



## MEMORANDUM

**To:** Nancy Nicol, Principle Investigator, York University, Envisioning Global LGBT Human Rights (funded by the Social Science and Humanities Research Council of Canada)\*  
**From:** Atrisha Lewis (3L) & Zahra Ahmed (LL.M.), International Human Rights Clinic  
**Date:** January 13<sup>th</sup>, 2012  
**Re:** **South Africa's Interactions with the UN System on the Issue of LGBT Rights**

This document was prepared by law students and highlights publicly-accessible information available at the time it was prepared. It is not exhaustive, nor is it updated on a regular basis. The information provided here is not a substitute for legal advice or legal assistance, and the International Human Rights program at the University of Toronto, Faculty of Law cannot provide such advice or assistance.

### Overview of the UN System

There are two major human rights systems at the United Nations (the "UN"): the Treaty based system and the Charter based system.

The treaty-based human rights system consists of nine treaty bodies that monitor state compliance with the obligations under their respective conventions. Each treaty body is comprised of a committee of independent experts that interpret and apply the convention in reviewing and commenting on periodic state reports and individual complaints. The treaty bodies are not judicial institutions and there is debate as to the nature of the body of law that the treaty bodies produce.<sup>1</sup> Regardless of whether these normative findings are actually law, they have legal significance as they are referenced in international and domestic decisions.<sup>2</sup>

The Charter based human rights system derives its authority from the UN Charter itself. The UN Human Rights Council, the successor to the Human Rights Commission, is the main organ in this Charter based system. The mandate of the Human Rights Council is to make recommendations on situations of human rights violation, while being guided by principles of "universality, impartiality, objectivity, and non-selectivity."<sup>3</sup> This intergovernmental body, which meets in Geneva 10 weeks a year, is composed of 47 elected United Nations Member States who serve for an initial period of 3 years, and cannot be elected for more than two consecutive terms. The Human Rights Council oversees the Universal Periodic Review (UPR), which is a process that involves a review of the human rights records of all 193 UN Member States once every four years.

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<sup>1</sup> Burgenthal, *The Evolving International Human Rights System* 100 A.J.I.L. 788, 787-791

<sup>2</sup> *Ibid*

<sup>3</sup> G.A. Res. 60/251 (March 15, 2006)



While not a human rights system, the General Assembly also deals with human rights issues through its broad mandate. Established in 1945 under the Charter of the United Nations, the General Assembly is the chief deliberative, policymaking and representative organ of the United Nations. Comprising all 193 Members of the United Nations, it provides a unique forum for multilateral discussion of the full spectrum of international issues covered by the Charter.

## **SOUTH AFRICA**

### 1. Summary

This is a summary of South Africa's interaction with UN mechanisms on Sexual Orientation and Gender Identity ("SOGI") issues.

- South Africa's constitution guarantees no discrimination on the basis of sexual orientation.
- South Africa has signed and ratified key human rights treaties. See chart below.
- South Africa has submitted reports to the treaty-based bodies. South Africa has been late in reporting and there are currently a number of reports that are overdue.
- South Africa has supported SOGI issues at the United Nations but its record is not consistent. More recently, South Africa has taken the lead in advocating SOGI issues at the United Nations.
- South Africa, most recently, introduced the first ever resolution at the Human Rights Council that deals with sexual orientation. The resolution asks for the documentation discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity.
- There are serious problems with enforcement of SOGI rights in South Africa. There is ongoing violence against lesbian women and transgendered persons. On December 5, 2011, Human Rights Watch issued a report outlining the human rights violations of lesbians and transgendered persons, specifically the high incidence of "corrective rape". See Human Rights Watch Report.<sup>4</sup>
- The Human Rights Council and the CEDAW Committee have expressed grave concerns about the status of LGBTI people particularly lesbians in South Africa.

### 2. Treaty/ Convention Status

International Conventions are subject to ratification, acceptance or accession by States. They define rules with which the States undertake to comply.

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<sup>4</sup> Human Rights Watch report titled "We'll show you You're a woman" released Dec. 5, 2011. <http://www.hrw.org/reports/2011/12/05/we-ll-show-you-you-re-woman>



The following chart highlights the international conventions that protect sexual orientation and gender identity rights through affirming international human rights principles such as the right to equality.

South Africa has ratified all relevant treaties. The chart highlights when South Africa has ratified these conventions.

