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Guide on International & Regional Standards for LGBTQ Rights

Vance Center & ArentFox Schiff LLP

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Guide on International & Regional Standards for LGBTQ Rights Applicable to Venezuela

ArentFox Schiff LLP and Cyrus R. Vance Center for International Justice of the
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ACRONYMS

ACHR	American Convention on Human Rights
American Declaration	American Declaration of the Rights and Duties of Man
IACHR	Inter-American Commission on Human Rights
I/A Court	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
FTA	Free Trade Agreements
TSJ	Venezuela's Supreme Justice Tribunal
LGBTQ	Lesbian, Gay, Bisexual, Transgender, and Queer
SAIME	Administrative Service of Identification and Migration Affairs
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commission of Human Rights
Optional Protocol	First Optional Protocol to the Covenant
UDHR	Universal Declaration of Human Rights

INTRODUCTION

Lesbian, Gay, Bisexual, Transgender, and Queer (“LGBTQ”) rights have gained worldwide recognition in recent decades, leading many countries to change their legal systems to protect these rights.¹ However, countries like Venezuela still have challenges and potential avenues for safeguarding these rights.

This guide explains the legal status of LGBTQ rights and identifies opportunities for human rights advocacy in Venezuela and is organized into four sections to empower stakeholders with legal knowledge and mechanisms for fostering change:

Section I provides an overview of the [legal status](#) of LGBTQ rights in Venezuela, highlighting challenges and progress.

Section II examines relevant [international legal](#) instruments that Venezuela has ratified or is considering for future ratification to protect LGBTQ rights in Venezuela.

Section III explains the international human rights [mechanisms](#) to protect LGBTQ rights in Venezuela.

Section IV outlines [actions](#) Venezuela should take to protect LGBTQ persons in the future.

This guide aims to empower activists, guide policymakers, and support LGBTQ rights in Venezuela. By providing this knowledge, we aim to foster a more inclusive society where LGBTQ individuals are fully recognized and protected under the equal protection of the law.

¹ *LGBTIQ+ communities and the anti-rights pushback: 5 things to know*, UN Women (May 28, 2024), <https://www.unwomen.org/en/news-stories/explainer/2024/05/lgbtiq-communities-and-the-anti-rights-pushback-5-things-to-know>.

LEGAL STATUS OVERVIEW OF LGBTQ RIGHTS IN VENEZUELA

In Venezuela, LGBTQ people face many legal challenges:

[Consensual same-sex relations](#) between adults are legal. In March 2023, Venezuela's Supreme Court of Justice overturned [Section 565 of the Military Justice Code](#), which banned "sexual acts against nature," criminalizing consensual sex between persons of the same gender in the military.² LGBTQ persons can now serve openly in the military, though transgender persons are banned.

[Same-sex marriage, however](#), is not legally recognized in Venezuela. [Article 77 of the Constitution](#) protects marriage between a man and a woman, thereby excluding same-sex marriage.³ This lack of recognition creates numerous practical challenges for LGBTQ individuals. For instance, LGBTQ individuals may be excluded from certain government assistance programs linked to marital status.⁴

[Change of names or gender in identification documents](#) is not allowed. In September 2016, the Administrative Service of Identification and Migration Affairs ("SAIME") announced that transgender people may request a new identity card according to their gender identity through [Article 146 of the Civil Registry Law](#).⁵ However, there's currently no administrative procedure or mechanism to make

² *Tribunal Supremo de Justicia Declara Nulidad de Norma Preconstitucional del Código Orgánico de Justicia Militar* [Supreme Court of Justice Declares Nullity of the Preconstitutional Rule of the Organic Code of Military Justice], Tribunal Supremo de Justicia (Mar. 16, 2023), <http://www.tsj.gob.ve/-/tribunal-supremo-de-justicia-declara-nulidad-de-norma-preconstitucional-del-codigo-organico-de-justicia-militar>.

³ Constitución de la República Bolivariana de Venezuela [CRBV] [Constitution] Dec. 30, 1999, art. 77 (Venez.).

⁴ *Venezuela*, Outright International, <https://outrightinternational.org/our-work/americas/venezuela> (last visited June 17, 2024).

⁵ [Saime adecuó la cédula de identidad para reconocer a los transgéneros](#) [Saime has adapted the identity card to recognize transgender people], El Universal (Sept. 14, 2016), https://www.eluniversal.com/noticias/politica/saime-adecuo-cedula-identidad-para-reconocer-los-transgeneros_544552 [https://web.archive.org/web/20170204132700/http://www.eluniversal.com/noticias/politica/saime-adecuo-cedula-identidad-para-reconocer-los-transgeneros_544552].

effective Article 146, leaving transgender people still unable to change their information on their identity cards.⁶

In June 2017, Venezuela's Supreme Justice Tribunal ("TSJ") declared through SC-No.-399-01-06-2017 the right to change one's name and gender in official documents. Filed in April of the same year by transgender activists and the group Divas of Venezuela, the petition to Venezuela's Constitutional Chamber argued that Article 20 of the Constitution, which guarantees "the right to the free development of personality,"⁷ should be interpreted to include the right to "the identification and expression of self-perceived gender."⁸ The Tribunal still has not decided.⁹ Still, transgender people have been denied by the Civil Registry and redirected to administrative judges, with most of the requests "denied after a prolonged time and medical, psychological, psychiatric or forensic examinations."¹⁰ In December 2022, the Venezuelan government modified its stance and created a new protocol to allow transgender people to change their names.¹¹

Governmental aid is distributed in a de facto discriminatory manner. Transgender Venezuelans struggle to access government-controlled food supplies because their identification documents do not reflect their gender identity.

⁶ Héctor Antolínez, *Comunidad transgénero espera con optimismo y cautela que CNE les permita ejercer su derecho a la identidad* [Transgender community hopes with optimism and caution that CNE will allow them to exercise their right to identity], *Crónica Uno* (Apr. 20, 2022), <https://cronica.uno/comunidad-transgenero-espera-con-optimismo-y-cautela-que-cne-les-permita-ejercer-su-derecho-a-la-identidad/>.

⁷ Constitución de la República Bolivariana de Venezuela [CRBV] [Constitution] Dec. 30, 1999, art. 20 (Venez.).

⁸ Rachel Boothroyd, *LGBTQ Community Celebrates Supreme Court's Acceptance of Landmark Transgender Rights Case*, *Venezuelanalysis* (June 13, 2017), <https://venezuelanalysis.com/news/13179/>.

⁹ AFP Agencia, *Justicia en Venezuela admite cambios de sexo e identidad* [Justice in Venezuela admits changes of sex and identity], *Teletica.com* (June 10, 2017, 5:05 AM), https://www.teletica.com/internacional/justicia-en-venezuela-admite-cambios-de-sexo-e-identidad_163837.

¹⁰ *LGBTI Rights in Venezuela*, ILGA World Database, <https://database.ilga.org/venezuela-lgbti#:~:text=There%20is%20currently%20no%20specific,medical%2C%20psychiatric%20and%20psychological%20examinations> (last visited May 6, 2024).

¹¹ *Legal Gender Recognition*, ILGA World Database, <https://database.ilga.org/legal-gender-recognition> (last visited May 6, 2024).

Housing discrimination is addressed by Article 5 of the Law for the Regulation and Control of Housing Leasing, which bans discrimination and protects those vulnerable to discrimination based on sexual orientation and gender identity, among others.¹²

Employment protection is provided by the country's labor laws, offering some level of security to sexual minority individuals from discrimination, though gender identity is not mentioned.¹³

LGBTQ organization's incorporation. LGBTQ civil society organizations can be registered.¹⁴

¹² Ley Para La Regularización y Control de Los Arrendamientos de Vivienda [Law for the Regularization and Control of Housing Rentals], art. 5, The National Assembly of the Bolivarian Republic of Venezuela, Nov. 12, 2011 (Venez.). [Ley Para La Regularización y Control de Los Arrendamientos de Vivienda.]

¹³ Organic Law of Labor, Workers, and Employees, art. 21, Official Gazette No. 6.076 Extraordinary, May 7, 2012 (Venezuela) [Ley Orgánica del Trabajo, los Trabajadores y las Trabajadoras].

¹⁴ *Venezuela*, *supra* note 4.

VENEZUELA'S RATIFICATION OF INTERNATIONAL TREATY TO PROTECT LGBTQ RIGHTS

While Venezuela is not a signatory to all the instruments listed below, stakeholders need to be aware of the protections available internationally, in case Venezuela decides to ratify or rejoin such instruments.

To provide a clear roadmap for stakeholders to follow, Section II is presented in a table format, listing each instrument with the relevant ratification date, relevant articles, and an accompanying comment explaining its significance.

Instrument	Article(s)	Comment
Universal Declaration of Human Rights ("UDHR.") ¹⁵ (Link) Ratified by Venezuela in 1948. ¹⁶	Article 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. "	The UDHR is not binding. However, it is enforced through International Covenant on Civil and Political Rights protocols. Article 2 has been interpreted as implicitly covering LGBTQ rights. ¹⁷ In other words, Article 2's "other status" category can be construed to include LGBTQ individuals. ¹⁸ The government of Canada refers to Article 2 as extending protection to LGBTQ individuals. ¹⁹

¹⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

¹⁶ *Signatories for Universal Declaration of Human Rights*, The Danish Institute for Human Rights, <https://sdg.humanrights.dk/en/instrument/signees/24> (last visited Mar. 6, 2024).

¹⁷ While Article 2 explicitly prohibits discrimination against racial, religious, or ethnic minorities, it also implicitly forbids discrimination against LGBTQ individuals.

¹⁸ The Office of the United Nations High Commissioner for Human Rights issued a press release on Article 2 in 2018, stating that "[i]t is not necessary to create a new set of LGBT[Q]-specific rights, or set new international human rights standards. All that is required to protect LGBT[Q] people from violence and discrimination is respect for existing rights." See [Press Release](#), Office of the United Nations High Commissioner for Human Rights, Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles – Article 2 (Nov. 11, 2018).

¹⁹ Global Affairs Canada, [The human rights of lesbian, gay, bisexual, transgender, queer, 2-spirit and intersex persons](#) (last visited Mar. 6, 2024).

Instrument	Article(s)	Comment
<p>International Covenant on Civil and Political Rights (“ICCPR”)</p> <p>Ratified by Venezuela on May 10, 1978.²⁰</p>	<p>Article 2 –1:</p> <p>“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”</p>	<p>It is enforced through the ICCPR and its protocols.</p>
<p>Rome Statute of the International Criminal Court.²¹</p> <p>Ratified by Venezuela on June 7, 2000.²²</p>	<p>Article 5-Crimes within the jurisdiction of the Court:</p> <p>“... The Court has jurisdiction in accordance with this Statute with respect to the following crimes:</p> <p>...</p> <p>(b) Crimes against humanity;</p> <p>...”</p> <p>Article 7-Crimes against humanity:</p> <p>“1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian</p>	<p>Article 7(3) defines the protection against crimes against humanity involving “gender” as “it is understood that the term “gender” refers to the two sexes, male and female, within the context of society.”²⁴ Within the context of society has been subsequently interpreted to include sexual orientation.²⁵</p>

²⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

²¹ Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90.

²² *Rome Statute of the International Criminal Court*, United Nations Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en (last visited Mar. 6, 2024).

²⁴ Rome Statute, *supra* note 21, art. 7.3 (emphasis added).

²⁵ See Office of the Prosecutor, International Criminal Court, Policy on the Crime of Gender Prosecution 6 (Dec. 7, 2022) (“All persons who are victims of crimes under the jurisdiction of the Court may be vulnerable to grounds for persecution under article 7(1)(h) of the Statute, including gender. Groups targeted for gender persecution include, for example, women, girls, men, boys and LGBTQI+ persons, and subsets of these groups.”), <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>.

Instrument	Article(s)	Comment
	<p>population, with knowledge of the attack:</p> <p>...</p> <p>(h) Persecution against any identifiable group or collectivity on ... gender as defined in paragraph 3, ...in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; ...</p> <p>...</p> <p>3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.”²³</p>	
<p>American Convention on Human Rights (“ACHR”)</p> <p>Venezuela <u>withdrew</u> from the ACHR on April 27, 2020.²⁶</p>	<p>Article 1-Obligation to Respect Rights:</p> <p>“1. The States Parties to this [ACHR] undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or</p>	<p>Venezuela was formerly a signatory to the ACHR; however, it withdrew on April 27, 2020.</p> <p>Inter-American Court of Human Rights (“I/A Court”) ruled that countries signatory to the ACHR are required to allow same-sex couples to marry.²⁸</p>

²³ Rome Statute, *supra* note 21, arts. 7.1, 7.3 (emphasis added).

