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Report on Torture and Discrimination

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1. The International Covenant on Civil and Political Rights (ICCPR)

1.1 The Prohibition of Torture and Guarantee of Non-discrimination

Torture and ill-treatment are prohibited in Article 7
'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

Article 2(1) guarantees the universal applicability of the rights contained within the treaty, '*without distinction of any kind*'.

Article 26 guarantees equality before the law
'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Although the list of prohibited grounds of discrimination does not explicitly mention sexual orientation the HRC has held that 'sex' should be interpreted so as to include sexual orientation. In ***Toonen v Australia***,[1] the author argued that the sections of the Criminal Code of Tasmania – which criminalised various forms of sexual contact including all forms of sexual contacts between consenting adult homosexual men in private – had profound and harmful impacts on many people in Tasmania, including himself, in that it fuelled discrimination and harassment of, and violence against, the homosexual community of Tasmania. The State party had sought the Committee's guidance as to whether sexual orientation may be considered an "other status" for the purposes of Article 26. The Committee confined itself to noting that in its view the reference to "sex" in Articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.

The Committee later reiterated this stance in ***Young v Australia***[2] where the author complained that Australia's refusal, on the basis of him being of the same sex as his partner, that is, due to his sexual orientation, to provide him with a pension benefit violated his right to equal treatment before the law and is contrary to article. The Committee recalled its earlier jurisprudence that the prohibition against discrimination under Article 26 comprises also discrimination based on sexual orientation.

[1] *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).
[2] *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003). S*ee also X v Colombia*, Communication No. 1361/2005, UN Doc CCPR/C/89/D/1361/2005 (2007) (regarding a pension refusal due to sexual orientation).

In the case of ***Allan Kendrick Dean v New Zealand***,[3] the author was charged with an offence of indecency with a boy between 12 and 16 years old. The author's case was later transferred to the High Court for sentence, and he was sentenced to preventive detention in accordance with the law applicable at the time which fixed a minimum ten year non-parole period. The author claimed that he has been discriminated against by the judiciary on the basis of his sexual orientation, under Article 26 of the Covenant, as he has been treated more harshly than non-homosexuals in respect of sentencing. The Committee notes that he was convicted for the crime of indecency with a minor and that he had failed to substantiate for purposes of admissibility, that he is a victim of discrimination on the basis of his sexual orientation. The Committee therefore considered that this part of the communication is inadmissible.

In ***José Luis García Fuenzalida v Ecuador***,[4] the author was detained and charged with the rape. He claimed to be innocent and argued that he had never had sexual relations with any woman. The author was tried, found guilty as charged and sentenced to eight years imprisonment. With regard to his arrest, the author states that he was detained by police officers, thrown on to the floor of a vehicle and blindfolded. From the submission it is not clear whether an arrest warrant had been issued. He was interrogated regarding his whereabouts on the day of the rape. He claims to have been subjected to serious ill-treatment, including being left shackled to a bed overnight. It is also alleged that, in contravention of Ecuadorian law and practice, samples of his blood and hair were taken. He also alleged that he was blindfolded and that a brine solution was poured into his eyes and nostrils. The author alleges that at some point of the interrogation the blindfold fell from his eyes and he was able to identify an officer who the author claims had a grudge against him from a prior detention on suspicion of murdering a homosexual friend. The author claims to be the victim of a violation of Article 3 in conjunction with Article 26, owing to the difficulties he encountered in retaining a lawyer, allegedly because of his homosexuality. However, The Committee considered that the author had not substantiated, for purposes of admissibility, that he had been unequally treated owing to his homosexuality and that this had been the cause of his difficulty in retaining a lawyer. This part of the communication was therefore declared inadmissible.

1.2 Exhaustion of Domestic Remedies

Cases are often considered admissible where there have been no challenges by the State party in question on grounds of admissibility, and in particular, with regards to exhaustion of domestic remedies. However, a change in tone was seen in ***Young v Australia***, where the Committee noted that domestic remedies need not be exhausted if they objectively have no prospect of success.

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[3] *Allan Kendrick Dean v New Zealand*, Communication No. 1512/2006, UN Doc CCPR/C/95/D/1512/2006 (2009).
[4] *José Luis García Fuenzalida v Ecuador*, Communication No. 480/1991, UN Doc CCPR/C/57/D/480/1991 (1996).

