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SEXUAL ORIENTATION, GENDER IDENTITY, AND GENDER EXPRESSION:  
KEY TERMS AND STANDARDS

[Study prepared by the Inter-American Commission on Human Rights "IACHR" pursuant to resolution AG/RES 2653 (XLI-O/11): Human Rights, Sexual Orientation, and Gender Identity]



INTER-AMERICAN COMMISSION ON HUMAN RIGHTS  
COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS  
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS  
COMMISSION INTERAMÉRICAINNE DES DROITS DE L'HOMME



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**ORGANIZATION OF AMERICAN STATES**  
**WASHINGTON, D.C. 2 0 0 0 6 U.S.A.**

April 23, 2012

**Re: Delivery of the study entitled “Sexual Orientation, Gender Identity, and Gender Expression: Key Terms and Standards”**

Excellency:

I have the honor to address Your Excellency on behalf of the Inter-American Commission on Human Rights (IACHR) and to attach the document entitled *Sexual Orientation, Gender Identity, and Gender Expression: Key Terms and Standards*, which will be available in English and Spanish.

This paper was prepared at the request of the OAS General Assembly, which, in resolution AG/RES. 2653 (XLI-O/11), asked the IACHR to prepare a study on “the legal implications and conceptual and terminological developments as regards sexual orientation, gender identity, and gender expression.” The IACHR remains at your disposal for any explanation or further details you may require.

Accept, Excellency, renewed assurances of my highest consideration.

Mario López Garelli  
on behalf of the Executive Secretary

Her Excellency  
Ambassador María Isabel Salvador  
Permanent Representative of Ecuador  
Chair of the Committee on Juridical and Political Affairs  
Organization of American States

Attachment

## **SEXUAL ORIENTATION, GENDER IDENTITY AND GENDER EXPRESSION: SOME TERMINOLOGY AND RELEVANT STANDARDS**

### **I. INTRODUCTION**

1. In performing its mission, the Inter-American Commission on Human Rights (hereinafter “the IACHR”, “the Commission” or “the Inter-American Commission”) has received ample information on the situation of the rights of lesbian, gay, trans, bisexual and intersex persons (hereinafter “LGTBI”) in the countries of the Americas, particularly regarding the serious discrimination they face<sup>i</sup>.

2. Given the situation, the Commission’s Strategic Plan features a Plan of Action 4.6.i on the rights of LGTBI persons. In November 2011,<sup>ii</sup> the Commission created a specialized unit within its Executive Secretariat on this subject. Among its functions the Unit will provide technical support to States in meeting their obligations in this area.

3. Through AG/RES. 2653 (XLI-O/11) on “Human Rights, Sexual Orientation and Gender Identity,” the Organization of American States (hereinafter “OAS”) General Assembly asked the Commission to prepare a study “on the legal implications and conceptual and terminological developments as regards sexual orientation, gender identity, and gender expression.”<sup>iii</sup>

### **II. SCOPE AND LIMITATIONS OF THE PRESENT STUDY**

4. Concepts like “sexual orientation,” “gender identity” and “gender expression” or reference to persons by the acronym LGTBI have, at the very least, social, legal and medical connotations. For example, the letters B (for bisexual), G (for gay), I (for intersex), L (for lesbian), and T (for trans) have been used to signify trends, movements or events organized to demand rights, to express solidarity, to mobilize the community or to protest; they can also be used to signify communities, groups or identities<sup>iv</sup>.

5. In law, particularly within the United Nations system, these social debates generally come under the rubric of “sexual minorities,”<sup>v</sup> a cover term for issues related to the rights of gay, lesbian, trans, bisexual, and intersex persons.

6. From the more technically precise standpoint of the sociology of law, the expressions ‘sexual orientation’, ‘gender identity’ and ‘gender expression’ have been used to make reference to the recognition and enforceability of rights by, *inter alia*, the legislature and the judiciary. Labeling someone as a lesbian, gay, trans, bisexual or intersex person ensures that his/her sexual orientation and/or gender identity are recognized in law as legally protected (but traditionally ‘invisibilized’) aspects that go into constructing his/her identity; it recognizes the discrimination to which persons who so identify themselves have historically been subjected, and affords them protection.

7. From a perspective of sociology and psychology there has been great emphasis on the fluidity of identity construction and self-definition: working from this perspective, sexual orientation, gender identity and gender expression are not static qualities in a person; on the contrary, they are dynamic, and depend on the construction that one makes of oneself and upon social perception<sup>vi</sup>. At the same time, in the context of international law of human rights sexual orientation

–and by analogy also gender identity and gender expression- has been understood as personal characteristics that are innate and inherent to the person<sup>vii</sup> (such as race and ethnicity) and immutable, “understood as meaning it is a characteristic that is difficult to control and which a person cannot abandon without sacrificing his or her identity”.<sup>viii</sup>

8. This apparent contradiction refers juridically to two characteristics of the categories of sexual orientation, gender identity and gender expression. On the one hand, in the sphere of intimate and personal decisions and as an essential part of their life project, people can be in a process of constant and fluctuating development, constructing themselves with respect to a specific sexual orientation, gender identity and gender expression. However, these categories and the possible fluctuation and mobility of one or more of these categories that are inherent to the person does not imply that they can be modified by third parties or by the State, as this would tantamount to a violation of their dignity<sup>ix</sup>.