²⁶ In 2019, the Interim Government of Venezuela annulled the country's withdrawal from the American Convention on Human Rights (ACHR). The Organization of American States (OAS) and the Inter-American Commission on Human Rights recognized this Interim Government as the legitimate representative of Venezuela. This recognition on July 19, 2019, along with the annulment of the withdrawal, restored the jurisdiction of the Inter-American Court of Human Rights over Venezuela. The Inter-American Court currently has two pending cases to decide on the validity of the annulment and its effect on the Court's jurisdiction. See more [here](#).

²⁸ State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Arts. 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in Relation to Art. 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017), https://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf.

Instrument	Article(s)	Comment
	social origin, economic status, birth, or any other social condition. ²⁷	

²⁷ Organization of American States, American Convention on Human Rights, art. 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (emphasis added).

INTERNATIONAL HUMAN RIGHTS MECHANISMS TO PROTECT LGBTQ RIGHTS IN VENEZUELA

This section analyzes the universal and regional human rights mechanisms available to protect LGBTQ rights in Venezuela.

There are many mechanisms to seek justice and reparations. To give insight into what international and regional human rights mechanisms are available to protect LGBTQ rights in Venezuela, each mechanism will be analyzed in the following format:

- ✓ Functions of the mechanism
- ✓ Who can bring a case
- ✓ Against whom can a case be brought
- ✓ Admissibility criteria
- ✓ What can be achieved
- ✓ Ramifications of non-compliance
- ✓ Relevant case law

A. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (“ICCPR”), adopted by the United Nations General Assembly in 1966, lays down a universal standard of human rights, encapsulating a wide array of civil and political rights.²⁹ These rights range from the right to life, freedom of speech, freedom of assembly, and voting rights, to protection against torture and arbitrary detention.³⁰

The core function of the ICCPR is to recognize these rights under international law and oblige its state parties to respect, protect, and fulfill these rights. It is a legally binding instrument for the nations that have ratified it, requiring them

²⁹ International Covenant on Civil and Political Rights, *supra* note 20.

³⁰ *Id.*

to adapt their national laws and policies to ensure compliance with the Covenant's provisions.

Another significant function of the ICCPR is its monitoring mechanism. Through the Human Rights Committee, the ICCPR oversees the implementation of the covenant of its state parties.³¹ This involves reviewing periodic reports submitted by the states, issuing observations and recommendations, and processing individual complaints of alleged violations.³²

✓ Functions of the mechanism

The ICCPR obligates countries that have ratified the treaty to protect and preserve basic human rights, such as the right to life and human dignity; equality before the law; freedom of speech, assembly, and association; religious freedom and privacy; freedom from torture, ill-treatment, and arbitrary detention; gender equality; the right to a fair trial; right family life and family unity; and minority rights. The Covenant compels governments to take administrative, judicial, and legislative measures to protect the rights enshrined in the treaty and to provide an effective remedy.³³

The complaint mechanism for alleged violations is contained in the First Optional Protocol to the Covenant (“Optional Protocol”), a separate treaty open to parties to the ICCPR.³⁴ States that have become a party to the Optional Protocol recognize the competence of the Human Rights Committee—a panel of 18

³¹ *Background to the International Covenant on Civil and Political Rights and Optional Protocols: Human Rights Committee*, Office of the United Nations High Commissioner for Human Rights, <https://www.ohchr.org/en/treaty-bodies/ccpr/background-international-covenant-civil-and-political-rights-and-optional-protocols> (last visited March 11, 2024).

³² Office of the United Nations High Commissioner for Human Rights, Reporting to the United Nations Human Rights Treaty Bodies Training Guide: Part I – Manual (New York and Geneva, 2017), <https://www.ohchr.org/sites/default/files/Documents/Publications/Reporting-ICCPR-Training-Guide.pdf>.

³³ *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, American Civil Liberties Union, <https://www.aclu.org/documents/faq-covenant-civil-political-rights-iccpr#:~:text=The%20ICCPR%20obligates%20countries%20that,treatment%2C%20and%20arbitrary%20detention%3B%20gender> (last visited Mar. 7, 2024); International Covenant on Civil and Political Rights, *supra* note 20.

³⁴ Note Venezuela ratified the Optional Protocol to the ICCPR on May 10, 1978, with the reservation that it does not recognize the competence of the Human Rights Committee regarding in-absentia trials for offenses committed within its jurisdiction.

independent experts who meet three times a year—to receive complaints from persons within their jurisdiction alleging violations of their rights under the Covenant.³⁵

✓ Who can bring a case

Anyone can file a complaint with the Human Rights Committee against a State that satisfies these conditions: 1. being a party to the treaty and 2. having accepted the Committee's competence to examine individual complaints by being a party to the Optional Protocol.³⁶ The Human Rights Committee has held that ICCPR rights must be extended to “all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves under the territory or subject to the jurisdiction of the State Party.”³⁷

✓ Against whom can a case be brought

A complaint can be brought only against a State that satisfies two conditions:

- The State must be a party (through ratification or accession) to the treaty providing for the rights that have allegedly been violated.³⁸
- The State party must have recognized the competence of the Committee monitoring the relevant treaty to receive and consider complaints from individuals.³⁹

✓ Admissibility criteria

³⁵ *Complaints procedures under the human rights treaties*, Office of the United Nations High Commissioner for Human Rights, https://www.ohchr.org/en/treaty-bodies/human-rights-bodies-complaints-procedures/complaints-procedures-under-human-rights-treaties#_ftn10 (last visited Mar. 8, 2024).

³⁶ *Individual Communications: Human Rights Treaty Bodies*, Office of the United Nations High Commissioner for Human Rights, <https://www.ohchr.org/en/treaty-bodies/individual-communications#whocan> (last visited Mar. 8, 2024).

³⁷ Human Rights Committee, General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 ¶ 10 (May 26, 2004).

³⁸ *Individual Communications*, *supra* note 36.

³⁹ *Id.*

Under Article 1 of the OP to the ICCPR, the following criteria must be met for a Complaint to be admissible:

- Relate to one or more violations of a particular victim's rights under that treaty.
- The victim must be an individual.
- Violation must relate to an incident three months after the state ratifies the Optional Protocol.
- Domestic remedies must have been exhausted.
- The HRC will not consider complaints that are being considered simultaneously by a relevant international body.⁴⁰
- The complaint cannot be precluded by the State's reservation to the Optional Protocol.⁴¹

✓ What can be achieved

The Committees' decisions represent an authoritative interpretation of the treaty concerned. They contain recommendations to the State party. All Committees have developed procedures to monitor whether state parties have implemented their recommendations (so-called follow-up procedures) since they consider that by accepting the procedure, state parties have also agreed to respect the Committee's findings.

When the Committee concludes that a Covenant violation has occurred, the State is invited to provide information, within 180 days, on the steps it has taken to implement the recommendations. The State's response is then transmitted to the complainant for comments.⁴²

⁴⁰ Sarah Joseph, Katie Mitchell & Linda Gyorki, *Procedures of the Human Rights Committee and the Committee Against Torture*, in *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* 53, 54-74 (Boris Wijkström ed., 2006); see also *Complaint Procedures under the Human Rights Treaties*, *supra* note 35.

⁴¹ Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302.

⁴² Office of the United Nations High Commissioner for Human Rights, *Individual Complaint Procedures under the United Nations Human Rights Treaties* 11 (2013), <https://www.ohchr.org/sites/default/files/2021-08/FactSheet7Rev.2.pdf>.

✓ Ramifications of non-compliance

If the State party fails to take appropriate action, the case is kept under consideration by the Committee under the follow-up procedure. A dialogue is thus pursued with the State party, and the case remains open until satisfactory measures are taken.⁴³

✓ Relevant case law

- **Toonen v. Australia (Human Rights Committee Communication No. 488/1992)**

In 1991, Nicholas Toonen, a homosexual man from Tasmania, sent a communication to the Human Rights Committee. At the time, homosexual sex was

criminalized in Tasmania. Toonen argued that this violated his right to privacy under Article 17 of the International Covenant on Civil and Political Rights (“ICCPR”). He also argued that because the law discriminated against homosexuals based on their sexuality, it violated Article 26. As a result of his complaint to the Human Rights Committee, Toonen lost his job as General



Manager of the Tasmanian AIDS Council (Inc), because the Tasmanian Government threatened to withdraw the Council's funding unless Toonen was fired. The Human Rights Committee did not consider Toonen's communication until 1994, but it ultimately agreed that because of Tasmania's law, Australia was in breach of its obligations under the treaty. In response to the Commission's view, the Commonwealth Government passed a law overriding Tasmania's criminalization of homosexual sex.

⁴³ Individual Communications, supra note 36.

The decision was limited to the right to privacy and did not extend more broadly to discrimination based on sexual orientation.⁴⁴

See more of the case in ANNEX. NICK TOONEN TELLS HOW HE WON THE FIRST CASE ON LGBTQ RIGHTS BEFORE THE UN

- ***Young v. Australia* (Human Rights Committee Communication No. 941/2000)**

In 1999, Edward Young took a complaint against Australia to the Human Rights Committee. Under the current Australian veterans' entitlements laws, same-sex couples are not entitled to the same veterans' pensions as opposite-sex couples.

The Committee found that Young had been discriminated against under Article 26 of the ICCPR and was entitled to an effective remedy, including reconsidering his pension application. The Committee noted that Australia was obliged to ensure that similar violations of the Covenant did not occur in the future.

B. United Nations Special Procedures and Working Groups

The Human Rights Council is an intergovernmental body within the United Nations system of 47 States responsible for promoting and protecting all human rights around the globe. The Human Rights Council does the following:

⁴⁴ See Australian Human Rights Commission, Human Rights Explained: Case Studies: Complaints about Australia to the Human Rights Committee (Sept. 16, 2010), https://humanrights.gov.au/sites/default/files/content/education/hr_explained/download/case_studies.pdf.

- Serves as an international forum for dialogue on human rights issues with UN officials and mandated experts, states, civil society, and other participants;
- Adopts resolutions or decisions during regular sessions that express the will of the international community on given human rights issues or situations. Adopting a resolution sends a strong political signal which can prompt governments to take action to remedy those situations;
- Holds crisis meetings known as special sessions to respond to urgent human rights situations, 36 of which have been held to date;
- Reviews the human rights records of all United Nations Member States via the Universal Periodic Review;
- Appoints the Special Procedures, independent human rights experts who serve as the eyes and ears of the Council by monitoring situations in specific countries or by looking at specific themes; and
- Authorizes commissions of inquiry and fact-finding missions, which produce hard-hitting evidence on war crimes and crimes against humanity.

✓ Submitting Information under the Special Procedures

The Special Procedures of the Human Rights Council grants independent human rights experts with mandates to report and advise on country-specific and thematic human rights issues. Under the Special Procedures, individuals (i.e., Special Rapporteurs or Independent Experts) or working groups are appointed to serve personally and report on mandated human rights issues.

✓ Functions of the mechanism:

- **Special Rapporteurs/Independent Experts**

The mandate for the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity was

established in 2016.⁴⁵ The current Independent Expert, appointed in September 2023, is Graeme Reid. Since its inception, the Independent Expert has yet to visit Venezuela.

The mandate of the Independent Expert is to explore ways to better protect persons who suffer from violence and discrimination based on their sexual orientation or gender identity through means such as:

- Assessing the implementation of human rights standards;
- Identifying best practices and gaps;
- Raising awareness of these issues;
- Identifying and addressing the root causes of violence and discrimination;
- Engaging in dialogue and consulting with States and other relevant stakeholders to foster the protection of LGBTQ and gender-diverse persons and
- Facilitating and supporting the provision of advisory services, technical assistance, capacity-building, and international cooperation to combat violence and discrimination.⁴⁶

In furtherance of their work, Special Rapporteurs/Independent Experts will release calls for input seeking information about specific human rights violations. For example, previously, the Independent Expert on Sexual Orientation and Gender Identity released calls for input on Cambodia and the UK concerning the

⁴⁵ See Human Rights Council Res. 32/2, U.N. Doc. A/71/53 (July 15, 2016); see also Human Rights Council Res. 50/10, U.N. Doc. A/77/53 (July 7, 2022).

⁴⁶ See Human Rights Council Res. 32/2, U.N. Doc. A/71/53 (July 15, 2016).

human rights to freedom of expression, association, and assembly.⁴⁷ Interested groups should monitor OHCHR's Call for Inputs page on its website.⁴⁸

- **Working Groups**

The Working Group on Business and Human Rights recently put out a call for input on respecting the rights of LGBTQ people in the context of business activities: fulfilling obligations and responsibilities under the United Nations Guiding Principles ("UNGPs").⁴⁹ The deadline for submissions was March 1, 2024. The Working Group's objective with the call for input is "further guidance to both States and businesses to adopt an LGBTI lens in implementing the UNGPs, with practical recommendations for what it means to protect, respect and remedy the rights of LGBTI persons in the context of business operations."⁵⁰ The input received will inform the Working Group's report to be presented to the 79th session of the General Assembly in October 2024.

