

A Shadow Report to the UN Committee on  
Economic, Social and Cultural Rights (ESCR)  
regarding Burundi's Protection of the Rights of  
Lesbian, Gay, Bisexual, Transgender and  
Intersex (LGBTI) persons.

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## EXECUTIVE SUMMARY

1. This report aims at informing the UN Committee on areas where the State of Burundi is failing to comply with international obligations under the International Covenant on Economic, Social and Cultural Rights (CESCR) to fulfill, respect and protect the Rights of LGBTI persons. It then suggests recommendations that should be included in the concluding observations of the Committee to the State of Burundi.

2. Burundi's Constitution integrates various relevant international and regional human rights instruments. Moreover, the Constitution guarantees non non-discrimination in line with international standards. However, intolerant discourses from official increased in recent years and legislation as well as discriminatory policies were adopted thus exacerbating an already existing intolerance against LGBTI individuals within the society. In 2009, the government of Burundi passed a legislation criminalizing same-sex sexual relations between consenting adults for the first time in the country's history. More concerning, as far as ESCR are concerned, is the fact that "homosexuality" is listed among the most serious faults leading to the exclusion from and denial of admission into education institutions according to a Ministerial Order adopted in 2011.

3. Burundi's discriminatory laws, policies and practices against LGBTI individuals show the State's failure to comply with its international obligations international human rights law. Non-discrimination and equality are the fundament principles upon which the whole human rights system rests. As the Committee has observed, non-discrimination under article 2 of is a cross-cutting obligation in the Covenant. Therefore, institutionalizing discrimination virtually affects any right under the Covenant. For the purpose of concision, however, this report focuses on Burundi's failure to enforce the rights under the Covenant as follows: **the principle of non-discrimination (art. 2), the right to work (art. 6), the right to health (art. 12), and right to education (art. 13)**. It then suggests recommendations for the Committee to the State of Burundi.

## INTRODUCTION

4. Burundi has undertaken a number of international and regional human rights commitments and is therefore bound to fulfill, respect and protect the human rights of Lesbian, Gay, Bisexual and Transgender (LGBTI) individuals<sup>1</sup>. Burundi is a State party to the International Covenant on Economic Social and Cultural Rights (CESCR)<sup>2</sup>, which it ratified on 9 May 1990. In accordance of article 19 of the Constitution of 18 March 2005: “The rights and duties proclaimed and guaranteed inter alia by the Universal Declaration of Human Rights, the international human rights covenants, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child form an integral part of the Constitution of the Republic of Burundi. These fundamental rights may not be the subject of any restriction or derogation, except in certain circumstances justified by the general interest of the protection of a fundamental right.” It is worth noting here that Burundi’s justifications of the country’s discriminatory laws and practices are inconsistent with the state party international obligations. Therefore, Burundi is under the obligation to enforce the Rights under the CESCR by virtue of its international commitments as well as the Country’s own Constitution.

5. Despite its obligations, Burundi has failed to undertake measures to achieve the full realization of the rights of LGBTI individuals under the Covenant and acted in violation of its obligations on occasions.

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<sup>1</sup>*Relevant instruments include the International Covenant on Civil and Political Rights (CCPR)*, Adopted and opened for signature, ratification and accession by General Assembly *resolution 2200A (XXI)* of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49, *the International Covenant on Economic, Social and Cultural Rights (CESCR)*, adopted December 16<sup>th</sup> 1966, G.A. *Res. 2200a (xxi)*, 21 U.N. Gaor supp. (No. 16), U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, Entered into force January 3, 1976; *Universal Declaration of Human Rights (UDHR)*, adopted December 10, 1948, G.A. *Res. 217a(iii)*, U.N. Doc. A/810 at 71 (1948); *the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, Adopted and opened for signature, ratification and accession by G.A. *resolution 39/46* of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1) on the international level; and on the regional level, *the African Charter on Human and Peoples’ Rights (ACHPR)*, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 *I.L.M.* 58 (1982), entered into force 21 October 1986

<sup>2</sup> Entered into force for Burundi on 9 August 1990.

