted by other human rights mechanisms*

The UPR has been the confrontational platform between states protecting a traditional vision of ‘family’ on the one hand and states advancing the LGBTI individuals’ right to found a family on the other. Similar tension is present in the overall work of the Human Rights Council, where resolutions on the protection of the ‘family’ have been adopted concomitantly to resolutions on sexual orientation and gender identity.

The UPR recommendations addressing the right to found a family (52 CTAs) are of particular importance considering the prudence adopted by the treaty bodies on those issues.

It results from the jurisprudence of the treaty bodies that state parties do not have the obligation to legalise same-sex marriage but must recognise and give legal protection to same-sex couples.<sup>170</sup> Trans persons must have the right to legal gender recognition without the requirement of dissolution of marriage or civil partnership.<sup>171</sup> The CRC has also called on Slovenia to regularise the status of children of same-sex families, either by amending the registration of the same-sex partnership act or by including an appropriate provision in the envisaged family code.<sup>172</sup>

Conversely, at the level of the UPR, recommending states brought further implications on the right to found a family, including the right to adopt.

States first called to protect equality between same-sex and different-sex relationships/partnerships/couples (as per Yogyakarta Principle 24 (e and f))<sup>173</sup> and legally recognise same-sex marriage.

In addition, recommendations were made to states under review to ‘legally recognise the right to adopt to same-sex couples’ (Yogyakarta Principle 24 (a));<sup>174</sup> ‘take necessary steps to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members (Yogyakarta Principle 24 (b));<sup>175</sup> and ‘protect the best interest of the children’ (Yogyakarta Principle 24 (c)).

In light of the above and in conclusion of Chapter 4, the two cycles of the UPR have no doubt achieved the first step towards the consolidation of the international legal framework. The

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169 UNHRC, ‘Report of the Special Rapporteur on torture, Juan E Méndez’ (2013) UN Doc A/HRC/22/53, para 88. Taken from the CAT, ‘Concluding Observations on Denmark’ (2015) UN Doc CAT/C/DNK/CO /6-7, paras 42–43. The Committee made similar recommendations for Austria (CAT /C/AUT /CO /6, para 44), Hong Kong (CAT /C/CHN-HKG/CO /5, paras 28–29) and Switzerland (CAT /C/CHE/CO /7, para 20) during the same year.

170 CESCR, ‘Concluding observations on the combined fourth and fifth reports of Bulgaria’ (2014) UN Doc E/C.12/BGR/CO/4-5, para 17: ‘The Committee recommends that the State party undertake a comprehensive review of its legislation to ensure de jure equality between de facto and official unions, to legally recognise same-sex couples, to regulate the financial effects of such relationships, and to guarantee the full protection of the rights of children born out of wedlock.’

171 HRCtee, ‘Concluding observations on the fourth periodic report of Ireland’ (2014) UN Doc CCPR/C/IRL/CO/4, para 7.

172 CRC, ‘Concluding observations on the combined third and fourth periodic reports of Slovenia’ (2013) UN Doc CRC/C/SVN/CO/3-4, para 27.

173 Germany to St Vincent: ‘Introduction of a law prohibiting the discrimination of same-sex relationships.’

174 UK to Austria: ‘Amend the legal status of same-sex partnerships to enable the right to adopt and have children.’

175 Iceland to Finland: ‘Eliminate discrimination against LGBTI people with regard to family and parental rights.’

assessment of the impact of the UPR on international law was made in this section in light of the recommendations made by the UN special procedures and treaty bodies.

The major contribution of the UPR to the work of the other human rights mechanisms so far has probably been the consolidation of the right to security and the criminalisation of hate crimes and hate speech, with 70 countries addressed and a 70 per cent acceptance rate. The recognition of the principle of non-discrimination based on SOGI has received support from more than 40 recommending states as well as 94 states under review.

Another major achievement through the UPR has been to open a dialogue with 67 of the 73 states criminalising same-sex relationships. Despite the low level of acceptance (25 per cent), the UPR has moved the debate away from the polarisation of states into two blocks and created a group of states affirming their intention to open a dialogue on this in their country.

Among issues that have been relatively poorly addressed by other human rights mechanisms, the protection of same-sex partnerships and the recognition of a broad definition of the ‘family’ has won a battle with the UPR. Despite being the more conflicting issue among states, the right to found a family constituted the fourth most addressed of the SOGIESC topics by recommending states.

Unlike specific issues related to sex characteristics, the recognition of legal gender identity has been addressed at the UPR and, in light of the limited recommendations of treaty bodies, remains noticeable. The same is true for freedom of association and expression, addressed by the UN special procedures but very sporadically by treaty bodies.

The main missed opportunity so far has been not to address LGBTI children’s rights directly, but only through sporadic education measures.

For the consolidation of the international legal framework to be completed, the UPR must provide impact on the ground and demonstrate alignment between acceptance and implementation of the recommendations. The discrepancy remains high. However, the UPR has been appraised by all actors as a long-term process and Cycle 3 is seen as the right time for the UPR impact to unfold.

## Chapter 5: Implementation and Follow Up

This chapter provides an overview of the implementation of the UPR recommendations on the ground and highlights key successes in that respect. Building on the challenges encountered in the implementation of the recommendations, this last section offers different options for the recommending states to develop for follow-up recommendations in the UPR Cycle 3.

### 5.1. Implementation overview

‘I am also disturbed by a widespread practice of what could be termed ‘human rights window-dressing’. The ratification of treaties and agreements, and acceptance of recommendations stemming from UN human rights mechanisms, are not in themselves human rights achievements. There needs to be follow-up and real change to bring greater freedoms and dignity to the people. Unless consequential at the level of the rights of the individual, the work we do will remain bureaucratic – or even theatre. Human rights obligations should not be a “tick-the-box” exercise designed only to boost a country’s international image.’<sup>176</sup>

SOGIESC recommendations made to a state under review are never the ultimate goal of UPR work: it is the implementation of those recommendations as laws, policies and practices that will actually improve the situation of LGBTI persons in the country.

There is currently no formal process set up to consistently measure the level of implementation in the states under review. However, national and international NGOs have done important work in this area: only 11 per cent of survey respondents reported that they do not do any monitoring work. 46 per cent have regular meetings with other NGOs; 43 per cent have met the NHRI; 26 per cent regularly meet with their governments to discuss the country’s UPR recommendations; 18 per cent have written a mid-term report; and 17 per cent work with OHCHR.

Twenty-three per cent of the respondents reported that their country has a follow-up mechanism in place and, out of those, two-thirds were involved in this mechanism in some way. Faced with the lack of an effective follow-up mechanism at state level, in some cases civil society or NHRIs have taken on the role to monitor implementation: 14 per cent of the respondents stated that they created a follow-up mechanism themselves.

‘The mandate to tackle the issues of the UPR process lies within the Ministry of Foreign Affairs. Due to its incompetence, lack of experience in human rights, sexuality and gender issues and lack of coordination and collaboration between/among sectors and ministries, the follow-up mechanism on the government side is next to non-existent. Therefore, civil society takes the leading role and keeps the government in check, but takes an approach of working hand-in-hand, rather than a confrontational stance of government versus civil society, which would be detrimental in the long run.’ (Cisgender gay man in the Asia-Pacific region)

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176 Zeid Ra'ad Al Hussein – High Commissioner for Human Rights, Human Rights Council 31st session (2016, OHCHR).

Civil society recommendations and the outcome of the report can serve as a roadmap for implementation for the government, and civil society groups have already used it as such. Many groups decided to continue their advocacy on recommendations that may not have been picked up by recommending states or were only noted by their governments, using them as a basis for further advocacy.

‘Overall our state considers the UPR as the road map or the proposed agenda in human rights for government and for the state. We are also incorporating the recommendations of the 2015 UPR on the national action plan on human rights. It is also a tool to ensure that the state objectively measures the level of compliance with its international commitments.’ (GRULAC state under review)

‘For me, accepted or noted, in the end the government has to work on the issues. And at least we can say, “even though you noted it, you see that at the international level the UN states already care about this issue. Why don’t we care about this issue?” Having these kinds of recommendations on trans and intersex issues, in the end, the government may deny it, but at least it’s already there.’ (Nada Chaiyajit, Togetherness for Equality and Action, LGBTI representative of the Thai CSO Coalition for the UPR – intersex transwoman)

‘When we wrote the report we knew it was going to be read by the government and UN people. We did not want it to be too broad... our examples and recommendations are very specific. So even if the recommendation is not picked up, we wanted this document to form part of the thinking process for the public servants in the country. Our recommendations are phrased in a way that anyone in charge of the specific issues within the government can just take that one piece. It is written in a way that it is meant to be implemented.’ (Bryan Choong, Oogachaga & Pink Dot joint team, Singapore – cisgender gay man)

In 2014, UPR Info asked all CSOs as well as all states under review to comment on the progress made and challenges ahead.<sup>177</sup> Forty-eight per cent of the total recommendations made in Cycle 1 have not triggered any action.

Out of the 20,452 recommendations analysed, there were 462 SOGIESC recommendations and UPR Info received information on 263.<sup>178</sup> Of these, 22 were fully implemented; 66 partially implemented; 160 not implemented at all; and nine were not assessed. This means that of the SOGIESC recommendations we have information on, 33 per cent have been at least partially implemented but 61 per cent have not been implemented at all.<sup>179</sup>

Forty-eight per cent of the total recommendations made in Cycle 1 have not been implemented at all. The most implemented recommendations in Cycle 1 were women’s rights, which received 1,891 recommendations, of which 1,114 have been fully or partially implemented.

There are several factors that may account for the relatively low levels of implementation. First, general SOGIESC recommendations may not set out specific steps for implementation. It is difficult to implement them and it is equally difficult to monitor their implementation.

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177 UPR Info, *Beyond Promises* (UPR Info 2014).

178 *Ibid.*, 37. The report only covers Cycle 1.

179 *Ibid.*

‘The steps they would have to take would not be reflected in the recommendations. When it is not specific, it does not give them the direction they need to work towards... But we hope that in the future recommendations can be very specific to SOGI issues and also specific for us to track the progress if the government accepts the recommendation. When it is very broad, it allows the government to say “yes we have done this”, but it is impossible to monitor or to track.’ (Bryan Choong, Oogachaga & Pink Dot joint team, Singapore – cisgender gay man)

Other hypotheses include the lack of will and commitment shown from a state under review or the lack of engagement from civil society with the UPR process, which results in non-existent community ownership.

Even though there are a lot of challenges ahead when it comes to implementation, there also exists good practices that states and civil society can apply during Cycle 3 and that can be used as entry points for some countries. Implementation and follow-up is the objective of this mechanism and states have taken a positive step by making recommendations and accepting them.

## 5.2. Impact and successes

Survey respondents rated the overall usefulness of the UPR as 3.2 (on a scale of one to five; five being ‘very useful’), which is relatively positive but also suggests some gaps that need to be addressed.

Over the first two cycles, the UPR has led to a number of legal and policy changes on SOGIESC issues at the national level. Survey respondents reported that in order to implement its SOGIESC recommendations, governments had changed existing laws (15 per cent); passed new laws (11 per cent); changed policies (four per cent); held workshops with government officials or other decision makers (four per cent); or created new institutions (four per cent).

Mozambique, Nauru, Palau, the Seychelles and São Tomé and Príncipe received recommendations on decriminalising same-sex relations between consenting adults, and have subsequently decriminalised. In several countries the anti-discrimination law has been amended to include sexual orientation and gender identity as protected grounds (eg, Greece and Suriname); in others, the penal code has been revised and now criminalises hate crimes and/or hate speech on the grounds of SOGI (eg, Honduras, Hungary and the Netherlands); some countries have aligned the age of consent (eg, Suriname); others have legalised same-sex partnerships (eg, Greece); and training has been organised for police forces (eg, Peru).

Other good examples of implementation include:

- Namibia: the inclusion of the decriminalisation of sodomy in the National Human Rights Action Plan; the inclusion of minority groups in the health policy regarding access to services; and the recognition of key populations in the national HIV strategic framework.
- Fiji: the establishment of the Fiji Human Rights & Anti-Discrimination Commission.

There was agreement among interviewees that these successes are usually only partially attributable to the UPR process and, in part, due to the ongoing advocacy work on the ground; the influence of other regional or international human rights mechanisms; or other factors. This is echoed by survey

respondents who were asked to indicate how much they thought that the positive changes were attributable to the UPR on a scale of one to five (where one meant ‘not at all’ and five meant ‘fully attributable’ to the UPR process). The average score was 2.89.

‘The UPR played a role; how big, we cannot determine.’ (Cisgender gay man in the Caribbean region)

The UPR has put states in the spotlight to answer SOGIESC-related questions and make commitments, which has been particularly important for states that would not otherwise engage with these issues.

‘It has “normalised” the issues in a way that states were not used to talking about them at all and would not make part of any foreign policy address or bring the issues to the Council. They have found themselves having to answer questions about it and defend their laws and respond to recommendations.’ (Representative of an international human rights NGO – cisgender gay man)

‘The government wanted to make sure we did not want to make them look bad. We suggested something they could do, which they did. We were trying to explore areas where we could have wins... and when it came to sodomy laws, they said “but we do not enforce” and we said “well, tell the Council that”. And they did. And so we cited that repeatedly as a state declaration on non-enforcement.’ (Cisgender gay man in the Caribbean region)

Many survey respondents felt that the UPR has increased awareness on SOGIESC issues in the broader public (20 per cent) and in the government (15 per cent). Fourteen per cent believe that the UPR has been useful in improving the government’s collaboration with civil society. Particularly in countries where same-sex relations are criminalised, the UPR has proven to be an unprecedented opportunity to open up discussion about SOGIESC issues for the first time – either publicly or behind the scenes. In other instances, the UPR helped open doors that were previously shut and helped re-establish or improve the dialogue between civil society and the government.

‘When our advocacy was finished in Geneva, the government kept calling us to have a conversation around our issues. So this is another significant impact. No matter that they did not come out directly and say they will buy in, but they did something behind the scenes. That is something a lot of people are forgetting to put as a big milestone; it is bringing big impact and it can take the recommendations further. The country does not need public attention. The government does not want to be in the spotlight but wants to do things in a silent mode which they believe will be better.’ (Gender non-conforming lesbian in the Africa region)

‘For us the most important thing has been (especially in the political situation in which we were at that time) a national human rights plan that did not include standards of equality and non-discrimination based on sexual orientation and gender identity and did not include issues on sexual and reproductive rights. It was an important process for us, because it allowed for resuming this agenda and it set a possibility to see how they could re-engage in this process, and the recommendations were precisely the issues that had been removed from the document of the national plan of action on human rights.’ (Rossina Guerrero Vasquez, PROMSEX, Peru – cisgender straight woman)

‘I think we can see a big change. Even before, they did not shut the door but they did not open it widely enough. But this time I remember that our government representative said “the state needs to review the national legal framework” and they “would like to invite us to work together to frame the legal framework”. And this is because of the UPR.’ (Nada Chaiyajit, Togetherness for Equality and Action, LGBTI representative of the Thai CSO Coalition for the UPR – intersex transwoman)

The UPR has also helped in informing the state that local LGBTI groups, broader civil society and the international arena are aware of human rights violations against LGBTI persons. UPR engagement also increased the prestige of local NGOs.