⁴⁷ *Call for Input: Protection against violence and discrimination based on sexual orientation and gender identity in relation to the human rights to freedom of expression, association and assembly*, Office of the United Nations High Commissioner for Human Rights, <https://www.ohchr.org/en/calls-for-input/2024/call-input-protection-against-violence-and-discrimination-based-sexual> (last visited Mar. 7, 2024); *Call for inputs by the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IE SOGI) in advance of country visit to the United Kingdom of Great Britain and Northern Ireland (24 April to 5 May 2023)*, Office of the United Nations High Commissioner for Human Rights, <https://www.ohchr.org/en/calls-for-input/2023/call-inputs-un-independent-expert-protection-against-violence-and> (last visited Mar. 7, 2024); *Call for inputs on upcoming country visit to the Kingdom of Cambodia by the Independent Expert on SOGI*, Office of the United Nations High Commissioner for Human Rights, <https://www.ohchr.org/en/calls-for-input/2023/call-inputs-upcoming-country-visit-kingdom-cambodia-independent-expert-sogi> (last visited Mar. 7, 2024).

⁴⁸ *Calls for Input*, Office of the United Nations High Commissioner for Human Rights, <https://www.ohchr.org/en/calls-for-input-listing> (last visited Mar. 7, 2024).

⁴⁹ This call follows a 2019 guidance on gender developed by the Working Group on Business and Human Rights, which proposed gender guidance specific to each of the 31 UNGPs.

⁵⁰ *Calls for input for the Working Group's report on respecting the rights of LGBTI people in the context of business activities: fulfilling obligations and responsibilities under the UNGPs*, Office of the United Nations High Commissioner for Human Rights, <https://www.ohchr.org/en/calls-for-input/2024/call-input-working-groups-report-respecting-rights-lgbti-people-context#:~:text=The%20Working%20Group%20seeks%20to,the%20context%20of%20business%20operations> (last visited Mar. 7, 2024); see also Office of the United Nations High Comm'r for Human Rights, Mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises (2024), <https://www.ohchr.org/sites/default/files/documents/issues/business/cfis/lgbti/LGBTI-questionnaire-States-en.pdf>.

While the deadline for submission has unfortunately passed, other working groups may release similar calls for input on other subject matters. Therefore, activists and advocates should closely monitor these calls.

Outside of calls for input, the Working Group on Arbitrary Detention also accepts individual complaints and urgent appeals and conducts country visits.⁵¹

✓ Who can bring a case:

Special Rapporteurs/Independent Experts or Working Groups act on information submitted in the communications that are sent to them. These may be submitted by the individuals concerned, their families, their representatives, or non-governmental organizations to protect human rights from governments and inter-governmental organizations regarding alleged cases of arbitrary detention.⁵²

It is important to note that, by default, the name(s) of the alleged victim(s) will be included in submissions to a government. Submissions must make clear whether a victim consents to the disclosure of their names in communications to the government, intergovernmental organizations, businesses, military, or security companies, as well as in the final public report to the Human Rights Council.⁵³

Generally, this depends on the call for input. Normally, anyone person/s can submit a call for input.

For the Working Group on Arbitrary Detention, individuals, their families, their representatives, NGOs, IGOs, or governments may submit complaints. Regarding

⁵¹ *Complaints and urgent appeals: Working Group on Arbitrary Detention*, Office of the United Nations High Comm'r for Human Rights, <https://www.ohchr.org/en/special-procedures/wg-arbitrary-detention/complaints-and-urgent-appeals#:~:text=The%20Working%20Group%20is%20the,individuals%20anywhere%20in%20the%20world> (last visited May 6, 2024).

⁵² *Special Procedures of the Human Rights Council: What are Communications?*, Office of the United Nations High Comm'r for Human Rights, <https://www.ohchr.org/en/special-procedures-human-rights-council/what-are-communications> (last visited Mar. 7, 2024).

⁵³ *Id.*

urgent appeals, there does not appear to be a limitation as to who may submit a request that the Working Group launch the procedure.⁵⁴

Finally, the Working Group on Arbitrary Detention conducts country visits where they schedule meetings with civil society representatives and members of the bar association. Civil society representatives may include NGOs, individuals who have been detained or whose proceedings are pending, resource persons who may provide useful information, political and religious leaders, etc.⁵⁵ No government representatives are permitted to be present during these meetings.⁵⁶

✓ Against whom can a case be brought:

- **Special Rapporteurs/Independent Experts**

Submissions can be submitted against any State. There is no requirement that the concerned State has ratified an international or regional human rights treaty.

- **Working Groups**

This depends on the call for input. In certain cases, calls for input may be specific to a certain region or country. Other times, the calls are more general. For example, the Working Group on Business and Human Rights' call for input was a call for all UN Member States.

Concerning the Working Group on Arbitrary Detention, individual complaints and urgent appeals are brought against the State or entity arbitrarily detaining the person.⁵⁷

⁵⁴ *Complaints and urgent appeals*, *supra* note 51

⁵⁵ *Terms of Reference for Country Visits by the Working Group on Arbitrary Detention*, Office of the United Nations High Commissioner for Human Rights, https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/TermsReference_CountryVisitsWGAD.doc (last visited May 6, 2024).

⁵⁶ *Id.*

⁵⁷ Office of the United Nations High Commissioner for Human Rights, Revised Fact Sheet No. 26, Working Group on Arbitrary Detention (Feb. 8, 2019), <https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/FactSheet26.pdf>.

✓ Admissibility criteria:

- **Special Rapporteurs/Independent Experts**

A submission sent to a Special Rapporteur/Independent Expert must consider the following:

- The communication should not be manifestly unfounded or politically motivated;
- The communication should contain a factual description of the alleged violations of human rights;
- The language in the communication should not be abusive;
- The communication should be submitted based on credible and detailed information;
- The communication should not be exclusively based on reports disseminated by mass media;
- Experts will not require that the concerned State has ratified an international or regional human rights treaty or that the alleged victim has exhausted domestic remedies to send a communication.⁵⁸

- **Working Groups**

This depends on the proceeding. For example, the Working Group on Business and Human Rights' call for input on respecting the rights of LGBTQ people in the context of business activities does not have admissibility requirements. However, the Working Group has requested that submissions be submitted in English, French, or Spanish, and limited to 2,500 words.⁵⁹

With regard to the Working Group on Arbitrary Detention, the Working Group has provided a model questionnaire to assist persons filing complaints.⁶⁰ The questionnaire is not mandatory. Further, there is no requirement to exhaust

⁵⁸ *Id.*

⁵⁹ Mandate of the Working Group, *supra* note 50.

⁶⁰ *Working Group on Arbitrary Detention: Contact*, Office of the United Nations High Commissioner for Human Rights, <https://www.ohchr.org/en/special-procedures/wg-arbitrary-detention/contact> (last visited May 6, 2024).

local remedies before submitting a case. The only requirement is that submissions should not exceed 20 pages and that the victim has given explicit consent (or their family's consent) to proceed with the examination.⁶¹

✓ What can be achieved:

- **Special Rapporteurs/Independent Experts**

Compilations of communications sent to governments, and responses received are published in a report prepared for each session of the Human Rights Council.

- **Working Groups**

This depends on the proceeding. For example, the Working Group on Business and Human Rights' call for input will be used to inform the Working Group's report to be presented to the 79th session of the General Assembly in October 2024.

With regard to the Working Group on Arbitrary Detention, individual complaints may result in the Working Group sending an opinion to the government together with recommendations. This opinion is subsequently published online. Furthermore, as of 2016, the Working Group now follows up with the relevant government within 6 months of the date the opinion is sent to each party to see the steps taken by the government to implement the opinion.⁶² Urgent Action appeals under the Working Group on Arbitrary Detention are automatically made public, and the Working Group may decide to take the case up as per its regular procedure.⁶³

Finally, for Country Visits, the Working Group presents its preliminary findings to the government, which are shared with the authorities and subsequently made

⁶¹ Revised Fact Sheet No. 26, *supra* note 57, at 7.

⁶² Revised Fact Sheet No. 26, *supra* note 57, at 8.

⁶³ Revised Fact Sheet No. 26, *supra* note 57, at 9.

public. The full report with its recommendations is later presented to the Human Rights Council.⁶⁴

✓ Ramifications of non-compliance:

- **Special Rapporteurs/Independent Experts**

The Special Rapporteur/Independent Expert may present their findings in a report before the Human Rights Council. Thereafter, the Member States may vote on a resolution based on the findings in the report. While there are no hard law implications, resolutions are useful in creating political pressure in the international community.

- **Working Groups**

Working groups report their findings annually to the Human Rights Council and General Assembly. Member States may then decide to pass resolutions relating to the Working Groups' findings.⁶⁵

✓ Relevant case law:

The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity released the communication UA QAT 1/2024 to the Qatari government requesting information on the facts and protective measures that it has taken to protect Manuel Guerrero.

Manuel Guerrero Aviña is a 45-year-old dual citizen of Mexico and the United Kingdom of Great Britain and Northern Ireland, who has lived for seven years in the State of Qatar, as an employee of Qatar Airways. Guerrero Aviña is living with HIV and is dependent on anti-retroviral (ARV) medicines to maintain his good health. On February 4, 2024, police authorities in Doha allegedly entrapped

⁶⁴ Revised Fact Sheet No. 26, *supra* note 57, at 9, 10.

⁶⁵ *About the mandate: Working Group on Business and Human Rights*, Office of the United Nations High Commissioner for Human Rights, <https://www.ohchr.org/en/special-procedures/wg-business/about-mandate> (last visited Mar. 7, 2024).

Guerrero Aviña through the social media application Grindr. Upon his arrest, Guerrero Aviña was forced to return to his apartment, where police reportedly entered without a warrant and made Guerrero Aviña wait for the arrival of a third foreign national person whom police also allegedly planned to entrap in the meeting. Police allegedly planted 0.25 grams of the narcotic crystal methamphetamine to incriminate Guerrero Aviña. The police also reportedly confiscated Guerrero Aviña's antiretroviral (ARV) medications and cleaning products. From February 4, 2024, to the present, Guerrero Aviña has been allegedly detained at the General Directorate of Drug Enforcement Qatar, where he has reportedly been subjected to torture and other forms of cruel, inhuman, or degrading treatment or punishment, based on a discriminatory motive due to his sexual orientation and his health status.⁶⁶

In addition, outside of the specific mandate of working groups and Special Rapporteurs/Independent Experts, OHCHR has released a report on Sexual Orientation and Gender Identity and International Human Rights Law.⁶⁷

In another method of work, on March 27, 2020, the Independent Expert on Sexual Orientation and Gender Identity issued an open letter on the impact of

⁶⁶ See more in Letter from Matthew Gillett, Vice-Chair on Communications of the Working Group on Arbitrary Detention, Tlaleng Mofokeng, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, & Graeme Reid, Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, to Government of Qatar, UA QAT 1/2024 (Mar. 7, 2024),

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=28809>.

⁶⁷ Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (2012), <https://www.ohchr.org/sites/default/files/Documents/Publications/BornFreeAndEqualLowRes.pdf>; see also United Nations High Commissioner for Human Rights, *Intersection of race and gender discrimination in sport*, U.N. Doc. A/HRC/44/26 (June 15, 2020), <https://www.ohchr.org/en/documents/thematic-reports/ahrc4426-intersection-race-and-gender-discrimination-sport-report-united>; see also Office of the United Nations High Commissioner for Human Rights, *Human Rights Violations Against Intersex People: A Background Note* (Oct. 24, 2019), <https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT/BackgroundNoteHuman-RightsViolationsagainstIntersexPeople.pdf>.

COVID-19 on LGBTQ communities, seeking input on COVID-19's specific impact.⁶⁸ Following the call for input, the Independent Expert presented a report on "Protection against violence and discrimination based on sexual orientation and gender identity" with a focus on the COVID-19 pandemic at the 75th session of the United Nations General Assembly on June 19, 2020.

More specifically, the Independent Expert on Sexual Orientation and Gender Identity has released reports and contributed press releases, along with other OHCHR independent experts and special rapporteurs, on the country-specific treatment of LGBTQ persons. For example:

- May 11, 2022: Visit to Tunisia: Report of the Independent Expert on Protection Against Violence and Discrimination based on sexual orientation and Gender Identity.⁶⁹
- April 27, 2020: Visit to Ukraine: Report of the Independent Expert on Protection Against Violence and Discrimination based on sexual orientation and Gender Identity.⁷⁰
- May 17, 2019: Visit to Mozambique: Report of the Independent Expert on Protection Against Violence and Discrimination based on sexual orientation and Gender Identity.⁷¹

⁶⁸ Letter from Victor Madrigal-Borloz, Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Office of the United Nations High Commissioner for Human Rights, to LGBT Community (Mar. 27, 2020),

https://www.ohchr.org/sites/default/files/Documents/Issues/SexualOrientation/IE_SOGI_LGBT_community.docx.

