

THE VIOLATIONS OF HUMAN RIGHTS ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN THE FEDERAL REPUBLIC OF NIGERIA UNDER THE AFRICAN CHARTER OF HUMAN AND PEOPLES' RIGHTS

A SHADOW REPORT

In Response to the
PERIODIC REPORT OF THE FEDERAL REPUBLIC OF NIGERIA Presented at the 50th
Ordinary Session of the Commission in October/November 2011

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AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

50TH SESSION OCTOBER AND NOVEMBER, 2011
BANJUL, THE GAMBIA

OCTOBER, 2011

I. Introduction

This shadow report on the rights of sexual minorities in The Federal Republic of Nigeria is the result of a collaborative effort between Heartland Alliance for Human Needs & Human Rights, the African Men for Sexual and Health Rights (AMSHeR), domestic and regional non-governmental organizations, and the International Human Rights Clinic and Human Rights Program at Harvard Law School.¹

Nigeria signed the African Charter on Human and Peoples' Rights ("the African Charter")² on 31 August, 1982 and ratified it on 22 June, 1983. The African Commission will consider Nigeria's August 2011 periodic country report on the implementation of the African Charter during the 50th ordinary session of the Commission, which will take place from 24 October to 7 November, 2011.

In its fourth periodic report to the African Commission, for the period of 2008 to 2010, the government of Nigeria asserted that it "is committed to the progressive realization of the basic rights and freedoms of individuals and groups as well as their duties enshrined in the African Charter on Human and Peoples' Rights through legislative, policy, judicial, administrative and budgetary measures."³ In spite of this commitment, however, the government of Nigeria failed to mention in its report, let alone address, the numerous serious human rights violations that face sexual minorities every day within that state. Persons throughout Nigeria continue to face criminalization, violence, intimidation, and discrimination on account of their sexual orientation and gender identity and the state is both taking active part in these violations and allowing them to be committed with impunity by private actors.

We hope that the African Commission will find the results and conclusions of this report to be useful in promoting and protecting human rights for all under the African Charter.

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² Organization of African Unity, African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *available at*: www.unhcr.org—3ae6b3630.html

³ Fourth implementation report. Nigeria. African Charter on Human and Peoples' Rights. Aug. 2011.

II. Executive Summary

In addition to being a party to the African Charter, the Constitution of Nigeria guarantees the fundamental rights to life,⁴ respect for the dignity of the person,⁵ liberty,⁶ a fair and speedy trial,⁷ privacy,⁸ freedom of assembly and association,⁹ and non-discrimination.¹⁰ The Constitution also asserts as one of its foreign policy objectives: “respect for international law and treaty obligations,” which serves to integrate into the Nigerian Constitution the rights protected by international conventions to which it is a party.¹¹ Nigeria is a State Party to the International Covenant on Civil and Political Rights (ICCPR),¹² the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹³ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁴ and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁵

Article 60 of the African Charter encourages the African Commission to “draw inspiration from international law on human and peoples' rights...as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.” Thus, Nigeria’s obligations under these international instruments can help to elucidate its obligations under the African Charter. The African Commission has already decided several cases in part by relying upon jurisprudence from other regional human rights bodies.¹⁶ The case of *Law Office of Ghazi Suleiman v. Sudan* in particular has highlighted the relevance of Article 60 in applying jurisprudence from the European Court on Human Rights and the Inter-American Court of Human Rights.¹⁷

Sections 214 and 217 of the Federal Penal Code violate Articles 2, 3, and 28 of the African Charter and Articles 2(1) and 26 of the ICCPR. Nigerian citizens are subject to harassment, violence, and discrimination on the basis of their real or presumed sexual orientation or gender identity in violation of Articles 2, 3, 4, 5, 6, 7, 15 and 16 of the African Charter.

Further, individuals face harassment, violence, torture, cruel, inhuman and degrading treatment at the hands of both private and state actors in Nigeria. Even when the state does not take active

⁴ The Constitution of the Federal Republic of Nigeria, Article 33.

⁵ The Constitution of the Federal Republic of Nigeria, Article 34.

⁶ The Constitution of the Federal Republic of Nigeria, Article 35.

