



**UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND  
CULTURAL RIGHTS**

**57<sup>th</sup> Session of the UN Committee on Economic, Social and Cultural Rights**  
22 February – 4 March 2016

**THE INTERNATIONAL COMMISSION OF JURISTS'  
SUBMISSION TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL  
RIGHTS IN ADVANCE OF THE EXAMINATION OF NAMIBIA'S COMBINED  
INITIAL, FIRST AND SECOND PERIODIC REPORTS UNDER ARTICLES 16 AND  
17 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND  
CULTURAL RIGHTS**

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P.O. Box, 91, Rue des Bains, 33, 1211 Geneva 8, Switzerland  
Tel: +41(0) 22 979 3800 – Fax: +41(0) 22 979 3801 – Website: <http://www.icj.org> -  
E-mail: [info@icj.org](mailto:info@icj.org)

**INTERNATIONAL COMMISSION OF JURISTS' SUBMISSION TO THE  
COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ADVANCE OF  
THE EXAMINATION OF NAMIBIA'S COMBINED INITIAL, FIRST AND SECOND  
PERIODIC REPORTS UNDER THE COVENANT**

**Introduction**

1. During its 57<sup>th</sup> session, from 22 February to 4 March 2016, the Committee on Economic, Social and Cultural Rights ('the Committee') will examine Namibia's implementation of the International Covenant on Economic, Social and Cultural Rights ('the Covenant'), including in light of the State party's combined Initial, First and Second Periodic Reports under articles 16 and 17 of the Covenant.<sup>1</sup> The International Commission of Jurists (ICJ) welcomes the opportunity to submit the following comments to the Committee.
2. In this submission, the ICJ wishes to draw the Committee's attention to the detrimental impact of the extant criminalization of consensual anal intercourse between males (hereafter: "sodomy") and of other various forms of sexual activities between consenting men through the crime of "unnatural sexual offences" on the enjoyment of Covenant rights, including, in particular, the principle of non-discrimination (article 2(2)) and the right to the highest attainable standard of physical and mental health (article 12) by gay and bisexual men and, more generally, by the gay, bisexual, lesbian and transgender (LGBT) community in the country.

**Background**

3. Today, under Namibian common law, the offence of "sodomy" criminalizes consensual anal intercourse between males with criminal liability attaching to both "active" and "passive" partners.<sup>2</sup>
4. Furthermore, the extant criminalization of "unnatural sexual offences" under Namibian common law makes men who consensually engage with one another in the following sexual activities criminally liable: "mutual masturbation"; "masturbation of one party by the other"; "sexual gratification obtained by friction between the legs of another person"; "oral sex"; and other unspecified sexual activity.<sup>3</sup> A man and a woman, or two women, who consensually engage in any of the above-mentioned sexual acts with one another, do not attract criminal liability.<sup>4</sup>
5. The Combating of Rape Act addresses a series of acts, including oral sex, anal sex and genital stimulation between people of the same or different sexes entailing non-consensual sexual contact in circumstances involving force or coercion. Such acts also

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<sup>1</sup> Committee on Economic, Social and Cultural Rights - Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights - Initial reports of States parties due in 1997 - Namibia, UN Doc.: [E/C.12/NAM/1](#), 13 February 2015.

<sup>2</sup> See, [Namibian Law on LGBT Issues](#), Gender Research and Advocacy Project, Legal Assistance Centre, 2015, p. 65.

<sup>3</sup> See [Namibian Law on LGBT Issues](#), p. 65.