9. In the realm of health sciences, a category or classification can serve a scientific purpose, which is to describe the treatment that a person can be offered. For example, in its work on providing comprehensive care to transgender and transsexual persons in Latin America and the Caribbean, the Pan American Health Organization (hereinafter “PAHO”) recommends that when treating someone in a health center the individual be asked his/her assigned sex at birth (“male, female, or other”) and how the person identifies himself/herself in terms of gender identity (“feminine, masculine, trans female, trans male, trans person, transvestite, or other”). PAHO observes that this information is vital to determining the proper treatment. Statistics have to be developed to highlight otherwise invisible problems: as PAHO points out, for example, trans persons are 40 times more affected by sexually transmitted infections than the general population, but this alarming difference is missed unless the data are broken down by sexual identity.<sup>x</sup> This will inevitably influence the shape of public policies on prevention, treatment and allocation of resources.

10. The legal effects of references to these categories of discrimination are evident in the language of OAS General Assembly resolution AG/RES. 2653 (XLI-O/11), in which the member states resolved:

1. To condemn discrimination against persons by reason of their sexual orientation and gender identity, [...]
2. To condemn acts of violence and human rights violations committed against persons because of their sexual orientation and gender identity [...]
3. To encourage the member states to consider, within the parameters of the legal institutions of their domestic systems, adopting public policies against discrimination by reason of sexual orientation and gender identity [and]
4. To urge states to ensure adequate protection for human rights defenders who work on the issue of acts of violence, discrimination, and human rights violations committed against individuals on the basis of their sexual orientation and gender identity.

11. This document discusses these categories in order to establish a common language or terminology that can be used as a point of reference. Through this document, the IACHR is not

attempting to coin its own definitions, establish discrete, distinctive categories or boundaries between persons based on sexual orientation, gender identity or gender expression;<sup>xi</sup> nor is it suggesting that the use, meaning or sense of any definition, category or classification discussed herein is universal.

12. The instant compilation presents some accepted notions of sex, gender, sexual orientation, gender identity, and gender expression. In closing, reference is made to the standards for the definition of discrimination, specifically as it relates to sexual orientation, gender identity, and gender expression, as well as standards related to sexual orientation, gender identity and gender expression as aspects pertaining to the right to private life of the person and the corresponding State obligations.

### **III. TERMINOLOGY AND RELEVANT STANDARDS**

#### **A. Sex**

13. In the strict sense, the term “sex” refers to “biological differences between men and women,”<sup>xii</sup> their physiological characteristics,<sup>xiii</sup> “the sum of biological characteristics that define the spectrum of humans as females and males,”<sup>xiv</sup> or “a biological construct, referring to the genetic, hormonal, anatomical, and physiological characteristics on whose basis one is labeled at birth as either male or female.”<sup>xv</sup>

#### **Intersex persons**

Sex is understood to refer to men, women and to intersex persons as well. In the literature, intersexuality has been defined as “all those situations in which an individual’s sexual anatomy does not physically conform to the culturally defined standard for the female and male body.”<sup>xvi</sup> The understanding of this specific biological identity has historically been identified with the mythological figure of Hermaphroditus, a person born with “both sexes; in other words, with a penis and a vagina.”<sup>xvii</sup> The term ‘intersex’ also appears in legal<sup>xviii</sup> and medical<sup>xix</sup> writings. At the present time, the term intersex is considered more technically correct both by the LGBTBI movement and in the medical and legal literature.<sup>xx</sup>

#### **B. Gender**

14. The difference between sex and gender is that the first is a reference to a biological difference, whereas the second is a social construction. The United Nations Committee that monitors compliance with the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter, the “CEDAW Committee”) has written that the term “sex” refers to biological differences between men and women. The term “gender” refers to socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences.<sup>xxi</sup>

15. Both in society and in literature, a distinction has been made between sex and gender. This distinction is now also being made with increasing frequency in the language of the law. At the international level, however, and with some degree of uniformity at the domestic level, the categories ‘sex’ and ‘gender’ have historically been used interchangeably<sup>xxii</sup>. Hence, in some international treaties and other bodies of law in which the ‘gender’ category was not used, the ‘sex’

category is understood to include the ‘gender’ category, in order to ensure the *effet utile* of comprehensive and inclusive legal protection.<sup>xxiii</sup>

### **C. Sexual Orientation**

16. A person’s sexual orientation is independent from his or her biological sex or gender identity. It has been defined as “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.”<sup>xxiv</sup> Within comparative law, sexual orientation is understood as a suspect category of discrimination tested by various criteria, one of which is the immutability of sexual orientation, understood as “a characteristic that is difficult to control and which a person cannot abandon without sacrificing his or her identity.”<sup>xxv</sup>

17. The terms ‘heterosexuality’, ‘homosexuality’ and ‘bisexuality’ come under the heading of sexual orientation and can be defined as follows:

#### **Heterosexuality**

This term refers to a person’s capacity for profound emotional, affectional and sexual attraction to a person of a different gender and to the capacity to maintain intimate and sexual relations with that other person.

#### **Homosexuality**

This term refers to a person’s capacity for profound emotional, affectional and sexual attraction to a person of the same gender and to the capacity to maintain intimate and sexual relations with that other person. From the information the Commission has received, the trend within the LGBTI movement seems to be to reclaim<sup>xxvi</sup> the use of and reference of the terms *lesbian*<sup>xxvii</sup> (for female homosexuality) and *gay* [or *gai*<sup>xxviii</sup> in Spanish] (for male or female homosexuality).

#### **Bisexuality**

This term refers to a person’s capacity for profound emotional, affectional and sexual attraction to a person of a different gender and of the same gender, and to that person’s capacity to maintain intimate and sexual relations with these persons.