## INTOLERANT LANGUAGE AND INSTITUTIONALIZATION OF DISCRIMINATION AGAINST LGBTI INDIVIDUALS

6. Although LGBTI people in Burundi have historically faced stigmatization and discrimination within the society, their lives have been for long characterized by silence and invisibility. As Andiah Kisia and Milka Wahu observe, in East African countries and in Burundi alike, the majority of the society knew little about the existence of sexual minorities not to say their sexual lives.<sup>3</sup>

7. In recent years, however, the LGBTI community in Burundi has faced public expression of intolerance including from opinion leaders and top government officials leading to the now institutionalized discrimination against LGBTIs. Between November 2008 and February 2009, Burundi's parliament engaged into debate about a new criminal code that would include article 567 criminalizing same-sex sexual conduct between consenting adults<sup>4</sup>. Though the provision had drawn controversy between the two chambers of Burundi's Parliament, the Senate having proposed its removal, it appeared in final version of the Code voted by National Assembly in February 2009. According to Human Rights Watch, the National Assembly's human rights commission added the provision at the last minute under the pressure of President Nkurunziza<sup>5</sup>. In March 2009, the ruling party, the National Council for the Defense of Democracy-Forces for the Defence of Democracy (*Conseil National pour la Défense de la Démocracie-Force de Défense de la Démocracie, CNDD-FDD*) organized a demonstration against homosexuality in Bujumbura clearly with the support from official authorities. School children were sent in to protest.

A step was taken farther towards the institutionalization of discrimination against LGBTI individuals in the area of ESCR when, the Minister for Primary and Secondary Education, Vocational and Professional Training and Literacy issued a Ministerial Ordinance listing 'homosexuality' as one of the most serious faults for which a school children shall be expelled and denied admission into any institution for the remainder of the considered

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<sup>3</sup>Andiah Kisia and Milka Wahu, in Wanja Muguongo and Happy Kinyili Ed., *A People condemned: The human rights of Lesbians, Gays, Bisexuals, Transgender and Intersex persons in East Africa (2009-2010)*, p.9

<sup>4</sup>Loi n° 1/05 du 22 avril 2009 portant révision du Code Pénal in *B.O.B n° 4 bis/2009*, pp.1-83.

<sup>5</sup>Human Rights Watch (2009) *Burundi: "Forbidden": Institutionalizing Discrimination Against Gays and Lesbians in Burundi*. New York, Berlin, Brussels, Geneva, London, Paris and Washington, D. C.: Human Rights Watch, July, p. 4

school year<sup>6</sup>.

8. Institutionalization as well as official expressions of intolerance against LGBTI individuals can be interpreted as an incitement towards more social stigmatization and discrimination against the LGBTI community, leading to children disownment by their parents in some instances according to the Movement for individual Liberties (Mouvement pour les Libertés Individuelles, MOLI)<sup>7</sup>. It further encourages human rights violations with a guaranteed impunity as illustrated in reports of allegations of harassments and threats, prosecutions or threats of prosecutions against LGBTI individuals due to their sexual orientation or gender identity as reported by Civil Society Organizations working on issues of human rights of LGBTI.

## SUBSTANTIVE VIOLATIONS

### Article 2 (General prohibition of discrimination)

9. Article 2 (2) of the Covenant obligates Burundi to ensure that all the substantive economic, social and cultural rights enunciated in the Covenant are exercised "without discrimination of any kind as to ... sex...or other status." Article 22 of Burundi's Constitution prohibits discrimination in similar wording whereas article 13 of the Constitution stipulates " All Burundians are equal in merit and in dignity, enjoy equally the same rights and have the same right to the protection by the law. No Burundian shall be excluded from the Nation's social, economic, social activities..."<sup>8</sup>

In the view of the Committee, article 2 (2) comprises sexual orientation as one of the grounds on which discrimination is prohibited given the wording "other status" indicating the non-exhaustive nature of the list of prohibited grounds<sup>9</sup>. According to the Committee, "In order for States parties to "guarantee" that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively."<sup>10</sup> Eliminating formal discrimination, the Committee observed, requires State

<sup>6</sup> Article 9, Ordonnance ministérielle n° 620/613 du 7/6/2011 portant fixation du règlement scolaire.