⁶⁹ Victor Madrigal-Borloz (Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity), *Visit to Tunisia*, U.N. Doc. A/HRC/50/27/Add.1 (May 11, 2022),

<https://documents.un.org/doc/undoc/gen/g22/339/54/pdf/g2233954.pdf?to-ken=5zZ4M2TuBdl1rqWh6g&fe=true>.

⁷⁰ Victor Madrigal-Borloz (Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity), *Visit to Ukraine*, U.N. Doc. A/HRC/44/53/Add.1 (Apr. 27, 2020),

<https://documents.un.org/doc/undoc/gen/g20/103/65/pdf/g2010365.pdf?to-ken=30LuQ8TQCd2Cd7N8r8&fe=true>.

⁷¹ Victor Madrigal-Borloz (Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity), *Visit to Mozambique*, U.N. Doc. A/HRC/41/45/Add.2 (May 17, 2019),

<https://documents.un.org/doc/undoc/gen/g19/140/82/pdf/g1914082.pdf?to-ken=DbLNUH0BlvpqDt7fge&fe=true>.

- April 9, 2018: Visit to Argentina: Report of the Independent Expert on Protection Against Violence and Discrimination based on sexual orientation and Gender Identity.⁷²
- March 1, 2024: UN experts urge Ghana's President to reject the discriminatory bill.⁷³
- December 7, 2023: UN experts condemn the Russian Supreme Court's decision banning the "LGBT[Q] movement" as "extremist."⁷⁴

- **Working Groups**

While there is no specific working group on sexual orientation, reports of other working groups have analyzed the impact of human rights violations on LGBTQ people within their mandate. For example:

- July 3, 2017: Working Group on Arbitrary Detention adopted Opinion No. 14/2017 finding that deprivation of liberty based on sexual orientation is arbitrary and prohibited under international law.⁷⁵
- July 2, 2019: Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the

⁷² Vitit Muntarbhorn (Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity), *Mission to Argentina*, U.N. Doc. A/HRC/38/43/Add.1 (Apr. 9, 2018), <https://www.ohchr.org/en/documents/country-reports/ahrc3843add1-report-independent-expert-protection-against-violence-and>.

⁷³ Press Release, Office of the United Nations High Commissioner for Human Rights, UN experts urge Ghana's President to reject discriminatory bill (Mar. 1, 2024), <https://www.ohchr.org/en/press-releases/2024/03/un-experts-urge-ghanas-president-reject-discriminatory-bill>.

⁷⁴ Press Release, Office of the United Nations High Commissioner for Human Rights, UN experts condemn Russian Supreme Court decision banning "LGBT movement" as "extremist" (Dec. 7, 2023), <https://www.ohchr.org/en/press-releases/2023/12/un-experts-condemn-russian-supreme-court-decision-banning-lgbt-movement>.

⁷⁵ The opinion concerned Cornelius Fonya who was accused of having consensual same-sex relations with a minor. Although the complainant did not testify at the trial, the source claims that it was demonstrated that he was at least 19 years of age. The relevant law in Cameroon imposes a double penalty when the act involves an adult and a person of the same sex who is between 16 and 21 years of age. By contrast, consensual sexual relations involving an adult and a person of the opposite sex who is between 16 and 21 years of age are legal in Cameroon. See Human Rights Council, Working Group on Arbitrary Detention, *Opinion No. 14/2017 concerning Cornelius Fonya (Cameroon)*, U.N. Doc. A/HRC/WGAD/2017/14 (July 3, 2017), <https://www.ohchr.org/en/special-procedures/wg-arbitrary-detention/opinions-adopted-working-group-arbitrary-detention-its-78th-session> (click on "A/HRC/WGAD/2017/14" next to "Opinion 14/2017 (Cameroon)"; then click on "English").

exercise of the right of peoples to self-determination: the gendered human rights impact of private military and security companies.⁷⁶

- o August 6, 2021: Report of the Working Group on Arbitrary Detention found that “The arrest or detention of individuals based on discriminatory grounds, including on the basis of their actual or perceived sexual orientation or gender identity, is per se arbitrary under international law and in violation of articles 2 (1), 3 and 26 of the Covenant and articles 2 and 7 of the Universal Declaration of Human Rights. (...) the arrest and detention of LGBTIQ+ persons on the basis of their sexual orientation or gender identity, such as in relation to morality, debauchery, crimes against the order of nature, public or grave scandal, or indecent act offences 97 are similarly discriminatory and in violation of international law.”⁷⁷

C. Office of the High Commission of Human Rights

The Office of the High Commission of Human Rights (“OHCHR”) is mandated by the UN General Assembly to promote and protect the enjoyment and full realization, by all people, of all human rights. Its main function is to coordinate human rights promotion and protection activities throughout the United Nations system.

✓ Functions of the mechanism

OHCHR has a solid background in monitoring and reporting on the human rights situation in Venezuela.

It has issued two public reports (2017 and 2018) based on the High Commissioner’s global mandate under General Assembly resolution 48/141. Since September 2019, the High Commissioner has presented oral updates and reports to

⁷⁶ Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, U.N. Human Rights Council, *Visit to Chad*, U.N. Doc. A/HRC/42/42/Add.1, annex (July 2, 2019), <https://documents.un.org/doc/undoc/gen/n19/234/61/pdf/n1923461.pdf?token=ecird7FhEPgnSi5clh&fe=true>.

⁷⁷ Human Rights Council, *Arbitrary Detention: Report of the Working Group on Arbitrary Detention*, ¶ 42, U.N. Doc. A/HRC/48/55 (Aug. 6, 2021), <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/HRC/48/55&Lang=E>.

the Human Rights Council as per relevant resolutions 39/1 (2018), 42/4 (2019), 42/25 (2019), 45/2 (2020), and 45/20 (2020)).

Since 2019, OHCHR has worked in Venezuela as part of the Office of the United Nations Resident Coordinator. The presence in Venezuela allows the Office to provide technical assistance for the effective implementation of recommendations issued in these reports, as well as those from other UN human rights mechanisms, support civil society, and continue to credibly assess the human rights situation and challenges from the ground.

However, on February 15, 2024, Venezuela shut down the Venezuela country office of OHCHR and suspended the work of OHCHR within the country.⁷⁸ As a result, future collaboration between Venezuela and OHCHR may be difficult, if not impossible, to achieve.

✓ What can be achieved

Before the expulsion of OHCHR staff from Venezuela, on July 4, 2023, the HRC published an advance version of its “Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General addressing human rights situations that require the Council’s attention.”⁷⁹ The report listed the following points on developments impacting LGBTQ Venezuelans:

Venezuelan Supreme Court declared void the last sentence of article 565 of the Organic Code of Military Justice criminalizing same-sex relations within the

⁷⁸ Press Release, Amnesty International, Venezuela: the government’s escalating repression and attempts at evading scrutiny face resounding condemnation from international civil society (Feb. 16, 2024), <https://www.amnesty.org/en/latest/press-release/2024/02/venezuela-the-governments-escalating-repression-and-attempts-at-evading-scrutiny-face-resounding-condemnation-from-international-civil-society/>.

⁷⁹ Human Rights Council, *Situation of human rights in the Bolivarian Republic of Venezuela*, U.N. Doc. A/HRC/53/54 (July 4, 2023), https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session53/advance-versions/A_HRC_53_54_AdvanceUneditedVersion.docx.

military.⁸⁰ “The decision represents an important step towards establishing conditions to guarantee a life with dignity and free from violence and discrimination for LGBT[Q]+ persons.”

✓ Ramifications of non-compliance

The High Commissioner can publicly highlight the State's non-compliance with the recommendations and raise awareness of specific cases, suggesting concrete actions for the State to take.

✓ Relevant case law

In Venezuela, the OHCHR recommends in its reports the development of a robust protocol for thorough and effective investigation and prosecution of cases of discrimination, hate crimes, and other forms of violence based on gender identity, gender expression, sex characteristics, and sexual orientation. This recommendation was based on the following:

- LGBTQ organizations continue to request to take measures to enable the full enjoyment of human rights, including the development of a law to guarantee the right of transgender people to their self-perceived gender identity, the implementation of article 146 of the Organic Law of the Civil Registry, allowing name change per their gender identity, and recognition of same-sex marriage.⁸¹
- Throughout 2022, one non-governmental organization recorded 97 cases of physical violence, hate speech, and discrimination targeting LGBTQ persons, of which close to 21 percent would be attributed to State actors, and 13 percent to other persons of influence.⁸²

⁸⁰ Judgment No. 0128, Tribunal Supremo de Justicia [TSJ] [Supreme Justice Tribunal], (Mar. 15, 2023) (Venez.), [https://database.ilga.org/api/downloader/download/1/VE%20-%20JUD%20-%20Supreme%20Court%20Judgment%20No%200128%20\(2023\)%20-%20OR%20\(es\).pdf](https://database.ilga.org/api/downloader/download/1/VE%20-%20JUD%20-%20Supreme%20Court%20Judgment%20No%200128%20(2023)%20-%20OR%20(es).pdf).

⁸¹ Héctor Antolínez, *Población LGBTIQ sigue sin respuestas claras sobre cambio de nombre luego de tres meses de promesas del Gobierno* [LGBTIQ population still without clear answers regarding name change after three months of Government promises], *Crónica Uno*, Feb. 27, 2023, <https://cronica.uno/poblacion-lgbtq-sigue-sin-respuestas-claras-sobre-cambio-de-nombre-luego-de-tres-meses-de-promesas-del-gobierno/>.

⁸² *Rompiendo el Silencio: informe sobre violencias contra las personas LGBTIQ+ en Venezuela durante el 2022 – Abril de 2023* [Breaking the Silence : report on violence against LGBTIQ+ people in Venezuela during 2022-April 2023], Observatorio Venezolano de Violencias LGBTIQ+, <https://nomasdiscriminacion.org/download/rompiendo-el-silencio-informe-sobre-violencias-a-personas-lgbtq-2022/> (last visited May 6, 2024).

- OHCHR conducted 15 visits to detention centers and interviewed 206 persons in detention, where 50 were women, six were LGBTQ persons, and four were boys. Since May 2022, 32 detainees were released (one woman) following OHCHR advocacy, including 19 without conditions, while others with alternative measures such as house arrests.

OHCHR raised concerns about the health conditions of many detainees, including 23 inmates awaiting responses to requests for humanitarian measures or other alternative measures to detention (three in the military and 20 in ordinary jurisdictions), and 63 awaiting medical transfers. The provision of timely and appropriate physical and mental healthcare for detainees is part of the State's responsibility, free of charge, without discrimination on the grounds of their legal status.⁸³ OHCHR also notes the differential risks and consequences associated with limited access to health services for specific persons in detention, such as women, LGBTQ persons, and persons with disabilities.

OHCHR acknowledges authorities' continued efforts to protect the rights of detained LGBTQ persons, including sensitizing the wider community on LGBTQ rights in detention centers.⁸⁴ OHCHR recommends the adoption of specific protocols to prevent discrimination and violence based on gender identity, gender expression, sex characteristics, and sexual orientation of persons deprived of liberty.

Most recently, on March 19, 2024, the Deputy High Commissioner for Human Rights Nada Al-Nashif provided an oral update on the situation of human rights in Venezuela.⁸⁵ She noted that "advancements have been made ... on the

⁸³ G.A. Res. 70/175, annex, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), rule 24 (Jan. 8, 2016), <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/NelsonMandelaRules.pdf>.

⁸⁴ Ana Weffer, *MPPSP garantiza los Derechos Humanos de la comunidad LGTBQ+ en los centros penitenciarios* [MPPSP guarantees the Human Rights of the LGTBQ+ community in penitentiary centers], Ministerio del Poder Popular para el Servicio Penitenciario [Ministry of Popular Power for the Penitentiary Service], June 28, 2022, <https://www.mppsp.gob.ve/index.php/noticias/4403-mppsp-garantiza-los-derechos-humanos-de-la-comunidad-lgbtq-en-los-centros-penitenciarios>.

⁸⁵ Nada Al-Nashif, Deputy High Commissioner for Human Rights, United Nations, Interactive dialogue on the oral update of the High Commissioner on the situation of human rights in the Bolivarian Republic of Venezuela 51/29 (Mar. 19, 2024), <https://www.ohchr.org/en/statements-and-speeches/2024/03/deputy-high-commissioner-updates-human-rights-council-venezuela>.

recognition of transpersons under the gender identity of their choice; and of same-sex marriages.”⁸⁶

D. Human Rights Council’s Complaint Procedure

✓ Functions of the mechanism

Complaint procedure addressing all human rights and fundamental freedoms in all UN Member States.

✓ Who can bring a case:

Any individual, group of individuals, or non-governmental organization.

✓ Against whom can a case be brought:

Any of the 193 UN Member States—including Venezuela—whether or not the country has ratified any particular treaty or made reservations under a particular instrument.