⁷ The Constitution of the Federal Republic of Nigeria, Article 36.

⁸ The Constitution of the Federal Republic of Nigeria, Article 37.

⁹ The Constitution of the Federal Republic of Nigeria, Article 40.

¹⁰ The Constitution of the Federal Republic of Nigeria, Article 42.

¹¹ The Constitution of the Federal Republic of Nigeria, Article 19(d).

¹² Acceded on 29 July, 1993.

¹³ Acceded on 29 July, 1993.

¹⁴ Signed on 23 April, 1984, ratified 13 June, 1985.

¹⁵ Signed on 28 July, 1988, ratified 28 June 2001.

¹⁶ For example, *Curtis Francis Doebbler v. Sudan* [Communication 236/2000 – 16th Annual Activity Report] applied jurisprudence from the European Court of Human Rights.

¹⁷ Communication 228/1999 – 16th Annual Activity Report at 48-50.

part in these human rights violations, police often fail to protect sexual minorities, in violations of Article 4 of the African Charter, political leaders foster the hostile environment with public homophobic statements, and the existence of laws criminalizing same sex conducts and other same sexual behaviors not only create the conditions for stigmatization, discrimination and violence, but promote impunity and lack of reporting for fear of consequences to the victims.

Sexual minorities and same-sex practicing persons in Nigeria are also systematically denied access to essential health services provided by state run facilities, in violation of Article 16 of the African Charter.

III. Substantive Violations of the Charter

Articles 2 and 3 (Non-Discrimination and Equal Protection)

Relevant Law and Jurisprudence

Article 2 of the African Charter provides that “[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status” while Article 3 guarantees that “[e]very individual shall be equal before the law” and that “[e]very individual shall be entitled to equal protection of the law.” Though the African Commission jurisprudence on the interpretation of these articles is limited, the Commission has established their importance in *Purohit and Another v The Gambia*:

“Articles 2 and 3 of the African Charter basically form the anti-discrimination and equal protection provisions of the African Charter. Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. Their provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter.”¹⁸

The Commission further developed the interpretation of these articles in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, this time with specific mention of sexual orientation:

“Together with equality before the law and equal protection of the law [as provided for by article 3 of the Charter], the principle of non-discrimination provided under article 2 of the Charter provides the foundation for the enjoyment of all human rights...equality and non-discrimination ‘are central to the human rights movement’. The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or *sexual orientation*.”¹⁹

In establishing the meaning of these articles, international sources beyond the interpretation of the African Commission, can also be referenced. Article 60 of the African Charter provides that “the Commission shall draw inspiration from international law on human and peoples’ rights” and “various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members.” This would include the ICCPR and interpretations by specialized UN Committees. Article 2(1) of the ICCPR contains language analogous to Articles 2 and 3 of the African Charter:

¹⁸ *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003)

¹⁹ *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (2006) AHRLR 128 (ACHPR 2006), emphasis added.

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

Article 26 of the ICCPR echoes this language explicitly requiring the equal protection of all individuals within States Parties:

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

Moreover, the Human Rights Committee (“HRC”)—the specialized international body established to monitor States Parties’ implementation of the ICCPR—requires that “non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.” The HRC has applied this stipulation in *Toonen v. Australia* and has interpreted “sex” in Articles 2(1) and 26 of the ICCPR to include sexual orientation stating that domestic law criminalizing private, homosexual relations between consenting adults to be discriminatory and in violation of these articles.²⁰ Additionally, another specialized body, the United Nations Working Group on Arbitrary Detention, has held that arrests for consensual homosexual conduct are *per se* human rights violations.²¹ In addition, Section 37 of the Nigeria’s 1999 Constitution guarantees the right to privacy while Section 15(1) guarantees the right to be free from discrimination. These provisions, compounded with Nigeria’s obligations under the ICCPR and African Charter demonstrate that the state cannot infringe on the rights of citizens on account of sexual orientation.