### **D. Gender identity**

18. According to the Yogyakarta Principles,<sup>xxix</sup> gender identity is

each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.<sup>xxx</sup>

19. Gender identity includes the category of transgenderism or trans. The following are the most commonly accepted definitions of this category and subcategories.

### **Transgenderism or trans**

This umbrella term –which includes the subcategory of transexuality and other variations- is used to describe the different variants of gender identity, whose common denominator is that the person’s biological sex and the gender identity traditionally assigned to that sex do not match.<sup>xxxii</sup> A trans person can construct his/her identity regardless of surgical interventions or medical treatment.<sup>xxxii</sup>

### **Transsexualism**

Transsexual persons feel and perceive themselves as belonging to a gender that is not the one socially or culturally associated with their biological sex and who opt to have medical treatment –hormonal, surgical or both- to adapt their physical-biological appearance to their mental, spiritual and social sense of self.

### **Other subcategories that do not necessarily imply body alterations**

In this category we find persons who are travesties (South America) and transvestites (North America). In general terms,<sup>xxxiii</sup> it could be said that travesties are persons who express their gender identity –either on a permanent or temporary basis- by wearing articles of clothing and adopting the deportment and mannerisms of the gender opposite to the one socially and culturally associated with their biological sex. This may or may not include body modifications.

Other terms have also been included under the category *transgender*, such as: cross-dressers (persons who occasionally wear clothing of the opposite sex); drag queens (men who dress as women, exaggerating feminine traits, generally on festive occasions); drag kings (women who dress as men, exaggerating male traits, generally on festive occasions); and *transformistas* [sometimes referred to as transgender performers] (men or women who play characters of the opposite sex in shows).<sup>xxxiv</sup>

20. The legal,<sup>xxxv</sup> medical-scientific,<sup>xxxvi</sup> and social<sup>xxxvii</sup> discussions of these categories approach them from a variety of angles. However, there is a certain degree of consensus<sup>xxxviii</sup> concerning the referents and self-referents used for and by transgender persons: a *trans women* is when the biological sex is male and the gender identity is female; a *trans man* is when the biological sex is female and the gender identity is male; a *trans person* or *trans* is when the person’s conviction is to self-identify outside the male/female classification.

## **E. Gender expression**

21. Gender expression has been defined as “the outward manifestations of the cultural traits that enable a person to identify himself/herself as male or female, according to the patterns that, at a particular moment in history, a given society defines as gender appropriate.”<sup>xxxix</sup>

22. The International Commission of Jurists has held that:

[t]he notion of what properly constitutes male or female norms has been a source of human rights abuses against individuals who do not fit or conform to the stereotypical models of masculine or feminine. Personal deportment, mode of dress, mannerisms, speech pattern, social behavior and interactions, economic independence of women and the absence of an opposite-sex partner are all features that may subvert gender expectations.<sup>xli</sup>

23. In one school of thought, gender expression falls under the category of gender identity. Recently, however, others have started to draw a distinction between gender identity and gender expression, with the latter being included specifically in a number of laws,<sup>xli</sup> thereby acknowledging that gender expression presupposes specific aspects of the outward manifestation and social perception of gender identity which had traditionally been invisible.

24. It is vital to bear in mind that gender expression is an outward or external expression, and that -even though that outward manifestation may not match one's definition of one's own identity- third parties can always draw an association with a given sexual orientation or a given gender identity.<sup>xlii</sup>

25. In law, the distinction is an important one, as it entitles a person to protection regardless of whether his/her gender expression matches up with a given gender identity or is merely perceived that way.<sup>xliii</sup>

#### **F. Discrimination based on gender identity, sexual orientation and gender expression**

26. The various international conventions and treaties define discrimination as any distinction, exclusion, restriction or preference made on the basis of any attribute of the person and whose effect or purpose is to impair or nullify the recognition, enjoyment or exercise, on a basis of equality, of human rights and fundamental freedoms.<sup>xliv</sup>

27. The IACHR defines discrimination based on sexual orientation, gender identity or gender expression as any distinction, exclusion, restriction or preference made against a person on these grounds, which has the effect or the purpose –whether *de jure* or *de facto*-<sup>xlv</sup> of impairing or nullifying the recognition, enjoyment or exercise, on the basis of equality, of human rights and fundamental freedoms, taking into account the social and cultural attributes that have been associated with those categories.

28. Nevertheless –particularly given the absence of specific, exhaustive regulations governing the prohibited grounds of discrimination for these categories-, from a legal standpoint, non-discrimination on the basis of sexual orientation and gender identity has generally been subsumed under two prohibited grounds for discrimination under international law, namely: discrimination by reason of “sex”,<sup>xlvi</sup> and under the open-ended non-discrimination clause of discrimination on the basis of “any other social condition”.<sup>xlvii</sup>

29. As for the interpretation of these provisions and the application of these standards within the inter-American human rights system, the Commission and the Inter-American Court of

Human Rights (hereinafter “Court” or Inter-American Court”) have maintained that sexual orientation and gender identity<sup>xlviii</sup> are covered under the phrase “any other social condition” that appears in Article 1(1) of the American Convention on Human Rights (hereinafter “American Convention” or “Convention”). Hence, any difference in treatment based on sexual orientation is a suspect category and presumed to be incompatible with the American Convention. The State is required to prove that the difference in treatment meets the especially rigorous test used to measure the reasonableness of the difference in treatment.<sup>xlix</sup> In a statement that the Inter-American Court echoed in its judgment, the Commission argued that when interpreting the expression “any other social condition” that appears in Article 1(1) of the Convention, one must always opt for the alternative most conducive to the protection of the human rights protected by the Convention, in keeping with the principle of the rule most favorable to the human being.<sup>1</sup>