<sup>4</sup> See [Namibian Law on LGBT Issues](#), p. 66.

amount to rape if they are committed with a child below 16 years of age.<sup>5</sup> In light of this, the common law crimes of "sodomy" and "unnatural sexual offences" are now relevant only to consensual sexual activity between men.<sup>6</sup>

6. While the common law criminal offences of sodomy and "unnatural sexual offences" appear to be seldom "enforced" in the sense of there being a recent record of criminal charge and imprisonment resulting from their application in respect of consensual acts between men,<sup>7</sup> charges have still occasionally been brought in practice. In 2005, for example, the Legal Assistance Centre represented two men who had been "arrested after being discovered committing a sexual act in a toilet in a private bar". They were charged with sodomy and other offences. Eventually, however, the sodomy charges were dropped.<sup>8</sup>
7. In addition, prison officials are reported as citing the "crime" of sodomy as a justification for refusing to distribute condoms among prisoners in an effort to prevent the spread of HIV infection – purportedly as a result of their stated fear that condom provision in this context would make them "accessories to crime".<sup>9</sup>
8. Furthermore, one cannot consider the said offences to have been abrogated through desuetude (i.e. lack of enforcement), since occasional arrests on suspicion of their commission are reported to occur, and since government officials, parliamentarians and others refer to them as being in existence.<sup>10</sup> For instance, when decriminalization was raised in the context of Namibia's Universal Periodic Review in 2011, with recommendations addressed to the Namibian authorities to decriminalize consensual homosexual activities, these recommendations were the only ones that "did not enjoy the support of Namibia".<sup>11</sup>
9. Festus Mogae, former President of Namibia, has gone on record noting that the criminalization of homosexuality, by punishing men who have sex with men, "forces them into secrecy. They are unable to access counselling and testing, making it almost impossible for HIV prevention and treatment interventions to reach them. The time has come for African leaders to take action against bad laws that stifle our HIV response. We must challenge societal values rooted in fear and prejudice and implement laws based on human rights and sound public health. This starts with recognizing the rights of women and decriminalizing homosexuality and voluntary sex work, which is vital to protecting the health and dignity of these groups."<sup>12</sup> This evidences a clear link between discrimination in form and substance, as addressed

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<sup>5</sup> The Combating of Rape Act of 2000 protects children below 14 years of age, while section 14 of the Combating of Immoral Practices Act 21 of 1980 providing similar protection for children up to 16 years of age 16. See [Namibian Law on LGBT Issues](#), p. 66.

<sup>6</sup> See [Namibian Law on LGBT Issues](#), p. 66.

<sup>7</sup> There are no reported court cases involving prosecutions for consensual sodomy or "unnatural sexual offences" between adult males since Namibian independence. However, statistics from the Namibian Police appear to disclose four to five arrests for sodomy over the ten-year period from 2003 to 2012. See, [Namibian Law on LGBT Issues](#), pp 66-67.

<sup>8</sup> See [Namibian Law on LGBT Issues](#), p. 67.

<sup>9</sup> See [Struggle to Survive: A Report on HIV/AIDS and Prisoners' Rights In Namibia](#), Aids Law Unit of the Legal Assistance Centre, Namibia and the University of Wyoming, 2008, p. 32 and following, cited in [Namibian Law on LGBT Issues](#), p. 69.

<sup>10</sup> See [Namibian Law on LGBT Issues](#), p. 66.

<sup>11</sup> [Report of the Working Group on the Universal Periodic Review: Namibia](#), Human Rights Council, Seventeenth Session, 24 March 2011, A/HRC/17/14, para. 99.

<sup>12</sup> Festus Mogae, former president of Botswana, July 2012, cited in [Namibian Law on LGBT Issues](#), p. 64.

below,<sup>13</sup> and the material enjoyment of the right to the highest attainable standard of health.<sup>14</sup>

### **ARTICLE 2(2): The principle of non-discrimination**

10. This Committee has clarified that “[i]n 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” in formal and substantive contexts:

(a) *“Formal discrimination: Eliminating formal discrimination requires ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds...;”*

(b) *“Substantive discrimination: Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2. The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. State parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.”<sup>15</sup>*

11. This Committee has also repeatedly stated that “other status” as recognized in article 2(2) of the Covenant includes sexual orientation and gender identity, and that “States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights”.<sup>16</sup>