In ***Toonen v Australia***, discussed above, the applicant's complaint involves two provisions of the Tasmanian Criminal Code (s 122(a) and (c) and 123), which criminalizes various form of sexual contact between men, including homosexual acts between consenting, adult men in private. The applicant submitted that there were no effective domestic remedies available in his case, as only state jurisdictions have the primary responsibility for the enactment and enforcement of criminal law. As the Upper and Lower Houses of Tasmanian Parliament have been deeply divided over the decriminalisation of homosexual activities and reform of the Criminal Code, the potential avenue of redress could be said to be ineffective. There are also no effective administrative remedies or judicial remedies available (para 3.3).

The State involved did not challenge the admissibility of the applicant's case on any grounds. The only consideration the Committee made with regards to admissibility later on was whether the applicant could qualify as a victim. In this case, it was held that the applicant made '*reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of these provisions... had affected him and continued to affect him personally*,' (para 5.1).

In ***Young v Australia***, also discussed above, the applicant's case concerned his entitlement to pension as a veteran's dependent, as he was in a same sex-relationship with the late veteran. His application for pension was denied as he was considered not to be a 'member of a couple' under the Veteran's Entitlement Act. The State involved argued that the applicant did not exhaust domestic remedies for the purposes of admissibility. ('*A remedy must have no chance of success in order for an author to successfully claim that the particular remedy does not need to be exhausted before a communication can be declared admissible*.') In this case, the State argued that the applicant could have appealed the decision not to grant him the pension to the Commonwealth Administrative Appeals Tribunal (para 4.7).

However, the Committee held that domestic remedies need not be exhausted if they objectively have no prospect of success: where under applicable domestic laws the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result (para 9.4). Noting that the State itself admits that an appeal to the Administrative Appeals Tribunal would have been unsuccessful anyway, the Committee concludes that there were no effective remedies that the author might have pursued.

The Committee recalls that domestic remedies need not be exhausted if they objectively have no prospect of success: where under applicable domestic laws the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result. (19) Taking into account the clear wording of the sections of the VEA in question, and noting that the State party itself admits that an appeal to the AAT would not have been successful, the Committee concludes that there were no effective remedies that

the author might have pursued. As the Committee can find no other reason to consider the communication inadmissible it proceeds to a consideration of the merits.

In ***Joslin v New Zealand***,[5] the case concerns the failure of the Marriage Act to provide for homosexual marriage. The State involved argues that the applicant has yet to exhaust domestic remedies, rejecting the applicants' claims of futility in pursuing a further appeal to the Privy Council, noting that it would be open to the Privy Council to construe the terms of the Marriage Act as permitting a lesbian marriage. While the question before the lower courts was one of statutory interpretation, the Privy Council would well be able to come to a contrary conclusion as to the proper meaning of the Act.[6]

The Committee notes that while it is possible for the Privy Council to interpret the statute in a manner contrary to the approach of the Court of Appeal, in the manner sought by the applicants, the State also expressly declared that it was making '*no submission as to the admissibility of the communication under article 5(2)(b) of the Optional Protocol*'. In light of this declaration and the absence of any other objections to admissibility, the Committee found the communication admissible.

[5] *Joslin v New Zealand*, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999 (2002).
[6] Ibid, para 4.1

2. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

2.1 The Prohibition of Torture and Guarantee of Non-discrimination

The CAT defines torture in Article 1 as
‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’

Although the text of the Convention does not explicitly mention sexual orientation or gender identity, the Committee Against Torture issued a General Comment in 2008 in which it stressed the importance of non-discrimination in the interpretation and application of the Convention. It emphasized that ‘*the discriminatory use of mental or physical violence is an important factor in determining whether or not an act constitutes torture.*’[7] The Committee also stated that ‘*the protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment*’ and that ‘*State Parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of ... sexual orientation, transgender identity’*.[8]

The Committee has also commented on ill-treatment and torture based on sexual orientation and gender in Kyrgyzstan. ‘*The Committee is concerned at (a) reports of police harassment, arbitrary arrest, ill-treatment and torture, including through sexual violence, perpetrated against persons on the basis of their sexual orientation or gender identity, including lesbian, gay, bisexual and transgender (LGBT) persons; and (b) the authorities’ more general failure to investigate allegations of sexual violence by officials, to punish perpetrators of such violence and to provide effective remedies to victims, as in the case of Ms. Zulhumor Tohtonazarova. Furthermore, it is concerned at the little progress in investigating reports of rape and sexual violence during and after the June 2010 violence (arts. 2, 11 and 16). The State party should ensure prompt, impartial, and thorough investigations of all allegations of ill-treatment and torture committed by police and detention officials against LGBT persons*