‘When they are already part of the civil society coalition and supported, and they engage with the governments or diplomats... it already shows that they are being accepted by the peers and the message you send is that the coalition represents the society or the type of society they want for the country: an inclusive society.’ (Emilie Pradichit, Asia Director of UPR Info Asia Regional Office)

‘The UPR is a very useful mechanism, a way of making sure that the government listens to LGBTI people... It is a way of making sure they hold to their commitment and that they know that we are watching them.’ (Sulique Waqa, Haus of Khameleon, Fiji – transgender woman)

‘The government began to identify us as an organisation that impacts the international human rights mechanisms: this improved our institutional position and our ability for dialogue, and we are called to processes that previously we were not called to.’ (Rossina Guerrero Vasquez, PROMSEX, Peru – cisgender straight woman)

Thanks to the UPR, local LGBTI communities have often become more aware of their human rights and of the support they can obtain from international mechanisms. The UPR has empowered some communities and got them interested and engaged in international human rights work. 20 per cent of survey respondents felt that the UPR has helped increase their capacity to engage with other UN, regional or national human rights mechanisms. Several groups reported that they have recycled their UPR reports as submissions to treaty bodies.

‘The UPR has empowered people and civil society organisations. We invited the local and grassroots organisations from the country, not just the organisations in the capital. We collected and put together information to make sure no one is left behind. I think that was a good part of the UPR process – bringing the voice of the grassroots community to the fore.’ (Nada Chaiyajit, Togetherness for Equality and Action, LGBTI representative of the Thai CSO Coalition for the UPR – intersex transwoman)

‘As it was the overall aim of the UPR, it really empowered civil society on the ground. They do have a voice now and they know that the UN is not far away from them. Their work on the ground has the most powerful impact, they are realising now.’ (Cisgender gay human rights defender in the Asia-Pacific region)

Thirty-four per cent of survey respondents and many interviewees felt that the UPR has strengthened collaboration among civil society actors. In some cases, cooperation between LGB(TI) and trans groups have started or strengthened, and in others LGBTI groups have strengthened or started collaboration with other human rights groups. These coalitions often continued after the adoption



of the recommendations, although the level of their intensity and effectiveness varies. In Fiji the civil society coalition has developed a monitoring matrix that facilitates their joint work in the follow-up and implementation phase.

‘With the other civil society organisations, we developed a monitoring matrix that we will be using... on a monthly/weekly/yearly basis in terms of filling in information on the progress of the position of the government. It is a tool for us to monitor Fiji’s commitments. We went through the whole list of recommendations that Fiji accepted and we divided them into thematic areas... When we had all the partners in the room, we identified the priority areas we want to focus on that are relevant to our ongoing work. *Haus of Khameleon* is monitoring five thematic areas – we want to make sure we are not overburdening ourselves and we really focus on the priorities of the LGBT community and our organisation. There are multiple organisations working on a recommendation, and it’s up to each individual organisation to monitor in their own way and to add their own perspective, and make recommendations. We are making sure that the LGBT perspective is always in there.’ (Sulique Waqa, Haus of Khameleon, Fiji – transgender woman)

### **5.3. Challenges and ways forward: preparing for UPR Cycle 3 recommendations**

In order to further strengthen the UPR’s impact, the following paragraphs address the challenges encountered in the acceptance and implementation of the UPR recommendations. As mentioned in Chapter 2, more than half of the UPR recommendations addressing SOGIE issues called for a specific action where implementation is measurable. Great emphasis was placed on law reform by recommending states, and to a lesser extent, on awareness-raising and education measures. A few recommendations addressed the need for data collection and monitoring mechanisms of violations or the need to finance mechanisms protecting LGBTI persons.

Besides the adoption of the principle of non-discrimination based on SOGIESC, a great majority of the UPR recommendations focused on the criminal justice system of the state under review in order to either repeal, amend or adopt legal provisions used in practice to criminalise LGBTI persons and/or prosecute and investigate violations committed against LGBTI persons.

By so doing, recommending states have focused on the ‘what’ to reach, rather than the ‘how’. The following paragraphs aim at nurturing the follow-up recommendations that recommending states will make in the third UPR Cycle. They look at the ‘how’; ie, how states under review could take steps towards the implementation of the recommendations. They look at possible ways to circumvent challenges encountered in the acceptance or implementation of recommendations. In light of the advocacy and strategic litigations put in place by NGOs and lawyers in Cameroon, Jamaica, India, Malaysia and Russia, an incremental approach is considered. The five countries were selected on the basis of their different legal environments. Particular attention is placed on a comprehensive approach to the legal, judicial and social environments, and the role and interaction of the main actors.

### 5.3.1. Law reform: paving the way to decriminalisation and an enabling legal environment

Countries from different legal traditions have received a UPR recommendation to repeal or amend laws criminalising or used in practice to criminalise the LGBTI community. Islamic countries widely criminalise issues relating to SOGI alongside their expression in society. The Commonwealth countries have inherited the ‘unnatural offences’ in their criminal code left over from former British colonisation. Civil law countries have followed various paths.

Notwithstanding their common legal tradition or legal heritage, the legal and judicial practice has varied a lot under the influence of domestic religious and political forces in place. Since their decolonisation, some Commonwealth states have made steps towards repeal, whereas others like Uganda have strengthened repression. At the same time all countries from all legal traditions have signed up to human rights treaties that commit them to recognising LGBT rights.<sup>180</sup>

As demonstrated by Jamaica, a country may well demonstrate cooperation with international mechanisms without opening up the dialogue on SOGI issues. The country has ratified most of the international human rights treaties and has shown remarkable due diligence in its reporting to treaty bodies. At the same time though, Jamaica has gone through such a process of domestication of the inherited sodomy law that the criminal offence is now perceived as truly emanating from the Jamaican people. Another example is Malaysia which has a dual legal system. The British legacy has remained in books but in practice has been superseded by the Sharia law due to the rise of Islamisation in the 1990s. The federal criminal provision has been applied once, against the then Prime Minister, with a view to creating a precedent and stopping sexual liberalisation in the country. The case has had a long-lasting impact on the public. However, the truly repressive drift has come from the daily practice of the Sharia courts and the police.

Notwithstanding if, how and how often national courts apply the law, interviews conducted in different countries evidenced that a discriminatory/repressive law creates effects that go beyond the judicial system. It fosters multiple sources of social stigmatisation and violence. The process is then circular: the law remains in place partly due to the fabricated homophobic environment. As highlighted in Jamaica, ‘homophobic attitudes [and instances of violence and harassment] will not change until the law [criminalising gay men] changes’.<sup>181</sup> Considering the social impact of any discriminatory law, the HRCtee has recognised the existence of the law as a human rights violation in itself – notwithstanding its application.<sup>182</sup> As a result, a law or constitutional reform must remain a key objective, even if it becomes a particularly long process. As put forward by Kiribati, the process of decriminalisation may be impeded by the high political threshold often required by many administrative or constitutional systems to amend a Bill of Rights. However, states like Jamaica or Singapore cannot meaningfully invoke (as they have done at the UPR), the non-application of the law in practice or the insufficient character of the law to change a general climate of homophobia, in order to note a recommendation calling for decriminalisation.

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180 See Chapter 4.

181 *Constitutional challenge to Jamaica’s anti-sodomy law: questions and answers* (AIDS-free world, 2015), 3.

182 See n 132 above, *Toonen v Australia*.

A great majority of the UPR recommendations asked for the state under review to either repeal or amend laws criminalising consensual same-sex sexual relationships. In practice it often means interpreting the law as excluding *consensual* relationships among adults from the scope of criminal law.

Lawyers in Cameroon and Jamaica are currently challenging the constitutionality of the anti-sodomy law before the Constitutional Court. In parallel, they are considering bringing a complaint to the African Commission on Human Rights, and request an opinion from the Inter-American Commission of Human Rights in order to challenge the conformity of anti-sodomy laws with the respective regional human rights law instruments.

As acknowledged by lawyers from different African countries and Russia, in other contexts recourse before the Constitutional Court has rarely resulted in the unconstitutionality of the criminal law in force.

Rather than looking for the ‘silver bullet’ and the decriminalisation of the matter, recommending states may take inspiration from strategic litigation undertaken by local lawyers and NGOs. Considering the wide diversity of legal and social contexts supporting the criminalisation of LGBT persons, the path towards decriminalisation will be different from one country to another.

A recommending state may call for states to engage with civil society and the LGBTI community; interpret other restrictive and repressive legislation in place; correct its applications; and/or counterbalance the repressive environment in place through more protective legal measures, as justified below.

#### ORGANISING PUBLIC CONSULTATION, EDUCATION AND AWARENESS MEASURES, BUT NOT REFERENDUMS

A number of states have highlighted the need for public consultation together with education and awareness-raising measures as a necessary preliminary step before decriminalisation. Some of them also mentioned that legislating on the matter could bring retrograde and/or unwilling reactions.

An inclusive consultative process may be important but major reservations should be made here as to the organisation of referendums on SOGIESC issues. Some countries like Ireland have resorted to a referendum to endorse same-sex marriages; however, there are clearly limits to the process. As raised by the NGO AIDS Free World in the context of Jamaica, ‘it is the mark of a free and democratic society that fundamental rights and freedoms are to be universally enjoyed by all persons. Respect for human rights cannot be contingent upon the approval of a majority, or else the rights of any person or community is profoundly at risk.’<sup>183</sup>

#### LIMITING THE SCOPE OF DISCRIMINATORY LAWS

Recommending states may consider calling for a limited interpretation of the scope of application of discriminatory law, such as anti-propaganda laws. Because the text of the law is usually less repressive than its actual implementation by courts, the strict application of the law could already make a significant difference. In Russia, access to information on SOGI, especially by children, is one of the

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<sup>183</sup> See n 181 above, 4.

legal arguments invoked by lawyers in order to challenge the current use of anti-propaganda laws against LGBTI persons.<sup>184</sup>

‘We are now considering a fourth constitutional recourse against an anti-propaganda law affecting the LGB community in Russia. It is unlikely that the Constitutional Court recognises the law to be unconstitutional. Rather, the best scenario is that the Court interprets restrictively the scope of the law so as to condemn part of its current abusive application. The hardest legal challenge is to persuade the Court that the law must not prevent LGBT children from accessing supports which they need.’ (Dmitri Bartenev, lawyer, Russia)

#### CREATING AN ENABLING ENVIRONMENT FOR LGBTI PERSONS

In a country like Cameroon, violence against LGBTI persons is extreme. In practice not only acts – whether in private or public places – but also the appearance of being an LGBTI person are repressed. Victims do not report violations, as they know they would be arrested instead of the perpetrator of the violation. Cameroon did not accept any recommendations and altogether rejected recommendations received that focused on decriminalisation; the principle of non-discrimination; and the protection from, and investigation of, hate crimes. As raised by one of only three lawyers taking LGBTI cases in the country, in those cases one way to push for legal advances is to address issues that relate not only to LGBTI persons but to all.

‘I diversify my strategies. I am on all fronts. I am arguing for the protection of human rights, women’s rights, right to health and so on and so forth. When someone closes a door, I open another one. Otherwise we don’t arrive anywhere. I am leading legal, diplomatic, religious and mediatic fights. I communicate a lot about cases. People need to feel concerned by the same problems as LGBTI people. The violation of the rule of law or the principle of fair and equitable trial are issues that speak to everyone.’ (Alice Nkom, lawyer, Cameroon – cisgender straight woman)

#### THE MORATORIUM OPTION

On the road towards decriminalisation, five states under review were recommended to establish a moratorium on condemnation (Cameroon, Malawi, Maldives, Senegal) and the application of the death penalty (Iraq) on the basis of sexual orientation. All five noted the recommendation.

Similarly, the three states that were recommended to ensure immediate release of prisoners ‘held solely on account of freely and mutually agreed sexual activity or sexual orientation’, noted the recommendation.

In order to foster acceptance of the recommendations described above, neighbouring countries of the state under review will have a key role to play in addressing the state under review on the situation for LGBTI persons in the country. At the core of the UPR is the exchange of good practices amongst states.<sup>185</sup> Several lawyers interviewed confirmed that a recommendation coming from a country

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184 See on litigation in Russia, Dmitri Bartenev, ‘Analytical Study on Jurisprudence of LGBTI Cases in Russia’, forthcoming (Equal Rights Trust 2016).

185 See Chapter 4.

considered as a friend by their country and echoing a more progressive legal or judicial practice would carry a particular weight. For instance, in the case of Russia, Finland and other Baltic countries could be influential. In Malaysia, India and Pakistan are particularly looked to. Furthermore, the tradition of precedent within the Commonwealth system can be expected to create a ripple effect, leading to progressive decisions being made in the rest of the Commonwealth states.

This may be true of some countries; however, the example of Jamaica defeats both hypotheses. First, Jamaica has distanced itself from progressive Commonwealth decisions on SOGIESC issues. Jamaica sees itself as retaining the right interpretation of the common law and considers contradictory Commonwealth decisions to be erroneous. Looking at neighbouring countries in the GRULAC region, while some are among the most progressive in terms of recognition and protection of LGBTI persons, no recommendation has been made to Jamaica on SOGIESC issues by GRULAC countries. The fact that each country needs to secure the vote of other countries for the adoption of their own resolutions at regional and international levels may restrain the potential dialogue on SOGIESC issues between countries. This type of political obstacle constitutes a major challenge.

### *5.3.2. Addressing sexual orientation and/or gender identity and expression and/or sex characteristics*

As mentioned in Chapter 2, the terminology used with respect to SOGIESC issues in international recommendations has often been imprecise and confused. This is particularly problematic as it undermines the already-sensitive dialogue on the topic amongst states at the UPR. Clear guidance and awareness-raising activities on correct terminology should be in place in order to prevent this from occurring. Furthermore, gender expression and sex characteristics are yet to be addressed at the UPR.