✓ Admissibility criteria:

The following admissibility criteria must be satisfied before bringing a claim before the Human Rights Council Complaint Procedure:

- Domestic remedies must have already been exhausted unless such remedies appear ineffective or unreasonably prolonged;
- It must be in writing in one of the six UN official languages (Arabic, Chinese, English, French, Russian and Spanish);
- It must contain a description of the relevant facts (including names of alleged victims, dates, location, and other evidence), with as much detail as possible;
- It must not be manifestly politically motivated, or based exclusively on reports disseminated by mass media;
- It does not contain abusive or insulting language; and
- The principle of non-duplication applies. This means the complaint must not already be under examination by a special procedure,

⁸⁶ *Id.*

a treaty body or other United Nations or similar regional complaints procedure in the field of human rights.⁸⁷

✓ What can be achieved:

After initial screening, a complaint goes through three possible stages:

- Consideration by the Working Group on Communications—who may decide to:
 - Discontinue the consideration of a complaint;
 - Keep a complaint under review and request the State concerned and/or the complainant to provide further information within a reasonable time; or
 - Refer any case and recommendations thereon to the Working Group on Situations.
- Consideration by the Working Group on Situations—who may decide to:
 - Discontinue the consideration of a case;
 - Keep the case under review for further consideration or additional information; or
 - Refer the case to the Human Rights Council when it feels that the allegations contained in the communication may reveal consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms.
- Consideration by the Human Rights Council—who may decide to:
 - Discontinue the consideration of a case;
 - Keep the case under review for further consideration or additional information; or
 - Refer the case to the Human Rights Council when it feels that the allegations contained in the communication may reveal consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms.

✓ Ramifications of non-compliance

⁸⁷ *Human Rights Council Complaint Procedure*, U.N. Human Rights Council, <https://www.ohchr.org/en/hr-bodies/hrc/complaint-procedure/hrc-complaint-procedure-index#:~:text=Any%20individual%2C%20group%20of%20individuals,reservations%20under%20a%20particular%20instrument> (last visited Mar. 7, 2024).

The Human Rights Council can vote to adopt a resolution condemning the State for failing to comply with its obligations.

✓ Relevant case law:

The complaint procedure before the Human Rights Council is non-public. However, there are public reports and resolutions passed within the HRC that are relevant to Venezuela.

On September 27, 2019, the United Nations Human Rights Council established the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela through resolution 42/25 for one year, to assess alleged human rights violations committed since 2014. The mandate of the Fact-Finding Mission was extended by the Council through resolution 45/20 and resolution 51/29, until September 2024.

The mandate of the Mission involves the following:

- ✓ To investigate gross violations of human rights, including extrajudicial executions, enforced disappearances, arbitrary detention, torture, and other cruel, inhuman, or degrading treatment, including those involving sexual and gender-based violence, committed since 2014;
- ✓ To help to combat impunity and ensure full accountability for perpetrators and justice for victims;
- ✓ To present oral updates on its work during an interactive dialogue at the 52nd and 55th sessions of the Council; and,
- ✓ To prepare written reports on its findings to be presented to the Council during interactive dialogues at its 54th and 57th sessions.

The Mission invites interested individuals, groups, and organizations to submit information and/or documents. In the framework of its ongoing investigations, the Mission is interested in receiving information related to:

- Recent cases of serious human rights violations (e.g., extrajudicial killings, enforced disappearances, arbitrary detention, torture, and other cruel, inhuman, or degrading treatment, including sexual and gender-based violence) from August 2023 onwards, in the context of political repression.

- Information on the status of accountability processes of persons allegedly responsible for serious human rights violations before Venezuelan courts, or other administrative or disciplinary mechanisms, and on access to justice for victims in relation to serious human rights violations perpetrated from 2014 to the present (e.g., investigations, prosecutions, convictions of persons found responsible for violations/crimes, judicial and other remedies available to victims or relatives).
- Information on reparations of victims, both individually and collectively, including guarantees of non-repetition so that violations do not happen again (e.g., financial compensation to victims and/or relatives, state measures of medical and psychosocial support, truth-seeking, public acknowledgments of responsibility, structural reforms carried out for the prevention of further gross human rights violations).

The Fact-Finding Mission further acknowledges the right to rectification of all persons identified in its previous reports and invites the persons concerned to submit all relevant information and/or documents to this effect, including crimes against LGBTQ individuals.

E. Universal Periodic Review

The Universal Periodic Review (“UPR”) is a mechanism under the Human Rights Council that places each UN Member State under a peer review of its human rights record every 4.5 years.⁸⁸

✓ Functions of the mechanism:

Through the UPR, each State is allowed to “report on the actions it has taken to improve the human rights situations” in its country and overcome the challenges to the enjoyment of human rights. Further, through multi-stakeholder input and pre-session reports from UN Member States, the relevant state is given recommendations on how to improve its human rights record.

⁸⁸ G.A. Res. 60/251, U.N. Doc. A/RES/60/251, ¶ 5(e) (Apr. 3, 2006), <https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F60%2F251&Language=E&DeviceType=Desktop&LangRequested=False> (click on “English”); Human Rights Council Res. 5/1, U.N. Doc. A/62/53, ¶ 15 (June 18, 2007), https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fap.ohchr.org%2Fdocuments%2FE%2FHRC%2Fresolutions%2FA_HRC_RES_5_1.doc&wdOrigin=BROWSELINK.

The reviews are based on 1) information provided by the State under review (often in the form of a “national report”); 2) information contained in the reports of independent human rights experts and groups from the Special Procedures, human rights treaty bodies, and other UN entities; 3) information from other stakeholders including national human rights institutions and NGOs.⁸⁹

✓ Who can bring a case:

There is no possibility of bringing a case before the UPR. Instead, every 4.5 years, a review of the UN Member State is conducted by the UPR Working Group. The UPR Working Group consists of the 47 members of the Human Rights Council. However, any Member State can provide input with respect to the reviewed States.

✓ Against whom can a case be brought:

Each UN Member State is automatically reviewed every 4.5 years.

✓ Admissibility criteria:

The only admissibility criterion is that the reviewed State is a UN Member State.

✓ What can be achieved:

After the UPR is completed, an “outcome report” is provided which summarizes the UPR’s findings. The report consists of questions, comments, and recommendations made by States to the country under review. The responses of the reviewed States are also provided.

After the outcome report is issued, the State has an opportunity to make preliminary comments on the recommendations and can choose to either accept them or note them. Accepted and noted recommendations are included in the report.

⁸⁹ *Basic facts about the UPR*, United Nations Human Rights Council, <https://www.ohchr.org/en/hr-bodies/upr/basic-facts> (last visited May 6, 2024).

The report must then be adopted at a plenary session of the Human Rights Council. During the session, the State has another opportunity to reply to questions and issues not sufficiently addressed during the UPR Working Group. Member and observer states may also make comments at this time.

✓ Ramifications of non-compliance

Where a State is not cooperating with the UPR, the Human Rights Council may decide on measures. For example, after Israel refused to cooperate with the UPR Working Group, the Human Rights Council adopted a decision in which:

1. Calls upon the State under review to resume its cooperation with the universal periodic review mechanism, consistent with General Assembly resolution 60/251 and Human Rights Council resolution 5/1 and the annexes thereto;

2. Requests the President of the Human Rights Council to take all appropriate steps and measures, in accordance with his mandate, to urge the State under review to resume its cooperation with the universal periodic review mechanism;

3. Also requests the President to report on the results of his efforts to the Human Rights Council at its twenty-second session and, if need be, at its twenty-third session;

4. Decides to consider at the session at which the final report of the President of the Human Rights Council is considered, but at the latest at its twenty-third session, any steps that may be deemed appropriate in the light of the provisions of General Assembly resolution 60/251 and Human Rights Council resolution 5/1;

5. Also decides to reschedule the universal periodic review of Israel, with a view to conducting it in 2013, for the

seventeenth session of the Working Group on the Universal Periodic Review at the latest;

6. Further decides to consider the above approach a precedent to be applied to all similar circumstances of non-cooperation in the future.⁹⁰

If another Member State does not comply with the UPR, the above measures may be taken.

✓ Relevant case law:

Venezuela has been reviewed three times under the UPR, in 2011, 2016, and 2022.⁹¹ With respect to the 2022 UPR, Venezuela received 328 recommendations. Venezuela supported 221 of those recommendations. The majority of recommendations, 69%, were regarding “Peace, Justice, and Strong Institutions.”⁹² Gender Equality and Reduced Inequalities followed, representing 6% and 4%, respectively.⁹³

With respect to LGBTQ rights, the following recommendations were made and supported by Venezuela:

Continue implementing public policies to ensure gender equality and the rights of LGBTQ communities;

Prevent all forms of discrimination on the basis of sexual orientation, gender identity and expression, and sex characteristics; and

⁹⁰ Human Rights Council, *Rep. on the Work of its Seventh Organizational Meeting, Twenty-Second Session, and Twenty-Third Session*, U.N. Doc. A/68/53, at 11 (2013), <https://documents.un.org/doc/undoc/gen/g13/164/03/pdf/g1316403.pdf?token=AQLdFnV6NUqABGWE2y&fe=true>.

⁹¹ *Universal Periodic Review – Venezuela (Bolivarian Republic of)*, United Nations Human Rights Council, <https://www.ohchr.org/en/hr-bodies/upr/ve-index> (last visited May 6, 2024).

⁹² *Venezuela* (infographic), in *Universal Periodic Review – Venezuela (Bolivarian Republic of)*, United Nations Human Rights Council, <https://www.ohchr.org/sites/default/files/documents/hrbodies/upr/sessions/session40/ve/2022-12-23/Venezuela.pdf> (last visited May 6, 2024).

⁹³ *Id.*

Strengthen efforts to address violence against women and children, and against all persons on the basis of their sexual orientation and gender identity, including measures to prevent violence and support survivors, as well as by removing obstacles that prevent access to justice.⁹⁴

Further, Iceland recommended that Venezuela “[a]llow same-sex marriage by modifying the Constitution, the Civil Code, and the Organic Code of Civil Registration.” Venezuela noted but did not support the recommendation.⁹⁵

F. International Criminal Court

The International Criminal Court (“ICC”) provides a mechanism for individuals to be prosecuted for (1) genocide, (2) crimes against humanity, (3) war crimes, and (4) crimes of aggression. While the Rome Statute (the statute governing the proceedings of the ICC) does not specifically identify crimes against LGBTQ persons as “crimes against humanity,” the Office of the Prosecutor has interpreted the protection against gender-based prosecution as extending to LGBTQ persons.⁹⁶

The ICC therefore provides for a mechanism allowing for the prosecution of individuals in Venezuela who have committed crimes outlined in the Rome Statute to be prosecuted and ultimately sentenced to up to 30 years (or in extreme cases life imprisonment).

✓ Functions of the mechanism:

The Rome Statute grants the ICC jurisdiction over four main crimes: (1) genocide; (2) crimes against humanity; (3) war crimes; and (4) crimes of aggression.

⁹⁴ *UPR of Venezuela (Bolivarian Republic of): Thematic list of recommendations*, United Nations Human Rights Council, https://www.ohchr.org/sites/default/files/documents/hrbodies/upr/sessions/session40/ve/2022-09-19/UPR40_Venezuela_Thematic_List_of_Recommendations.doc (last visited May 6, 2024).

⁹⁵ *Id.*

⁹⁶ See Policy on the Crime of Gender Prosecution, *supra* note 25, at 6.

✓ Who can bring a case:

Individuals may not bring a case before the ICC. However, an individual may submit a claim or communication of an alleged violation of the Rome Statute to the Office of the Prosecutor for consideration.⁹⁷

The Office of the Prosecutor may initiate an investigation “on the basis of information on crimes within the jurisdiction of the Court.”⁹⁸

If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, they “shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected.”⁹⁹

At the Pre-Trial Chamber, “[v]ictims may make representations... in accordance with the Rules of Procedure and Evidence.”¹⁰⁰

If the Pre-Trial Chamber considers there to be a reasonable basis to proceed with an investigation, and that the case “appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to the subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.”¹⁰¹

If the Pre-Trial Chamber refuses to authorize an investigation, the Prosecutor may make a subsequent request based on new facts or evidence regarding the same situation.¹⁰²

⁹⁷ Form for the submission of complaints and information to the Office of the Prosecutor, available at: *Welcome to OTP Link*, International Criminal Court, <https://otplink.icc-cpi.int/> (last visited Mar. 8, 2024).

⁹⁸ Rome Statute, *supra* note 21, art. 15.1.

⁹⁹ Rome Statute, *supra* note 21, art. 15.3.

¹⁰⁰ *Id.*

¹⁰¹ Rome Statute, *supra* note 21, art. 15.4.

¹⁰² Rome Statute, *supra* note 21, art. 15.5.