12. Namibia’s criminalization of the above-mentioned consensual sexual acts between men, including through the notion of “unnatural sexual offences” which, in turn, lacks the clarity and specificity that the criminal law requires,<sup>17</sup> makes conduct protected under international human rights law “criminal” domestically. Criminalizing consensual same-sex acts contravenes Namibia’s Constitution and its international treaty and customary international law obligations, including under the Covenant, by which the country is bound. In particular, such criminalization breaches Namibia’s obligation to respect and protect the right to dignity; equality, including equality before the law and equal protection of the law; non-discrimination; liberty and security of person; privacy; opinion and expression; association and peaceful assembly; and the right to access health services and care without discrimination.<sup>18</sup> It also undermines the critical work of human rights defenders and civil society

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<sup>13</sup> See, immediately below, the section entitled: “ARTICLE 2(2): The principle of non-discrimination”.

<sup>14</sup> See, further below, the section entitled: “ARTICLE 12: the right to the highest attainable standard of health”.

<sup>15</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20: Non-discrimination in social, economic and cultural rights, UN Doc. E/C.12/GC/20, para. 8.

<sup>16</sup> Among others, CESCR, General Comment No. 20: Non-discrimination in social, economic and cultural rights, UN Doc. E/C.12/GC/20, para. 32.

<sup>17</sup> Under the principle *nullem crimen, nulla poena sine praevia lege poenali* and the consequent need for criminalization to be prescribed by law in clear and precise terms.

<sup>18</sup> Including as a result of Namibia’s customary international law obligations reflected in the Universal Declaration of Human Rights and pertaining to the listed rights.

organizations that seek to combat discrimination based on real or perceived sexual orientation and/or gender identity. Criminalization in this context has very serious public health implications, including, for example, as a result of the fact that it hinders the prevention and treatment of HIV/AIDS.

13. The Namibian common law "offences" of consensual sodomy and "unnatural sexual offences" constitute and directly result in discrimination on the basis of sexual orientation. In doing so, they foment an atmosphere of stigma and prejudice and fan the flames of hatred directed at LGBTI individuals in the country. They also constitute substantive discrimination in the enjoyment of Covenant rights, such as, for example, the enjoyment of rights to employment, education and health, as they prevent the adoption of measures to prevent, diminish and eliminate the conditions and attitudes that cause substantive or *de facto* discrimination.
14. Like the European Court of Human Rights in its ruling in *Dudgeon v. the United Kingdom*,<sup>19</sup> UN human rights Treaty Bodies, including this Committee, and independent human rights experts, recognizing the harm caused by the criminalization of consensual same-sex sexual conduct, have repeatedly urged States to repeal laws criminalizing homosexuality.<sup>20</sup> Furthermore, they have called attention to the ways in which the criminalization of consensual same-sex sexual conduct legitimizes prejudice and exposes people to hate crimes and police abuse, and have recognized that it can lead to torture and other ill-treatment.<sup>21</sup>
15. Legislation and administrative regulations that directly or indirectly criminalize consensual same-sex sexual orientation or conduct provide State actors with the means to perpetrate human rights violations, and enable non-State actors to infringe

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<sup>19</sup> *Dudgeon v. the United Kingdom*, no. 7525/76, European Court of Human Rights, judgment, 22 October 1981.