Here a dilemma exists as to whether a recommendation addressing one issue such as sexual orientation, or one group, for instance gay men, would have more acceptance and impact than addressing SOGIESC or LGBTI persons all at once.

On the one hand, the overarching objective is to bring inclusiveness, universality and acceptance towards diversity, while ensuring the widest level of protection to all.

‘We have quite good domestic laws and procedures when it comes to passports, but intersex issues and gender identity issues are not commonly raised, so we always try to include LGB+T+I... We try to include the full range of LGBTI individuals in our recommendations, so we don’t exclude trans people or intersex people.’ (WEOG recommending state)

On the other hand, for a number of countries such as Jamaica that are rejecting diversity in sexual orientation, the gender identity discussion – let alone the intersex discussion – is only just arising. In some other cases like in India, gender identity is relatively well-accepted. As a result, addressing LGBTI persons or SOGIESC issues together may seem either premature or exceeding the scope of the problem. Ultimately, a country will be more likely to accept a recommendation that addresses an identified and relatively understood problem. In Malaysia, transgender women and gay men are both groups under particular repression by Sharia courts. At the same time, from a civil society perspective the issue of gender identity is easier to address than sexual orientation.

‘Based on my experience working in Malaysia and South East Asia, we notice that there is relatively higher openness and acceptance towards gender identity rather than sexual orientation, as gender identity can be scientifically proven. People feel that is something that they can understand. People don’t want to talk about sexual orientation... people think you should restrain yourself.’ (Thilaga, human rights defender, Malaysia)

Alternative views expressed a desire to address all issues and to commence work on the education of all segments of society about SOGIESC issues.

‘I am of two minds here. Strategically, you would better address one issue at a time. But if you do, the other communities will be left aside. What you need above all is to address ignorance on those issues. You need to explain what sexual orientation and gender identity are about. For that reason, we have to know when an international resolution is coming up, so as to brief our state representatives.’ (Maurice Tomlinson, lawyer, Jamaica – cisgender gay man)

From a human rights perspective international developments contributed to the interlinking of all issues together under the umbrella concept of ‘LGBTI’.

### *5.3.3. Stopping repressive judicial and police practices through the active engagement of the legal profession*

In a great majority of cases the application of the law would have limited consequences if strictly implemented by law officers and strictly interpreted by courts. This is particularly the case in law, where only indecencies committed in public places are prohibited. The negative impact of the law can come from, or be amplified by, the judicial practice; the power of religious authorities superseding the state authority; the lack of effective legal aid; and/or the stigma and violence generated at various levels of the social and family spheres. The lack of independence, impartiality or efficiency of the justice system undoubtedly contributes to the issue.

In those circumstances law enforcement officers and courts play a key role in the implementation of the law. Lawyers are then strategically placed at the interface between the judiciary system and civil society. Notwithstanding its key role, a few recommendations were addressed to the legal profession. In Cycle 1 training measures addressing the legal profession were directed at 21 countries.<sup>186</sup> In Cycle 2 the number of countries receiving such recommendations has so far been limited to eight.<sup>187</sup> Only one country in Asia and six in Africa received this recommendation between session one and session 22. Similarly, only a few recommendations addressed access to legal assistance for the victims.<sup>188</sup>

Until now, the positioning and role of lawyers in the protection of the rights of LGBTI persons has been uneven from one region to another. Threats faced by lawyers working on LGBTI issues and the possibility of continuous legal education vary also from one country to another.

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186 Albania, Azerbaijan, Bangladesh, Belize, Bolivia, Dominica, Equatorial Guinea, Estonia, Ethiopia, Guatemala, Honduras, Hungary, Montenegro, Portugal, Republic of the Congo, Russian Federation, Senegal, Slovakia, South Africa, Spain and Turkey.

187 Armenia, Belize, Bosnia and Herzegovina, Ghana, Macedonia, Romania, Serbia and Slovakia.

188 Norway to Uruguay: ‘Adopt necessary legislative and administrative measures to guarantee the security of LGBT persons and facilitate their access to justice and legal assistance.’

In countries such as India, Malaysia and Russia, lawyers enjoy a specific role and status within society that provides them with great influential power. NGOs work with lawyers, as much as they develop training targeted at lawyers, as part of their strategy. As stated by a human rights defender in Malaysia:

‘Lawyers are part of a larger activism. Training of lawyers is useful as they have the power to influence change as they are involved in many things. We want to make sure that lawyers are involved with updated arguments to address. When you are in a country with a hostile environment, our imagination can be restricted by the environment.’ (Thilaga, human rights defender, Malaysia)

As a result of the training of lawyers in Malaysia, a coalition of lawyers and CSOs has been set up:

‘We realised that some of the lawyers and CSOs did not know each other prior to the training. They decided during the training that a close-knit coalition, which also works as an “urgent-response group”, should be formed between the lawyers, human rights defenders and CSOs who are involved in trans activism. The coalition/urgent-response group is now in place through a ‘Google group’. When a trans person is arrested, an available lawyer or human rights defender who is nearby can go to the police station as soon as possible to assist the person. Currently difficulties may arise when a lawyer from the legal aid centre is not present with the human rights defenders who were trying to help the person being arrested. Under such a scenario, the longer the trans person is being remanded, there is always the fear of appalling violence and perverse sexual abuses by police officers or other inmates. These claims are in fact based on true events experienced by trans people who were previously remanded and abused by the authorities. The trained lawyers, who are mostly young, will be the next generation of lawyers who are committed to upholding the constitutional human rights through fighting tirelessly for equal rights for everyone, especially the most marginalised people.’ (Henry Koh, legal consultant, Malaysia)

Efficiently equipped lawyers have the power not only to temper the application of the law and avoid judicial confrontation through careful counsel, but also to challenge the law before the constitutional court or during legal debates:

‘The debate on LGBTI people has nothing to do with respecting the tradition or moral values. We have a common platform: the Constitution, the Rule of Law. Nobody is beyond the law and everybody is equal. If you ignore the Constitution and throw it away; if the state does not respect minorities – it is a jungle.’ (Alice Nkom, lawyer, Cameroon – cisgender straight woman)

In Africa, interviewees have evidenced very different realities. In some cases like Cameroon or Malawi, the two or three lawyers currently taking SO cases are constantly under threat for these activities. In this case, training for those in the legal profession aims at normalising SOGIESC-related litigation and diminishing threats targeting them.

In some other countries litigating on SOGIESC issues is seen as a lucrative business for lawyers, who have demonstrated a financial interest for getting involved. NGOs must learn that establishing a trusting relationship with lawyers constitutes the first step towards litigation and that trust-building requires time. In that case, more trained lawyers and more lawyers taking SOGIESC cases also means that lawyers are not in a position to abuse their monopoly.

In all circumstances, the choice of trained lawyers is key, as lawyers who are trained are expected to trigger further change within the broader legal profession. In Malaysia, it is expected that civil lawyers reach Sharia lawyers through their contact networks. Similarly, in Jamaica the challenge consists in defining an entry point to the Lawyers' Christian Fellowship, an association that has more power than the General Council or the Jamaican Bar Association. In cases where continuous legal education is not organised by the legal profession, like in India, or is self-selected, like in Jamaica, key lawyers may not be easily accessible.

Turning to the judicial practice, a number of issues have been reported that go beyond the legal framework or the repression of LGBT persons and address the independence, impartiality and efficiency of the justice system. In Russia judges have been reported as systematically disregarding evidence and medical expertise brought to court. Conversely, in other countries, courts accept medical evidence such as forced anal examinations as grounds for conviction. In all cases, the training of judges on LGBTI issues is seen as necessary but difficult. In Russia legal education is in the hands of the judiciary and continuous legal education exists only on paper. In the case of Sharia courts, an entry point identified in Malaysia by human right defenders is through Sharia lawyers and, more broadly, through local communities. Similarly, in Jamaica the Lawyers' Christian Fellowship could constitute an entry point to the legal profession given the weight of religion on legal practices there.

#### *5.3.4. Ending impunity for hate crimes: from reporting processes to fair-trial guarantees*

At the UPR, recommending states have often addressed the need for prosecution and investigation of crimes committed against LGBTI persons as a *general* objective. Specific recommendations taking into account the context of each country have been rarer.

'Calling for the recognition of the principle of non-discrimination on the basis of sexual orientation and gender identity may have no real impact on the ground in Russia. The government denies the existence of discrimination on the basis of sexual orientation. However, this may constitute a first step to further advance strategic litigation before courts on cases related to discrimination on grounds of sexual orientation or gender identity. At the same time, more specific recommendations on the protection of LGBTI people as a vulnerable social group could be useful for litigation for hate crimes committed on the basis of sexual orientation or gender identity.' (Kseniya Kirichenko, Director, Transgender Legal Defense Project, Russia – polysexual woman)

It is noteworthy that a country can both prohibit same-sex sexual relationships *and* prosecute violence against LGBTI persons without being legally inconsistent. For instance, even though the recommendation to repeal the laws criminalising sexual orientation did not garner Jamaica's support, the recommendations to protect from, prosecute and investigate cases of violence against LGBTI persons were accepted.<sup>189</sup> This is where the UPR can be instrumental in engaging with states under review in a more protective environment.

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189 Canada to Jamaica: 'Take effective measures to investigate and prosecute all incidents and acts of violence targeting individuals based on sexual orientation.'



While states have extensively resorted to the recommendation to prosecute and investigate crimes against LGBTI persons, they have poorly addressed *how* to circumvent current obstacles faced by LGBTI victims in accessing justice.

The major necessity here is to address ‘how’ hate crimes and hate speech can be punished and LGBTI victims protected. Reported concerns raised by UN mechanisms include ineffective police action; failure to register cases; loss of documents; inappropriate classification of acts including physical assaults as a minor offence; and investigations guided by stereotypes and prejudices. In some countries, such as Jamaica, the police ignore reports made by victims. In worst case scenarios, such as in Cameroon, the police arrest the victims instead of the perpetrators.

Less than 20 recommendations addressed the right to access to justice, the protection of the victims or to report incidents to the police without fear of reprisal;<sup>190</sup> for example, Canada’s recommendation to Kazakhstan, which stated: ‘Enact specific legislation that prohibits discrimination against women and on the basis of sexual orientation, and develop a system through which all individuals *can safely report cases of discrimination and access avenues of redress*’ [emphasis added].

The added value of an ombudsman for LGBTI issues, like in Guatemala or Sweden, should be further documented and discussed at the UPR as among good practices. The concept of the ‘gender desk’ for gender-based violence could be adapted in order to integrate LGBTI issues. So could a special desk for reporting violations at police stations. Country reporting provides a key opportunity to share good practices in that respect:

‘The penal code was reformed in 2012. Committing a crime on the basis of sexual orientation and gender identity – among other categories – is strongly punished. In the country discrimination is seen as a very strong offense in the criminal code... Within the Public Ministry, a special unit of crimes against life exists. They investigate femicide, violent deaths of children and cases of killings of LGBT people already under investigation. It is important because some of these cases are also considered to have a high social impact. We believe we have made progress generally in the modernisation of criminal investigation. It helped us to overcome a handicap we had with the LGBT population.’ (GRULAC state under review)

### 5.3.5. Addressing the religious narrative

Jamaica and Malaysia are pertinent examples of the power that religious authorities can have over the legal system, and strategies in place to establish a dialogue.

‘Malaysia has a dual legal system, with the federal law applicable to all and Sharia law or enactments adopted by states and applicable to Muslim people. In theory the Sharia law provides only guidance in the application of the law. However, in practice it has superseded the federal law and in a context of governmental religious support, nobody dares to raise the contradictions between current Sharia legal provisions that address ‘indecentcies’ and the federal constitutional protection of the principle of non-discrimination towards anyone.’ (Henry Koh, legal consultant, Malaysia)

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190 See Annex 1, Principles 28 and 8.

As mentioned above, trained lawyers are expected to reach out to Sharia lawyers.

In Jamaica, a dialogue with the religious groups has been put in place:

‘Lawyers and judges deeply enmeshed in the community and the Bar Association or the General Legal Council have little power compared to the Lawyers’ Christian Fellowship. In Jamaica, a dialogue with some progressive priests has been initiated as an entry point in order to trigger a peer-to-peer dialogue using a theological standpoint.’ (Maurice Tomlinson, lawyer, Jamaica – cisgender gay man)

### *5.3.6. Addressing stigmatisation, fear and ignorance*

As has been clearly stated by a transgender human rights defender in India: ‘education is the backbone of the movement’. In India and Malaysia human rights defenders extensively resort to legal anthropology. For Malaysia, there is no need to look far back for the reasons why. The Islamisation of the country in the 1990s has turned the country from one of the most to one of the least tolerant societies in the region.

As discussed above,<sup>191</sup> it is key that recommending states address more education programmes and children’s rights.

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191 See Chapter 4.

## Chapter 6: Conclusions and Recommendations

In light of the findings above, this chapter summarises the main contribution of the UPR in protecting the rights of LGBTI persons. Despite general criticisms of polarisation of the debate, a lack of understanding of LGBTI issues by governments and gaps in reaffirming civil society recommendations, the findings provide elements for a more promising impact of the UPR. The consolidation of the international legal framework through progressive UPR recommendations is already a reality. The ways forward are clearer than ever for addressing the numerous existing challenges. The following recommendations aim to assist different stakeholders in addressing those challenges.

### THE SLOW DE-POLARISATION OF THE DEBATE AROUND SOGIESC ISSUES: TOWARDS A CONSOLIDATION OF THE INTERNATIONAL LEGAL FRAMEWORK

The discrepancy between the growing consensus among courts and human rights mechanisms for a SOGIESC approach to human rights on the one hand and the slow international political progress towards the protection of LGBTI persons on the other, was presented in the introduction to this report. Against this backdrop it appears from the findings presented above that the UPR is slowly but steadily contributing to a move away from the polarisation currently slowing down political progress. More states are making SOGIESC recommendations and more states are receiving SOGIESC recommendations for the first time.

States' acceptance of SOGIESC recommendations has been uneven from one issue to another. States will tend to accept a general recognition on the principle of non-discrimination based on sexual orientation and gender identity rather than a specific recommendation; for example, 'adopt an anti-discrimination law'. At the same time, the rate of acceptance has been particularly high regarding the prosecution of violence against LGBTI persons. Notwithstanding discrepancies, the UPR has no doubt paved the way for broader acceptance towards these issues. As such it has triggered the first step towards consolidating the international legal framework for the protection of LGBTI persons. The recognition of the principle of non-discrimination; the right to security and the protection from arbitrary detention; the right to privacy through the decriminalisation of consensual same-sex sexual relationships; and the protection of human rights defenders, together with the freedoms of association, assembly and expression regarding SOGIESC issues, are part of the block of international norms consolidated at the UPR. The protection of same-sex partnerships and the recognition of a broad definition of 'family' has been upheld at the UPR insofar as it constituted the fourth most recommended topic among SOGIESC issues. The growing mobilisation of states calling for a restrictive definition of the family and therefore counterbalancing these progressive recommendations could well foster an even stronger reaction in favour of the right to found a family.