[7] Committee Against Torture, ‘General Comment No. 2: Implementation of Article 2 by States Parties’ (UN Doc CAT/C/GC/2, 24 January 2008) para 20.
[8] Ibid, para 20.

or others on the basis of their sexual orientation or gender identity, and prosecute and, upon conviction, punish perpetrators with appropriate penalties.'[9]

In one case, a non-refoulement claim, the Committee Against Torture *did* find torture for discriminatory purposes, but in a rather superficial manner. In ***Elmi v Australia***,[10] the author alleged that his expulsion would constitute a violation by Australia of Article 3 CAT. The author was originally from Mogadishu where his father was an elder of the Shikal clan, who are of Arabic descent and identifiable by their lighter coloured skin and discernable accent. The author's father was shot and killed for his refusal to provide support to the Hawiye militia in general and in particular to provide one of his sons to fight for the militia. The author's brother was also killed by the militia when a bomb detonated inside his home, and his sister was raped three times by members of the Hawiye militia, precipitating her suicide in 1994. The Committee did not share the State party's view that the Convention is not applicable in the present case since, according to the State party, the acts of torture the author fears he would be subjected to in Somalia would not fall within the definition of torture set out in Article 1 (i.e. pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, in this instance for discriminatory purposes).

2.2 Individual Complaints Procedure

With regard to the individual complaints procedure, and the type of evidence needed in complaints of torture and ill treatment, two cases might prove useful. Both concerned Serbian citizens of Romani origins alleging violations of Article 2(1) in connection with Article 1 CAT against Serbia and Montenegro. Yet, it is interesting to note that the Committee did not discuss torture on based on discrimination in either of them.

In ***Dragan Dimitrijevic v Serbia and Montenegro***,[11] the complainant was arrested in connection with the investigation of a crime. He was taken to the local police station where he was handcuffed to a radiator and a bicycle, and beaten up by several police officers who kicked and punched him all over his body while insulting his ethnic origins and cursing his 'gypsy mother'. At one point the complainant began bleeding from his ears, despite which the beating continued until he was released. The complainant alleged violations of Article 2(1) in connection with Article 1, and of Article 16(1). The Committee noted in this respect the description made by the complainant of the treatment he was subjected to while in detention, which could be characterized as severe pain or suffering intentionally inflicted by public officials in the context of the investigation of a crime, and the written testimonies of witnesses to his arrest and release that the complainant has provided. The Committee also noted that the State party has not contested the facts as presented by the complainant. In the circumstances, the Committee concluded that due weight must be given to the complainant's

[9] Committee Against Torture, 'Concluding observations on the second periodic report of Kyrgyzstan' (UN Doc CAT/C/KGZ/CO/2, 20 December 2013) para 19.
[10] *Elmi v Australia*, Communication No. 120/1998, UN Doc CAT/C/22/D/120/1998 (1999).
[11] *Dragan Dimitrijevic v Serbia and Montenegro,* Communication No. 207/2002, UN Doc CAT/C/33/D/207/2002 (2004).

allegations and that the facts, as submitted, constitute torture within the meaning of Article 1 of the Convention.

In ***Danilo Dimitrijevic v Serbia and Montenegro***,[12] the complainant was arrested and taken to the police station where he was locked into one of the offices. He was not presented with an arrest warrant but assumed the reason for his arrest was criminal charges pending against him. An unknown man in civilian clothes entered the office, ordered him to strip to his underwear, handcuffed him to a metal bar attached to a wall and proceeded to beat him with a police club for approximately one hour. He sustained numerous injuries, in particular on his thighs and back. The complainant spent the next three days, during daytime hours, in the same room where he had been beaten. During that time, he was denied food and water, and the possibility of using the lavatory.

The complainant argued that the alleged violations should be interpreted against a backdrop of systematic police brutality to which the Roma and others in the State party are subjected, as well as the generally poor human rights situation in the State party. He claimed a violation of Article 2(1), read in connection with Articles 1 and 16(1) for having been subjected to police brutality inflicting on him great physical and mental suffering amounting to torture, cruel, inhuman and/or degrading treatment or punishment, for the purposes of obtaining a confession, or otherwise intimidating or punishing him. The Committee noted that the complainant's description of the treatment he was subjected to while in detention, which can be characterized as severe pain or suffering intentionally inflicted by public officials for such purposes as obtaining from him information or a confession or punishing him for an act he has committed, or intimidating or coercing him for any reason based on discrimination of any kind in the context of the investigation of a crime. The Committee also noted the observations of the investigating judge with respect to his injuries, and photographs of his injuries provided by the complainant. It observed that the State Party had not contested the facts as presented by the complainant. In the circumstances, the Committee concluded that due weight must be given to the complainant's allegations and that the facts, as submitted, constitute torture within the meaning of Article 1 of the Convention.