With these non-discrimination provisions of both the ICCPR and the African Charter come their respective equal protection provisions. In forbidding discrimination against individuals based on a variety of statuses, both the African Charter and the ICCPR require that States Parties equally protect all individuals irrespective of the enumerated categories. In *Legal Resources Foundation v. Zambia* the Commission underlined the importance of this right to equal protection stating that “equality, or the lack of it, affects the capacity of one to enjoy many other rights.”²² Meanwhile, the HRC has read this right *vis-à-vis* the equal protection clause to include sexual orientation as a protected category. In *Young v Australia*, the HRC held that Australia had violated Article 26 of the ICCPR by “denying the author a pension on the basis of his sex or sexual orientation.”²³

²⁰Toonen v Australia, Communication No. 488/1992, U.N Doc CCPR/C/50/D/488/1992 (1994).

²¹ Report of the Working Group on Arbitrary Detention, E/CN.4/2004/3, 15 December 2003, para. 73; see also Working Group on Arbitrary Detention, Opinion No. 7/2002 (Egypt), para. 27, UN Doc. E/CN.4/2003/8/Add.1; Opinion No. 22/2006 (Cameroon), para. 19, UN Doc.A/HRC/4/40/Add.1.

²²Legal Resources Foundation v Zambia, [Communication 211/98 – 14th Annual Activity Report: 2000-2001], at 63.

²³ Edward Young v Australia, Communication No. 941/2000: Australia. 18/09/2003. U.N Doc. CCPR/C/78/D/941/2000 (2003) at 10.4.

Through this holding, the HRC concluded that distinctions made on the basis of sexual orientation were denials of the right to equality before the law.

The HRC has rejected the criminalization of homosexuality as well. In *Toonen*, the HRC repudiated Tasmania's argument that the criminalization of homosexual practices was a reasonable and proportionate measure to "achieve the aim of preventing the spread of HIV/AIDS." The Committee held that it is "undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy'."²⁴ According to the HRC, the sodomy law was "arbitrary interference with Mr. Toonen's privacy" without being "proportional to the end sought and... necessary in the circumstances "of the case."²⁵ In this vein, the newly created Committee of People Living with HIV/AIDS, and persons at risk, vulnerable and affected by HIV/AIDS includes in its mandate that vulnerable groups, including men who have sex with men ("MSM"), should receive special attention, when working to combat the spread of HIV/AIDS.²⁶ This mechanism of the African Commission therefore is a proponent of special attention to MSM communities rather than criminalization as a way to combat HIV/AIDS.

Violations and Effects of Discrimination based on Sexual Orientation and Gender Identity

Both the Federal Criminal Code and the Shari'a Penal Code of Nigeria criminalize homosexual relations and same-sex sexual behaviors and conducts in some form. Section 214 of the Nigerian Federal Code Act contains the broad provision prohibiting any person from having "*carnal knowledge of any person against the order of nature...*" or who "*permits a male person to have carnal knowledge of him or her against the order of nature*" and makes anyone convicted of these crimes liable to fourteen years of imprisonment.²⁷ Moreover, Section 217 of the Nigerian Criminal Code states that "*Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for three years.*"²⁸

Additionally, twelve Northern states in Nigeria have adopted Shari'a law as state penal law.²⁹ As an example, Zamfara Shari'a penal code law in Section 130 defines Sodomy (Liwat) thus: "*Whoever has carnal intercourse against the order of nature with any man or woman is said to commit the offence of sodomy: Provided that whoever is compelled by the use of force or threats or without his consent to commit the act of sodomy upon the person of another or be the subject*

²⁴Toonen v Australia at 8.2.

²⁵Ibid. at 8.3.

²⁶ The African Commission on Human and Peoples' Rights, meeting at its 47th Ordinary Session held in Banjul, The Gambia, from 12 to 26 May 2010. Available at:http://www.achpr.org/english/resolutions/Resolution163_en.htm

²⁷ Nigerian Federal Criminal Code, Section 214.

²⁸ Nigerian Federal Criminal Code, Section 217.

²⁹ <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119018.htm>

of the act of sodomy, shall not be deemed to have committed the offence."³⁰ It punishes the act with 100 lashes for the unmarried and holds the perpetrator liable for one year imprisonment and punishes those who are married with stoning to death. Moreover, unlike the Federal Criminal Code act, the Shari'a specifically punishes lesbianism (Sihaq): "*Whoever being a woman engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another has committed the offence of Lesbianism.*" The punishment is stated thus: "*Whoever commits the offence of lesbianism shall be punished with caning which may extend to fifty lashes and in addition be sentenced to a term of imprisonment which may extend to six month*"³¹s.