### THE INCREASED AND IMPROVED APPRAISAL OF LGBTI ISSUES

Ignorance, confusion and conflation around LGBTI issues were and still remain a reality. To some extent the UPR has paved the way for progress. It has provided visibility to existing misunderstandings and ignorance but also to a number of issues facing the LGBTI community. Civil society has made

significant contributions to making visible a wide array of human rights violations faced by LGBTI people across the world including homophobic and transphobic murders, sexual violence, detention, sterilisation, threats, discrimination in healthcare, employment and education and many others. Their engagement has increased awareness among states and in many cases translated into useful and practical state recommendations. A number of key issues such as the death penalty and torture, which amount to cruel, inhuman and degrading treatment of the LGBTI community, have mostly been ignored. So have trans and intersex issues, which is rather concerning given the high level of particularly trans-specific civil society submissions and recommendations. Similarly, children and youths have been mostly ignored and the right to education has been little addressed compared to general recommendations addressing ‘awareness-raising’ and ‘educational’ measures. The few recommendations addressing social and economic rights have addressed very specific and relevant issues but have remained sporadic. These trends justify human rights defenders continuing to invest time in engaging and addressing gaps in the UPR and in legal frameworks.

On the implementation side, if putting more pressure on governments is needed, recommendations have often pointed at a specific action for the state under review to undertake. Law reform, and to a lesser extent, awareness-raising and training measures, have been prioritised. At the same time, too little has been recommended as to ‘how’ states should proceed and the role of key professionals such as legal and health professionals has been little addressed.

#### THE GROWING MOBILISATION AROUND THE UPR PROCESS

The UPR has provided an unprecedented opportunity for SOGIESC human rights defenders to raise human rights violations against LGBTI people and proactively engage with governments. Civil society has steadily contributed to the UPR process since its early days and has significantly strengthened its presence and participation through submissions and recommendations, oral interventions, advocacy meetings and follow-up work. Coalition work has been a defining feature of civil society engagement. Coalitions have been formed and/or strengthened not only between local and international groups but also across movements.

It is particularly positive that LGBTI groups have had a firm presence in the process of civil society forming its voice on SOGIESC issues. The presence of local LGBTI groups has also increased considerably. While mainstream human rights INGOs continued making submissions in the second cycle, international LGBTI organisations have changed their engagement strategy and have reallocated resources to better support the work of local human rights defenders. This may have meant a drop in the number of submissions and statements but has ensured that states receive more in-depth and nuanced information about the human rights situation on the ground and that local civil society has ownership of the process.

The interviews conducted shed light on the various ways civil society and the legal profession work together to define litigation strategy. While gaps remain, some new paths are opening up. Ways to conduct strategic litigation and strategic advocacy among countries in a complementary manner certainly deserves more comparative analysis.

## 6.1. Recommendations

In light of the findings presented in the report, ARC International, the IBAHRI and ILGA make the following recommendations with a view to addressing the challenges evidenced and improving the role of the UPR mechanism in protecting the rights of LGBTI persons.

### 6.1.1. Recommendations to recommending states

1. **To continue or start making recommendations that are specific, measurable, achievable, realistic and time-bound (SMART) and call for states under review to act in consultation with the LGBTI community.**

More than half of the recommendations made between 2008 and 2015 are specific and close to qualifying as SMART. However, the number and quality of the recommendations made have varied between sessions. A SMART recommendation is easier to implement and to follow up. A key condition to meaningful implementation of the recommendations remains the involvement of LGBTI persons. Only six recommendations have referred to engagement or consultation with CSOs or LGBTI persons to date.

2. **To address not only ‘what’ to achieve, but also ‘how’ to achieve it.**

In order to promote the impact of their recommendation, states are encouraged to address not only ‘what’ to achieve but also ‘how’ to achieve, through the inclusion of possible implementation measures. For instance, the obligation to investigate and prosecute is rarely accompanied by a concrete measure such as a complaint mechanism responding to the issue of reporting in the country. The creation of an LGBTI desk at police stations or specific complaints mechanisms constitute key measures. The involvement of the main stakeholders is another approach to ‘how’. Training and involving legal and health professionals in the dialogue on SOGIESC issues are absolutely key to facilitating law reform, access to justice and better access to healthcare for LGBTI persons.

3. **To address in their recommendations: sexual orientation, gender identity and expression and sex characteristics issues as well as – both collectively and as individual sub-groups – lesbian, gay, bisexual, trans and intersex individuals, including children.**

Throughout the sessions there has been an increase in SOGIESC and LGBTI recommendations. However, they often refer to LGBTI persons as a homogenous group. There is a need to begin to address gender identity and expression and sex characteristics issues in a more targeted manner. To date, only ten recommendations focused on trans people. Not one recommendation has focused on intersex people. While children and youth are key segments in need of protection and active engagement in SOGIESC issues, LGBTI minors have only been mentioned once and the right to education has been mentioned in just 11 recommendations.

- 4. To make sure that the recommendations are in line with terminology used by SOGIESC human rights defenders, using accurate and precise language when referring to SOGIESC or LGBTI issues.**

Some of the recommendations have used inadequate and offensive language such as ‘transgendered’. Recommending states should take into account the precise language proposed by SOGIESC human rights defenders. In case of doubt, civil society will always be willing to help on these issues.

- 5. To explicitly mention the national, regional and/or international legal basis supporting the recommendations.**

The legal basis provides legal strength and further content to the recommendation. It also creates a ripple effect that strengthens the international legal framework applicable to LGBTI persons. In that respect, the Yogyakarta Principles constitute the key reference instrument for a SOGIESC application of human rights law. The fact that only seven per cent of the SOGIESC recommendations have either a general or specific legal basis constitutes a missed opportunity to further strengthen existing instruments, especially the Yogyakarta Principles.

- 6. To make country-specific recommendations, keeping in mind the reality and background of every country.**

The CTAs by recommending states have been rather similar from one country to another and have focused on the ‘what’ to achieve rather than the ‘how’. It has been voiced by human rights defenders that the UPR process should take these differences into consideration and encourage an incremental reform in light of the local context. Every country has a different background and a distinct situation therefore knowledge of what is happening in a specific country and civil society is a valuable asset.

- 7. To use the UPR as a forum to address structural root causes responsible for violence and discrimination on the grounds of SOGIESC.**

States should not wait until the situation has worsened in a country to make a recommendation: there are many different issues that can be addressed in the UPR and that can address the root causes of violence and discrimination on the grounds of SOGIESC. The UPR objective is not to reactively respond to an emergency situation but to proactively improve the human rights situation in a country. Therefore, even though some of the recommendations don’t directly address the right to life or to personal integrity, or are not about decriminalisation or imprisonment, they are as valuable and important as the ones that address these situations.

- 8. To more systematically address the need for states to monitor and collect data on discrimination and violence against LGBTI persons.**

With 15 recommendations addressing the need to produce information about, and monitor violence against, LGBTI persons, a country data system is a concrete instrument for establishing an evidence-based response to address challenges encountered at country level.

**9. To ask for the training of key stakeholders on SOGIESC issues such as legal and health professionals.**

The vast majority of SOGIESC recommendations address the need for law reform in the state under review. At the same time, legal professionals have been poorly referred to, despite their role in advancing legal debate and providing legal assistance. A call for the training of the judiciary and law enforcement officers on SOGIESC issues has been made to 27 countries – with six made in Africa and one in Asia. None of the recommendations referred to lawyers, even though they are the interface between civil society and the justice system. Similarly, only a few recommendations addressed health professionals. Both health professionals and lawyers have a role to play in preventing the justice and health sectors being instrumentalised against LGBTI persons.

**10. To change the narrative on LGBTI persons by sharing SOGIESC good practices and the benefits of diversity.**

Various states have received SOGIESC recommendations, but much of the information on positive steps that they have taken is not available. By sharing good practices and positive examples, states can either implement recommendations or ask for technical assistance or capacity-building for the state under review, or could perhaps trigger the acceptance of a recommendation because a state under review has seen that a state that shares similar characteristics was able to implement such a recommendation.

**11. To coordinate with other recommending states to ensure that the whole spectrum of SOGIESC issues are covered.**

Often when a state under review receives recommendations, they receive many on the same topic. Recommending states should talk with one another to coordinate different types of recommendations. Such coordination would ensure that no areas of recommendation are left out.

**12. To follow up recommendations made with local embassies.**

Recommending states should feel responsible when they make a recommendation; therefore after the recommendation has been accepted it should be communicated to the recommending state's embassy in the state under review. That embassy or other body should be responsible for following up on the proposed recommendation.

**13. To continue engaging in dialogue with states under review.**

The process of the UPR does not end when the recommending state makes a recommendation. Recommendations should be used to start bilateral dialogues on SOGIESC issues as well as to share good practices and technical cooperation and/or capacity-building; ie, training for capacity development and/or financial assistance.

#### **14. To continue a dialogue with civil society when making recommendations.**

Civil society input should be a primary source for recommending states when making recommendations. Civil society knows what type of recommendations are most useful; ie, what type of recommendations might have a better impact on the ground. Numerous human rights defenders raised the concern that recommending states often fail to raise issues that are priorities for LGBTI persons on the ground. Recommending states should be sure to include the messages, concerns and priorities of civil society in their statement and on the final drafting of the recommendations. Meetings with civil society have demonstrated that there are good opportunities to increase understanding of what is happening in a country and what type of recommendations are most useful.

#### **6.1.2. Recommendations to states under review**

##### **1. To hold a dialogue with civil society before presenting the UPR and before deciding (accepting or noting) on the proposed recommendations.**

Every step of the UPR should be in close consultation and meaningful engagement with SOGIESC human rights defenders. These types of dialogues not only help in facilitating understanding of some of the issues addressed but also in ensuring that states work with civil society from the beginning. The UPR is a process that has a direct impact on civil society and therefore they need to be part of the discussion.

##### **2. To accept SOGIESC recommendations.**

States under review should take into account that the principle UPR objective is to improve the situation of human rights on the ground, therefore a peer review does not expect states under review to have perfect human rights records. However, what recommending states and other stakeholders are expecting is the will of the state to improve the human rights situation, to overcome the challenges involved in doing so and to implement the received recommendations.

##### **3. To note all recommendations that jeopardise the diverse forms of family.**

For the past 22 sessions there has been an increase in recommendations that are either openly or obliquely hostile to LGBTI persons and their rights. States have accepted these recommendations, which address issues such as the ‘traditional family’; ie, ‘adopt policy to strengthen the institution of the family, and develop traditional family values’ and to ‘continue providing effective protection for the family unit, as the natural and fundamental unit of the society’. Neither of these recommendations should enjoy the support of the state under review. The state under review should make a strong statement in the addendum presented to the OHCHR and also on the statement made during the outcome of the UPR emphatically highlighting that those types of recommendations do not have the support of the state because they are hostile and go against the rights of LGBTI persons by attempting to undermine the existence of diverse families.



- 4. To implement SOGIESC recommendations by making them a part of the human rights action plan and/or human rights public policy.**

The UPR is an international platform that addresses national issues, therefore the UPR recommendations should become the roadmap for addressing the human rights situation in-country. It is a multi-stakeholder review that involves states and others such as civil society and where more than 50 human rights topics are addressed.

- 5. To monitor SOGIESC issues in the country and ensure that implementation is carried out in close consultation and with the active participation of civil society, including key stakeholders such as legal and health professionals.**

The UPR has demonstrated that it can be a good tool when the recommendations proposed are implemented. Without an implementation mechanism the UPR is only one more process rather than a possible solution for the human rights situation on the ground. Civil society and other stakeholders should be part of the mechanism as the implementation of recommendations or lack thereof has a direct impact on them.

- 6. To ensure that LGBTI and SOGIESC human rights defenders are not subject to reprisals.**

When engaging with the UPR all human rights defenders should be able to engage freely, to make recommendations and to be part of the process without reprisal.

- 7. To include the developments on SOGIESC and LGBTI issues in their national report.**

States rarely address the human rights situation for SOGIESC or LGBTI persons and infrequently answer the more detailed questions put forward on these topics. It is important for states to include this topic in the national report, to enable other states and stakeholders to be aware of the implementation or challenges that a state is facing so as to propose further recommendations or offer technical cooperation.

- 8. To report on the progress of the recommendations through a voluntarily mid-term report that would include the progress on the implementation of SOGIESC recommendations.**

Some states have been successful in voluntarily presenting mid-term reports that have been useful for other states that can then see how similar recommendations in similar countries have been implemented. It also eases the task of the state: rather than analysing the situation every five years, states can start building a roadmap and explain in the middle of the cycle how they are doing and how they are planning to implement the remaining recommendations. Not all recommendations are to be implemented in one cycle, some of them require more time, but states must show planning and progress on the implementation of all recommendations.

### 6.1.3. Recommendations to civil society

#### A. TO NATIONAL NGOs

**1. To build ownership of the UPR process within the LGBTI community through community level consultations and processes.**

Local human rights defenders have seen community ownership as a way to ensure that civil society recommendations echo the situation and needs of LGBTI persons in the country and that there will be meaningful and effective civil society engagement in the follow-up and implementation phase.

**2. To consider the UPR as a primarily domestic process.**

Civil society and states agree that the UPR is a primarily domestic process. Human rights defenders feel that their UPR work was most effective when it tied into their ongoing national-level advocacy work. They have used the UPR to reiterate advocacy messages previously conveyed to their government. They have considered UPR recommendations as an additional tool for continuing their national level advocacy.

**3. To continue making civil society submissions and provide states with solid, evidence-based information.**

Civil society has viewed submissions as one of the most useful forms of engagement. Civil society and states have seen submissions as a tool for ensuring that recommending states have solid, evidence-based information to support their recommendations. Human rights defenders have used them as reference points during advocacy work with embassies and missions and as roadmaps for implementation. Civil society organisations have made strategic choices about submitting an individual report, a joint report or both.

**4. To prepare for the next UPR of a country no later than six months before the deadline for submission of the CSO report.**

Civil society respondents and interviewees agreed that UPR engagement requires considerable investment. They have advised human rights defenders to plan their engagement ahead of time and ensure that they have the capacity for consultation; human rights documentation; writing a submission; engaging the government; advocating with missions and embassies; and cooperating with other key actors (UN agencies, NHRIs, media etc).