2.3 Evidence and Burden of Proof

The Committee has consistently maintained that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information. It is implicit in Article 4, paragraph 2 of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by evidence submitted by the author and where further clarification of the cases depends on information exclusively in the hands of the State party, the Committee may consider the author's allegations as substantiated

[12] *Danilo Dimitrijevic v Serbia and Montenegro*, Communication No. 172/2000, UN Doc CAT/C/35/D/172/2000 (2005).

in the absence of satisfactory evidence and explanation to the contrary submitted by the State party.[13]

2.4 Exhaustion of Domestic Remedies

There have been two successful cases pleading sexual orientation discrimination considered by the CAT: ***K.S.Y. v the Netherlands***[14] and ***E.J.V.M. v Sweden***[15].

K.S.Y. v the Netherlands involves an applicant seeking asylum from the Netherlands, claiming that his deportation back to Iran would constitute violation of Article 3 of the UN Convention Against Torture due to his sexual orientation. In this case, there were no grounds of inadmissibility proposed by the State party in question, thus the communication was deemed admissible by the Committee.

E.J.V.M. v Sweden is similar to ***K.S.Y.*** in its facts. The applicant sought asylum from Sweden, arguing his deportation back to Costa Rica would constitute violation of Article 3 of the UN Convention Against Torture. Domestic remedies were acknowledged to be exhausted: the applicant was allowed a meeting with the Swedish Migration Board and was rejected asylum. The applicant appealed, but the Aliens Appeals Board rejected the appeal (Para 4.2).

In both cases it can be observed that only where there were no grounds of inadmissibility regarding exhaustion of domestic remedies put forth by the State, were the applicants allowed to proceed with their case under the CAT.

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[13] *Bouroual v Algeria*, Communication No. 992/2001, UN Doc CCPR/C/86/D/992/2001 (2006) para 9.4. S*ee* also *Bleier v Uruguay*, Communication No. 30/1978 (1982) para 13.3.
[14] *K.S.Y. v the Netherlands*, Communication No. 190/2001, UN Doc CAT/C/30/D/190/2001 (2003).
[15] *E.J.V.M. v Sweden*, Communication No. 213/2002, UN Doc CAT/C/31/D/213/2002 (2003).

3. Working Group on Arbitrary Detention

3.1 Torture and Sexual Orientation

A handful of cases by the Working Group on Arbitrary Detention specifically addressed the issue of torture or ill treatment on account of sexual orientation.

In ***Yasser Mohamed Salah et al. v Egypt***,[16] the Working Group had received a report that 55 Egyptian men had been arrested in Cairo on grounds of their sexual orientation. The men were detained for several weeks then charged with crimes including habitually engaging in immoral acts with men, and contempt of religion. The criminal prosecutions were pending at the time this opinion was issued. The ICCPR requires states parties, including Egypt, to ensure to all individuals the rights recognized in the Covenant without discrimination on particular grounds, including sex and 'other status.'

The question was whether the alleged prosecution or conviction of the persons accused on grounds of sexual orientation was justified and, if so, whether those grounds did constitute discrimination under Article 2, paragraph 1 of both the UDHR and ICCPR, which would confer an arbitrary character on their detention.

The Working Group considered that the other persons were in fact prosecuted on charges of homosexuality, as is attested by the legal examination ordered by the Procurator's Office on the grounds that homosexuality, as a sexual orientation, is a source of "social dissensions" under Article 98, paragraph 1 of the Egyptian Penal Code.

3.2 Deprivation of Liberty and Discrimination

With regard to the discriminatory character of the measure of deprivation of liberty which would confer on such deprivation an arbitrary character, the Working Group noted that, in its reply, the Government refers to Article 26 of the Covenant in the following terms:

'The obligations set forth in Article 2 (1) place the States parties to the International Covenant, including Egypt, under a positive obligation to respect and to ensure to all individuals within their territory and subject to their jurisdiction them rights recognized in the Covenant, without distinction of any kind or on any ground. However, Article 26 cited above, which establishes the right of all persons not to be subjected to discrimination has, as its corollary, the responsibility imposed on States parties (Article 2, paragraph 1 of the Covenant) to undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as … sex … or other status.'