Treaty	Date of Signature	Date of Accession(a), Succession(s), Ratification
International Convention on the Elimination of all forms of Racial Discrimination (“CERD”)	3 Oct 1994	10 Dec 1998
International Covenant on Civil and Political Rights (“ICCPR”)	3 Oct 1994	10 Dec 1998
Optional Protocol to the ICCPR <sup>5</sup>	--	28 Aug 2002 (a)
International Covenant on Economic, Social and Cultural Rights (“ICESCR”)	3 Oct 1994	--
Convention on the Elimination of all forms of Discrimination Against Women (“CEDAW”)	29 Jan 1993	15 December 1995
Convention against Torture (“CAT”)	29 Jan 1993	10 Dec 1998
Convention on the Rights of the Child (“CRC”)	29 Jan 1993	16 June 1995

In accordance with the various treaties, South African has an obligation to report its compliance with the treaties. The tables below set out the status of South Africa’s reporting.

#### Reporting to Human Rights Council under Universal Periodic Review

	Date of Report	Next reporting date
Universal Periodic Review <sup>6</sup>	2008 <sup>7</sup>	2012

#### Reporting to Treaty-based bodies

Treaty-based bodies	Date of Report	Comments
Human Rights Committee (CCPR)		Initial report overdue since 2000 <sup>8</sup>
Committee on the Elimination of Racial Discrimination (“CERD”)	2006	Initial to third report submitted together by

<sup>5</sup> Authorizes the Human Rights Committee to hear complaints by private persons alleging violations of their rights under the ICCPR

<sup>6</sup> Info re Universal Periodic Review, including calendar.  
<http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>

<sup>7</sup> All Documents relating to South Africa’s 2008 Universal Periodic Review:  
<http://www.ohchr.org/EN/HRBodies/UPR/PAGES/ZASession1.aspx>

<sup>8</sup> See HRC report to 65 session of GA. UN Doc. A/65/40 (Vol.1) at page 12



Committee on Economic, Social and Cultural Rights (“ICESCR”)		South Africa. South Africa has not ratified. No reporting obligation.
Committee on the Elimination of all forms of Discrimination Against Women (“CEDAW”)	1998 <sup>9</sup> , 2011	
Committee against Torture (“CAT”)	2006 <sup>10</sup>	Report overdue since 2009 <sup>11</sup>
Committee on the Rights of the Child (“CRC”)	2000 <sup>12</sup>	Report overdue

### 3. All Official State Positions on LGBT Rights as Reflected in Voting Patterns

#### Human Rights Council

The Human Rights Council is an inter-governmental body within the UN system made up of 47 States responsible for strengthening the promotion and protection of human rights around the globe. The Council was created by the UN General Assembly on 15 March 2006 with the main purpose of addressing situations of human rights violations and make recommendations on them.

Year	Resolution	Vote
2011	<p><b>Resolution 17/19 Human rights, sexual orientation and gender identity<sup>13</sup></b></p> <p>The resolution requested that the UN High Commissioner on Human Rights conduct a study on SOGI Human Rights violations in all regions of the world, convene a panel to discuss the results, and remain seized of the issue.</p> <p>Resolution adopted 23 to 19 with 3 abstentions, at the Human Rights Council on June 17, 2011</p>	In favour (introduced it)
	<p><b>Comment/Statement:</b></p> <p>South Africa believes that no one should be subjected to discrimination or violence based on their sexual orientation or gender identity. No-one should have to fear for their lives because of their sexual orientation or gender identity. No-one should be denied</p>	

<sup>9</sup> Concluding observations by Committee (CEDAW) of South Africa’s report in 1998 UN Doc. A/53/38/Rev.1

<sup>10</sup> Concluding observations by Committee (CAT) of South Africa’s report in 2006 UN Doc.

CAT/C/ZAF/CO/

<sup>11</sup> Report of the CAT, General Assembly, Official Records, Sixty-sixth session, Supplement No. 44 (A/66/44) at pg. 256 <http://www2.ohchr.org/english/bodies/cat/docs/A.66.44.pdf>

<sup>12</sup> Concluding observations of CRC to South Africa in 2000 UN Doc. CRC/C/15/Add.12

<sup>13</sup> A/HRC/RES/17/19



	services because of sexual orientation and gender identity.	
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### General Assembly Resolutions

The votes on the draft resolutions relating to the *Special Rapporteur on Extra-judicial executions* are tracked in the following chart. The resolution relates to whether the scope of investigation should specifically include investigating extra-judicial killings on the basis of sexual orientation. The chart tracks draft resolutions because this is where the clear statements and votes relating to include or remove the explicit reference to “sexual orientation” actually occur. The final resolutions are typically passed without any discussion relating to the inclusion or removal of the words “sexual orientation.”