**5. To work in coalitions to ensure that civil society groups are broader in their approach.**

Civil society actors have found it important that SOGIESC UPR work is inclusive, intersectional and cross-sectional. Trans and intersex respondents in particular stressed the role and responsibility of broader LGBTI groups in ensuring that their advocacy work is truly inclusive of SOGIESC issues. Numerous groups applied an intersectional approach in their work to ensure that they addressed the situation and needs of historically marginalised groups within the LGBTI community (LGBTI women, racial and ethnic minorities, sex workers, asylum seekers and

refugees, etc). Others found cross-sectional work crucial for successful engagement and built alliances with other movements.

SOGIESC human rights defenders have found coalitions a valuable strategy during their engagement. They have formed coalitions with fellow LGBTI groups, other human rights groups and/or regional and international NGOs. Some have faced difficulties during coalition work and have seen their issues being dismissed. In such cases, LGBTI human rights defenders have often chosen to do independent advocacy in addition to their coalition work.

**6. To propose SMART recommendations to recommending states.**

Civil society found UPR recommendations the most useful when they were specific, measurable, achievable, realistic and time-bound. There is agreement that civil society recommendations should also be SMART and human rights defenders should urge recommending states to adhere to the SMART recommendations. Some LGBTI groups have used their SMART recommendations as a roadmap for implementation at the national level.

**7. To identify three priority advocacy messages with recommending states, based on the identified priorities of each recommending state.**

Civil society groups have often made submissions that are inclusive of a diverse range of SOGIESC issues. During their advocacy with embassies and missions they have often chosen to prioritise certain issues and provide a brief summary of their advocacy targets. They have commonly used two-page factsheets that include evidence-based data, anecdotes, case studies and quotes. There was agreement across the board that such a brief and concise summary is a very useful and reliable advocacy tool.

SOGIESC human rights defenders have been particularly strategic in their engagement with recommending states and recommended others to do the same. Some relied on INGOs to help identify their most likely supporters; others were more independent and autonomous, knowing their context and the political dynamics best. They have considered the following factors: SOGIESC recommendations their state has made to other states; recommendations previously made to their state; the situation of LGBTI persons in their country; their foreign policy priorities; and their relationship with the state under review.

**8. To garner support from the INGO that best fits one's purposes.**

INGOs have been effectively supporting SOGIESC human rights defenders in all phases of the UPR. Local civil society actors recognise and appreciate these efforts and have encouraged others to reach out to INGOs and use their resources and expertise to increase the effectiveness of their work. Some human rights defenders at first found it hard to know which INGO fits their purposes best – they recommended mapping the field and contacting INGOs such as ARC International, COC Netherlands, ILGA, Sexual Rights Initiative or UPR Info.

**9. To pursue advocacy on multiple fronts at both national and international levels.**

Civil society has found submissions, advocacy with missions and embassies the three most useful forms of engagement for influencing UPR recommendations. They have found that these may depend on the recommending state where it is most efficient to influence them. Civil society

has then urged their government to accept and implement the recommendations and often sensitised them along the way, so that they have a better understanding of SOGIESC issues.

**10. To consider the UPR advocacy as complementary to other UN and regional mechanisms.**

LGBTI human rights defenders, particularly in the Africa and Latin American and Caribbean regions, have stressed the importance of engaging with regional human rights mechanisms parallel to the UPR. Human rights defenders felt that international and regional standards can mutually reinforce each other. In the African context in particular, some civil society representatives thought the government gives more weight to a regional mechanism.

**11. To stay committed to the UPR in conjunction with other international recommendations.**

There is agreement among civil society and recommending states that the most important phase of UPR work is follow-up and implementation. However, this phase of UPR remains the greatest gap to date. Civil society has often taken it upon itself to monitor implementation, while in some countries this is part of the state-monitoring mechanism. Civil society has encouraged cooperation with the government to ensure they are aware of SOGIESC issues and what steps they need to take.

**12. To see the UPR as an investment in long-term change.**

Human rights defenders commonly see the UPR as an investment in long-term change. They have recommended others to stay committed and keep in mind that the UPR may not be the best tool for immediate change. It may, however, start or accelerate ongoing processes at the national level and open up new avenues for engaging the government on SOGIESC issues.

**B. TO INTERNATIONAL NGOs**

**13. To keep supporting local human rights defenders in all phases of the UPR.**

Local SOGIESC human rights defenders have appreciated the support of INGOs and encourage them to continue this work. A great number of people highlighted the importance of their engagement in Geneva and were grateful for the support they have received in this regard. Both financial and technical assistance have been raised as crucial, so that local groups can effectively engage in all phases of the UPR process.

**14. To consider reallocating funding to better support domestic advocacy work.**

Local civil society actors have greatly appreciated the financial support they have received from INGOs in order to come to Geneva and engage with missions. However, some were concerned that this significant financial investment may not be the most meaningful if human rights defenders have no resources to later follow up on recommendations in-country. They suggested that a more serious investment be made into local engagement as that is at the core of effective UPR work.

**15. To continue ensuring that local civil society actors take the lead on the UPR work.**

Local civil society actors have repeatedly pointed out that there needs to be ownership of the UPR process among those working at the national level. Some highlighted that where local human rights defenders work on SOGIESC issues, they need to be consulted and included in any UPR engagement work that INGOs do. This way UPR recommendations will be based on the needs of local LGBTI communities and these communities can effectively follow up on them.

**16. To encourage and support NGO engagement with regional mechanisms in addition to UPR engagement.**

Several human rights defenders noted – primarily in the GRULAC and Africa region – that regional mechanisms may either be more useful for them than the UN or they are necessary accompaniments to international engagement. Some argued that their governments are more likely to listen to a regional mechanism, particularly with regards to SOGIESC issues. While investment into the UPR is essential, INGOs and funders should consider contributing to increasing regional engagement on these issues.

**17. To make sure that strategic information is easily accessible and available to NGOs.**

Some human rights defenders have recommended that INGOs invest resources into making strategic information available to them and other NGOs. For example, deadlines, advocacy strategies, and country-specific information and learning points.

**18. To facilitate capacity-building in Geneva on SOGIESC issues for the missions in order to separately appraise the human rights issues of each of the different groups (L/G/B/T/I).**

States have made ten recommendations on trans issues and none on intersex issues to date. Some human rights defenders expressed concern that recommendations they had made on SOGIESC issues are routinely not picked up by recommending states. This concern is echoed by the contrast between the number of state recommendations on these issues and those raised by civil society. Few people felt it may be useful to directly boost the knowledge of missions staff in Geneva so that there is a better understanding and perhaps more willingness to raise SOGIESC issues in their recommendations.

**19. To provide more targeted support to trans and intersex groups engaging with the UPR.**

INGOs could further contribute to an increase in SOGIESC-specific recommendations by supporting trans and intersex groups in their engagement. Submissions that have been made with the participation or leadership of trans and intersex groups have outlined the issues in detail. At the same time, broader LGBTI reports often fail to address these issues in detail.

#### *6.1.4. Recommendations to legal professionals and professional legal associations*

The report finds that the role of legal professionals in advancing the rights of LGBTI persons has been under-addressed at the UPR. At the same time, the level of involvement of the legal profession has proven to be uneven from one country/region to another. The following recommendations provide an overview of the training, litigation and networking lawyers can undertake.

##### **A. IN ORDER TO ASSIST IN THE IMPLEMENTATION OF THE UPR RECOMMENDATIONS**

#### **1. To organise and attend training on the principles of equality and non-discrimination and LGBTI issues as part of continuous legal education for all legal professionals.**

As mentioned by lawyers who were interviewed, there will only be legal advances if there is education on LGBTI issues for all legal professionals including magistrates, law enforcement officers and lawyers. While there was a fair number of recommendations addressing awareness-raising and education measures, the recommendations focused on law enforcement officers and the judiciary; none addressed lawyers specifically.

#### **2. To assist in training communities, law enforcement officers, judges and members of the government on the principles of universality, equality and non-discrimination.**

Lawyers in India and Malaysia have addressed the need to develop legal and human rights training for grassroots communities. Lawyers have a key role to play in refining the legal debate around SOGIESC issues and conveying the role of the principle of non-discrimination not only for the protection of the LGBTI persons but for all.

#### **3. To engage in strategic litigation for the protection of LGBTI persons, taking into account international norms and recommendations.**

International recommendations such as the UPR recommendations have no legal force. However, they serve as guidance for the interpretation of human rights. The Yogyakarta Principles have gained legitimacy and legal strength for over ten years by informing courts' decisions at national, regional and international levels. Lawyers are encouraged to develop strategic litigation for the protection of LGBTI persons based on the regional and international jurisprudence on SOGIESC issues, as well as building on the Yogyakarta Principles.

#### **4. To foster legal debate on the legal protection of LGBTI persons, taking into account international norms and recommendations.**

Opportunities for lawyers to address these issues goes beyond litigation. Through online platforms like the Forum of Lawyers in Cameroon, or through their networks, lawyers can foster debate within the legal profession. This is an opportunity for lawyers who have been trained on LGBTI legal issues to spread the word and reach out to members of the profession who would not be willing to attend training on LGBTI issues in systems where lawyers register themselves.

**B. IN ORDER TO MEANINGFULLY ENGAGE IN THE UPR AND PREPARE RECOMMENDATIONS**

**5. To engage with human rights defenders to coordinate strategic advocacy and litigation on SOGIESC issues in order to propose strong recommendations to recommending states.**

In the five countries where interviews with lawyers were conducted, lawyers developed strategic litigation to contain the application of repressive law and foster legal protection for LGBTI persons. They do it through personal engagement as a human rights defender or through their support of the work conducted by human rights defenders. Strategic litigation at domestic level and strategic advocacy at the UN should be mutually supportive and developed in a more systematic manner.

**6. To organise regional legal symposia in order to exchange with peers from neighbouring countries on good practices for protecting the rights of LGBTI persons.**

While none of the interviewees could mention exchanges taking place across their region, all of them mentioned the influence of neighbouring countries. Along the same lines as the UPR, a peer-to-peer dialogue within the legal community would facilitate the exchange of good practices.

# Annex 1: List of Calls to Action (CTAs) made at the UPR, following the Yogyakarta Principles

Yogyakarta Principles	International Treaty (ICCPR/ ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTAs)	Total number of CTAs
<p>Principle 1: Right to universal enjoyment of human rights</p> <p>Principle 2: Right to equality and non-discrimination</p> <p>continued overleaf...</p>	<p>Art 2 ICCPR</p>	<ul style="list-style-type: none"> <li>• ‘The Committee confines itself to noting, however, that in its view the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.’ <i>Toonen v Australia</i> CCPR/C/50/D/488/1992 (HRCtee, 1992), para 8.7.</li> <li>• ‘The State party should review its Constitution and legislation to ensure that discrimination on the grounds of sexual orientation and gender identity is prohibited, including by decriminalizing sexual relations between consenting adults of the same sex, in order to bring its legislation into line with the Covenant. The State party should also take the necessary steps to put an end to the social stigmatization of homosexuality and send a clear message that it does not tolerate any form of harassment, discrimination or violence against persons based on their sexual orientation or gender identity.’ CCPR/C/SLE/CO/1 (HRCtee, 2014), para 11.</li> <li>• ‘The State party should also ensure that reliable and public data is systematically collected on cases of discrimination and their treatment by the competent judicial authorities.’ CCPR/C/TUR/CO/1 (HRCtee, 2012), para 8.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recommending states made general recommendations calling for (468 CTAs):</b> <ul style="list-style-type: none"> <li>– <b>ensuring the rights of LGBTI persons (69 CTAs)</b> eg, ‘Continue the increased respect of the rights of lesbian, gay, bisexual and transgender people’. (Norway to Nicaragua)</li> <li>– <b>ensuring equal treatment of LGBTI persons (6 CTAs)</b> eg, ‘Promote equality in the enjoyment of human rights of LGBTI persons incorporating it into national legislation’. (Uruguay to Mongolia)</li> <li>– <b>adopting measures to protect LGBTI persons from discrimination and/or violence (172 CTAs)</b> eg, ‘Adopt measures to end discrimination and violence based on sexual orientation and gender identity, actual or perceived, in compliance with its human rights obligations’. (Switzerland to Bulgaria)</li> </ul> </li> <li>• <b>Recommending states made specific recommendations calling for:</b> <ul style="list-style-type: none"> <li>– <b>adopting legislative measures on non-discrimination or anti-discrimination laws protecting LGBTI persons (211 CTAs)</b> eg, ‘Ensure that respect for the principle of non-discrimination on the basis of gender includes lesbian, gay, bisexual, transgender and intersex persons’. (Spain to Belarus)</li> <li>– <b>equalising age of consent for same-sex and different-sex sexual activity (3 CTAs)</b> eg, ‘Equalize the age of consent for opposite and same-sex conduct’. (The Netherlands and Norway to Suriname)</li> </ul> </li> </ul>	<p>494</p>



Yogyakarta Principles	International Treaty (ICCPR/ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTAs)	Total number of CTAs
<p>Principle 1: Right to universal enjoyment of human rights</p> <p>Principle 2: Right to equality and non-discrimination</p> <p>...continued</p>			<ul style="list-style-type: none"> <li data-bbox="959 241 1321 533"> <p>• <b>Recommending states called to set up a monitoring mechanism of SOGIESC recommendations or SOGIESC issues (6 CTAs)</b>  eg, 'Establish a mechanism that monitors gender equality in employment, wage discrimination against women and discrimination on sexual orientation'. (United Kingdom to Monaco)</p> </li> <li data-bbox="959 555 1321 813"> <p>• <b>Recommending states called to provide financial resources to protect LGBTI rights (1 CTA)</b>  eg, 'Allocate the necessary resources to the fight against discrimination on the basis of gender and sexual orientation, so as to accelerate progress on this matter'. (Spain to Italy)</p> </li> <li data-bbox="959 835 1321 1151"> <p>• <b>Recommending states called for strengthening recognition and implementation of international instruments protecting the rights of LGBTI persons and/or related to SOGIESC (26 CTAs)</b>  eg, 'Apply the Yogyakarta Principles as a guide for new policies in the area of lesbian, gay, bisexual and transgender rights'. (The Netherlands to Serbia)</p> </li> </ul>	