✓ Against whom can a case be brought:

Any State that is a Party to the Rome Statute.¹⁰³ Venezuela ratified the Rome Statute on June 7, 2000.¹⁰⁴

✓ Admissibility criteria:

The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if:

1) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14 of the Rome Statute¹⁰⁵;

2) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

3) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.¹⁰⁶

The Court shall determine that a case is inadmissible where:

- The case is being investigated or prosecuted by a State which has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

¹⁰³ Rome Statute, *supra* note 21, art. 11.2.

¹⁰⁴ *Rome Statute of the International Criminal Court*, *supra* note 22.

¹⁰⁵ Rome Statute, *supra* note 21, art. 14 (“Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.”)

¹⁰⁶ Rome Statute, *supra* note 21, art. 13.

- The case has been investigated by a State that has jurisdiction over it and the State has decided not to prosecute the person concerned unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- The person concerned has already been tried for conduct that is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;
- The case is not of sufficient gravity to justify further action by the Court.¹⁰⁷

✓ What can be achieved:

The ICC may find an individual guilty of committing 1) genocide, (2) crimes against humanity, (3) war crimes, and (4) crimes of aggression, and sentence the individual to a sentence of up to 30 years in prison.¹⁰⁸ In extreme cases, the Court may impose a time of life imprisonment.¹⁰⁹

✓ Ramifications of non-compliance:

The ICC does not have its own police force or enforcement body and relies on cooperation with countries to make arrests.¹¹⁰

✓ Relevant case law:

- **Venezuela I**

The Office of the Prosecutor opened a preliminary examination into the situation in Venezuela in February 2018 as to whether “since at least April 2017, crimes within the jurisdiction of the Court have been committed in Venezuela in the context of demonstrations and of the related political instability.”¹¹¹

¹⁰⁷ Rome Statute, *supra* note 21, art. 17.1.

¹⁰⁸ Rome Statute, *supra* note 21, art. 77.

¹⁰⁹ *Id.*

¹¹⁰ *How the Court works*, International Criminal Court, <https://www.icc-cpi.int/about/how-the-court-works#:~:text=As%20a%20judicial%20institution%2C%20the,%20assets%2C%20and%20enforcing%20sentences> (last visited Mar. 8, 2024).

¹¹¹ Letter from Mauricio Macri, President of Argentina, Iván Duque Márquez, President of Colombia, Mario Abdo Benitez, President of Paraguay, Justin Trudeau, Prime Minister of Canada, Sebastián Piñera Echenique, President of Chile, and Martín Vizcarra Cornejo, President of Peru, to Fatou Bensouda, Prosecutor of the International Criminal Court 2-3 (Sept. 26, 2018), https://www.icc-cpi.int/sites/default/files/itemsDocuments/180925-otp-referral-venezuela_ENG.pdf.

Additionally, on September 26, 2018, the Office of the Prosecutor received a referral from a group of State Parties to the Rome Statute requesting the initiation of an investigation for crimes against humanity allegedly committed in Venezuela since February 21, 2014. The referral raised concerns such as:

“... arbitrary detentions, murders, extrajudicial executions, torture, sexual abuse and rape, as well as flagrant attacks against due process, to the detriment of people of both sexes, including minors. At the same time, a systematic action would be carried out against young men between 15 and 30 years old, who, without justification, would be arrested or taken.”¹¹²

The Prosecutor announced the opening of an investigation on November 3, 2021.

On June 27, 2023, the Pre-Trial Chamber authorized the ICC Prosecutor to resume its investigation following an application from Venezuela to defer the investigation in favor of a national investigation.¹¹³

- **Venezuela II**

On February 13, 2020, the Office of the Prosecutor received a referral from the Government of Venezuela regarding a situation in its territory.¹¹⁴ In its referral, Venezuela stated that crimes against humanity were being committed “as a result of the application of unlawful coercive measures adopted unilaterally by the

¹¹² Letter from Mauricio Macri, President of Argentina, Iván Duque Márquez, President of Colombia, Mario Abdo Benitez, President of Paraguay, Justin Trudeau, Prime Minister of Canada, Sebastián Piñera Echenique, President of Chile, and Martin Vizcarra Cornejo, President of Peru, to Fatou Bensouda, Prosecutor of the International Criminal Court 2-3 (Sept. 26, 2018), https://www.icc-cpi.int/sites/default/files/itemsDocuments/180925-otp-referral-venezuela_ENG.pdf

¹¹³ *Venezuela I*, International Criminal Court, <https://www.icc-cpi.int/venezuela-i> (last visited Mar. 8, 2024).

¹¹⁴ *Preliminary examination: Venezuela II*, International Criminal Court, <https://www.icc-cpi.int/venezuela-ii> (last visited Mar. 8, 2024).

government of the United States of America against Venezuela, at least since the year 2014.”¹¹⁵

- ***The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (ICC-01/12-01/18)***

A warrant of arrest for Al Hassan Ag Abdoul Aziz, an alleged member of Ansar Eddine and de facto chief of the Islamic Police, was issued on March 27, 2018. The charges were based on “suspected crimes against humanity allegedly committed in Timbuktu, Mali, in the context of a widespread and systematic attack by armed groups Ansar Eddine/Al Qaeda in the Islamic Maghreb against the civilian population in Timbuktu and its region, between 1 April 2012 and 28 January 2018.”¹¹⁶ Al Hassan was alleged to have played an important role in the commission of “crimes and religions and gender-based persecution by those armed groups against the civilian population in Timbuktu.”¹¹⁷ The charges included torture, rape, sexual slavery, and other inhuman acts including forced marriages, persecution, and war crimes committed in Timbuktu, Mali. On September 30, 2019, the Pre-Trial Chamber I issued a confidential decision confirming the charges of war and crimes against humanity and committed him to trial. Notably, for the first time in the Court’s history, an ICC Pre-Trial Chamber confirmed charges of persecution on grounds of gender.¹¹⁸

G. Inter-American Commission on Human Rights/Inter-American Court on Human Rights/Organization of American States

Venezuela was the first state to denounce the ACHR in 2012, thus leaving the jurisdiction of the I/A Court and notified the Organization of American States

¹¹⁵ *Id.*

¹¹⁶ *Al Hassan Case: The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, International Criminal Court, <https://www.icc-cpi.int/mali/al-hassan> (last visited Mar. 8, 2024).

¹¹⁷ *Al Hassan Case: Case Information Sheet*, International Criminal Court (Jan. 2024), <https://www.icc-cpi.int/sites/default/files/2024-01/al-hassanEng.pdf>.

¹¹⁸ See *Al Hassan Case*, *supra* note 116; see also Policy on the Crime of Gender Prosecution, *supra* note 25, at 8.

("OAS") of its intention to withdraw from the institutional framework. Venezuela officially withdrew from the on April 27, 2020.¹¹⁹

However, questions remain as to whether Venezuela has "officially" withdrawn from the OAS, given that in January 2019, Congressional President, Juan Guaidó, retroactively ratified the ACHR.

The I/A Court and the Inter-American Commission on Human Rights ("IACHR") guide the implementation of LGBTQ rights in the Americas. Thus, if the IACHR and I/A Court assert jurisdiction over Venezuela in light of the retroactive ratification of these instruments by Congressional President, Juan Guaidó, or if Venezuela eventually chooses to rejoin OAS and re-sign the ACHR, it is important to understand what protections would be granted to LGBTQ people as a result.

Under the OAS structure, individuals can only bring complaints before the IACHR. By contrast, the jurisdiction of the I/A Court is reserved for contentious complaints and requests for advisory opinions filed by State parties and the Commission. Within the I/A Court's contentious function, the Court determines if a State has incurred an international responsibility for violating a right outlined in the American Convention or other relevant human rights treaties in the Inter-American system. The I/A Court's advisory function relates to interpreting treaties adopted within the framework, or under the auspices, of the Inter-American system, such as the 1988 San Salvador Protocol, and other treaties concerning the protection of human rights in the American States.

¹¹⁹ César Torres, *Venezuela's withdrawal from OAS, a free, sovereign decision in the face of imperial aggressions*, Gobierno Bolivariano de Venezuela Ministeria del Poder Popular para Relaciones Exteriores [Bolivarian Government of Venezuela Ministry of Popular Power for Foreign Relations] (Apr. 27, 2020), <https://mppre.gob.ve/en/2020/04/27/venezuelas-withdrawal-oas-sovereign-decision/#:~:text=April%2027%20was%20an%20historical,organization's%20Secretary%20General%20Luis%20Almagro.>

Because individuals are limited to the IACHR process, for this section, only relevant procedural aspects of filing a complaint before the IACHR will be analyzed.

✓ Functions of the mechanism:

To promote the observance and defense of human rights in the Americas through, among other activities, the processing and analysis of individual petitions with the aim of determining the international responsibility of States for human rights violations and issuing recommendations.

✓ Who can bring a case:

Individuals, groups of individuals, or organizations that allege violations of the human rights guaranteed in the American Declaration of the Rights and Duties of Man (the “American Declaration”), the ACHR, and other inter-American human rights treaties (i.e., Inter-American Convention to Prevent and Punish Torture, 1985; Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights, “Protocol of San Salvador”, 1988; Protocol to the American Convention on Human Rights to Abolish the Death Penalty, 1990; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, “Convention of Belém do Pará,” 1994; Inter-American Convention on Forced Disappearance of Persons, 1994; Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 1999).

Note petitions can only be brought against a State that has ratified the specific convention/treaty under which the right exists. For example, the U.S. has signed but not ratified the American Convention.

✓ Against whom can a case be brought:

Must be filed against one or more Member States of OAS.¹²⁰

A State may be responsible for violating human rights through:

- Action (as a result of an act by the State or its agents),
- Acquiescence (as a result of tacit consent of the State or its agents),
or
- Omission (as a result of the State or its agents' failure to take action).

The IACHR is not competent to attribute individual liability. The IACHR is only competent to determine the international responsibility of a Member State of the OAS.

✓ Admissibility criteria:

Under Article 46 of the ACHR, a petition or communication shall be subject to the following requirements:

- That the remedies under domestic law have been pursued and exhausted per generally recognized principles of international law;
- That the petition or communication is lodged within six months from the date on which the party alleging violation of its rights was notified of the final judgment;
- That the subject of the petition or communication is not pending in another international proceeding for settlement; and
- That, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or the legal representative of the entity lodging the petition.¹²¹

✓ What can be achieved:

¹²⁰ For a list of OAS member states, see *Member States*, Organization of American States, https://www.oas.org/en/member_states/default.asp (last visited Mar. 8, 2024).

¹²¹ Organization of American States, American Convention on Human Rights art. 46, Nov. 22, 1969, O.A.S.T.S. No. 36, U.N.T.S. 123, <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

If the IACHR determines that a State is responsible for violating the human rights of a person or group of persons, it will issue a report with recommendations. These recommendations may include:

1) Suspend the acts in violation of human rights; investigate and punish the person responsible.

2) Make reparation for the damages caused; make changes to legislation; and/or require that the State adopt other measures or actions.¹²²

The IACHR may also attempt to facilitate a settlement between the complainant and the State.

✓ Ramifications of non-compliance

Where a State does not comply with the IACHR's recommendations, the IACHR may:

- Publish the case; or
- Refer the case to the Inter-American Court of Human Rights.

Note that only the Commission or State parties may submit a case to the I/A Court. For individuals to have recourse, they must first file their petitions before the Commission and complete the procedural stages explained above.

✓ Relevant case law.

For the purposes of this section, relevant decisions of the IACHR and I/A Court, as well as annual reports of the OAS and press releases, will be summarized.

- IACHR

¹²² See Inter-Am. Comm'n H.R., *Petition and Case System 8* (2022) https://www.oas.org/en/iachr/docs/Booklet/folleto_peticiones_EN.pdf.

IACHR (2016), [Report No. 66/16](#) of December 2016. Tamara Mariana Adriana Hernandez (“Petitioner”) submitted a petition to the IACHR over Venezuela’s alleged failure to provide a suitable and effective remedy for changing an individual’s gender identity in the registry documentation system, which Petitioner alleged violated her human rights.

The IACHR determined that the Petitioner’s claims were admissible because Venezuela’s Organic Civil Registry Law only allowed name changes and not changes to a person’s sexual identity, which was the object of the Petitioner. Hence, the law did not provide an “ideal resource for remedying the situation alleged by the [P]etitioner,” and the Petitioner exhausted internal remedies established in [Article 46\(2\)\(c\)](#) of the ACHR and [31\(2\)\(c\)](#) of the Rules of Procedure.

- **IACHR (2016), Report No. 73/16 of December 2016**

Alexa Rodriguez and the International Human Rights Law Clinic (WCL, American University) (“Petitioners”) submitted a petition to the IACHR over El Salvador’s unwillingness to register her complaint of the physical and verbal attacks she received on several occasions based on her status as a transgender woman. Specifically, the Petitioners claimed that Rodriguez was attacked on different occasions by members of the “Mara Salvatrucha” gang and by officers of the National Civil Police. The Petitioners claim that attempts to report the incidents to the National Civil Police and the Prosecutor General’s Office were unavailing, despite repeated attempts.