While the Federal Penal code explicitly penalizes men from engaging in same-sex sexual intercourse and Shari'a law prohibits both sexes from engaging in same-sex sexual conducts a new draft law criminalizing same-sex marriage has also been introduced to the Nigerian political landscape. The Same-Gender Marriage (Prohibition) bill originating from a previous version introduced in 2006 by the government of Former President Obasanjo, has been introduced as private bill in 2011 and is currently before the Senate for consideration³². The new proposed legislation notably criminalizes the contracting of marriage between individuals of the same sex, an offense punishable for five years of prison and/or a fine.³³ One of the most worrisome provisions of the draft law is the criminalization of the "coming together of persons of same sex with the purpose of living together as husband and wife or for other purposes of same sexual relationship."³⁴ Nigerian human rights groups, both LGBT and mainstream civil society organizations and activists, have expressed concern that the draft law, if enacted, particularly with this provision, will lead to widespread human rights abuses. Even more concerning, the bill establishes that any person who "witnesses, aids and abets" the solemnization of same sex marriage is punishable up to five years of imprisonment.

According to LGBT and mainstream human rights organizations, the bill targets a certain group of people and thus violates Nigeria's regional and international human rights commitments and the principles of non-discrimination of the Nigerian Constitution. The proposed legislation violates privacy, freedom of assembly, and the gender and sexual identity of a group of people. The proposed bill is also considered aimed to exclude a group of Nigerian citizens from being equal members of their communities and society. In several aspects, the wording of the law is very vague, giving room to different interpretations. For example, witnessing can be interpreted in the sense of a legal notification of a marriage, but it can also be interpreted in a broader sense, which would include all persons being present at a same sex marriage. The problem of vague wording also lies in the bill defining same sex marriage broadly as persons of the same sex coming together to live as husband and wife or for other purposes of a same sexual relationship.

³⁰ Shari'a Penal Code Law Zamfara State of Nigeria, January, 2000, at <http://www.f-law.net/law/showthread.php/37487-Shari-ah-Penal-Code-Law-Zamfara-State-Of-Nigeria-January-2000>

³¹ Shari'a Penal Code Law Zamfara State, articles 134-135.

³² A bill for An Act to Prohibit Marriage Between Persons of the Same Gender, Solemnization of Same and for Other Matters Related Therewith, SB. 05, 2011.

³³ Same Gender Marriage (Prohibition) Bill, § , Federal Republic of Nigeria Senate

³⁴ Ibid. at § 6

The ambiguous language of the bill is considered a major problem by members of LGBT Civil Society and mainstream human rights organizations, because the definition of a same sex marriage is wide and vague, and the bill also criminalizes persons who live together without being married. Furthermore, it was unclear what the bill means by prohibiting persons living together for “other purposes”. The bill is seen by LGBT and mainstream civil society as a tool which could easily cover a number of normal, everyday circumstances where people share a room for economic reasons, as friends or as migrant workers. The bill could also be used in a situation, where a woman/ a man are staying in a flat with a house help. In Nigeria most young males often share a room because they are not economically stable and because living with a woman without being married is not allowed in some parts of the country. The proposed piece of legislation could generate hate crimes and give justification for police and the public to extrajudicial actions such as arbitrary arrests, beatings, lynching and even killings. This will further bring about more insecurity to an already infringed and marginalized group of people. The federal nature of the bill will also prohibit the age-long same sex marriages even in those states where today same sex marriages among females are accepted as traditional and cultural unions for the purpose of procreation.³⁵

Human rights activists have highlighted the potential implication of the Same-Gender Marriage (Prohibition) Bill 2011. This bill, like the 2007 and 2006 versions, goes beyond the prohibition of same-sex marriage and creates potential areas of repression against citizens on grounds of their presumed or real sexual orientation. As indicated above, the definition of same-sex marriage according to the bill is inconsistent with the definition of (opposite-sex) marriage, but includes not well defined forms of living together of persons of the same sex, easily subject to abuse, blackmail and extortion by state and non-state actors. A similar risk would occur for anyone (regardless of his or her sexual orientation) who had any connection to two individuals of the same sex who are suspected to live together “as husband and wife or for other purposes of same sexual relationship.” According to the definition of same-sex marriage provided by the bill itself, such union would not require any solemnization, but the mere fact of living together, expanding the risk of prosecution for “witnessing, aiding and abetting” to anyone related to individuals of the same sex living under the same roof for whatever reason.