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[16] *Yasser Mohamed Salah et al. v. Egypt*, Working Group on Arbitrary Detention**,** Opinion no. 7/2002, UN Doc E/CN.4/2003/8/Add.1 at 68 (2002).

The question, therefore, is whether the reference to 'sex' may be regarded as covering 'sexual orientation or affiliation', and whether it follows that the detention of the defendants can be considered arbitrary on the grounds that it was ordered on the basis of a domestic legislation provision (namely Article 98, paragraph 1 of the Egyptian Penal Code) not in accordance with the international standards set forth in Article 2, paragraph 1 of the UDHR, and Articles 2, paragraph 1, and 26 of the Covenant to which the Government refers. The approach adopted by United Nations human rights bodies with regard to this question would argue in favour of an affirmative answer.[17]

Thus, the detention of the 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.

3.3 Criminalization of Homosexuality

In ***François Ayissi et al. v Cameroon***,[18] police arrested 32 people at a Yaoundé night club - 11 were prosecuted, and 9 were convicted of homosexuality.

The Government asserted that the criminalization of homosexuality is contrary neither to Article 12 of the UDHR nor to Article 26 of the ICCPR, since the persons in question are not denied a right or service on the ground of their presumed sexual orientation. What is involved is prosecution for practices contrary to law and to the moral standards of Cameroonian society. And even if criminalization not be consistent with Article 26 of the ICCPR, justification for it can be found in Article 29, paragraph 2 of the UDHR, which provides that a State may limit a right or freedom '*for the purposes of securing due recognition for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*'.

Ever since the Human Rights Committee adopted its View in ***Toonen v. Australia*** and it itself adopted its Opinion 7/2002 (Egypt), the Working Group has followed the line taken in those cases. That means that the existence of laws criminalizing homosexual behaviour between consenting adults in private and the application of criminal penalties against persons accused of such behaviour violate the rights to privacy and freedom from discrimination set

[17] Citing *Toonen*, para 23; the CESCR General Comment No. 14 (2000), para 18, the CEDAW Committee paras 127 and 128 of its concluding observations on Kyrgyzstan (A/5438): "The Committee is concerned that lesbianism is classified as a sexual offence in the Penal Code, and accordingly, recommends that lesbianism be reconceptualized as a sexual orientation and that penalties for its practice be abolished"; UNHCR's "Guidelines on International Protection: gender-related persecution within the context of article 1A(2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees" para 17: "Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalized, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm."

[18] *François Ayissi et al. v Cameroon*, Working Group on Arbitrary Detention, Opinion No. 22/2006, UN Doc A/HRC/4/40/Add.1 at 91 (2006); see also No. 42/2008 (Egypt) (A/HRC/13/30/Add.1).

forth in the ICCPR. Consequently, the Working Group considers that the fact that the criminalization of homosexuality in Cameroonian law is incompatible with Articles 17 and 26 of the ICCPR, which Cameroon has ratified.

4. The European Human Rights Protection System

4.1 The Prohibition of Torture and Guarantee of Non-discrimination

Under the jurisprudence of the European Court of Human Rights, torture and discrimination comes into play under Articles 3 and 14 respectively.

Article 3
'*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*'

Article 3 is an absolute right, meaning it cannot be derogated in time of war or other emergency, and is expressed in unqualified terms.[19] Where an applicant submits an application for Article 3, the ill treatment alleged must "attain a minimum level of severity to fall within Article 3… the threshold is a relative one. It depends on the circumstances of the case, such as the nature and context of the treatment, manner and method of its execution, its duration, physical or mental effects and in some cases, the age, sex and state of health of the victim."