Yogyakarta Principles	International Treaty (ICCPR/ ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTAs)	Total number of CTAs
<p>Awareness-raising and training measures on SOGIESC issues</p> <p>Principles: 1(c), 5(e), 7(c), 8(c), 9(g), 10(c), 12(b), 15(e), 16(c), 16(d), 16(e), 16(g), 20(d), 28(f)</p>		<ul style="list-style-type: none"> <li>• ‘The State party should implement broad awareness-raising campaigns, as well as trainings for law enforcement officials, to counter negative sentiments against LGBT individuals. It should consider adopting a targeted national action plan on the issue. The Committee, finally, recalls the obligation of the State party to guarantee all human rights of such individuals, including the right to freedom of expression and the right to freedom of assembly.’ CCPR/CLTU/CO/3 (HRCtee, 2012), para 8.</li> <li>• ‘The Committee urges the State party to intensify its efforts to combat discrimination against women based on their sexual orientation and gender identity, including by launching a sensitization campaign aimed at the general public, as well as providing appropriate training to law enforcement officials and health services providers, in order to avoid abuses and mistreatment of these women.’ CEDAW/C/CRI/CO/5-6 (CEDAW, 2011), para 41.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recommending states called for awareness-raising and education measures on LGBTI persons and SOGIESC issues (133 CTAs) through:</b> <ul style="list-style-type: none"> <li>– <b>a general recommendation (54 CTAs)</b> eg, ‘Adopt measures and take steps aimed at raising public awareness to fight against the climate of homophobia that prevails in the country’. (Belgium to Ghana)</li> <li>– <b>a recommendation specifically addressing law enforcement officers (5 CTAs) and/or judicial officials (36 CTAs)</b> eg, ‘Provide specific training aimed at the protection of human rights, in particular of women, children and persons of minority ethnicity, sexual orientation or gender identity to all law enforcement and judicial officials’. (Czech Republic to Republic of Congo)</li> <li>– <b>a recommendation addressing LGBTI issues in education programmes (18 CTAs)</b> eg, ‘Continue innovative education programs recognizing sexual diversity’. (Netherlands to Uruguay)</li> <li>– <b>a recommendation calling for the promotion of tolerance with regard to same-sex relationships, prevent stigmatisation and develop a national dialogue (social measures) (20 CTAs)</b> eg, ‘... adopt measures to promote tolerance in this regard’. (Czech Republic to Republic of Congo)</li> </ul> </li> </ul>	133

Yogyakarta Principles	International Treaty (ICCPR/ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTAs)	Total number of CTAs
Principle 6: Right to privacy	Art 17, 9(1)–9(3) ICCPR	<ul style="list-style-type: none"> <li>• ‘... the Committee has found a violation of Mr Toonen’s rights under articles 17(1) and 2(1) of the Covenant requiring the repeal of the offending law [criminalizing same-sex relationships].’ <i>Toonen v Australia</i> CCPR/C/50/D/488/1992 (HRCtee, 1992), para 11.</li> <li>• ‘The State party should also decriminalize sexual relations between consenting adults of the same sex, in order to bring its legislation into line with the Covenant and put an end to prejudices and the social stigmatization of homosexuality.’ CCPR/C/JAM/CO/3 (CCPR, 2011), para 8.</li> <li>• ‘The State party should repeal or amend all legislation which provides for or could result in discrimination against, and prosecution and punishment of, people because of their sexual orientation or gender identity.’ CCPR/C/IRN/CO/3 (CCPR, 2012), para 10. See also E/C.12/GMB/CO/1 (CESCR, 2015), para 12; C.12/IRN/CO/2, para 7, CEDAW/C/UGA/CO/7, paras 43-44; CRC/C/GAM/CO/2-3, paras 29-30; A/HRC/14/20 paras 17-26, CCPR/C/KWT/CO/2, para 30.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recommending states called for:</b> <ul style="list-style-type: none"> <li>– <b>abrogating/repealing/ reviewing discriminating and/ or restrictive laws against LGBTI persons (general recommendation) (158 CTAs)</b> eg, ‘Bring existing regional and draft federal-level legislation related to homosexuality into conformity with its commitment to the principles of non-discrimination’. (Canada to Russian Federation)</li> <li>– <b>decriminalising consensual same-sex relationships (specific recommendations) (294 CTAs)</b> eg, ‘... repeal the provisions of the penal code which criminalise sexual relations between consenting adults of the same sex’. (Norway to Afghanistan)</li> <li>– <b>ending the use of criminal and other legal provisions of general application to de facto criminalise consensual sexual activity/ sexual orientation (specific recommendations) (18 CTAs)</b> eg, ‘Decriminalize homosexual conduct by reforming the penal code so that for the purposes of prosecution, gross indecency would not apply to private acts between consenting adults’. (United States to Antigua)</li> </ul> </li> </ul>	470

Yogyakarta Principles	International Treaty (ICCPR/ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTAs)	Total number of CTAs
<p>Principle 5: Right to security</p> <p>Principle 29: Accountability</p>	<p>Art 9(1)–9(3) ICCPR</p>	<ul style="list-style-type: none"> <li>• '[The state should] amend the penal code to define hate speech and hate crimes based on sexual orientation or gender identity among the categories of punishable offences.' CCPR/C/POL/CO/6 (CCPR, 2010), para 8. See also CCPR/C/JAM/CO/3 (CCPR, 2011); CCPR/C/GTM/CO/3 (CCPR, 2012).</li> <li>• '[The state] should ensure that anyone held solely on account of freely and mutually agreed sexual activities or sexual orientation should be released immediately and unconditionally.' CCPR/C/IRN/CO/3 (HRCtee, 2012), para 10.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recommending states called for:</b> <ul style="list-style-type: none"> <li>– <b>adopting laws to address discrimination and violence against LGBTI persons (38 CTAs)</b> eg, 'Adopt legislation to protect LGBT persons against gender-based violence and discrimination'. (The Netherlands to Dominican Republic)</li> <li>– <b>adopting hate crime or hate speech legislation/legislative measures to guarantee the security of LGBTI persons (47 CTAs)</b> eg, 'Include a sexual orientation and gender identity perspective with regard to measures against incitement to hatred'. (Spain to Austria)</li> <li>– <b>investigating and prosecuting authors of crimes committed against LGBTI persons (68 CTAs)</b> eg, 'Take specific measures to ensure effective investigation of acts of violence against LGBT persons and hold the perpetrators to account'. (Iceland to Russian Federation)</li> <li>– <b>investigating and/or prosecuting crimes committed by law enforcement officers (3 CTAs)</b> eg, 'Carry out independent, impartial and effective investigations into the unlawful use of force against lesbian, gay, bisexual and transgender activists by Honduran law enforcement officials'. (Ireland to Honduras)</li> <li>– <b>monitoring cases of violence against individuals on the basis of SOGIESC (7 CTAs)</b> eg, 'Develop monitoring capacity and legislation to enhance the prevention, investigation and prosecution of crimes of violence against individuals on the grounds of their sexual orientation or gender identity'. (The Netherlands to South Africa)</li> </ul> </li> </ul>	<p>163</p>

Yogyakarta Principles	International Treaty (ICCPR/ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTAs)	Total number of CTAs
Principle 24: Right to found a family	Art 23(1)–(2) ICCPR	<ul style="list-style-type: none"> <li>• ‘The committee is concerned about the existence of several legal provisions that are discriminatory against same-sex partners and their families, including in the health care and health insurance act, the housing act, the code of obligations, the penal code, and the marriage and family relations act. The committee is particularly concerned about the retention of article 22 of the registration of same-sex partnerships act, despite the decision by the constitutional court (2013) ruling that it violated the right to non-discrimination on the ground of sexual orientation (Art 2, para 2)’ E/C.12/SVN/CO/2 (CESCR, 2014), para 12.</li> <li>• ‘The Committee urges the State party ensure the swift adoption of the model legislation on same-sex partnerships.’ CEDAW/C/SRB/CO/2-3 (CEDAW, 2013), para 39</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recommending states called for the state under review to:</b> <ul style="list-style-type: none"> <li>– <b>legally recognise the right to adopt to same-sex couples (4 CTAs)</b> eg, ‘Amend the legal status of same-sex partnerships to enable the right to adopt and have children’. (United Kingdom to Austria)</li> <li>– <b>take necessary steps to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members (9 CTAs)</b> eg, ‘Eliminate discrimination against LGBTI people with regard to family and parental rights’. (Iceland to Finland)</li> <li>– <b>protect the best interests of children (1 CTA)</b> eg, ‘Regularize the status of children of same-sex couples and ensure their protection against discrimination’. (Sweden to Slovenia)</li> <li>– <b>protect the equality between same-sex and different-sex relationships/partnerships/couples (16 CTAs)</b> eg, ‘Introduction of a law prohibiting the discrimination of same-sex relationships’. (Germany to St Vincent)</li> <li>– <b>legally recognise same-sex marriage (22 CTAs)</b> eg, ‘Further recognize the rights of same-sex couples by legalizing same-sex marriage and adoption’. (Iceland to Colombia)</li> </ul> </li> </ul>	52

Yogyakarta Principles	International Treaty (ICCPR/ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTAs)	Total number of CTAs
<p>Principle 20: Freedom of peaceful assembly</p> <p>Principle 19: Freedom of opinion and expression</p>	<p>Art 19(1)– (2), 21, 22(1) ICCPR</p>	<ul style="list-style-type: none"> <li>• ‘The Committee is of the view that, by displaying posters that declared “Homosexuality is normal” and “I am proud of my homosexuality” near a secondary school building, the author has not made any public actions aimed at involving minors in any particular sexual activity or at advocating for any particular sexual orientation. Instead, she was giving expression to her sexual identity and seeking understanding for it... The Committee concludes that the author’s conviction of an administrative offence for “propaganda of homosexuality among minors” on the basis of the ambiguous and discriminatory section 3.10 of the Ryazan Region Law, amounted to a violation of her rights under article 19, paragraph 2, read in conjunction with article 26 of the Covenant.’ HRCtee, <i>Fedotova v Russian Federation</i> (2012) CCPR/C/106/D/1932/2010, paras 10.7 and 10.8.</li> <li>• The ban of a gay pride violates the right to peaceful assembly. HRCtee, <i>Alekseev v Russian Federation</i> (2009) CCPR/C/109/D/1873/2009.</li> <li>• ‘The committee is concerned that certain legal instruments such as the law on the protection of minors against the detrimental effect of public information (art. 7) may be applied in a manner unduly restrictive of the freedom of expression guaranteed under the covenant and may have the effect of justifying discrimination against lesbian, gay, bisexual and transgender (LGBT) individuals.’ CCPR/C/LTU/CO/3 (HRCtee, 2012), para 8.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recommending states called for the state under review to:</b> <ul style="list-style-type: none"> <li>– <b>ensure/protect the right to peaceful assembly and association (7 CTAs), freedom of expression (5 CTAs) or both rights (26 CTAs) of LGBTI persons</b> eg, ‘Ensure the right to association of lesbian, gay, bisexual and transgender people (LGBTs)’. (Spain to Mozambique)</li> <li>– <b>ensure protection during assemblies of LGBTI persons (3 CTAs)</b> eg, ‘Ensure their safety during public events such as the Belgrade Pride Parade’. (Austria to Serbia)</li> <li>– <b>ensure the registration of association of LGBTI persons/ protecting the rights of LGBTI persons (3 CTAs)</b> eg, ‘Facilitate the registration and activities of NGOs specialized in issues of sexual orientation and gender identity’. (Spain to Mozambique)</li> </ul> </li> </ul>	<p>44</p>

Yogyakarta Principles	International Treaty (ICCPR/ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTAs)	Total number of CTAs
Principle 27: Right to promote human rights		<ul style="list-style-type: none"> <li>• ‘The Commission should fully comply with its mandate and engage in all human rights issues, including those related to the rights of lesbian, gay, bisexual, transgender and intersex persons.’ CCPR/C/MW/CO/1/Add.1 (HRCtee, 2014).</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recommending states called for the state under review to:</b> <ul style="list-style-type: none"> <li>– <b>protect LGBTI activists/human rights defenders protecting the rights of LGBTIs persons and end attacks (13 CTAs)</b> eg, ‘Ensure adequate protection for those human rights defenders who work on the rights of Lesbian, Gay, Bisexual and Transgender persons’. (United States to Antigua)</li> <li>– <b>condemn/prosecute violence against LGBTI defenders (8 CTAs)</b> eg, ‘Adopt further measures to end impunity for attacks against human rights defenders’. (Czech Republic to Guatemala)</li> <li>– <b>not criminalise activists (1 CTA)</b> eg, ‘Urgently abolish article 193-1 of the Criminal Code, which criminalises activities by non-registered organizations and generally end the pattern of obstruction, harassment and intimidation of civil society organizations promoting and defending human rights’. (Denmark to Belarus)</li> <li>– <b>consult CSOs on SOGIESC issues, also on the implementation of human rights obligations (6 CTAs)</b> eg, ‘Establish a more effective mechanism of dialogue with human rights defenders in the area of sexual minorities’. (Spain to Serbia)</li> </ul> </li> </ul>	28