This criminalization of homosexual conduct has led to the arrests of individuals suspected of engaging in homosexual activity and the deprivation of these individuals’ due process rights.

Additionally, while anti-sodomy laws are difficult to enforce because participants must essentially be caught in the act, particularly under Shari’a law, where the evidence requirements are particularly strict, they serve to produce a climate of fear and discrimination for individuals based on their real or presumed sexual orientation. This climate encourages private actors to victimize individuals, and particularly members of the sexual minorities, because they are seen as criminals rather than individuals deserving rights and protection; it further tends to make state action to protect the rights of sexual minorities less likely. Anti-sodomy laws also discourage sexual minorities from seeking essential health services and from reporting instances of violence perpetrated against them, because they fear prosecution if their sexual orientation is discovered.

³⁵ This is mostly practiced in the cultures of the eastern and southern part of Nigeria by women who are unable to have children. These women marry their fellow women for purposes of procreation.

One such incident of violence involved attacks on members of the House of Rainbow Metropolitan Community Church, a church which supports members of the lesbian, gay, bisexual and transgender community in Lagos. On 12 September 2008, local newspapers, Nation, Vanguard, PM News and the Sunday Sun, published photos, names, and addresses of church members. Consequently, people harassed and threatened several members of the church. Reports of abuses include eleven men attacking one woman while perpetrators beat, threatened, and threw stones at other members.³⁶

One victim who was attacked by a mob reported: *“This is just to inform you all that I practically escaped death just a few days ago when a group of about eleven to fifteen boys rampageous attacked me with planks, sticks, bottles and iron bars. I sustained very fatal injuries all over my body... I have a broken lip. I sustained lacerations all over my body and a blood spot on my eye that was almost blinded. It was a very ghastly incident!”*³⁷ Another person accounted: *“In some exceptional incidence I was being stoned with tomatoes at the market place close to my house, when I was off for shopping. Right now I am hiding due to attacks and being evicted by my own family. I have no access to money, food, clothing, shelter, and I am being hunted for.”*³⁸ According to a third account of another member of the House of Rainbow: *“Although we may not notice any reaction of the public as at now, but you will all agree with me that anything could happen. The Police, the SSS and the Area Boys might have been stimulated by this kind of article now, and they might have started keeping trails on any affiliate of House of rainbow, or any group or individual that is suspected to be gay... Well the news as spread to my school regarding the second year anniversary programme [the event of the House of Rainbow that attracted the attention of media and caused the violent reaction in the communities] I attended. This led to different kind of abuse and discriminations. I was being given a corporal punishment by beating. I have been rejected by my family. I was being beaten by gangs of boys employed by my father, now I am sustaining some injuries on my body. I am getting sadder every minute. I was told of being reported to the police by my father for arrest, and I have no where to go. No shelter and nothing to live on.”*³⁹

The incident demonstrates the hostility of much of the Nigerian press against individuals to be suspected to be homosexuals as well as issues of state protection with regard to attacks on individuals suspected to be gays and lesbians. According to the U.S. State Department Human Rights Report on Nigeria, no investigation was carried out to bring perpetrators to justice.⁴⁰

Incidents regarding attacks from community members against individuals suspected to be homosexuals occur frequently in Nigeria, with total impunity for perpetrators.

³⁶ UK Gay News, US State Department Criticises Russia, Serbia for Breaches of Human Rights of Gays - Human Rights Report praised by Moscow Gay Pride Organisers, <http://ukgaynews.org.uk/Archive/09/Feb/2602.htm>, February 26 2009

³⁷ Communication with one of the victims, September 23rd, 2008.