Article 14
'*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*'

Article 14 contains a prohibition of discrimination. The grounds for discrimination are broad and varying – while some of these are specifically stated within the Article (e.g. "sex, race, colour, language"), the last of these ("other status") allows the courts to extend discrimination to other areas not specified within the Article, such as sexual orientation. Today, the use of Article 14 has been exemplified in various cases relating to discrimination based on sexual orientation – the first of which was ***W.B. v Germany***.[20]

In situations where torture is alleged on the basis of discrimination, Article 3 and Article 14 can be used alongside each other. The first complaint alleging both Articles 3 and 14 was ***A.S. v Germany*** in 1960.[21] In the case, the applicant was arrested and imprisoned indefinitely for being in a homosexual relationship (a criminal offence under Article 175 of the German Penal Code). However, the case was declared inadmissible on the grounds of it being manifestly ill-founded (Article 27(2)).[22] Since ***A.S. v Germany***, applications alleging both Article 3 and Article 14 were frequently seen in cases where there was criminalisation of

[19] It has been suggested that sever wounding may be justified under Article 2 (right to life), which means there are exceptions to the absolute nature of Article 3. See Harris, O'Boyle and Warbick, *Law of European Convention of Human Rights* (2nd edn, Oxford University Press 2009) 61.
[20] no. 104/55 (1955).
[21] no. 530/59 (1960).
[22] Yearbook of the European Convention on Human Rights by COE,185-196.

private sexual activity[23]. Until recently, most of these applications were deemed inadmissible, and the Commission often failed to engage with the complaints about degrading and inhuman treatment on the grounds of sexual orientation[24].

4.2 Ill-Treatment and Discrimination on the Grounds of Sexual Orientation

It was only until 2011 did the court finally give its first judgement in respect of a complaint of treatment in detention on the grounds of sexual orientation in ***Stasi v France***.[25] The applicant was the subject of acts of violence during his imprisonment. Relying on Article 3, the applicant alleged that he was a victim of ill-treatment on the basis of his homosexuality and that the authorities failed to take necessary measures to ensure his protection. In its judgement, the Court found that while the acts of violence were serious enough to be classified as inhuman and degrading treatment under Article 3, it was held that the authorities had taken all the measures they reasonably could to protect the applicant and that existing domestic law was sufficient to protect the applicant. Thus, the Court found no breach of Article 3, having regard to the facts of the case.

Subsequently in 2012, the Court found a breach of Article 3 in ***Zontul v Greece***.[26] The applicant was held under detention in a coastal navy school in Greece where he was subject to poor conditions and *acts* of abuse and violence by the coastguards (including an incident of rape), which he alleged was motivated by his sexual orientation. In the eventual judgement given by the Naval Appeals Tribunal, the coastguards involved in his rape were sentenced the 6 and 5 months of imprisonment each respectively, which were commuted to fines. The applicant alleged a breach of Article 3 as along with the acts of violence committed against him, the authorities failed to conduct a fair, thorough and impartial investigation and the Appeals Tribunal imposed inadequate penalties. While the court found a violation of Article 3, it was noted by Johnson that the issue of the applicant's sexual orientation discrimination was not considered at all by the Court.

It was only in the later case of ***X v Turkey***[27] where the Court upheld the first successful complaint about ill-treatment in detention due to sexual orientation discrimination. The facts of the case were that the applicant was subject to intimidation and harassment by other prisoners due to his sexual orientation. Following his request for a transfer, he was placed in a single cell with squalid conditions and was not allowed to partake in any social activities or outdoor exercise. The applicant argues that this treatment is inhuman and constitutes an unlawful and disproportionate interference with his right to physical and moral integrity and alleges a breach of Articles 3 and 14.

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[23] See *H.S. v Germany* (no. 704/60), Commission Decision, 4 August 1960; *X v Germany* (no. 1138/61), Commission Decision, 7 May 1962; *X v Austria* (no. 1593/62), Commission Decision 4 April 1964; *S v Germany* (no.10686/83), Commission Decision, 5 October 1984 .
[24] *X v Austria* (no 1593/62) (1962).
[25] no. 25001/07 (2007).
[26] no.12294/07 (2007).
[27] no 24626/09 (2009).

In considering Article 3, the Court held that it was necessary to consider both the cumulative effects of the detention and the allegations of the detainee. In this case, it was noted that there was no denial by the respondent government regarding the squalid conditions of the prison cell. Also, the court noted that certain aspects of the applicant's conditions of detention were stricter than the regime applied in Turkey for prisoners serving life sentences. Aside from these conditions, there was also a lack of an effective remedy, causing the applicant to suffer mentally and physically, thus invoking a breach of Article 3.

The court also considered Article 14 alongside Article 3. Taking into consideration the principle of proportionately, the court held that the measures taken by the authorities were inappropriate, given the intended objective (that is, to protect the physical integrity of the applicant). Instead, the court found that the measures were taken due to the sexual orientation of the applicant, thus finding a breach of Article 14.