**G. Sexual orientation, gender identity and gender expression as aspects of the right to private life**

30. Regarding the specific content of the right to privacy, the Commission has indicated that it “encompasses all spheres of the intimate realm and autonomy of an individual, including his or her personality, identity, decisions over his or her sexual life, and his or her personal and family relations”<sup>li</sup>. With respect to sexual orientation and its link to the right to privacy, the Commission has indicated:

Sexual orientation constitutes a fundamental component of the private life of an individual that should be free from arbitrary and abusive interferences by the State, in the absence of weighty and convincing reasons.<sup>lii</sup> There is a clear nexus between the sexual orientation and the development of the identity and life plan of an individual, including his or her personality, and relations with other human beings. (...) The Commission reiterates that the right to privacy protects the right to determine one’s own identity and to establish personal and family relations on the basis of that identity, even if it is not accepted or tolerated by a majority within society.<sup>liii</sup>

31. Sexual orientation, gender identity and gender expression are fundamental components of people’s private life or privacy. The Inter-American Commission has highlighted that the right to private life guarantees spheres of privacy in which the State or anyone cannot intrude, such as the ability to pursue the development of one’s personality and aspirations and determining one’s identity, as well as those spheres of activities such as decisions, interpersonal and family relations, and the home.<sup>liv</sup> In this regard, the Inter-American Court has established that “the sphere of privacy is characterized by being free and immune to the intrusions and abusive aggressions by third parties or the State<sup>lv</sup>. Regarding State interference on the basis of a person’s sexual orientation, the IACHR, echoing a decision by the European Court of Human Rights, has indicated that such interference affects an intimate part of someone’s private life, requiring States to present particularly compelling and good reasons to justify such actions.<sup>lvi</sup>

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i. With respect to the discrimination these persons face, the Inter-American Court has indicated “the alleged lack of a consensus domestically in some countries for the full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the

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discrimination that these minorities have suffered historically and structurally”. I/A Court H.R., Case of Karen Atala Riffo and daughters v. Chile, Merits, Reparations and Costs. Judgment of February 24, 2012. Series C. No. 239, para. 92 (Free Translation by the IACHR).

.ii. IACHR, Press Release No. 115/11, IACHR Creates Unit on the Rights of Lesbians, Gays, Trans, Bisexual, and Intersex Persons, November 3, 2011. In response to the many and varied categories that exist today and the debates ongoing in certain areas, the IACHR’s Unit for the Rights of Lesbian, Gay, Trans, Bisexual and Intersex Persons (LGBTI) has adopted this easily recognizable name as a practical way of synthesizing some of the principal discussions still underway on the issue of categories of sexual orientation, gender identity and gender expression. In this way, the Commission is acknowledging the terminology; however, as a guiding principle, it is also embracing the notion of each person’s self-identification; consequently, it is possible that the persons who are the focus of the Unit’s work may not identify themselves as belonging to these or other categories.

iii. OAS, General Assembly, Human Rights, Sexual Orientation and Gender Identity, AG/Res. 2653 (XLI-O/11), approved at the fourth plenary session, held on June 7, 2011.

iv. Although the political, social, sexual and gender identities encompassed by LGBTI are not equally relevant in all communities and/or for all individuals, the category of LGBTI exists as a collective concept that has been claimed by some individuals and activist groups in many countries to assert their demand for recognition, space and legal personhood. In other words, it has been successfully used for political, social and economic organizing purposes. However, the LGBTI categorization contains several weaknesses. First, it lumps women, men, transgender and intersex people together, even though the human rights abuses they most commonly face may be significantly different. It also risks erasing differences of history, geography and politics, as well as other characteristics for which individuals face stigma and discrimination, such as their race, ethnicity, (im)migrant status, health status, language, etc. Finally, it may put out of sight culturally specific sexual and gender identities, giving the wrong impression that those identities originated in the West, and only recently. *Global Rights: Partners for Justice, Demanding Credibility and Sustaining Activism, A Guide to Sexuality-Based Advocacy*, 2010, p. 14. This guide was co-authored and edited by Stefano Fabeni, who was an expert consulted for the drafting of the Yogyakarta Principles.

v. Professor Alice Miller suggests that “although the UN experts and bodies have used this cover term to refer to issues of discrimination, exclusion and stigmatization, it is unclear which groups are included among the sexual minorities and how they are determined to be sexual minorities. She observes that although this category is useful to highlight these questions, it could be a problematic “clubbing together” in terms of gender- and sexuality-related categories of human rights abuses”. See International Commission of Jurists, *Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No. 4*, 2009, p. 25.

vi. According to the literature: “Perhaps instead of thinking of identity as an already accomplished fact, which the new cultural practices then represent, we should think of identity as a 'production', which is never complete, always in process, and always constituted within, not outside, representation.” Stuart Hall, *Cultural Identity and Diaspora*, in *Identity*, J.Rutherford (ed.), Lawrence and Wishart, pp. 222–237, 1990.

vii. I/A Court H.R., Case of Karen Atala Riffo and daughters v. Chile, Merits, Reparations and Costs. Judgment of February 24, 2012. Series C. No. 239, para. 87, *citing* ECHR, *Clift v. UK*, (No. 7205/07), Judgment dated July 13, 2010. Final, November 22, 2010, para. 57.