<sup>20</sup> In its Concluding Observations on Cyprus, in December 1998, for example, this Committee welcomed the abrogation of the provisions of the Penal Code criminalizing homosexual acts (E/C.12/1/Add.28, 4 December 1998, para. 7). See also, e.g., CESCR, Concluding Observations, E/C.12/TZA/CO/1-3, 13 December 2012: Tanzania; CESCR, Concluding Observations, E/C.12/IRN/CO/2, 17 May 2013: Iran; CESCR, Concluding Observations, E/C.12/JAM/CO/3-4, 17 May 2013: Jamaica; CESCR, Concluding Observations, E/C.12/UGA/CO/1, 19 June 2015: Uganda; CESCR; Concluding Observations, E/C.12/GMB/CO/1, 6 March 2015: Gambia; Human Rights Committee, *Toonen v Australia* (Communication 488/1992, 4 April 1994), UN Doc. CCPR/C/50/D/488/1992). The Update Report of the United Nations High Commissioner for Human Rights on Discrimination and violence against individuals based on their sexual orientation and gender identity, 4 May 2015, UN Doc. [A/HRC/29/23](#) (hereafter: the 2015 OHCHR SOGI Report), notes: "States have an obligation to protect the rights to privacy, liberty and security of the person, including the right not to be subjected to arbitrary arrest and detention. United Nations mechanisms have called upon States to fulfil these obligations by repealing laws used to punish individuals based on their sexual orientation and gender identity, including laws criminalizing homosexuality and cross-dressing, and have rejected attempts to justify such laws on grounds of the protection of public health or morals. States must refrain from arresting or detaining persons on discriminatory grounds, including sexual orientation and gender identity" and that "States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination. Arrests and the detention of individuals on charges relating to sexual orientation and gender identity – including offences not directly related to sexual conduct, such as those pertaining to physical appearance or so-called 'public scandal' – are discriminatory and arbitrary", para. 15 and para. 43, respectively (footnotes in the original omitted).

<sup>21</sup> E.g., see *Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law*, Office of the High Commissioner for Human Rights, [HR/PUB/12/06](#), 2012, p. 33; and the Report of the UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc.: [A/56/156](#), 3 July 2001, para. 20 and, generally, paras 18-25.

the rights of individuals on account of their real or imputed sexual orientation and/or gender identity with impunity.<sup>22</sup> As a result of criminal sanctions, people may be threatened with arrest and detention based on their real or imputed sexual orientation and may be subjected to baseless and degrading physical examinations, purportedly to "prove" their same-sex sexual orientation. Furthermore, the 2015 Update Report of the United Nations High Commissioner for Human Rights on Discrimination and violence against individuals based on their sexual orientation and gender identity has noted that, "[h]uman rights mechanisms continue to emphasize links between criminalization and homophobic and transphobic hate crimes, police abuse, torture, family and community violence and stigmatization, as well as the constraints that criminalization puts on the work of human rights defenders. The Special Rapporteur on freedom of religion or belief has noted that these laws may give a pretext to vigilante groups and other perpetrators of hatred for intimidating people and committing acts of violence".<sup>23</sup>

16. The European Court of Human Rights, for example, has found that pernicious legal, administrative, policy and/or judicial measures that were in themselves discriminatory – whether or not enforced at the time – or that were implemented in a discriminatory manner, violated the European Convention and caused their victims to experience fear and distress.<sup>24</sup> This approach recognizes the potential for persecution arising from the mere existence of these laws, even in the absence of a recent record of prosecutions and imprisonments,<sup>25</sup> whether arising from misfeasance of State actors outside due process or of non-State actors' abuses, against whom the State does not offer protection. In the case of *Dudgeon v. the UK*, the European Commission in fact noted the possibility of such laws making it more likely that police and private actors would commit acts of extortion and other crimes as well as engage in discriminatory treatment,<sup>26</sup> instead of, or at times in addition to, prosecution.

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<sup>22</sup> As the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has noted: "sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality directed at affected individuals," *A/HRC/14/20*, para. 20. The UN Special Rapporteur on extrajudicial executions noted that criminalization increases social stigmatization and made people "more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity", *A/57/138*, para. 37.

<sup>23</sup> The 2015 OHCHR SOGI Report, UN Doc. *A/HRC/29/23*, para. 45.