The IACHR concluded that authorities’ alleged denial to receive complaints from Rodriguez, consisting of discriminatory treatment for her gender identity, and police officers’ alleged comments aimed at discouraging her from filing a complaint and threatening the alleged victim, taken as a whole, were sufficient elements to trigger exception set forth in [Article 46.2\(b\)](#) of the Convention. Therefore, the IACHR deemed the petition admissible.

- **I/A Court**

I/A Court (2017), **Advisory Opinion OC-24/17** of November 2017, requested by the Republic of Costa Rica. Gender identity, equality, and non-discrimination of same-sex couples.¹²³

In 2017, the I/A Court clarified in a milestone advisory opinion that the expression “any other social condition” in **Article 1** of the ACHR prohibits discriminatory laws, acts, or practices based on an individual’s sexual orientation and gender identity. The advisory opinion also calls for greater inclusion of all sexual and gender minorities, including intersex people.¹²⁴

On January 9, 2018, in **Advisory Opinion OC 24/7**, the I/A Court ruled that countries signatories to the American Convention on Human Rights are required to allow same-sex couples to marry. The ruling states that:

The State must recognize and guarantee all rights derived from a family bond between persons of the same sex in accordance with the provisions of Articles 11.2 and 17.1 of the American Convention. (...) in accordance with articles 1.1, 2, 11.2, 17, and 24 of the American Convention, it is necessary to guarantee access to all the existing figures in domestic legal systems, including the right to marry. (..) To ensure the protection of all the rights of families formed by same-sex couples, without discrimination with respect to those that are constituted by heterosexual couples.

- **IACHR Annual Report for 2019**

¹²³ Advisory Opinion OC-24/17, *supra* note 28, ¶ 22; Letter from Ana Helena Chacón Echeverría, Vice President, Republic of Costa Rica, to Roberto F. Caldas, President, Inter-Am. Ct. H.R. (May 18, 2016), https://www.corteidh.or.cr/docs/solicitudoc/solicitud_17_05_16_eng.pdf.

¹²⁴ Advisory Opinion OC-24/17, *supra* note 28.

In 2019, the IACHR published a report titled “Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas.”¹²⁵ While the report acknowledges the progress made in the region for LGBTQ persons, it notes that violence against LGBTQ persons in the region continues to exist, as well as the criminalization of sexual orientations and disinformation campaigns and initiatives that proliferate stigma and stereotypes against LGBTQ persons.

- **IACHR Annual Report for 2022**

The IACHR Annual Report for 2022 included a chapter on Venezuela, which “presents the Commission’s monitoring of the serious human rights crisis in the country, derived from the absence of the rule of law, and documents the progressive weakening of democratic institutions and the deterioration of the human rights situation.”¹²⁶

With respect to LGBTQ rights, the Commission’s findings were as follows:

158. LGBTI people continue to be exposed to situations of violence. This is due, among other things, to the Venezuelan context, which is characterized by discrimination based on real or perceived sexual orientation and gender identity, the lack of official figures on the particular needs of these people, as well as legislation that does not promote their rights on equal terms.

The IACHR annual report noted that while Venezuela adopted measures in 2022 to “combat impunity for crimes against LGBTQ persons, “the State’s opacity persisted in relation to the violence faced by these persons.”¹²⁷

¹²⁵ Inter-Am. Comm’n on H.R., *Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas*, OEA/Ser.L/V/II.170, doc. 184 (Dec. 7, 2018), <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.oas.org%2Fen%2Fiacr%2Freports%2Fpdfs%2FLGBTI-RecognitionRights2019.docx&wdOrigin=BROWSELINK>.

¹²⁶ *Report of the Inter-American Commission on Human Rights 2022*, Inter-Am. Comm’n on H.R. (Apr. 1, 2023), <https://www.oas.org/en/iachr/reports/ia.asp?Year=2022>.

¹²⁷ Inter-Am. Comm’n on H.R., *Chapter IV.B: Venezuela*, in Report of the Inter-American Commission on Human Rights 2022 671, 724 (Apr. 1, 2023), https://www.oas.org/en/iachr/docs/annual/2022/Chapters/9-IA2022_Cap_4B_VE_EN.pdf.

The IACHR annual report also called for the removal of Section 565 of the Organic Code of Military Justice, which punished military persons who “commit sexual acts against nature” with 1-3 years of imprisonment, from the legal system.¹²⁸ Notably, in March 2023, the Supreme Court of Justice annulled Section 565 of the Military Justice Code, which banned “sexual acts against nature” and was used to punish gay soldiers.¹²⁹

- **2022 IACHR Report**

In 2022, the IACHR published the “Report on Trans and Gender-Diverse Persons and Their Economic, Social, Cultural, and Environmental Rights.”¹³⁰ The report emphasizes that trans and gender-diverse persons are “exposed to greater vulnerability and tend to suffer higher rates of exclusion, stigmatization, and social prejudice.” The report calls for OAS members to take urgent action in light of the high rates of violence and discrimination faced by trans and gender-diverse persons in the region, as well as the exclusion of trans and gender-diverse persons from civil society.

As it relates to Venezuela, the Report noted that a survey conducted in Venezuela revealed that “84% of trans and gender-diverse persons surveyed stated that they had been denied jobs at least once because of their gender identities.”¹³¹ Moreover, the Report found that an alarming “86% of the trans women surveyed perform sex work, and that of that group, more than 90% said they ‘would leave sex work if they had any other type of work that would enable them to live.’”¹³²

- **2023 Press Release**

¹²⁸ Inter-Am. Comm’n on H.R., *supra* note 127, at 725.

¹²⁹ Tribunal Supremo de Justicia Declara Nulidad, *supra* note 2.

¹³⁰ Inter-Am. Comm’n on H.R., *Report on Trans and Gender-Diverse Persons and Their Economic, Social, Cultural, and Environmental Rights*, OEA/Ser.L/V/II, doc. 239 rev. 20 (Aug. 7, 2020), <https://www.oas.org/en/iachr/reports/pdfs/transdesca-en.pdf>.

¹³¹ Report on Trans and Gender-Diverse Persons, *supra* note 130, ¶ 259.

¹³² Report on Trans and Gender-Diverse Persons, *supra* note 130, ¶ 277.

In a 2023 press release, the IACHR expressed concern over Venezuela's national police over its alleged abuse of authority and arbitrary measures taken against individuals based on their sexual orientation, gender identity and/or expression, and sexual characteristics.¹³³ According to the IACHR, Venezuela's national police arbitrarily arrested 33 men in an establishment frequently attended by LGBTQ persons under the guise of an alleged "noise complaint."¹³⁴

In effect, the IACHR called on "Venezuela to respect human rights and cease criminalizing LGBTI[Q] people, in strict compliance with the principles of equality and nondiscrimination. It also called on the State to guarantee the principle of legality and to ensure that people are released if no crime has been committed and no charges have been brought against them."¹³⁵

VENEZUELA IN THE FUTURE

This guide has been designed as a resource to help stakeholders identify existing protections and remedies for LGBTQ persons in Venezuela. However, as highlighted, Venezuela has progressively withdrawn from its previously ratified international obligations.

While the future of Venezuela's re-engagement with the international community remains uncertain, this section outlines actions Venezuela can take to implement more international protections for LGBTQ persons. These recommendations include:

- Ratifying international legal instruments, such as the American Convention on Human Rights and rejoining the OECD.
- Adopting an LGBTQ trade strategy: To promote inclusive economic policies.

¹³³ Press Release, Inter-Am. Comm'n on H.R., IACHR Urges Venezuela to Refrain from Criminalizing LGBTI People (Aug. 7, 2023), https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2023/176.asp.

¹³⁴ *Id.*

¹³⁵ *Id.*

- Implementing the Yogyakarta Principles and the OECD's Road to LGBTI Inclusion: To ensure comprehensive protections and rights for LGBTQ individuals.

A. Joining Organisation for Economic Co-operation and Development

Although Venezuela is not a member of the Organisation for Economic Co-operation and Development ("OECD"), the organization's member countries have signed and ratified numerous treaties, conventions, and charters that uphold international human rights standards relevant to LGBTQ individuals. These countries are also guided by non-binding recommendations and reports on LGBTQ equality from key human rights entities like the UN, EU, Council of Europe, and Organization of American States.

Additionally, LGBTQ laws are strongly correlated with positive economic development.

A recent study analyzes the relationship between the Global Index on Legal Recognition of Homosexual Orientation ("GILRHO") and economic development in 132 countries from 1966 to 2011. The GILRHO includes eight categories of legal rights representing most of the important legal steps that various countries have taken to strengthen the rights of LGBTQ people: (1) legality of consensual homosexual acts between adults; (2) equal age limits for consensual homosexual and heterosexual acts; (3) explicit legal prohibition of sexual orientation discrimination in employment; (4) explicit legal prohibition of sexual orientation discrimination regarding goods and/or services; (5) legal recognition of the non-registered cohabitation of same-sex couples; (6) availability of registered partnership for same-sex couples; (7) possibility of second-parent and/or joint adoption by same-sex partners; and (8) legal option of marriage for same-sex couples.

Each country with a law corresponding to each of the eight categories is awarded a full point per year since the relevant law entered into force. If the law in question only applies in part of the country, a half point is given irrespective of the number of states, provinces, or regions where the law applies.

The study finds that an additional point on the 8-point GILRHO scale of legal rights for LGBTQ persons is associated with an increase in real GDP per capita of approximately USD 2,000. A series of robustness checks confirm that this index continues to have a positive and statistically significant association with real GDP per capita after controlling for predictors of economic development that are correlated with the GILRHO, such as legal measures promoting gender equality.¹³⁶

B. Rejoining the Organization of American States

Although Venezuela is not currently a member of the OAS as a result of its withdrawal, the possibility remains that it may decide to rejoin the OAS, thus availing itself of the IACHR and I/A Court's jurisdiction. This would impact the ability of members of civil society to lodge LGBTQ-related petitions with the IACHR, like the case brought by Tamara Mariana Adriana Hernandez outlined above. The practical reality, however, is that even if the petition is found admissible, these cases often take several years to determine and do not guarantee compliance by Member States.

C. Adopting an LGBTQ Trade Strategy

Over the past five years, there has been a trend to include articles and even chapters dedicated to gender in free trade agreements. In Latin America, for example, Uruguay, Chile, and Argentina have all ratified Free Trade Agreements with entire chapters dedicated to gender.

As an example, in Chile – Uruguay FTA Chapter 14 on Gender provides in relevant part:

¹³⁶ M.V. Lee Badgett, Kees Waaldijk & Yana van der Meulen Rodgers, *The relationship between LGBT inclusion and economic development: Macro-level evidence*, 120 *World Development* 1, 5 (Aug. 2019), <https://doi.org/10.1016/j.worlddev.2019.03.011> (quoted in Organisation for Economic Co-operation and Development, *Over the Rainbow? The Road to LGBTI Inclusion* (June 24, 2020), <https://doi.org/10.1787/8d2fd1a8-en>).

Article 14.1 “1. The Parties recognize the importance of gender mainstreaming in promoting inclusive economic growth, as well as the instrumental role that gender policies can play in achieving greater sustainable socio-economic development. Inclusive economic growth seeks to benefit the entire population through more equitable participation of men and women in business, industry, and the labor market.”

Article 14.2 “The Parties confirm their intention to continue their efforts to implement, from a rights perspective, their respective international commitments on gender. In particular, those priority agreements related to equal pay for men and women, maternity protection, reconciliation of work and family life, decent work for domestic workers, family responsibility, among others.”¹³⁷

Article 14.3 “...[T]he Parties shall carry out cooperative activities aimed at enhancing the capacity of women, including workers, entrepreneurs and business people, to access and benefit fully from the opportunities created by this Agreement.”

Article 14.4 “1. The Parties hereby establish a Gender Committee (hereinafter referred to as the "Committee"), composed of representatives of their government institutions responsible for relevant gender and trade issues in each Party...”¹³⁸

¹³⁷ See Free Trade Agreement, Chile-Uru., ch. 14, Oct. 4, 2016, <https://edit.wti.org/document/show/d1cba00f-4306-48a6-843d-c9a4bdcf7a93>; see also Agreement to amend, in respect of investment and gender, the Free Trade Agreement, Can.-Chile, ch. N *bis*, Feb. 5, 2019, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017_Amend_Modif-App2-Chap-N.aspx?lang=eng&_ga=2.84416538.281293725.1709928807-2076183070.1709761456; Free Trade Agreement, Chile-Arg., ch. 15, Nov. 2, 2017, <https://edit.wti.org/document/show/bf9aa665-cb2a-472f-849d-090e28b096fb>.

¹³⁸ See Free Trade Agreement, Chile-Uru., *supra* note 137.