³⁸ Communication with one of the victims, September 21st, 2008.

³⁹ Communication with one of the victims, September 25th, 2008

⁴⁰ US State Department 2010 Human Rights Report: Nigeria, <<http://www.state.gov/g/drl/rls/hrrpt/2010/af/154363.htm>>

On May 29th, 2011, in the Federal Capital Territory, four young men were ousted publicly about their alleged sexual orientation and about information of their volunteering with a gay organization. A crowd invaded their houses vandalizing their properties, stripped them naked, whipped them with cutlasses, took their belongings out of the house and burnt it with fire, and after molesting them, they marched them to the chief's (community head) palace in that area threatening to kill them. The four men were able to escape but could not return to their houses⁴¹.

In March 2011 in Benin City, Edo State, three girls were intercepted in their apartments early in the morning by 7 men with weapons and were asked to have sex with one another while they were being recorded with a camera, The men alleged that the girls were lesbians and that they had heard them having sex during the previous night. The three young women were forced to perform sexual acts with one another under the threat of being raped to "ensure they never go back to lesbianism"⁴². The recording of the sexual assault has been circulating among youth in Benin City and came to the attention of human rights defenders in the area.

On January 13th 2011 in Ifitedunnu, Awka Anambra State, during a traditional marriage in the community, a 20 years old man was taken to a corner by five men who were present at the marriage celebration and seriously beaten. The men alleged they had beaten their victim because of his alleged sexual orientation and his "girly behaviours"⁴³.

On April 25th 2011, in Awka, Anambra State, a young boy named Eloka and his cousin were seriously beaten and locked up in an empty room for 3 days by youths of their community who claimed they acted upon instruction of the uncle of the victim to punish them because of their alleged sexual orientation⁴⁴. Another well-known incident is the arrest of eighteen men in the Northern State of Bauchi. In August 2007, 18 men were arrested and were charged with idleness, which includes "addressing each other as women and dressing themselves as women," and is illegal under section 372 sub-section 2(e) of the Islamic Shari'a penal code. These men were attending a private party at a local hotel when the Hisbah (anti-vice squad) and the Nigerian Police force, who had been informed that gay youths would be attending the party and somehow construed that the event was a gay wedding, raided the party. Activists and lawyers that followed the case reported that the men were not dressed like women when they were arrested, contrary to the report of the police charge sheet, thereby suggesting that "the charges have been drummed up to incite hatred against gay people."⁴⁵

⁴¹ Account of one of the victims, May 2011, on file with the International Human Rights Clinic and Human Rights Program at Harvard Law School.

⁴² Communication with human rights defenders in South-East Nigeria, October 2011, on file with the International Human Rights Clinic and Human Rights Program at Harvard Law School. (A video of the incident is available for reference purposes with Nigerian LGBT human rights defenders upon request.)

⁴³ Communication with human rights defenders in South-East Nigeria, October 2011, on file with the International Human Rights Clinic and Human Rights Program at Harvard Law School.

⁴⁴ Communication with human rights defenders in South-East Nigeria, October 2011, on file with the International Human Rights Clinic and Human Rights Program at Harvard Law School.

⁴⁵ Communications from activists and lawyers, August-September 2007, on file with the International Human Rights Clinic and Human Rights Program at Harvard Law School.

Evidences that the eighteen men were dressed like women were never produced in court. Rather, in contradiction with the charges, the police later argued that articles of female clothing and cosmetics were found in the belongings of the accused, which according to the government, proved that the young men were about to carry out an illegal and immoral act of same sex marriage and homosexuality⁴⁶.

The young men were subject to angry and violent public responses to their alleged crimes. There were local demands for the men to be stoned to death and angry mobs assembled outside of the court yelling anti-gay epithets and demanding the stoning of these men. In response to the judge downgrading the charge to the non-death penalty charge of vagrancy, the angry mob threw rocks at the defendants and attempted to lynch the judge. There were even reports of angry community members trying to force their way into the prison where the defendants were held in an attempt to lynch them.⁴⁷ This incident highlights several alarming issues. The angry attack by the mobs suggests that individuals that are simply suspected of being homosexuals are vulnerable in Nigeria and the criminalization of homosexual conduct only fuels this hate sentiment. Moreover, the suspect nature of the police raid also suggests that individuals are vulnerable to police abuse on grounds of their real or presumed sexual orientation or gender identity because of these laws.