Final Resolution	Draft Resolution	Vote
57/214	2002 Draft Resolution <sup>14</sup>	
	New reference to "sexual orientation"	Abstain
59/197	2004 Draft resolution <sup>15</sup>	
	Retain words "sexual orientation"	Abstain
63/182	2009 Amendment <sup>16</sup> to Draft Resolution <sup>17</sup> at Third Committee	
	Remove words "sexual orientation"	In Favour
	Vote to Adopt Draft Resolution with sexual orientation in it.	In Favour
65/208	2010 Amendment <sup>18</sup> to Draft Resolution <sup>19</sup> at Third Committee	
	Remove words "sexual orientation"	In Favour
	Comment/Statement summary	39. <b>Mr. Govender</b> (South Africa) said that his country had voted in favour of the amendment because of its belief in the principle of non-discrimination on any grounds, including on the basis of sexual orientation. South Africa believed that the international human rights system should define sexual orientation and gender identity and establish their parameters

<sup>14</sup> A/C.3/57/L.56/Rev.1

<sup>15</sup> A/C.3/59/L.57/Rev.1

<sup>16</sup> A/C.3/63/L.75

<sup>17</sup> A/C.3/63/L.35/Rev.1

<sup>18</sup> A/C.3/65/L.65

<sup>19</sup> A/C.3/L.29/Rev.1



		under international human rights law. Until formal open-ended intergovernmental dialogue on that issue took place at the United Nations level, disputes between Member States were likely to continue.
	2010 Amendment <sup>20</sup> to Draft Resolution <sup>21</sup> at Plenary	
	Re-include "sexual orientation"	In Favour
	Comment/Statement	South Africa ( <b>Mr. Mashabane</b> ): We are called upon today to consider an amendment that seeks to include in the draft resolution on extrajudicial killings a prohibition on the killing of people on the basis of their sexual orientation. Last month in the Third Committee, when the draft resolution was considered, my delegation supported and voted for an amendment by the African Group because the amendment referred to a prohibition of discrimination on any basis. It was our well-considered view that the amendment was broad enough to not require specifying sexual orientation over the numerous other possible grounds for discrimination. The amendment now before us has nothing to do with the other amendment I have just referred to. We are considering today's amendment on its own merits. My delegation, guided by our Constitution, which guarantees the right to life, holds a strong view that no killing of human beings whatever can be justified. This amendment seeks to provide a very significant protection to a category of people who are killed because of their sexual orientation. Therefore, for this reason, my delegation will vote in favour of the proposed amendment.

### Other Statements

Over the years, countries have made joint statements at the Commission on Human Rights (predecessor of the Human Rights Council), the Human Rights Council and the UN General

<sup>20</sup> A/65/L.53

<sup>21</sup> A/C.3/L.29/Rev.1



Assembly on sexual orientation and human rights seeking recognition of sexual orientation as a fundamental aspect of an individual and as recognition of discrimination on the basis of sexual orientation.

<b>JOINT STATEMENTS RE SEXUAL ORIENTATION AND HUMAN RIGHTS</b>	
	South Africa
<p>March 2011 Joint Statement at Human Rights Council by 85 countries<sup>22</sup> which stated:</p> <p>We call on States to take steps to end acts of violence, criminal sanctions and related human rights violations committed against individuals because of their sexual orientation or gender identity, encourage Special Procedures, treaty bodies and other stakeholders to continue to integrate these issues within their relevant mandates, and urge the Council to address these important human rights issues.</p>	Supported
<p>Dec 2008 Joint Statement at UN General Assembly by 66 countries<sup>23</sup> in which the States called upon States and international human rights mechanisms to “commit to promote and protect human rights of all persons, regardless of sexual orientation and gender identity”.</p>	Did not support
<p>Dec 2006 Joint Statement at Human Rights Council by 54 countries<sup>24</sup> in which the countries stated:</p> <p>We express deep concern at these ongoing human rights violations. The principles of universality and non-discrimination require that these issues be addressed. We therefore urge the Human Rights Council to pay due attention to human rights violations based on sexual orientation and gender identity, and request the President of the Council to provide an opportunity, at an appropriate future session of the Council, for a discussion of these important human rights issues.</p>	Did not support
<p>March 2005 Joint Statement at Commission on Human Rights by 32 countries<sup>25</sup> calling for the recognition of “Sexual orientation is a fundamental aspect of every individual’s identity and an immutable</p>	Did not support