Yogyakarta Principles	International Treaty (ICCPR/ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTAs)	Total number of CTAs
Principle 17: Right to health  continued overleaf...	Art 12(1)  CESCR	<ul style="list-style-type: none"> <li>• ‘The Committee recommends that the State party: (f) Ensure access to sexual and reproductive health by all women, including lesbians, without discrimination and avoiding any form of stigmatization’. CEDAW/C/DOM/CO/6-7 (CEDAW, 2013), para 37 (f).</li> <li>• ‘The Committee calls upon the State party to provide adequate human and financial resources to effectively implement the National HIV/STI Programme to ensure that any progress achieved so far is not reversed. The Committee also requests the State party to ensure that discrimination against persons with HIV/AIDS is prohibited under its legislation, and to repeal or amend laws that stigmatize and increase the vulnerability of those most at risk.’ E/C.12/JAM/CO/3-4 (CESCR, 2013), para 28.</li> <li>• ‘The Committee recommends that the State party establish guidelines for ensuring that lesbian, gay, bisexual and transgender persons have access to health services, including sexual and reproductive health services, on a non-discriminatory basis.’ E/C.12/ECU/CO/3 (CESCR, 2012), para 30.</li> <li>• ‘The Committee... recommends that the State party take concrete measures to raise awareness on HIV/AIDS with a view to combating prejudices and negative stereotypes against people living with HIV/AIDS, including homosexuals. The State party should also ensure that persons living with HIV/AIDS, including homosexuals, have equal access to medical care and treatment.’ CCPR/C/KEN/CO/3 (HRCtee, 2012), para 9.</li> <li>• ‘The Committee urges the State party to: (b) Provide appropriate training to health-service providers, in order to avoid abuse and mistreatment of [LBTI] women.’ CEDAW/C/NOR/CO/8 (CEDAW, 2012), para 34. See also SR Health, A/64/272 (2009)</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recommending states called for the states under review to:</b> <ul style="list-style-type: none"> <li>– <b>protect/guarantee/ensure the right to health of LGBTI persons (2 CTAs)</b> eg, ‘... promote the right to health of persons with disabilities and lesbian, gay, bisexual, transgender and intersex persons’. (Colombia to Panama)</li> <li>– <b>ensure equal access to health services, with no discrimination based on SOGIESC (7 CTAs)</b> eg, ‘Fight discrimination against LGBT persons both in law and in practice, as it impacts on the possibilities of education, justice and access to health services, with emphasis on the difficulties faced by transgender people’. (Uruguay to Costa Rica)</li> <li>– <b>raise awareness and develop education on LGBTIs issues in health policy (6 CTAs)</b> eg, ‘... facilitate more effective educational programmes for HIV-AIDS prevention’. (Czech Republic to Senegal)</li> <li>– <b>develop programmes to respond to the HIV-AIDS related needs of sexually-active gay men (2 CTAs)</b> eg, ‘Develop programmes to respond to the HIV-AIDS related needs of sexually active gay men’. (Canada to Zambia)</li> <li>– <b>ensure access to reproductive medicine to LGBTI persons (1 CTA)</b> eg, ‘Treat equally same-sex relationships with opposite-sex relationships, including the right to equal consideration for adoption and access to reproductive medicine’. (The Netherlands to Austria)</li> <li>– <b>ensure access to abortion for LGBTI persons (1 CTA)</b> eg, ‘Reconsider the relevant provisions of the new Constitution in order to ensure keeping access to abortion as a safe and legal option, and to ensure that the same protection and rights apply to every person regardless of their sexual orientation’. (Norway to Hungary)</li> </ul> </li> </ul>	19



Yogyakarta Principles	International Treaty (ICCPR/ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTAs)	Total number of CTAs
Principle 17: Right to health ...continued		<ul style="list-style-type: none"> <li>• 'The Committee urges the State party to step up measures, legislative or otherwise, on the identity and the health of transsexual and inter-sex persons with a view to ensuring that they are no longer discriminated against and that their personal integrity and sexual and reproductive health rights are respected. The Committee calls on the State party to fully consult transsexual and inter-sexed persons for this purpose.' E/C.12/DEU/CO/5 (CESCR, 2011), para 26.</li> </ul>		
Principle 28: Effective remedies  Principle 8: Fair trial	Art 9(3) ICCPR	<ul style="list-style-type: none"> <li>• 'The State should also take appropriate steps to ensure that acts of discrimination are investigated and that victims obtain reparation.' CCPR/C/BOL/CO/3 (CCPR, 2013), para 7.</li> <li>• 'The state party should adopt comprehensive anti-discrimination legislation that... provides victims of discrimination with effective and appropriate remedies.' CCPR/C/JPN/CO/6 (CCPR, 2014), para 11.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recommending states called for the states under review to:</b> <ul style="list-style-type: none"> <li>– <b>ensure access to justice to LGBTI persons (5 CTAs)</b> eg, 'Adopt necessary legislative and administrative measures to guarantee the security of LGBT persons and facilitate their access to justice and legal assistance'. (Norway to Uruguay)</li> <li>– <b>ensure effective remedies to LGBTI victims of violence (8 CTAs)</b> eg, 'Develop programs to prevent discrimination based on sexual orientation and gender identity, to punish violence of this kind and ensure that victims receive appropriate support'. (France to South Africa)</li> <li>– <b>ensure protection of the victims of crimes committed on the basis of SOGIESC (4 CTAs)</b> eg, 'Adopt measures guaranteeing the protection of women, who are victims of discrimination and violence on the grounds of their sexual orientation or gender condition'. (Argentina to El Salvador)</li> </ul> </li> </ul>	17

Yogyakarta Principles	International Treaty (ICCPR/ ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTAs)	Total number of CTAs
Principle 7: Arbitrary detention	Art 9 ICCPR	<ul style="list-style-type: none"> <li>• ‘The Working Group renders the following opinion: The detention of the above-mentioned persons prosecuted on the grounds that, by their sexual orientation, they incited “social dissention” constitutes an arbitrary deprivation of liberty, being in contravention of the provisions of article 2, paragraph 1, of the [UDHR], and articles 2, paragraph 1, and 26 of the [ICCPR] to which the Government is a party.’ (See Working Group on Arbitrary Detention Opinion n.7/2002 (Egypt) CN.4/2003/8/Add 1, para 28, See also, CCPR/C/GC/35, paras 3 and 17.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recommending states called for:</b> <ul style="list-style-type: none"> <li>– <b>releasing individuals convicted for involvement in same-sex relationships (6 CTAs)</b> eg, ‘Free all persons imprisoned on the grounds of their sexual orientation’. (Belgium to Senegal)</li> <li>– <b>adopting a de facto moratorium on convictions related to SOGIESC (4 CTAs)</b> eg, ‘Put in place a moratorium on convictions for same-sex relationships’. (France to Malawi)</li> <li>– <b>preventing arbitrary detention based on SOGIESC (4 CTAs)</b> eg, ‘Ensure that no person is subject to arbitrary arrest or detention because of their sexual orientation or gender identity’. (Austria to Uganda)</li> </ul> </li> </ul>	14
Principle 16: Right to education	Art 13 (1) CDESCR	<ul style="list-style-type: none"> <li>• ‘The state party should also take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation, including with respect to access to employment, housing, education and health care, and to ensure that individuals of different sexual orientation or gender identity are protected from violence and social exclusion within the community.’ CCPR/C/IRN/CO/3 (HRCtee 2012), para 10.</li> <li>• ‘The committee is concerned about discrimination on the grounds of sexual orientation and gender identity in employment, social security, health care and education.’ E/C.12/UKR/CO/6 (CESCR, 2014) para 10.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recommending states called for the states under review to:</b> <ul style="list-style-type: none"> <li>– <b>prevent discrimination in access to education, based on SOGIESC (4 CTAs)</b> eg, ‘Establish anti-discrimination laws and regulations to ensure that lesbian, gay, bisexual and transgender persons enjoy equal treatment, including at schools and in the workplace’. (Ireland to China)</li> <li>– <b>ensure equal access to education, with no discrimination based on SOGIESC (2 CTAs)</b> eg, ‘Ensure access to joint and inclusive quality education, with special attention towards the Roma minority, persons with disabilities and LGBT issues’. (Norway to Bosnia and Herzegovina)</li> <li>– <b>integrate SOGIESC-related issues into education programmes/curricula (5 CTAs)</b> eg, ‘Introduce gender equality issues, as well as non-discrimination and non-violence due to gender identity and sexual orientation in education programmes, in school regulations and in the training of teachers’. (Colombia to Bolivia)</li> </ul> </li> </ul>	11

Yogyakarta Principles	International Treaty (ICCPR/ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTAs)	Total number of CTAs
Principle 12: Right to work	Art 6–7 ICESCR	<ul style="list-style-type: none"> <li>• ‘The state party should also take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation, including with respect to access to employment, housing, education and health care, and to ensure that individuals of different sexual orientation or gender identity are protected from violence and social exclusion within the community.’ CCPR/C/IRN/CO/3 (CCPR, 2012), para 10.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recommending states called for the states under review to:</b> <ul style="list-style-type: none"> <li>– <b>ensure non-discrimination in access to employment (9 CTAs)</b> eg, ‘Take further measures to combat discrimination in the labour market and combat in particular discrimination based on ethnic origin and discrimination targeting transgender people’. (France to the Netherlands)</li> <li>– <b>ensure protection in the work place (1 CTA)</b> eg, ‘Adopt all necessary measures to reduce prejudice and discrimination against the LGBT community... to ensure the adequate protection of LGBT persons in the work place’. (Ireland to Serbia)</li> </ul> </li> </ul>	10
Principle 3: Right to identity	Art 16 ICCPR	<ul style="list-style-type: none"> <li>• ‘The Committee calls upon the State party: (e)... to abolish restrictions for transgender persons with regard to obtaining identity documents.’ CEDAW/C/GEO/CO/4-5 (CEDAW, 2014), para 35.</li> <li>• ‘The Committee encourages the State party to take effective measures to ensure that lesbian, gay, bisexual and transgender persons can enjoy their economic, social and cultural rights without discrimination, including access to health care, employment and education, and that legal recognition of their gender is not dependent on whether or not they have undergone gender reassignment surgery.’ E/C.12/LTU/CO/2 (CESCR, 2014), para 8.</li> <li>• ‘The Committee takes note of the establishment of regulations aiming to respect the identity of transgender women in the identity photograph cards issued by the Civil Registry Office.’ CEDAW/C/CRI/CO/5-6 (CEDAW, 2011) para 40.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recommending states called for the states under review to:</b> <ul style="list-style-type: none"> <li>– <b>recognise gender identity in law (7 CTAs)</b> eg, ‘Adopt a law on gender identity allowing legal recognition in the national register of persons in accordance with their sexual orientation and image of the persons concerned’. (Madagascar to Honduras)</li> <li>– <b>access to information in accordance with gender identity (1 CTA)</b> eg, ‘... intensify measures intended to protect free sexual orientation and sexual identity through specific educational initiatives and awareness-raising for all society, to facilitate documentation for transsexual people in line with their identity...’. (Spain to Costa Rica)</li> <li>– <b>allow medical changes to be reflected in the person’s identity documents (1 CTA)</b> eg, ‘Guarantee personal autonomy and individual rights, as enshrined in the Constitution, by a prohibition of discrimination based on sexual orientation or gender identity, as well as by allowing a medical gender change to be reflected in a person’s identity documents’. (The Netherlands to Kuwait)</li> </ul> </li> </ul>	9

Yogyakarta Principles	International Treaty (ICCPR/ ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTAs)	Total number of CTAs
<p>Principle 10: Torture</p> <p>Principle 18: Protection from medical abuses</p> <p>continued overleaf...</p>	<p>Art 7, 8(1)–(2) ICCPR</p>	<ul style="list-style-type: none"> <li>• Certain forms of abuses against LGBTI persons may cross a threshold of mistreatment that is tantamount to torture or cruel, inhuman or degrading treatment or punishment. Examples include denial of medical treatment; verbal abuse and public humiliation; and a variety of forced or coercive procedures, such as surgical and other medical treatment of intersex people without effective consent. See: (A/HRC/22/53(2013); CEDAW/C/NLD/CO/5 (2010), para. 47; E/C.12/DEU/CO/5 (2011); A/HRC/29/23 (2015).</li> <li>• ‘Ensure the effective application of legal and medical standards following the best practices of granting informed consent to medical and surgical treatment of intersex people, including full information, orally and in writing, on the suggested treatment, its justification and alternatives.’ CAT/C/DEU/CO/5 (2011), para 20 (a).</li> <li>• ‘The committee is concerned at reports of discrimination, bullying, homicide, ill-treatment, torture, sexual aggression and sexual harassment against persons because of their sexual orientation or gender identity. The committee also regrets the lack of information on the effective investigation and punishment of such acts. (Arts 3, 6, 7 and 26)’ CCPR/C/DOM/CO/5 (HRCtee,2012) para 16.</li> <li>• ‘To prohibit discrimination against intersex people, including by banning unnecessary medical or surgical treatment, and adopt measures to overcome discriminatory attitudes and practices through awareness-raising, training for public officials and medical professionals and the elaboration of ethical and professional standards that respect the rights of intersex persons, in consultation with intersex people and their organizations.’ A/70/213 (SR Health, 2015) para 112 (m).</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recommending states called for the states under review to:</b> <ul style="list-style-type: none"> <li>– <b>prevent torture against LGBTI persons and investigate cases of torture (4 CTAs)</b> eg, ‘Ensure that allegations of violence, torture, inhuman and degrading treatment of LGBT persons, by government and non-government actors, are investigated promptly and efficiently and that perpetrators are brought to justice’. (Sweden to Kyrgyzstan)</li> <li>– <b>ensure protection from abusive medical practices (2 CTAs)</b> eg, ‘Outlaw forced or coerced sterilisation, sex reassignment surgeries and reparative therapies imposed without free and informed consent’. (Iceland to Iran)</li> </ul> </li> </ul>	<p>6</p>

Yogyakarta Principles	International Treaty (ICCPR/ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTAs)	Total number of CTAs
Principle 10: Torture Principle 18: Protection from medical abuses ...continued		<ul style="list-style-type: none"> <li>'The Special Rapporteur calls upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, 'reparative therapies' or 'conversion therapies', when enforced or administered without the free and informed consent of the person concerned. He also calls upon them to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups.'</li> </ul> <p>A/HRC/22/53 (Special Rapporteur on Torture, 2013), para 88.</p>		
Principle 15: Right to housing	Art 18 ICESCR	<ul style="list-style-type: none"> <li>'The state party should also take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation, including with respect to access to employment, housing, education and health care...'</li> <li>'The State should remove the remaining restrictions in terms of eligibility criteria applied to same-sex couples with respect to publicly operated housing services at the municipal level.'</li> </ul> <p>CCPR/C/IRN/CO/3 (HRCtee 2012), para 10. CCPR/C/JPN/CO/6 (HRCtee, 2014), para 11.</p>	<ul style="list-style-type: none"> <li><b>Ensure non-discrimination in access to adequate housing, and prevent forced evictions/ ensure remedies in case of forced evictions</b> eg, 'Ensure non-discrimination in access to adequate housing, and prevent forced evictions, as well as the threat of forced evictions, on the basis of sexual orientation or gender identity'. (United States to Gambia)</li> </ul>	5
Principle 4: Right to life	Art 6(1)–6(2) ICCPR	<ul style="list-style-type: none"> <li>Death penalty as punishment for consensual same-sex relations between adults is a violation of Art 6 ICCPR.</li> </ul> <p>CCPR/C/SDN/CO/3 (HRCtee, 2007), para 19; E/CN.4/2000/3.</p>	<ul style="list-style-type: none"> <li><b>Recommending states called for the states under review to:</b> <ul style="list-style-type: none"> <li><b>abolish the death penalty applied on the basis of sexual orientation (3 CTAs)</b> eg, 'Ensure that the death penalty is not applied to consensual same-sex relations between adults'. (Sweden to Mauritania)</li> <li><b>adopt a moratorium on the death penalty applied on the basis of sexual orientation (1 CTA)</b> eg, 'Re-establish the moratorium on death penalty in all cases. If not, extend that moratorium to the cases that are contrary to international law, including the death penalty for sexual orientation'. (Spain to Iraq)</li> </ul> </li> </ul>	4