<sup>24</sup> See, *Dudgeon v. the United Kingdom*, no. 7525/76, judgment, 22 October 1981, paras 40 to 46; *Norris v. Ireland*, no. 10581/83, judgment, 26 October 1988, paras 38 and 46 to 47; *Modinos v. Cyprus*, no. 15070/89, judgment, 22 April 1993, paras 23, 24 and 26; and *A.D.T. v. the UK*, no. 35765/97, judgment, 31 July 2000, paras 26 and 39. See also, *Marangos v. Cyprus*, no. 31106/96, Commission's report of 3 December 1997, unpublished.

<sup>25</sup> In *Dudgeon v. the United Kingdom*, the European Court of Human Rights observed that, notwithstanding the then apparent paucity or even absence of a record of prosecutions in these types of cases, it could not be said that the legislation in question was a dead letter, because there was no stated policy on the part of the authorities not to enforce the law (para. 41 of the Court's judgment). In *Modinos v. Cyprus*, the European Court of Human Rights reiterated this point by noting that, notwithstanding the fact that the Attorney-General had followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct considering that the law in question was a dead letter, the said policy provided "no guarantee that action will not be taken by a future Attorney-General to enforce the law, particularly when regard is had to statements by Government ministers which appear to suggest that the relevant provisions of the Criminal Code are still in force", *Modinos*, judgment of the Court, para. 23.

<sup>26</sup> See the European Commission's report in *Dudgeon*, cited in the Court's judgment in the same case, where, in arriving at its conclusion that it saw no reasons to doubt the truthfulness of the applicant's allegations, the Commission had noted that, "the existence of the law will give rise to a degree of fear or restraint on the part of male homosexuals [...] the existence of the law prohibiting consensual and private homosexual acts [...] provides opportunities for blackmail [...] and may put a strain upon young men [...] who fear prosecution for their homosexual activities". They reached

17. Thus, the mere existence of laws criminalizing consensual same-sex sexual conduct can give rise to acts of persecution, without necessarily leading to recorded court cases and convictions.
18. Particular attention should also be paid to the lack of equality before the law and equal protection of the law, as well as access to justice, including to an effective remedy for violations of rights guaranteed under the Covenant,<sup>27</sup> arising as a consequence of criminalization. As an example, if LGBTI persons are dismissed from work, denied access to education and/or health care, or are discriminated against in their enjoyment of other Covenant rights, how can they seek an effective remedy and redress if the basis for these harms is legitimized in law by the existence of legislative provisions criminalizing consensual same-sex relations?
19. As a 2013 report on human rights commissioned by the Office of the Ombudsman in Namibia observed, "the presence of sodomy laws... makes gay men particularly susceptible to discrimination and interference with their privacy... The continued presence of sodomy laws also mistakenly creates the impression that the practice or otherwise of homosexuality is illegal in this country and this is wrong...".<sup>28</sup>
20. For these reasons, the ICJ considers that Namibia's common law "offences" of consensual "sodomy" and "unnatural sexual offences" between consenting men violate the principle of non-discrimination enshrined in article 2(2) of the Covenant.
21. In light of the above, the ICJ invites the Committee to address the following recommendations to the Namibian authorities:
  - a. **The State party should abolish the extant common law consensual "offences" of "sodomy" and "unnatural sexual offences";**
  - b. **The State party should introduce concrete measure aimed at eliminating formal and substantive discrimination on the basis of sexual orientation and/or gender identity.**

#### **ARTICLE 12: the right to the highest attainable standard of health**

22. As the Legal Assistance Centre notes, "[e]ven though the laws on sodomy and unnatural sexual offences are seldom enforced, their existence has a negative impact on the LGBT community. These laws perpetuate stigma and discrimination, create an

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this conclusion despite their finding that the number of prosecutions in such cases [...] was so small "that the law has in effect ceased to operate". It appears inevitable to the Commission that the existence of the laws in question will have similar effects. The applicant alleges in his affidavits that they have such effects on him", Commission's report, para. 94.