<sup>7</sup> Mouvement pour les Libertés Individuelles (2014), "*I love my country but my country does not love me*". *Human Rights: the situation of Lesbian, Gay, Bisexual, Transgender and Intersex persons in Burundi (2003-2013)*, p. 17

<sup>8</sup> Loi N° 1/010 du 18 mars 2005 portant promulgation de la Constitution de la République du Burundi, *B.O.B 2005, n°3 Ter*, p.1

<sup>9</sup> Committee on Economic, Social, and Cultural Rights, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, adopted in the Committee's 42nd session, Geneva, 4-22 May 2009, UN Economic and Social Council, E/C.12/GC/20, 10 June 2009, at 3, 7.

<sup>10</sup> *Id.*, at 8.

parties to ensure that laws and policy documents do not discriminate on prohibited grounds. Eliminating discrimination substantively or in practice, in turn, that measures are taken towards effective elimination of discrimination. Such an exercise may require special measures to accommodate groups of individuals, which suffer historical or persistent prejudice. Therefore, discrimination may occur through actions or omissions committed by State organs, either directly or indirectly, formally (*de jure*) or substantively (*de facto*) in the words of the Committee<sup>11</sup>.

10. The State of Burundi has failed to fulfill its obligations under the Covenant both formally and substantively. Formally, Burundi has violated its obligations under article 2 by enacting a legislation criminalizing homosexuality as well as adopting discriminatory policies.

Burundi's justifications of domestic discriminatory laws and policies against same-sex conduct on the ground of "homosexuality" "clashes with the customs of the population" is inconsistent with its obligations under international human rights law. As the Committee has reminded, common the common provision on equality and non-discrimination in both the Covenant and the International Covenant on Civil and Political Rights needs to be understood in light of article 26 of the International Covenant on Civil and Political Rights, which contains an independent guarantee of equal and effective protection before and of the law<sup>12</sup>. According to General Comment No. 18 of the Human Rights Committee, "Any legislation adopted by a State party "must comply with the requirement of article 26 that its content should not be discriminatory."<sup>13</sup> As the Human Rights Committee has further reminded, in the face of discriminatory customs and traditions, it is the State party obligation to take the lead and eliminate discrimination<sup>14</sup>. Therefore, the endured and systematic stigmatization and discrimination against LGBTI individuals in Burundi is an illustrative consequence of State's failure to effectively comply the obligations under article 2, and subsequently other rights under the covenant.

### **The right to work (art. 6& 7)**

11. The right to work is guaranteed under Article 6 and 7 of the Covenant. Article 54 of Burundi's Constitution guarantees the right of everyone to enjoy fair and satisfactory working conditions. In the case of LGBTI people in Burundi, the State has failed to

<sup>11</sup> *Id.*, at 3, 8. See *id.*, at 8 ( a) and (b) for a discussion on formal and substantive discrimination.

<sup>12</sup> General Comment No. 20, at 5.

<sup>13</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989. UN Doc. A/45/40, at 5.

<sup>14</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 28: Equality of Rights between Men and Women*, March 29, 2000. U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000),

implement its obligations under articles 6 and 7 both because of the State's failure to comply with article 2 and through the occurrence of violations.

12. First, enjoyment of the right to work by LGBTI individuals is undermined through Burundi's discriminatory legislation and policy documents, particularly in the education system. As the Committee has observed in its General Comment No. 13 "education is both a human right in itself and an indispensable means of realizing other human rights."<sup>15</sup> "As an empowering right", the Committee emphasizes, "education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities."<sup>16</sup> Therefore, failing to guarantee the right to education results inevitably in barrier to the full and effective of rights under articles 6 and 7 of the Covenant.

Second, there are reports of targeted acts of violation of the right to work against LGBTI individuals in Burundi. For example, a lesbian individual was fired from her job as a teaching assistant when her sexual orientation was discovered<sup>17</sup>. MOLI, in turn, reports that, in May 2011, in the central province of Gitega a job candidate known in the area to be a gay was rejected. The prospective employer is reported to have declared to the applicant that he/she would be recruited for the position only if he/she changed his/her same-sex orientation and then come back<sup>18</sup>.

### **The right to health (art. 12)**

13. Article 12 (1) of the Covenant recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The right to health is enshrined in article 55 of Burundi's Constitution though in a narrower definition confined to the right to health care services. According to the Committee, "the right to health contains both freedoms and entitlements." The Committee further observes "that the freedoms, include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference...." whereas "the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the

<sup>15</sup> Committee on Economic, Social, and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13, the right to education (art. 13)*, adopted in the Committee's 21st session, Geneva, 15 November- 3 December 1999, UN Economic and Social Council, E/C.12/GC/1999/10, 8 December 1999, at 1.