<sup>22</sup> For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/human-rights-council/hrc16/joint-statement>

<sup>23</sup> For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/sogi-statements/2008-joint-statement>

<sup>24</sup> For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement>

<sup>25</sup> For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/sogi-statements/2005-joint-statement>



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Year	Location	Statement
June 2010	Human Rights Council	South Africa spoke in support of the 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. In his report, the Special Rapporteur calls for the decriminalization of consensual sex between adults in the context of transmission of HIV, sex work and sexual orientation. <sup>26</sup>

4. All UN Statements on the situation of LGBT rights in South Africa

**Universal Periodic Review**

The Universal Periodic Review (UPR) is a unique state-driven process conducted under the auspices of the Human Rights Council, which involves a review of the human rights records of all 192 UN Member States once every four years. The Universal Periodic Review process began in 2006 and the first round will be completed by 2011. The documents on which the reviews are based are: 1) information provided by the State under review, which can take the form of a “national report”; 2) information contained in the reports of independent human rights experts and groups, known as the Special Procedures, human rights treaty bodies, and other UN entities; 3) information from other stakeholders including non-governmental organizations and national human rights institutions. Following the State review, a report referred to as the “outcome report” is produced. This report consists of the questions, comments and recommendations made by States to the country under review, as well as the responses by the reviewed State.

Year	National Report/Comments during the review process	Outcome of the Review
2011	<p>South Africa’s National report did not include any reference to SOGI issues.</p> <p>However, during the review process, when specifically questioned, the delegate from South Africa stated:</p> <p>572. In South Africa, everyone has the right to equal protection and benefit of the law. No one may be discriminated against on any ground. The Constitution extends this</p>	<p>Following the review process, a series of recommendations were made. The recommendations relating to SOGI are set out below:</p> <p>20. Recommended to South Africa to continue to promote and protect the right of all persons to equality without discrimination based on sexual orientation,</p>

<sup>26</sup> ARC summary report - <http://arc-international.net/wp-content/uploads/2011/09/HRC-Decriminalisation-Debate-2010.pdf>



	<p>protection to all groups, including persons with alternative life and sexual orientations. Successful cases have been adjudicated upon by the South African Constitutional Court where discrimination on some of these grounds could be proven.<sup>27</sup></p>	<p>at both the national and international levels (United Kingdom);</p> <p>21. Recommended to South Africa to increase its efforts to provide mediation machinery to provide victims of discrimination on the basis of sexual orientation more accessible and rapid remedies (Belgium);</p> <p>22. Recommended to make efforts on the sensitization in education to strengthen the prevention of these forms of discrimination (Belgium).<sup>28</sup></p>
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### Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women, composed of 23 independent experts, monitors the Convention on the Elimination of All Forms of Discrimination Against Women.

In 2011, the Committee addressed LGBTI Human Rights in South Africa in its Concluding Observation specifically the crime of “corrective rape” of lesbians.

Year	Report	Concluding Observations <sup>29</sup>
2011	Second, Third and Fourth Report of South Africa	<p>In the concluding observations, the Committee called upon South Africa to ensure that the state provide effective protection from violence and discrimination against women based on their sexual orientation. In this regard, the Committee recommended that South Africa take certain specific steps:</p> <ol style="list-style-type: none"> <li>1. Enact comprehensive anti-discrimination legislation that would include the prohibition of multiple forms of discrimination against women on all grounds, including on the grounds of sexual orientation.</li> <li>2. Continue its sensitization campaign aimed at the general public</li> <li>3. Provide appropriate training to law enforcement officials and other</li> </ol>

<sup>27</sup> Report of the Human Rights Council on its Eighth Session UN Doc. A/HRC/8/52 at page 187