<sup>27</sup> See CESCR, General Comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant), Fifth session (1990), contained in document E/1991/23, para. 5; CESCR, General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, 2 July 2009, para. 40; and CESCR, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000, paras 59-62. See also, generally on the right to a remedy and to obtain reparation specifically with regard to economic, social and cultural rights, see International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, Human Rights and Rule of Law Series N° 2, International Commission of Jurists, Geneva, 2008.

<sup>28</sup> Office of the Ombudsman, [2013 Baseline Study Report on Human Rights in Namibia](#), 2013 at p. 97, cited in [Namibian Law on LGBT Issues](#), p. 64.

environment of fear, encourage secrecy which undermines public health initiatives and damage the dignity of LGBT individuals."<sup>29</sup>

23. As this Committee has clarified in its General Comment No. 14, the right to health contains a number of interrelated and essential elements, which include, among other things, non-discrimination (i.e., "health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds") and "information accessibility" (i.e., "the right to seek, receive and impart information and ideas concerning health issues").<sup>30</sup>
24. As pointed out by this Committee, "[b]y virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of... sexual orientation..., which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health".<sup>31</sup>
25. Furthermore, the following core obligations under article 12, as identified by this Committee, are of particular relevance for present purposes:
- (a) *"To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;*
  - (b) *"To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;*
  - (c) *"To ensure equitable distribution of all health facilities;*
  - (d) *"To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups."*<sup>32</sup>
26. Guaranteeing that the right to health will be exercised without discrimination of any kind constitutes an immediate obligation for the State party.<sup>33</sup> Further, the Committee has identified "a strong presumption that retrogressive measures taken in relation to

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<sup>29</sup> [Namibian Law on LGBT Issues](#), p. 64.

<sup>30</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para. 12.

<sup>31</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para. 18.

<sup>32</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para. 43. Furthermore, "obligations of comparable priority" are:

- (a) *To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;*
- (b) *To provide immunization against the major infectious diseases occurring in the community;*
- (c) *To take measures to prevent, treat and control epidemic and endemic diseases;*
- (d) *To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;*
- (e) *To provide appropriate training for health personnel, including education on health and human rights."*

CESCR, General Comment No. 14, para. 44.

<sup>33</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para. 30.



the right to health are not permissible".<sup>34</sup>

27. In its General Comment No. 14, this Committee identified a number of specific legal obligations stemming from the provision, including, among other things, "refraining from denying or limiting equal access for all persons"; "abstaining from enforcing discriminatory practices as a State policy"; refraining "from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information"; establishing a public health infrastructure that provides for sexual and reproductive health services; and "supporting people in making informed choices about their health".<sup>35</sup>
28. As the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has affirmed, the "health-related impact of discrimination based on sexual conduct and orientation is far-reaching, and prevents affected individuals from gaining access to other economic, social and cultural rights. In turn, the infringement of other human rights impacts on the realization of the right to health, such as by impeding access to employment or housing". The Special Rapporteur stated that "[t]hese infringements ultimately undermine the inherent dignity of persons upon which the international human rights framework is based".<sup>36</sup>
29. Generally, when consensual same-sex sexual conduct is criminalized patients may feel inhibited to share their sexual history with their doctor, which, in turn, may hinder their ability to recount their medical history and ultimately accurate diagnoses. Thus in general criminalization of consensual same-sex conduct detrimentally affects access to appropriate and adequate treatment and care.
30. The criminalization of consensual sodomy and the "unnatural sexual offences" thereby breaches Namibia's obligation to respect and protect the right to the highest attainable standard of health of persons who engage in consensual same-sex sexual conduct, as it impedes their access to health facilities, goods and services on a non-discriminatory basis. In countries where consensual same-sex sexual conduct is criminalized, such as Namibia, affected individuals are much more likely to be unable to gain access to effective health services, and preventive health measures that should be tailored to these communities are suppressed.<sup>37</sup>
31. Furthermore, criminalization in this context prevents the elaboration and operation of a health strategy that addresses the specific needs of persons who engage in consensual same-sex sexual conduct.
32. The continued criminalization of same-sex sexual conduct has negative consequences for mental health too, as criminalization perpetuates stigma, through the

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<sup>34</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para. 32.