Yogyakarta Principles	International Treaty (ICCPR/ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTA)	Total number of CTAs
Principle 13: Right to social security	Art 9 ICESCR	<ul style="list-style-type: none"> <li>The committee is concerned about discrimination on the grounds of sexual orientation and gender identity in employment, social security, health care and education.’ E/C.12/UKR/CO/6 (CESCR, 2014) para 10.</li> </ul>	<ul style="list-style-type: none"> <li><b>Ensure non-discrimination in access to social security services</b> eg, ‘Introduce legislation that recognizes the diversity of forms of families and that provides same sex couples with the same rights and social security as couples of the opposite sex’. (The Netherlands to Latvia)</li> </ul>	3
Principle 25: Right to participate in public life	Art 13 (1) IESCR		<ul style="list-style-type: none"> <li><b>Ensure non-discrimination based on SOGIESC in access to services and public office</b> eg, ‘Amend discriminatory provisions based on sexual orientation or gender identity, in particular with regard to equality of access to services and public office’. (Uruguay to Liberia)</li> </ul>	2
Principle 23: Right to seek asylum	UN Convention the rights of refugees	<ul style="list-style-type: none"> <li>A State may not remove, expel or extradite a person to any State where the person may face a threat to their life or freedom, including persecution, on the basis of sexual orientation, gender identity or intersex status. <i>M.I. vs Sweden</i> CCPR/C/108/D/2149/2012 (HRCtee, 2012)</li> </ul>	<ul style="list-style-type: none"> <li><b>Recognise SOGIESC as grounds for asylum seeking</b> eg, ‘Follow the Council of the European Union Asylum Qualification Directive in future cases with regard to sexual orientation as a ground for asylum-seeking’. (Canada to United Kingdom)</li> </ul>	2
Principle 21: Freedom of religion	Art 18 ICCPR		<ul style="list-style-type: none"> <li><b>Ensure the right of LGBTI persons to practice religion</b> eg, ‘Make progress towards the protection of LGBTI people, by creating the conditions allowing them access to basic services in the fields of health, work and religious activities, and in addition by eliminating definitively from the Criminal Code sodomy as a crime’. (Chile to Lesotho)</li> </ul>	1

Yogyakarta Principles	International Treaty (ICCPR/ICESCR)	Decisions and concluding observations of treaty bodies	Calls to action (CTA)	Total number of CTAs
Children's rights	Convention the Rights of the Child	<ul style="list-style-type: none"> <li>• 'The committee urges the state party to ensure that its programme address the situation of discrimination against... children because of their sexual orientation and/or gender identity.' CRC/C/GUY/CO/2-4 (CRC, 2013), para 25; CRC/C/AUS/CO/4 (CRC, 2012), para 30 (e).</li> <li>• The state should 'ensure that children who belong to lesbian, gay, bisexual and transgender groups or who are cared for by persons from these groups, as well as children demonstrating non-conformist social behaviour, are not subjected to any form of discrimination, by raising the public's awareness of equality and non-discrimination on the basis of sexual orientation and gender identity.' CRC/C/IRQ/CO/2-4 (CRC, 2015), para 20 (c). See also CRC/C/RUS/CO/4-5 (CRC, 2014).</li> </ul>	<ul style="list-style-type: none"> <li>– <b>Ensure the protection of LGBTI minors</b> eg, 'Adopt and implement legislation ensuring effective protection of LGBT people, inter alia on the prohibition of discrimination and hate crimes, a confidential complaints mechanism and protection of LGBT minors'. (The Netherlands to Kyrgyzstan)</li> </ul>	1

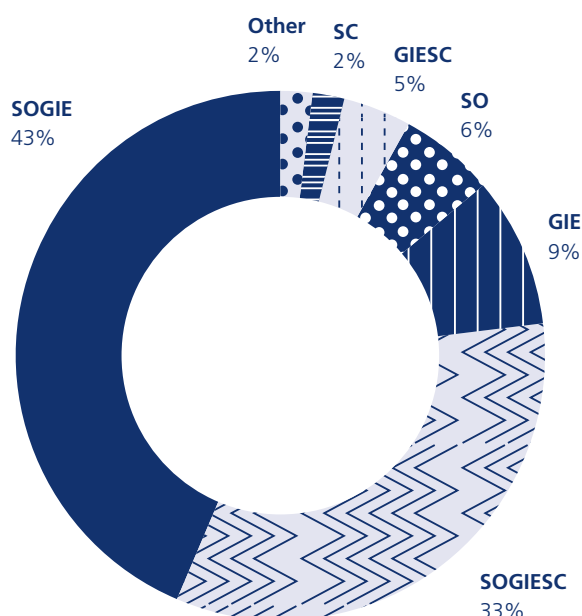
## Annex 2: Demographic data of survey respondents and interviewees

A total of 64 survey respondents and 33 interviewees participated in the research project, representing a wide range of areas of expertise, geographical focus and identities. Interviewees included representatives of national or local trans and LGBTI organisations (12), lawyers (11), states (7), (I)NGOs (2) and UN staff (1).

### SOGIESC expertise

The majority of survey respondents worked in organisations that focus broadly on SOGIE or SOGIESC issues. A much smaller number of respondents worked on GIE, SO, GIESC or SC issues only.

Figure 12: thematic expertise of the 64 survey respondents



### Regional focus

Survey respondents represented a variety of regional foci in their work. Interviewees were selected with a view to ensuring a good balance of perspectives and addressing some of the gaps in the survey. Further, some individuals were selected because the organisations they represented could share UPR engagement good practice examples.



Figure 13: the regional focus of survey respondents

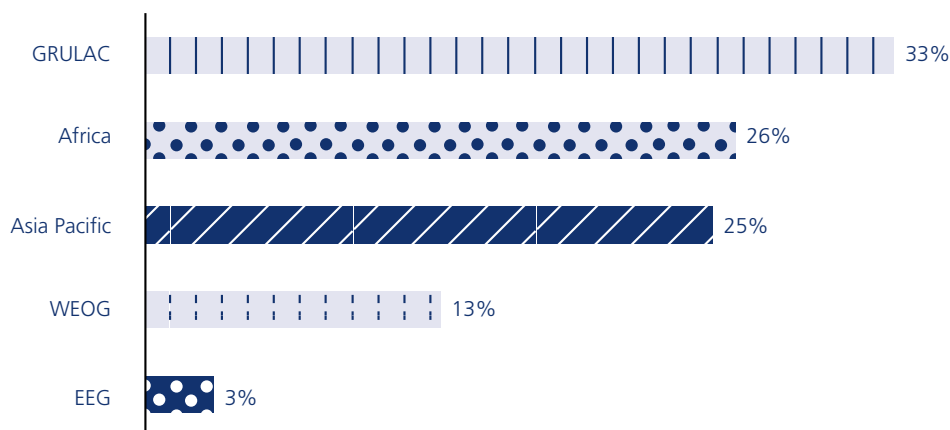
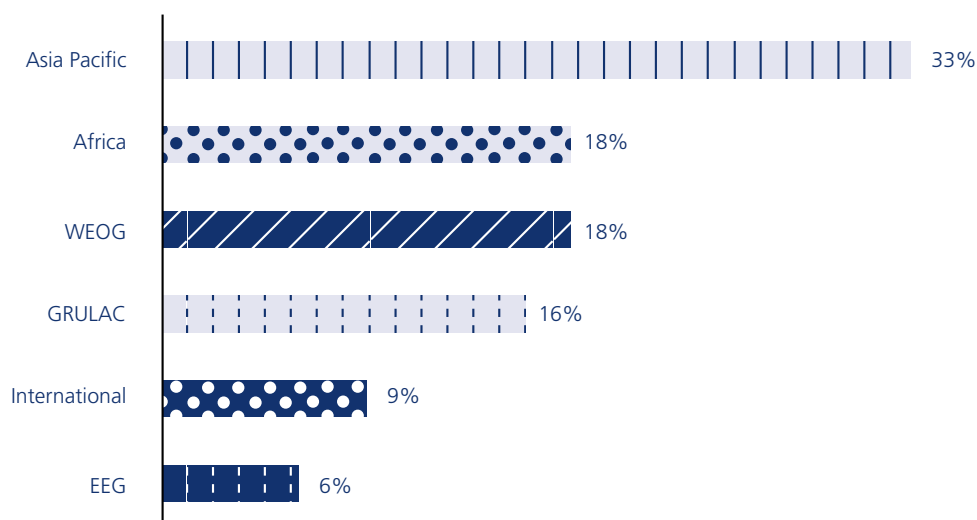


Figure 14: the regional focus of interviewees ((I)NGOs, lawyers, UN staff, state representatives)



## Gender identity, trans and intersex status and sexual orientation

Survey respondents were asked to indicate their gender identity and sexual orientation, as well as if they identified as trans or had an intersex variation. Only 39 respondents answered these questions. Among them there were more men than women and a significant number of non-binary people. One third of them identified as trans, and there were only three intersex respondents. Among the 25 NGO, INGO and lawyer interviewees, there was an equal mix of men and women, with only one non-binary person participating. Three trans people and one intersex person were also interviewed. A high number of interviewees did not disclose their identities.

Figure 15: ratio of gender identity, trans and intersex status and sexual orientation of survey respondents

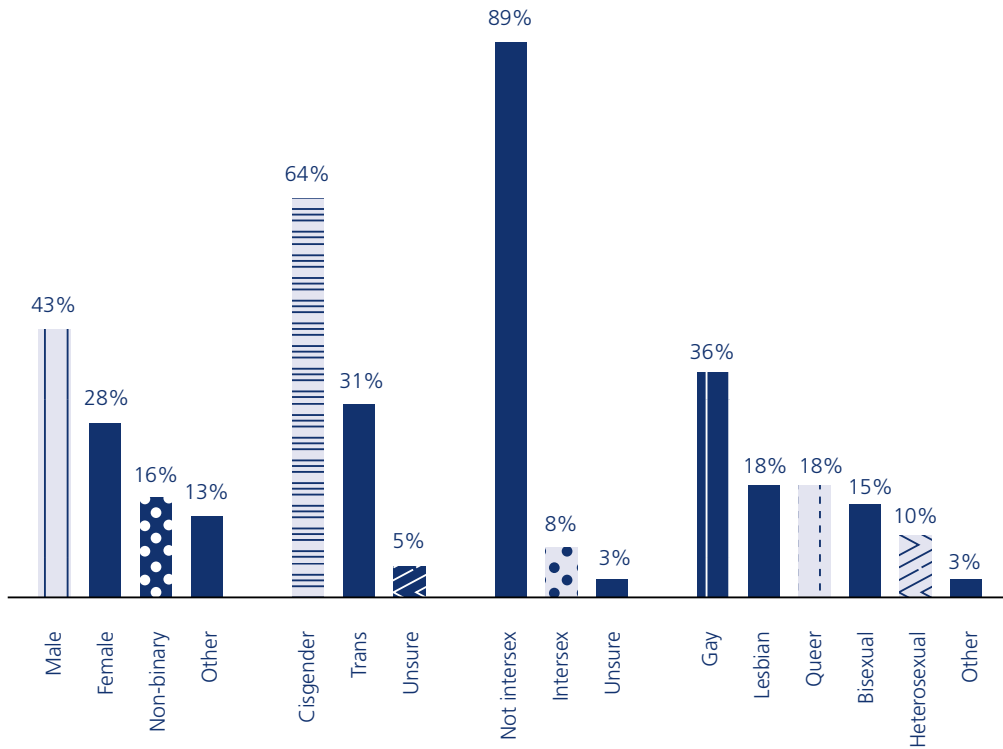
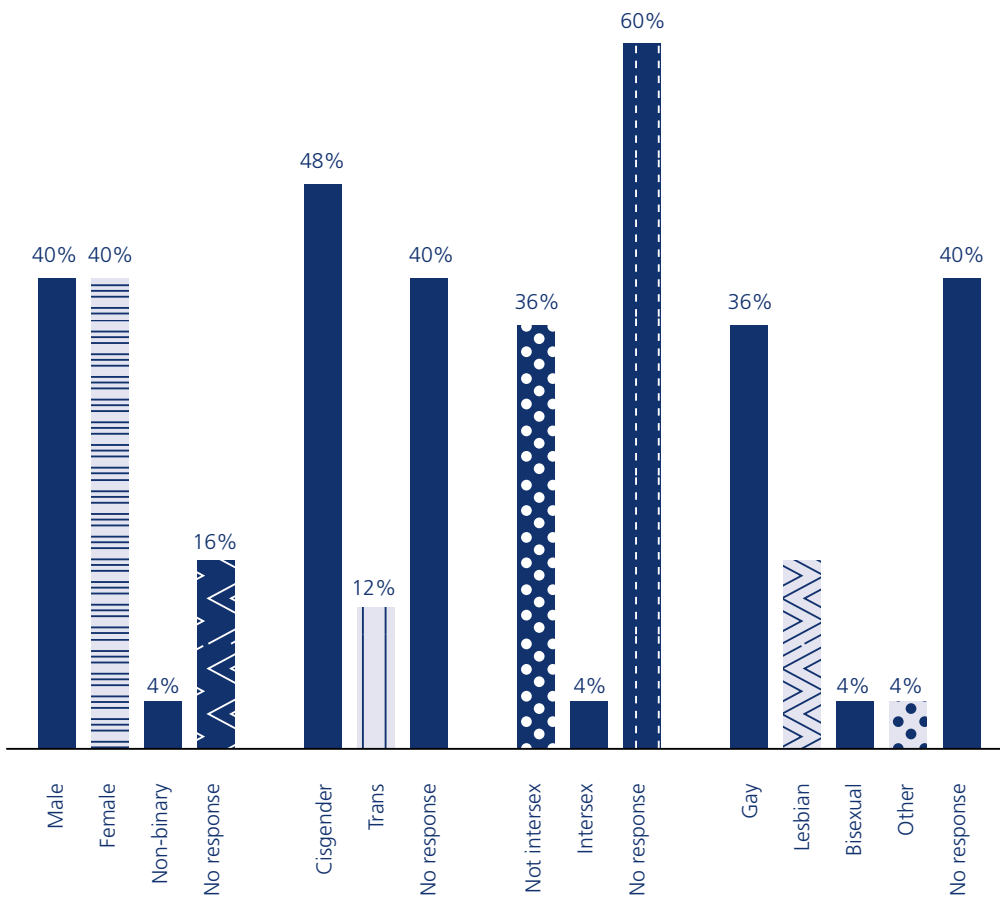


Figure 16: ratio of gender identity, trans and intersex status', and sexual orientation of interviewees ((I)NGOs and lawyers)



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