viii. IACHR, Application before the Inter-American Court of Human Rights In the case of Karen Atala and daughters (Case 12.502) against the State of Chile, September 17, 2010, para. 94.

ix. In 2009 the American Psychological Association ruled out the effectiveness of therapies that aim at changing the sexual orientation of persons. To this respect, see the Report of the APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation, available at:

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<http://www.apa.org/pi/lgbt/resources/sexual-orientation.aspx>.

x. PAHO; Blueprint for the provision of comprehensive care to transgender and transsexual persons and their communities in Latin America and the Caribbean (LAC); in association with IAPAC; mimeograph, limited distribution, p. 7.

xi. Hall, Stuart. (1990) "Cultural Identity and Diaspora". In *Pensar (en) los Intersticios. Teoría y práctica de la crítica poscolonial*. Santiago Castro, Oscar Guardiola and Carme Millán (eds.): 131 – 145. Pensar – Universidad Javeriana. Bogota. See also "Cuerpos Construidos para el Espectáculo: Transformistas, strippers y drag queens". In *Cuerpo: Diferencias y desigualdades*. Mara Viveros and Gloria Garay (eds.). Universidad Nacional – CES. Bogota. 1999.

xii. Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, December 16, 2010, para. 5.

xiii. United Nations. Committee on Economic, Social and Cultural Rights. General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, paragraph 2), E/C.12/GC/20. 2009, paragraph 20.

xiv. Pan American Health Organization and American University Washington College of Law, *The Right of Young People to Health and Gender Identities: Findings, Trends and Targets for Public Health Action*, Washington, D.C., 2011, p. 7.

xv. Institute of Medicine (National Academies of Sciences of the United States); *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding*, The National Academies Press 2011; p. 25, available at: <http://www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx>.

xvi. Cabral Mauro and Benzur Gabriel. *Cuando Digo Intersex. Un diálogo introductorio a la intersexualidad*, Cad. Pagu no.24 Campinas Jan./June 2005 [Free translation by the IACHR].

xvii. Cabral Mauro and Benzur Gabriel. *Cuando Digo Intersex. Un diálogo introductorio a la intersexualidad*, Cad. Pagu no.24 Campinas Jan./June 2005 [Free translation by the IACHR].

xviii. In 1999, the Constitutional Court of Colombia studied a case involving the "castration" of a pseudo-hermaphroditic boy. Doctrine Unification Judgment SU-337 of 1999.

xix. In medicine, there are three types of hermaphroditism: feminine pseudo-hermaphroditism, masculine pseudo-hermaphroditism and true hermaphroditism. The Constitutional Court of Colombia studied these various medical categories in 1999, using a variety of medical books and specialized journals on the subject. See, *inter alia*: Bruce Wilson, William Reiner, "Management of intersex: a shifting paradigm" in The Journal of Clinical Ethics, Vol 9, No 4, 1998, p 360 and Hermaphrodites and the Medical Invention of Sex. Cambridge: Harvard University Press, 1998.

xx. In medical literature, the term intersexuality is now preferred over hermaphroditism or pseudo-hermaphroditism to designate Disorders of Sexual Development (DSD); they are now referred to as '46, XX Intersex'; '46, XY Intersex'; 'True Gonadal Intersex'; and 'Complex or Undetermined Intersex'. For its part, domestic case law, like Colombia's, has used the expression "intersex conditions" when discussing this topic, particularly in its judgments T-1021 from 2003 and T-912 from 2008. International organizations that are pioneers in this area, such as the *Intersex Society of North America*, have also preferred the term 'intersex' over hermaphroditism, although divorced from the concept of a disorder of sexual development.

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xxi. Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, December 16, 2010, para. 5.

xxii. In a broader sense, the meaning of the term ‘sex’ goes beyond strictly biological characteristics. As the United Nations Committee on Economic, Social and Cultural Rights has held, the notion of ‘sex’ “has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfillment of economic, social and cultural rights.” United Nations Committee on Economic, Social and Cultural Rights. General Comment No. 20, E/C.12/GC/20, July 2, 2009, para. 20.

xxiii. For example, in interpreting the CEDAW, its Committee has written that “[a]lthough the Convention only refers to sex-based discrimination, interpreting article 1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women.” The Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, December 16, 2010.

xxiv. Yogyakarta Principles, p. 6, footnote 1. Principles on the application of international human rights law in relation to sexual orientation and gender identity, 2006.

xxv. IACHR, Application before the Inter-American Court of Human Rights In the case of Karen Atala and daughters (Case 12.502) against the State of Chile, September 17, 2010, para. 94.

xxvi. Back on May 17, 1990, the World Health Organization (WHO) removed ‘homosexuality’ from the International Statistical Classification of Diseases and Related Health Problems. The term ‘homosexuality’ tends to be associated with the pathology of ‘homosexualism’, which was for many years listed among the classifications of psychiatric disorders. It was the social movement that rejected this term, preferring instead the term “gay”.

xxvii. In the English-speaking countries, the term “gay” tends to be used indiscriminately to refer to male and female. However, in Spanish-speaking countries, the preference is to use the adjective “gay” to refer to men, and “lesbian” to refer to women. The persistent association of the expression “lesbian” with lesbianism-homosexualism (as an illness or disorder) is problematic, which has made for opposing viewpoints on the use of this category.

xxviii. In its pan-Hispanic dictionary of doubts, the Royal Academy of the Spanish Language makes ‘gai’ the preferred orthography, rather than ‘gay’, and says the following in this regard: “Although among Spanish speakers the English pronunciation [géi] is widespread, the recommended usage in Spanish is to adapt the pronunciation to the orthography, which would mean that the pronunciation would be [gái]” [Free translation by the IACHR].