<sup>35</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, paras 34-37.

<sup>36</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to the Human Rights Council, UN Doc. A/HRC/14/20, para. 6-7.

<sup>37</sup> Mahon, 'Sexual orientation, gender identity and the right to health' in Clapham & Robinson (eds.), *Swiss Human Rights Book*, vol. 3, *Realizing the right to health*, p. 238, cited at A/HRC/14/20, para. 18.

reinforcement of existing prejudices and stereotypes.<sup>38</sup> This can have a severe negative impact on the self-regard and mental well-being of persons who engage in consensual same-sex sexual conduct.<sup>39</sup>

33. Criminalization violates the right to health not just of those who engage in consensual same-sex sexual conduct but also of the population in general, in restricting access to information about sexuality. Thus, criminalization causes the withholding of health-related information, in turn undermining people's ability to make informed choices.
34. The criminalization of consensual same-sex sexual conduct has also undermined Namibia's fight against HIV/AIDS. Men who have sex with men (MSM) have been identified as one of the categories of the population that is "most at risk" of HIV. However, as the Namibia AIDS Response Progress Report 2015 states, "[w]idespread stigma and discrimination, gender violence and legal barriers continue to impede the realisation of human rights and HIV prevention and health care access of key populations, notably MSM and SW, thus exacerbating their already high risk for HIV, and that of clients"<sup>40</sup> and "[l]egal reforms are needed to protect key populations such as MSM and sex workers, and to strengthen the enabling environment for the protection of rights of people living with HIV".<sup>41</sup> The report for the previous reporting period also identified as a key challenge the fact that the "legal environment for Key Populations in Namibia remains prohibitive with sodomy and sex work punishable under the common law statutes of the country".<sup>42</sup>
35. The fact that MSM are highly marginalized in Namibia precludes them from easy access to HIV/AIDS services, which leads to a heightened risk of HIV transmission and infection.
36. For these reasons, the ICJ considers that Namibia's extant criminalization of consensual same-sex sexual conduct contributes to unequal access to health services and violates the right to the highest attainable standard of health, including by restricting access to relevant health-related information, in particular for, although not restricted to, those who engage in consensual same-sex sexual conduct.
37. In light of the above, the ICJ invites the Committee to address the following recommendations to the Namibian authorities:
  - a. **The State party should take tailored measures to ensure the right to the highest attainable standard of health for persons who engage in consensual same-sex sexual conduct; and**
  - b. **The State party should take measures to improve access to HIV/AIDS services, including by ensuring access to and the provision of health-related information to those who engage in consensual same-sex conduct and to the public at large.**

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<sup>38</sup> See e.g., Constitutional Court of South Africa, *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999), para. 54.

<sup>39</sup> On the negative health impact of the phenomenon of "minority stress", see Ilan H. Meyer, Declaration in the cases of Bayev v. Russia (No. 67667/09), Kiselev v. Russia (No. 44092/12), and Alekseyev v. Russia (No. 56717/12). <http://goo.gl/PnKhzp> (last accessed 25 September 2014).

<sup>40</sup> *The Namibia AIDS Response Progress Report 2015*, Reporting Period: 2013 – 2014, Republic of Namibia, Ministry of Health and Social Services, p. 36.

<sup>41</sup> *The Namibia AIDS Response Progress Report 2015*, p. 47.

<sup>42</sup> *The Namibia AIDS Response Progress Report 2013*, Reporting Period: 2012 – 2013, Republic of Namibia, Ministry of Health and Social Services, p. 40.