<sup>16</sup> *Id.*

<sup>17</sup> Interview quoted in Andiah Kisia and Milka Wahu, in Wanja Muguongo and Happy Kinyili Ed. (2010),

p.38

<sup>18</sup> MOLI (2014), p. 17



highest attainable level of health.”<sup>19</sup>

14. In adopting a legislation criminalizing same-sex conduct as well as discriminatory policies against homosexuality, the State of Burundi has acted in violation of its obligations under article 12 of the Covenant. As The UN Special Rapporteur on the right to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover notes “Criminal laws concerning consensual same-sex conduct, sexual orientation and gender identity often infringe on various human rights, including the right to health”<sup>20</sup>. Because of their generally inherent discrimination nature, the Special Rapporteur further points out, such laws “breach the requirements of a right-to-health approach, which requires equality in access to all people.”<sup>21</sup> Domestic laws criminalizing homosexuality, he further argued, have “adverse consequences on the enjoyment of the right to health ... through the creation of the societal perception that they are “abnormal” and “criminals”<sup>22</sup> because “the fear of judgement and punishment can deter those engaging in consensual same-sex conduct from seeking out and gaining access to health services.”<sup>23</sup>

15. Similar concerns were raised amidst parliamentary debates on the Burundi’s over the criminalization of same-sex sexual relations. A number of CSOs expressed concerns that, if adopted, such a law would particularly hamper the country’s efforts to prevent and combat AIDS<sup>24</sup>. Field research findings show that, in fact, sexual minorities prefer to avoid a health care system perceived as hostile fearing that their sexual orientation would be discovered if they sought treatment and they would face negative consequences<sup>25</sup>.

16. Burundi’s failure to comply to the State’s obligations under article 12 with regard to LGBTIs individuals is of a particular concern in the case of Burundi where state policies recognize LGBTIs individuals as one the most at risk groups and confirms the negative impact of societal stigmatization and discrimination<sup>26</sup>. It is not only a violation of Burundi’s international obligations but also a contradiction in the country’s policy planning and tools.

<sup>19</sup> Committee on Economic, Social, and Cultural Rights, *Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14, the right to the highest attainable standard of health (art. 12)*, adopted in the Committee’s 22<sup>nd</sup> session, Geneva, 25 April-12 May 2000, UN Economic and Social Council, E/C.12/2000/4, 11 August 2000, at 1.

<sup>20</sup> Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, submitted to the Human Rights Council in its 14<sup>th</sup> session, UN General Assembly, A/HRC/14/20, Apr. 27, 2010, at 6.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Human Rights Watch (2009), above, no. 8, p. 4

<sup>25</sup> Andiah Kisia and Milka Wahu, in Wanja Muguongo and Happy Kinyili Ed., above, no. 8, p. 49

<sup>26</sup> République du Burundi (2011), *Plan Stratégique National de Lutte contre le SIDA 2012-2016*, p. 31

### The right to education (art. 13)

17. Article 13(1) of the ICESCR recognizes "the right of everyone to education", where education "shall be directed to the full development of the human personality and the sense of its dignity..." The Committee has confirmed that State parties are under an obligation to "avoid measures that hinder or prevent the enjoyment of the right to education."<sup>27</sup> Article 2(2) of the Covenant, the Committee, observed, requires that the right to education in article 13 be exercised without discrimination of any kind, including on the basis of sexual orientation or gender identity<sup>28</sup>. The Committee has clearly expressed the view that State parties are under the obligation to ensure that "a person's sexual orientation is not a barrier to realizing Covenant rights..."<sup>29</sup>. Similarly, the requirement of "fellowship system" in schools, by virtue of article 13 (2) should be read with "the Covenant's non-discrimination and equality provisions"<sup>30</sup>.