xxix. The Yogyakarta Principles are today an important source for a legal understanding of LGBTBI persons and their rights, because experts on the subject were instrumental in crafting those principles. Accordingly, some of the definitions used are based on these principles, as a reference, coupled with other relevant legal pronouncements on the subject. Yogyakarta Principles. Principles on the application of international human rights law in relation to sexual orientation and gender identity, 2006.

xxx. Yogyakarta Principles, p. 6, footnote 2. Principles on the application of international human rights law in relation to sexual orientation and gender identity, 2006.

xxxi. In her *The Apartheid of Sex: A Manifesto on the Freedom of Gender*, Dr. Martine Aliana Rothblatt developed this generic category, which the LGBTI social movement and academia have used as a cover term for the various expressions of transgender gender identity. The opposite of the transgender category

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is the cisgender category, which is when one's gender identity matches the behavior or role considered appropriate for one's biological sex. The subcategory of 'cis male' refers to a biological male with male gender identity, whereas the 'cis female' would be a biological female with a female gender identity. See in this regard, Serano, Julia. *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity*. Seal Press (Emeryville, CA), June 2007.

xxxii. See, for example, the Gender Identity Act, Uruguay, October 12 2009. This Act establishes in Article 3 (requirements) that "in no case it is required to have sex reassignment surgery for the granting of registration of the name or sex that does not conform to the gender identity of the person that is referred to in that document" (Free Translation by the IACHR).

xxxiii. In general terms there is a wide range of political positions around the term *travesti*. On the one hand, some groups of trans activists have pointed out that this term is derogatory, while other groups see the term *travesti* as a political term with great significance (see, for example, the Declaration of Feminist Travestis, XI Feminist Meeting of Latinamerican and the Caribbean. Mexico City, March 2009). Organizations such as Global Rights have indicated that the definition of a *travesti* person, as has been used in some parts in Latin America, has been used to refer to "males who, often at very young ages, adopt female names, clothing styles, hairstyles, and pronouns. They may or may not take female hormones, modify their bodies with silicone and/or undergo sex reassignment surgery. Generally *travestis* do not identify themselves with men or women, but claim their own identity. *Travesti* is a less comprehensive term than *transgender* is in English and they do not necessarily identify with the English usage of "transvestite." (p. 98). In the U.S. context, this organization points out, the term "transvestite is an out-of- date description most often referring to men who wear clothes conventionally associated with another gender". (p. 16). See Global Rights: Partners for Justice, Demanding Credibility and Sustaining Activism: A guide to sexuality-based advocacy, 2010, pp. 98, 16. The DSM or Diagnostic and Statistical Manual of Mental Disorders (302.3 "transvestic fetishism") defines these persons as heterosexual men who recurrently and with sexual intensity elaborate fantasies or actions that involve use of female clothing.

xxxiv. Information received by the IACHR in thematic hearings on the Situation of Human Rights of Lesbians, Gays, Trans, Bisexual and Intersex Persons.

xxxv. At the international level, the cases heard by the European Court of Human Rights –such as *B v. France* and *Christine Goodwin v. United Kingdom*– examine the legal implications of the discrimination experienced by transsexual persons who have undergone surgical treatment to become trans women.

xxxvi. The *Diagnostic and Statistical Manual of Mental Disorders IV (or "DSM IV"*, its acronym in English) of the American Psychiatric Association (APA) includes the nomenclature "Gender Identity Disorder in Adolescents or Adults" and "Transvestic Fetishism" [302.xx] to refer to transsexuality and transvestism, respectively.

xxxvii. The LGBTI movement, especially the trans movement, has mobilized to reject the medical-psychiatric categories under which they are classified. An example is the movement called "Stop Trans Pathologization 2012" whose goal is to get "gender dysphoria" and "gender identity disorders" delisted from the APA's DSM-IV.

xxxviii. From the information received by the Commission through hearings, information asserted in the reports sent to the Commission, and the complaints it received of alleged human rights violations, the Commission has become acquainted with some of the referents and self-referents. These vary according to a number of different factors, such as the LGTBI social sector, the country of origin, social or economic position or level of education. Nevertheless, there is a core consensus regarding certain referents and self-referents that harmonize those factors for practical reasons.

xxxix. Rodolfo and Abril Alcaraz, *El derecho a la no discriminación por identidad y expresión de género*, Textos del caracol, No. 4. Dante No. 14, CONAPRED 2008, p. 6 [free translation by the IACHR]. See

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also, International Commission of Jurists, *Sexual Orientation, Gender Identity and International Human Rights Law*, Practitioners Guide No. 4, 2009, p.21.

xli. International Commission of Jurists, *Sexual Orientation, Gender Identity and International Human Rights Law*, Practitioners Guide No. 4, 2009, p. 21.

xlii. For example, countries like Sweden prohibit discrimination by reason of a person's "transgender identity or expression." (See Sweden's Anti-Discrimination Act, which entered into force on January 1, 2009). See also the Gender Expression Non-Discrimination Act (GENDA), New York State, United States. The International Commission of Jurists has written that: "The second, 'social perception', approach examines whether or not members of a group share common characteristics constituting a recognizable group which sets them apart from society at large. The UNHCR Guideline on "Membership of a Particular Social Group" cites women, families and homosexuals as examples recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist. (...) Expressions of gender identity could conceivably be included in this approach. Gender expression is visible and can be a source of identification, especially when, through characteristics such as dress, mannerisms and modification of the body it subverts traditional expectations of gender expression." See Guidelines on International Protection ("Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees), paragraph 1. International Commission of Jurists. *Sexual Orientation, Gender Identity and International Human Rights Law*, Practitioners Guide No. 4, 2009, pp.132-133.