Since the successful application of Articles 3 and 14 together in ***X v Turkey***, the Court has yet to give judgement on another analogous case. However, there are on-going cases to date alleging a breach of both Articles 3 and 14 together.

One such case would be ***Aghdgomelashvili and Japaridze v Georgia***,[28] concerning a police search of the premises of Inclusive Foundation, the only LGBT NGO in Georgia. During the search, the police officers involved allegedly abused their powers and violated domestic procedures while subjecting the applicants to humiliating and degrading treatment, such as displaying extreme homophobic behaviour and conducting unlawful strip searches. The applicants allege a breach of Articles 3, 8 and 14 rights, based on their perceived sexual orientation by the police (Article 1 of Protocol No 12). They also allege that the State's failure to act has resulted in a continuing procedural violation of the aforementioned articles. The lack of effective remedies available to the applicants also breaches Article 13.

Another on-going case would be ***M.C. and A.C. v Romania***,[29] where the applicants were attacked by a group of strangers after participating in a gay march. After the incident, they filed a criminal complaint with the police in June 2006. Due to the reorganisation of the police, the file was only registered in April 2007. However, the case was not further investigated nor were steps taken to investigate it until it went beyond the statutory limitation and became time-barred. The applicants thus allege a breach of Articles 3 and 8 of the Convention regarding the failure to adequately investigate their criminal complaints, and the lack of adequate measures and remedies to combat hate-crimes against sexual minorities. They also allege a breach of Article 6(1) for their failure to obtain civil damages due to the ineffectiveness of the investigation and Article 13 for the lack of effective remedy at their disposal. Finally, they allege a breach of Article 14 (when read together with Articles 3, 8 and 13) where the authorities failed to take into account of the fact that the offences against them were motivated by their sexual orientation.

[28] no. 7224/11 (2011).
[29] no. 12060/12 (2012).

4.3 Conclusion

While there have been numerous cases alleging torture on the basis of sexual orientation discrimination within the ECHR jurisprudence in the last few decades, there have been very few cases where the Court is willing to recognise or acknowledge the issue of sexual orientation discrimination, and only very recently, upheld the validity of such claims. Since the ruling in ***X v Turkey***, however, the Court has indicated a change in its attitude and upheld the first successful claim of torture in detention on the basis of sexual orientation discrimination.

5. The Inter-American Human Rights Protection System

5.1 The Prohibition of Torture and Guarantee of Non-discrimination

American Convention on Human Rights, Article 5(2)
'*No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.*'

Besides this Article, the Inter-American Convention to Prevent and Punish Torture, according to the Interpretation of the IACtHR, torture consists of three basic elements (1) there must be an '*intentional act through which physical and mental pain and suffering is inflicted*' upon the victim; (2) there must be a purpose to the act; and (3) the act must be '*committed by a public official or by a private person acting at the instigation of*' a public official.[30]

In 2013, the Organisation of American States adopted two Conventions: The Anti- Racism Convention: Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance; and the Anti- Discrimination Convention: Inter-American Convention against All Forms of Discrimination and Intolerance. This is undoubtedly a very important step towards the elimination of the any forms of discrimination and intolerance in the region. The Article 1(1) of the first Convention clearly prohibits discrimination based on '*race, color, lineage, or national or ethnic origin*'.

5.2 Torture and Ill-Treatment of Women

In ***Rosendo Cantu v Mexico***[31], Rosendo Cantu was walking home when a group of soldiers stopped her and raised a couple of question. Since, she did not give the soldiers the answers they were looking for, two of the soldiers raped her while six others watched. Subsequent to the rape, the State failed to carry out an effective investigation into the allegations of sexual violence by members of the armed forces. The Inter-American Court, taking into consideration the Inter-American Law, held that Mexico had committed an act of torture, underlining the importance of the Articles of the Convention to Prevent and Punish Torture.

In ***Miguel Castro-Castro Prison v Peru***[32], approximately 135 female prison inmates (along with about 450 male inmates) were subjected to violent attacks by guards and other state agents over the course of three days at the Castro-Castro maximum security prison. Some female inmates were humiliated, stripped-down and subjected to further physical and psychological abuse. Many inmates were held in solitary confinement, were denied medical care, and were kept from communicating with their families or their attorneys. The Court

[30] *Raquel Martín de Mejía (Peru)*, Case 10.970, Report Nº 5/96 (1996); *Ceferino Ul Musicue et al. (Colombia)*, Case 9.853, Report Nº 4/98 (1998).
[31] *Rosendo Cantu (Mexico)*, Case 972-03, Report No. 93/06 (2006).
[32] *Miguel Castro-Castro Prison (Peru)*, Series C, No.160 (2006).

found Peru to have violated Articles 4, 5(1), 5(2), 8(1) and 25 of the American Convention on Human Rights, Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, and Article 7(b) of the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women. The Court did not make any mention to the discrimination that took place.