18. Burundi's current discriminatory laws and policies against LGBTI people, particularly the above mentioned Ministerial Ordinance are obvious illustrations of the State's violations of its obligations under article 13 of the Covenant. The State of Burundi has failed to comply with its obligations under the Covenant in all the above aspects. It is worth mentioning that the Ministerial Order goes even farther than the criminal code in its discriminatory effects given the potential abuses<sup>31</sup> it can lead to since it refers to homosexuality as such whereas the penal code refers to same-sex sexual conduct. Reference to homosexuality as a real or perceived identity can lead to abuses in the interpretation and application of the Ordinance where mere suspicion of same-sex orientation or identity can trigger acts of violation, as this has been the situation in Burundi. In July 2014, MOLI has documented two cases, respectively in the northern province of Kayanza and Bujumbura, the capital city where two children might have been expelled merely on suspicions related to their sexual orientation<sup>32</sup>. The overall limited level of education among LGBTI individuals<sup>33</sup> can be seen as a resulting consequence of Burundi's formal discrimination as well as endured harassments against LGBTI people in schools. This is a serious failure to fulfill, respect and protect the rights under article 13 in violation of the requirement to implement "a fellowship school system".

<sup>27</sup> General Comment No 13, at 47.

<sup>28</sup> Committee on Economic, Social, and Cultural Rights, *General Comment No. 20*, at 3, 7.

<sup>29</sup> *Id.*, at 32.

<sup>30</sup> General Comment No 13, at 26

<sup>31</sup> MOLI (2014), p. 28

<sup>32</sup> Electronic correspondence with MOLI staff.

<sup>33</sup> *Id.*, p. 20

## CONCLUSIONS AND SUGGESTED RECOMMENDATIONS

19. Burundi's failure to comply with its international obligations under the Covenant is attributed to the country's discriminatory laws, policies and practices against LGBTI individuals. The institutionalization of discrimination against adults engaging in same-sex conduct, accompanied with an intolerant language including from top officials clearly incites to further human rights violations with a guarantee of impunity.

20. The following recommendations are suggested for the Committee to the State of Burundi:

### **20. 1. In relation to article 2 (non-discrimination, equality before law, right to human dignity):**

- Prohibit, punish intolerance against LGBTI individuals and take concrete and effective legislative, administrative measures to promote understanding of sexual orientation, gender identity and acceptance towards LGBTI individuals within the society as a whole;
- Clearly include sexual orientation and gender identity into anti discrimination provisions in the country's legislation and policy documents as a prohibited ground in the private and public sector;
- Revise the penal code to repeal article 567 criminalizing same sex same-sex sexual relations;

### **20. 2. In relation to article 6&7 read with article 2 (right to work, non discrimination):**

Take concrete legislative, administrative and other policy measures to eliminate any form of discrimination against LBGT individuals in the work place and take concrete and effective measures to guarantee their full enjoyment of the right to work without any barrier.

### **20. 3. In relation to article 12 read with article 2 (right to health, non discrimination):**

Take concrete and effective measures to ensure full enjoyment by LGBTI individuals of their right to health under the Covenant including through access to information, health care services particularly in relation to HIV/AIDs. Such measures should aim at rebuilding and promoting the confidence towards the health care system among LGBTI individuals through the promotion of understanding about sexual orientation choices and gender identify as well as capacity building on these issues for staffs in the health care system.

**20. 4. In relation to article 13 read with article 2 (right to education, non discrimination):**

- Amend the Ministerial Ordinance No.620/613 of 7 June 2011 establishing school regulations in Burundi to eliminate homosexuality as a fault punishable under school system regulations;
- Take concrete and effective measures to combat and eradicate acts of discrimination against LGBTI individuals in schools and ensure that cases of violations are punished;
- Promote understanding and tolerance of sexual orientation choices and gender identity among school staffs and as well as school children.

### **QUESTIONS TO THE STATE PARTY**

- 1) What measures does the State party intend to undertake to eliminate formal discrimination in all its forms including on the ground of sexual orientation and identity in domestic laws and policies?
- 2) What specific measures does the State party intend to undertake to modify the Ministerial Ordinance No.620/613 of 7 June 2011 establishing school regulations in Burundi to eliminate homosexuality as a fault punishable under school system regulations?
- 3) What measures and actions does the State party intend to undertake to effectively combat and eliminate discrimination against LGBTI people in Burundi in all the sectors of life, private and public?
- 4) What specific measures does the State party intend to undertake to combat and eliminate discrimination against LGBTI individuals in schools and in the work places, private and public?
- 5) What measures and actions does the State party intend to undertake to promote understanding of sexual orientation and identity choices and acceptance of LGBTI individuals within Burundi's society as a whole?

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