xliii. This may be the case of those persons who could be labeled as queer and, even though they do not lay claim to any category or would like to be labeled in any of them, society may label them because of their gender expression and the way society perceives them. Theoretician Judith Butler writes that gender is performative; i.e., the social definition of gender identity, and even of sexual orientation, is permeated by people's expressions and how they are perceived socially. See, *inter alia*, Judith Butler, *Gender trouble: feminism and the subversion of identity*, November 15, 1989.

xliiii. In the *Case of Perozo et al. v. Venezuela*, the Inter-American Court observed that: "[i]t is possible for a person to feel discriminated by the way other people think about its relation to a group or social sector, independently of whether such perception corresponds to reality or to the victim's self-identification." I/A Court H.R., *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195, paragraph 380. Similarly, other domestic courts like the United Kingdom's Asylum and Immigration Tribunal ruled as follows in one case: "[w]e find that as the reasons for persecution must be found in the mind of the persecutor there is no need to differentiate between such categories. The only question we need to ask is whether an individual is a member of a particular social group. It may matter a great deal to an individual whether he is or is not homosexual but, certainly in the context of Jamaica, whether an individual is or is not homosexual, bisexual or asexual is of far less importance than the question whether he is perceived to be homosexual. There is some force in the suggestion, that "perception is all". *DW (Homosexual Men - Persecution - Sufficiency of Protection) Jamaica v. Secretary of State for the Home Department*, CG [2005] UKAIT 00168, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 28 November 2005, para. 71, available at: <http://www.unhcr.org/refworld/docid/46836aa80.html>. The position of the Office of the United Nations High Commissioner for Refugees is similar. In this regard, it has held "in UNHCR's view, homosexuals can be within the ambit of a social group category, either as a group sharing a common characteristic or because they are perceived as a cognizable group in the society (...) This is widely accepted in practice of various jurisdictions." UN High Commissioner for Refugees, *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation*, 3 September 2004, para. 8, available at: <http://www.unhcr.org/refworld/docid/4551c0d04.html>.

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xliv. See, for example, the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the UN General Assembly and opened for signature and ratification in its resolution 34/180 of December 18, 1979, and which entered into force on September 3, 1991, pursuant to Article 27(1); and the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly and opened for signature and ratification in its resolution 2106 A (XX) of December 21, 1965. Entered into force on January 4, 1969, pursuant to Article 19.

xlv. The IACHR is of the view that this discrimination can manifest itself directly (intentionally or “with the effect of”), or indirectly (unintentionally or “with the purpose of”). Also that discrimination can be *de facto* –when it manifests itself in practice- or *de jure* –when its source can be traced to the law or a legal norm.

xlvi. The universal system for the protection of human rights has interpreted sex-based discrimination as including biological-physiological characteristics, but also discrimination based on gender, sexual orientation, gender identity and gender expression. In the *case of Toonen v. Australia* (April 1994), the United Nations Committee on Civil and Political Rights affirmed: “The State party has sought the Committee's guidance as to whether sexual orientation may be considered an “other status” for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view, the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.” *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994). See also the cases of the United Nations Committee on Civil and Political Rights: *Edward Young v. Australia* (Communication No. 941/2000), CCPR/C/78/D/941/2000, 6 August 2000) and *X v. Colombia* (Human Rights Committee, Communication No. 1361/2005: Colombia. 14/05/2007. CCPR/C/89/D/1361/2005).

xlvii. The Inter-American Commission and Court have statements in this regard in interpreting article 1.1 of the American Convention. Article 1.1 of the American Convention establishes: “[t]he States Parties to this Convention 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 social origin, economic status, birth, or any other social condition.” See IACHR, Application before the Inter-American Court of Human Rights In the case of Karen Atala and daughters (Case 12.502) against the State of Chile, September 17, 2010, paras. 95 and 105; I/A Court H.R., *Case of Karen Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2010. Series C No. 239, paras. 84, 85, 91 and 93. See IACHR, Application before the Inter-American Court of Human Rights in the case of Karen Atala and Daughters v. Chile, Case 12.502, September 17, 2010, pára. 95, 105. The Committee on Economic, Social and Cultural Rights of United Nations has indicated that ““Other status” as recognized in article 2, paragraph 2, includes sexual orientation. (...). States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.” UN, Committee on Economic, Social and Cultural Rights. General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, E/C.12/GC/20. 2009, para. 32 (see also 15 and 27). The European Court of Human Rights has indicated that sexual orientation is a concept covered under Article 14 of the European Convention on Human Rights. Article 14 of that treaty establishes: “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” See ECHR, *Salgueiro da Silva Mouta V. Portugal*, (No. 33290/96), Judgement dated 21 December 1999. Final, 21 March 2000, para. 28. See also ECHR, *Clift V. UK*, (No. 7205/07), Judgement 13 July 2010. Final, 22 November 2010, para. 57; ECHR, *Fretté V. France*, (No.