<sup>28</sup> Complete report of the Working Group on the Universal Periodic Review UN Doc. A/HRC/8/3 at page 21  
All documents pertaining to South’s Africa’s 2008 Universal Periodic Review  
<http://www.ohchr.org/EN/HRBodies/UPR/PAGES/ZASession1.aspx>

<sup>29</sup> Concluding Observations of the Committee on the Elimination of Discrimination against Women UN Doc. CEDAW/C/ZAF/CO/4



		<p>relevant actors.</p> <p>The Committee made specific note of sexual orientation issues in South Africa and stated:</p> <p><b>Sexual orientation</b></p> <p>39. The Committee notes that the State party has in its Constitution the prohibition of discrimination based on the sexual orientation of individuals. However, the Committee expresses grave concern about reported sexual offences and murder committed against women on account of their sexual orientation. The Committee further expresses serious concern about the practice of so called “corrective rape” of lesbians.</p> <p>40. The Committee calls on the State party to abide by its Constitutional provisions and to provide effective protection from violence and discrimination against women based on their sexual orientation, in particular through the enactment of comprehensive anti-discrimination legislation that would include the prohibition of multiple forms of discrimination against women on all grounds, including on the grounds of sexual orientation. The Committee further recommends that the State party continue its sensitization campaign aimed at the general public, as well as provide appropriate training to law enforcement officials and other relevant actors.</p>
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**Special Rapporteurs and UN High Commissioner on Human Rights**

Date	UN Official	Comment
2011	Special Rapporteur on the Human Rights of Migrants	<p>The 2011 Report of the Special Rapporteur on human rights of migrants addressed the violence and discrimination experienced by migrants in South Africa. He specifically reference mentioned “sexual orientation”.</p> <p>The recommendation of the Special Rapporteur is set out below:</p> <p>77. The Special Rapporteur encourages the Government to introduce as soon as possible the hate crime bill, which is currently being finalized by the Department of Justice and Constitutional Development, given the fact that general provisions included in the</p>



		<p>Constitution and the Criminal Code are not effective enough in protecting migrants from discrimination based on nationality. Migrant communities should be consulted and encouraged to participate in the process of elaboration of this law. The law should, in particular:</p> <p>(a) Make any act of violence against individuals or property on the basis of a person's race, nationality, religion, ethnicity, sexual orientation or gender identity ("hate crime") an aggravating circumstance;...<sup>30</sup></p>
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### 5. Individual Complaints

South Africa has accepted the competence of the Human Rights Committee to consider complaints from South African individuals.<sup>31</sup> Presently, the Human Rights Committee has not received any individual complaints relating to South Africa. None of the other Committee have heard complaints respecting SOGI issues relating to South Africa.

Special procedures have expressed concern over events in South Africa, on behalf of individuals, by means of the submission of letters of allegation and/or urgent appeals to the Government of South Africa. The below chart refers to these communications relating to SOGI issues.

Type of Communication	Special Procedure	Complaint	Result
January 14, 2011 Letter of Allegation	Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on	On 14 January 2011, the Special Rapporteur, together with the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on violence against women, sent an allegation letter concerning the situation of Ms. Millicent Gaika, a woman who was allegedly beaten and raped by a man who intended to "cure" her from her sexual orientation, and Ms. Ndumie Funda, a local community activist supporting victims of "corrective" rape...	The Rapporteur noted that no response had been received at the time of the finalization of the report.  The Rapporteur in his report stated:  "He urges the Government to respond to the concerns raised

<sup>30</sup> 2011 Report of the Special Rapporteur on human rights of migrants UN Doc. A/HRC/17/33/Add.4A link to the complete report:

<http://www.universalhumanrightsindex.org/documents/852/2054/document/en/text.html>

<sup>31</sup> See Optional Protocol 1 to the ICCPR



	violence against women	Further concern was expressed that these attacks do not constitute isolated incidents and that lesbian women in South Africa face an increased risk of becoming victims of violence, especially rape, because of widely held prejudices and myths that maintain they would change their sexual orientation if they are raped by a man. Furthermore, concern was expressed over increasing reports that hate crimes against lesbians are not being recognized or punished by the South African legal system. <sup>32</sup>	by him, and to provide detailed information regarding investigations undertaken, subsequent prosecutions as well as protective measures taken.
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<sup>32</sup> 2011 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue - Addendum A/HRC/17/27/Add.1 at page 280