Outside of Latin America, Canada and Israel in 2019 agreed to an FTA in which the dispute settlement procedures under the FTA extend to the gender chapter.

Chapter 13 of the Canada-Israel FTA, provides in relevant part:

Article 13.6: ...

2. If the Parties cannot resolve the matter in accordance with paragraph 1, they may consent to submit the matter to dispute settlement in accordance with Chapter Nineteen (Dispute Settlement).

While the first of its kind, the dispute resolution under the Canada-Israel FTA has yet to be tested. As a result, it is unclear how disputes related to gender would be resolved.

With respect to the inclusion of LGBTQ rights in FTAs, the United States-Mexico-Canada Agreement (“USMCA”) includes the parties’ goal of eliminating discrimination based on both gender and sexual orientation. Specifically, Art. 23.9 of the USMCA provides:

Parties recognize the goal of eliminating discrimination in employment and occupation and support the goal of promoting equality of women in the workplace. Each party shall implement policies it considers appropriate to protect workers against employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and care giving responsibilities; provide job protected leave for birth or adoption of a child and care of family members; and protect against wage discriminations.

While not applying to LGBTQ rights, the recent trend of including gender chapters in FTAs provides a roadmap for similar chapters or provisions to be included in future FTAs concerning LGBTQ rights.

In the future, if Venezuela seeks to negotiate FTAs with countries that favor the inclusion of LGBTQ rights in FTAs, it could force Venezuela to reevaluate its obligations under international law for LGBTQ rights, even trigger Venezuela to sign and ratify various international legal instruments protecting LGBTQ rights, and eventually implement those protections domestically. We have seen states adopt laws as a result of their obligations under FTAs outside the context of LGBTQ rights. For example, Mexico passed domestic forced labor laws banning the importation of goods produced with forced labor¹³⁹ as a result of its commitment under the USMCA. In particular, Article 23.6 calls for each USCMA party to “prohibit the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor...”¹⁴⁰

D. Implementation of the Yogyakarta Principles plus 10 and OECD’s Road to LGBTI Inclusion

Outside of formal international law processes, academics, experts, and scholars have compiled resources addressing the future of LGBTQ rights. Two such resources are the Yogyakarta Principles and the OECD’s Road to LGBTI Inclusion. Both can serve as references for advocates seeking to make change in their home countries.

The Yogyakarta Principles provide a comprehensive legal framework to address issues related to sexual orientation and gender identity. Written by a group of human rights experts in 2006 and updated in 2017, these principles are a

¹³⁹ Acuerdo que establece las mercancías cuya importación está sujeta a regulación a cargo de la Secretaría del Trabajo y Previsión Social [Agreement that establishes the goods whose importation is subject to regulation by the Secretary of Labor and Social Security], Diario Oficial de la Federación [DOF] 17-02-2023 (Mex.), https://dof.gob.mx/nota_to_doc.php?codnota=5679954.

¹⁴⁰ United States-Mexico-Canada Agreement art. 23.6, July 1, 2020, 134 Stat. 11.

testament to the international community's commitment to protecting the rights of the LGBTQ community.¹⁴¹ The principles were written outside of the UN system, but they aim to promote best practices in protecting the rights of LGBTQ people and serve as an interpretive aid to the landscape of international LGBTQ protection.¹⁴²

Though the Yogyakarta Principles are not binding, they are a useful reference for lawmakers and advocates. The principles cover:

- The right to universal enjoyment of human rights, non-discrimination, and recognition before the law;¹⁴³
- The right to human and personal security;¹⁴⁴
- Economic, social and cultural rights;¹⁴⁵
- The right to self-expression, opinion, and association;¹⁴⁶
- Freedom of movement and asylum;¹⁴⁷
- The right of participation in cultural and family life;¹⁴⁸
- The rights of human rights defenders;¹⁴⁹
- The right to redress and accountability;¹⁵⁰
- Recommendations for national human rights institutions, professional bodies, funders, NGOs, UN agencies, governments, and others.¹⁵¹

¹⁴¹ The Yogyakarta Principles, ARC Int'l (2016), <http://www.yogyakartaprinciples.org/>.

¹⁴² 'Yogyakarta Principles' a Milestone for Lesbian, Gay, Bisexual and Transgender Rights: Experts Set Out Global Standards for Sexual Rights and Gender Equality, Hum. Rts. Watch (Mar. 26, 2007), <https://www.hrw.org/news/2007/03/26/yogyakarta-principles-milestone-lesbian-gay-bisexual-and-transgender-rights>.

¹⁴³ See ARC Int'l, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* 10-12 (Mar. 2007), http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf.

¹⁴⁴ See *The Yogyakarta Principles*, *supra* note 143, at 12-18.

¹⁴⁵ See *The Yogyakarta Principles*, *supra* note 143, at 18-23.

¹⁴⁶ See *The Yogyakarta Principles*, *supra* note 143, at 24-26.

¹⁴⁷ See *The Yogyakarta Principles*, *supra* note 143, at 26-27.

¹⁴⁸ See *The Yogyakarta Principles*, *supra* note 143, at 27-29.

¹⁴⁹ See *The Yogyakarta Principles*, *supra* note 143, at 29-30.

¹⁵⁰ See *The Yogyakarta Principles*, *supra* note 143, at 30-31.

¹⁵¹ ARC Int'l, *The Yogyakarta Principles plus 10* (Nov. 10, 2017), http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf.

Similarly, the OECD has leveraged its expertise in data collection and analysis to create a document titled the “Road to LGBTI Inclusion.”¹⁵² This document presents a strategic blueprint aimed at promoting and protecting the rights of LGBTQ individuals within OECD member countries and beyond. It provides an in-depth analysis of the legal, social, and economic challenges faced by the LGBTQ community and offers concrete recommendations for change. The document’s primary objective is to strengthen the commitment of Member Countries and other stakeholders toward ensuring LGBTQ inclusivity across all sectors.

¹⁵² OECD, *Over the Rainbow? The Road to LGBTI Inclusion*, OECD Publishing (2020), <https://doi.org/10.1787/8d2fd1a8-en>.

CONCLUSION

Overall, whilst Venezuela has taken a step back in terms of its international legal obligations over the last decade, there are still available remedies—both through soft and hard law—in the international arena. This Guide hopes to function as a tool for stakeholders to identify the most suitable available remedy to enforce LGBTQ protections for persons in Venezuela. Advocates working in different legal, social, or economic areas can benefit from understanding the routes for change already available to them and the routes that are yet unavailable to them but have worked for others. LGBTQ equality will certainly require simultaneous advocacy in multiple areas of human life, both in the courts and beyond.

ANNEX. NICK TOONEN TELLS HOW HE WON THE FIRST CASE ON LGBTQ+ RIGHTS BEFORE THE UN

Thirty years ago, Nicholas Toonen, an openly gay Australian citizen, achieved the first victory for LGBTQ rights in the United Nations' human rights system. Nick challenged a law in Tasmania, a state of Australia, that criminalized consensual same-sex relations, arguing that it violated his rights under the ICCPR.

Nick was able to submit his petition because several conditions were satisfied. First, he argued that his rights to privacy and equal protection, as enumerated in the ICCPR, had been violated. Second, Australia, where the violation occurred, was a signatory to the ICCPR. Third, the country had ratified the First Optional Protocol to the ICCPR, allowing individuals to submit complaints to the HRC's independent experts for review and decision on potential ICCPR violations.

When Nick sent the petition, he "wasn't sure what to expect" and he was "more prepared for disappointment than for victory." However, his triumph was more a result of a well-defined strategy than mere luck. He planned his case to be the first LGBTQ rights petition from Australia to the HRC, ensuring it was submitted on the first day the ICCPR became effective in Australia—Christmas Day of 1992. This timing was deliberate, designed to draw attention to the issue.

This case transcended personal triumph, becoming a bedrock for LGBTQ rights in international law. Today, his case—*Toonen v. Australia*—continues to serve as a precedent, influencing broader human rights mechanisms to protect.

Nick shared the backstage story of his historic case:

How did you come up with the idea of using the United Nations' Human Rights Committee when no one had done so before?

We couldn't convince the Tasmanian parliament to decriminalize same-sex relations. We tried broadening the avenues for pressuring the Tasmanian parliament. Initially, when we approached the national government, they expressed sympathy. They were displeased that such a law still existed, but they maintained a neutral stance on the law because the criminal code is a matter of the state, not within the national government's jurisdiction. It wasn't until the UN case was decided that the national government took a definitive position. The decision empowered them to act, encouraging them to offer more than a statement of moral support.

How did you know that you were the right person to go to the HRC?

The optional protocol is about an individual taking a case, and I met the criteria best. The person had to be: First, a gay individual who was breaking the law. Secondly, someone born in Tasmania. A lot of the opponents were arguing that there were people coming from other places trying to corrupt the young people of Tasmania, but we said "no, we are the young people of Tasmania." Thirdly, someone who was willing to be in the media and do all the things that go with it, and, fourthly, someone who was committed to staying in Tasmania as long as that case took.

Did you seek assistance from NGOs or any pro bono work from law firms?

We received a lot of pro bono legal support from lawyers, legal academics, and law firms, supporting with legal advice, representation, and drafting. From them came some good advice and some not so good advice. They did not believe that the UN would ever rule in our favor, but we ignored that skepticism.

How was the drafting process for you?

A legal academic wrote parts of the petition to frame it to privacy and discrimination. However, it was not completely legal writing. A lot of the drafting we did ourselves. It wasn't legal writing. It was individual communication, and it was drafted as coming from an individual. It was around how did the law impact on me and other gay individuals in Tasmania, directly and indirectly, and in all sorts of other ways.

What drafting challenges did you encounter?

My petition went around whether I could bring the case, given that I hadn't been arrested or charged with Tasmania's law – which is called standing.

The solution was to frame my arguments around the threat of being arrested, rather than an actual arrest. I highlighted how the law impacted me as a representative of the gay community in Tasmania. We illustrate with practical examples the impact of the law: A standard clause in most lease contracts permits the landlord to terminate the lease if the tenant is engaged in illegal activities. My own apartment lease included this clause, which could have served as grounds for termination if my landlord believed I was violating Tasmanian law by engaging in same-sex relations.

What were your expectations?

We didn't have clear expectations. We were more prepared for disappointment than success. For us, the process of going to the United Nations, whatever the result, was going to pressure the national government to act. Our target was to bring media attention and people along with us.

We didn't necessarily have this in mind at the time, but we had an ticks-all-the-boxes kind of case for the UN to decide in favor of LGBTQ rights. It was about sexual activity in private by consenting adults, and Australia wasn't saying we don't agree. They were saying yes, we agree with Nick, but it is the state of Tasmania, within Australia, the contravener of the human rights.

Why did you file the petition on Christmas Day?

Because the Optional Protocol was effective three months after the State's ratification. For Australia, those three months passed on December 25th, 1991. We wanted to be the first case against Australia under the Optional Protocol. We knew that would create pressure and bring publicity.

It took 3 years to get the decision. How did you manage those years?

We weren't sitting around waiting for the UN. We continued all the other aspects of the campaigning process: community education and media visibility. We would go and speak at any organization, unions, professional associations, school groups, senior citizens groups, anyone who would meet and hear real life stories of gay and lesbian people and understand why we were trying to change the law. Our goal was not just changing the law but transforming attitudes and values towards queer people.

Once you got the decision in your favor, what was the next step?

After the decision, it took three years for the Tasmanian parliament to change the law. We demanded the national government to do something about our rights. They were aware of the decision and its implications. Utilizing

their powers under the Australian Constitution, which were bolstered by the UN decision, the federal government finally passed the Human Rights Sexual Conduct Act. This legislation reflected the privacy section of the ICCPR. As a result, we were left with a new piece of federal legislation that contradicted the Tasmanian law, though it did not directly override it. Then, we went to the High Court of Australia, asking to the Court to interpret the federal legislation and the Tasmanian legislation to tell us which one would prevail. Before the High Court made a final decision on the case, we dropped the case because the Tasmanian parliament changed the law.

What were the objections of the Tasmanian institution to the UN decision?

They said “we’re a sovereign state of Australia, we make our own decisions. We are not having someone else tell us what to do.” Some of the politicians in Tasmania doubled down because they said, not only do we not want to change the law, but we especially don’t want to be told by an international body, or the Australian federal government that we must change the law. We answered saying to them, “well, that’s right. We don’t want those people to tell you either. We want you to change the law,” which in the end they did.

LGBTQ rights are not guaranteed, and in some countries, these rights have regressed. What are your thoughts on this troubling trend?

History is not linear. Human rights don’t just keep progressing, they go forwards and backwards, but overall, there has been a positive movement over in the last decades. There’s the importance of human rights mechanisms like the Optional Protocol to the ICCPR because it enables an individual to go to a UN body. These decisions, regardless of whatever happens in individual countries or places, are still there. Precedents, like the case I won, are there so that if other similar cases come, others can build on those precedents as arguments.

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