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36515/97), Judgement 26 february 2002. Final, 26 May 2002, para. 32; ECHR, *Kozak V. Poland*, (No. 13102/02), Judgement 2 March 2010. Final, 2 June 2010, para. 92; *J.M. V. UK*, (No. 37060/06), Judgement 28 September 2010. Final, 28 de diciembre de 2010, para. 55, y *Caso Alekseyev v. Russia*, (No. 4916/07, 25924/08 y 14599/09), Judgement 21 October 2010. Final, 11 April 2011, para. 108 (cited in I/A Court H.R., *Case of Karen Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2010. Series C No. 239, para. 87). See also the Presentation by the Office of the United Nations High Commissioner on Human Rights at the International Conference on LGBT Human Rights, Montreal, July 26, 2006, available at: [www.unhchr.ch/hurricane/hurricane.nsf/0/B91AE52651D33F0DC12571BE002F172C](http://www.unhchr.ch/hurricane/hurricane.nsf/0/B91AE52651D33F0DC12571BE002F172C).

xlvi. In this regard, the Inter-American Court indicated: “Taking into account the obligations of respect and guarantee under Article 1.1 of the American Convention, the criteria of interpretation established under article 29 of this Convention, the text of the Vienna Convention on the Law of Treaties, the OAS General Assembly Resolutions, the standards established by the European Court and the United Nations mechanisms, (...) the Inter-American Court affirms that the sexual orientation and gender identity of persons are protected categories under the Convention”. I/A Court H.R., *Case of Karen Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2010. Series C No. 239, para. 91 (Free Translation of the IACHR).

xlix. This case concerns a mother’s loss of custody of her daughters by virtue of her sexual orientation, in violation of the rights, *inter alia*, to due process and non-discrimination protected by the American Convention. Based on its analysis, the IACHR concluded that by taking away the mother’s custody of her daughters because of her sexual orientation, the State violated her right to equality protected under Article 24 of the American Convention, read in conjunction with Article 1(1) thereof, as there was no logical causal relationship between the means of removing custody and the end sought, which was the best interests of the girls. IACHR, Application before the Inter-American Court of Human Rights In the case of Karen Atala and daughters (Case 12.502) against the State of Chile, September 17, 2010, paras. 95, 105.

i. I/A Court H.R., *Case of Karen Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2010. Series C No. 239, paragraph 84. For an analysis of sexual orientation based on the jurisprudence of international human rights law, see in general paragraphs 83-93.

li. IACHR, Application before the Inter-American Court of Human Rights In the case of Karen Atala and daughters (Case 12.502) against the State of Chile, September 17, 2010, para. 111.

lii. The Commission has established in the past that the right to privacy can be implicated in denying intimate visits to women in jail based on their sexual orientation. In the case of Martha Lucia Alvarez Giraldo the petitioner alleged that her personal integrity, honor and equality, had been affected by the denial by penitentiary authorities to authorize the exercise of her right to intimate visits due to her sexual orientation. She alleged that the authorities made a distinction between the right to intimate visits for heterosexuals and homosexuals in jail. The State alleged for its part that to authorize intimate visits to homosexuals would affect the internal disciplinary regime of the jail establishments, since in its opinion, “the Latin American culture is not tolerant to homosexual practices in general”. The Commission admitted this complaint considering that these facts could characterize a violation of article 11(2) of the American Convention. See, IACHR, Report No. 71/99, Case 11.656, Martha Lucia Alvarez Giraldo, Colombia, May 4, 1999.

liii. IACHR, Application before the Inter-American Court of Human Rights In the case of Karen Atala and daughters (Case 12.502) against the State of Chile, September 17, 2010, paras. 111 and 116.

liv. IACHR, Report N. 4/01, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, para. 47 and IACHR, Report No. 38/96, X and Y (Argentina), October 15, 1996, para. 91 *cited in* IACHR, Application before the Inter-American Court of Human Rights In the case of Karen Atala and daughters (Case 12.502) against the State of Chile, September 17, 2010, para. 110. In this regard, see also the decision by the Human Rights Committee in the matter of *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc.

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CCPR/C/50/D/488/1992 (1994), para. 8. The Committee then said: “[t]he prohibition against private homosexual behaviour is provided for by law, namely, Sections 122 and 123 of the Tasmanian Criminal Code. As to whether it may be deemed arbitrary, the Committee recalls that pursuant to its General Comment 16[32] on article 17, the "introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances" (4) The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

Iv. I/A Court H.R., Case of Karen Atala Riffo and daughters v. Chile, Merits, Reparations and Costs. Judgment of February 24, 2012. Series C. No. 239, para. 191 (Free Translation by the IACHR) para. 161, citing its own jurisprudence in the cases of *Masacres de Ituango v. Colombia*. Preliminary Exception, Merits, Reparations and Costs. Judgment 1 July 2006 Serie C No. 148, para. 194 and *Fontevicchia y D'Amico v. Argentina*, Merits, Reparations and Costs. Judgment 29 de noviembre de 2011, Serie C. No. 238, para. 48.

Ivi. IACHR, Application before the Inter-American Court of Human Rights In the case of Karen Atala and daughters (Case 12.502) against the State of Chile, September 17, 2010, para. 111 *citing* the European Court of Human Rights, *E.B. v. Francia*, Application No. 43546/02, 22 January 2008, para. 91; European Court of Human Rights, *Smith and Grady v. the United Kingdom*, Applications Nos. 33985/96 and 33986/96, 27 September 1999, para. 89; European Court of Human Rights, *Lustig-Prean and Beckett v. the United Kingdom*, Applications Nos. 31417/96 and 32377/96, 27 September 1999, para. 82; European Court of Human Rights, *Karner v. Austria*, Application No. 40016/98, 24 July 2003, para. 37.