In ***María Elena Loayza-Tamayo v Peru***[33], the National Counter-Terrorism Bureau of Peru detained Mrs. María Elena Loayza-Tamayo. While detained, state agents threatened her with torture and repeatedly raped her in an effort to force her to confess to belonging to the Peruvian Communist Party ('Shining Path'). Mrs. Loayza-Tamayo was charged and convicted of treason, and was held in solitary confinement during detention. Mrs. Loayza-Tamayo filed a complaint alleging numerous human rights violations and requesting her release. The Inter-American Court of Human Rights (the Court) held that Peru violated the right to humane treatment and to personal liberty recognized in Articles 5 and 7, respectively, of the American Convention on Human Rights (ACHR) by detaining her incommunicado, holding her in detention after the military court rendered its final order, and subjecting her to torture.

In ***Giraldo v Colombia***,[34] the petitioner alleged that her personal integrity, honour and equality were violated by the prison authorities' decision not to authorize the exercise of her right to intimate visits because of her sexual orientation. The State argued that allowing homosexuals to receive intimate visits would affect the internal disciplinary regime of prison establishments and that Latin American culture has little tolerance towards homosexual practices in general. The Commission found that, in principle, the claim of the petitioner refers to facts that could involve, *inter alia,* a violation of Article 11(2) of the American Convention in so far as they could constitute an arbitrary or abusive interference with her private life. The Commission was to determine the scope of this concept and the protection to be afforded to persons legally deprived of their liberty, but the petition never reached the merits phase.

5.3 Discrimination on the Grounds of Homosexuality

The most significant case so far in the protection of LGBT rights in the Inter-American system of human rights protection is the case of ***Atala Riffo and Niñas v Chile***,[35] which concerned the alleged international responsibility of the State for discriminatory treatment and arbitrary interference in the private and family life suffered by Ms. Atala due to her sexual orientation, in the legal process that resulted in the loss of care and custody of her daughters. The Inter-American Court establishes that the sexual orientation of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person's sexual orientation is prohibited. Moreover, a right granted to all persons cannot be denied or restricted under any circumstances based on their sexual orientation.[36] As regards the prohibition of discrimination based on sexual orientation,

[33] *María Elena Loayza-Tamayo v Peru*, Series C, No.33 (1997).
[34] *Giraldo v Colombia*, Case 11.656, Report Nº 71/99 (1999).
[35] *Atala Riffo and Niñas vs. Chile (Atala Riffo and Daughters v Chile)*, Merits, Reparations and Costs, Judgment of February 24 2012 (2012).
[36] Ibid, paras 91, 93.

any restriction of a right would need to be based on rigorous and weighty reasons. Furthermore, the burden of proof is reversed, which means that it is up to the authority to prove that its decision does not have a discriminatory purpose or effect. This is especially pertinent in a case such as this, bearing in mind that the determination of harm must be supported by technical evidence and reports from experts and researchers in order to reach conclusions that do not result in discriminatory decisions. The Court considered it necessary to emphasize that the scope of the right to non-discrimination due to sexual orientation is not limited to the fact of being a homosexual per se, but includes its expression and the ensuing consequences in a person's life project, ultimately finding a violation of, among others, Article 1(1) of the American Convention.

5.4 Conclusion

Looking at the above cases, it is obvious that, the Inter American Court of Human Rights is not as progressive and advanced as the ECHR, and it has dealt with very few cases on Torture. Nevertheless, it is clear that the Court has been very willing to recognise, condemn the violations on Torture and ask the reparation of the victim. At this point, it could be argued that the Court comes to a decision against Torture without giving an important interpretation of the Convention's provisions as the ECHR does so. Furthermore, even if there are cases where discrimination takes place, the IACHR does not make any mention to that. Actually, this fact could be explained by the recent adoption of the Conventions against Discrimination and Intolerance; they have come into force since June 2013. In future and upcoming cases, the Court will have over its hands the legally binding material in order to handle issues which involves Torture and Discrimination. For that reason, the victims might expect decisions not only against torture but also against discrimination.