According to another incident, as reported by local newspaper, The Nation, involved two men from Imo State who were “on the run for fear of being killed” after they were allegedly caught “committing homosexuality.” The men were caught by community members, ordered to submit themselves to “purification rituals,” which have a deadly implication, and subsequently ran away.⁴⁸ Another report from a gay individual detailed an encounter with a landlord threatening to evict him on the ground of his sexual orientation. The individual and his friends were “ousted publicly” and information that they had provided to a “gay organization” was made public. As a result of these revelations, a crowd came into the house, stripped the individual and his friends, whipped them with cutlasses, vandalized and burnt their belongings and threatened to kill them. The individual reported the situation to the police who, upon finding out that he was accused of being gay, beat and robbed him.

Situations like the one described above are not uncommon. A study describes how the punishment for persons “involved in same sex relationships include purification, banishment, flogging, ostracism, and demolition of homes, destruction of property and even in some rare cases death”. According to the testimony in the context of a Community Focused Discussion “*There is punishment, one, those people will be subjected to a kind of cleansing ritual by the chief priest of the land, they will be stripped naked and taken round the whole village...so after doing that they will be banished for life or for a specific period of time and their houses will be demolished and their properties will be confiscated by the chief priest of the land until may be when he must have served the punishment and they will be welcomed back to the village.*”⁴⁹

⁴⁶ Global Rights, Fighting human rights abuses against lesbian, gay, bisexual and transgender (LGBT) individuals, communities and human rights defenders in Nigeria, January 2008

⁴⁷ Nigeria’s anti-Gay Witchhunt, The Guardian, 29 August 2007

⁴⁸ Two Face Death for Homosexuality in Imo, The Nation Newspaper, December 10, 2010.

⁴⁹ INCREASE, Report of a Survey on Sexual Diversity, cap. 5.5, 2009.

These sentiments of hatred also appear to exist among political and religious leaders. During discussions of the Same Gender Marriage (Prohibition) Bill 2007, different House Representatives made a variety of homophobic comments. For instance, Hon. Igo Aguma reportedly said: “It is time for us at this point in time to think back and look at the scourge of HIV/AIDS. The greatest means of transmitting this disease is through the act of ‘sodomy’. Young children are already victims of been lured into this cruel and unimaginable act. It is an act of perversion.”⁵⁰ Additionally, in February 2009, the Nigerian Minister of Foreign Affairs told a UN Universal Periodic Review (“UNUPR”) of Human Rights that there is no gay, lesbian, bisexual and trans community in Nigeria. In his address to the UNUPR, Minister Ojo Madueke, echoing Nigeria’s official report to the UN, stated that there is “no record of any group of Nigerians who have come together under the umbrella of Lesbian, Gay and Transgender group; let alone to start talking of their rights.”⁵¹ These official remarks indicate neglect of the gays and lesbians in Nigeria as a vulnerable group, which therefore call into question the state’s protection of these individuals. This neglect compounded with homophobic attitudes among police, politicians, and the general population, suggest a profound problem regarding discrimination against gay and lesbian individuals.

The primate of the Nigerian Anglican Church Nicholas Okoh, speaking at a conference in Abuja in June 2011, has suggested that Nigeria withdrew from the UN system to “protect the moral health of our nation” if the UN continued endorsing the human rights of sexual minorities⁵².

Article 4 (Life)

Relevant Law and Jurisprudence

Article 4 of the African Charter proclaims “human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.” The African Charter has previously recognized sexual identity-based discrimination as a reason for concern. In its 2005 Consideration of the State Report submitted by Cameroon, the African Commission cited “intolerance against sexual minorities” as an area of concern regarding that country’s compliance with the African Charter, establishing a nexus between Article 4’s proclamation and the commission’s desire to protect sexual minorities.⁵³

Additionally, discrimination based on sexual orientation in Nigeria is in direct conflict with the country’s own constitution.⁵⁴ Chapter 14 of the Nigerian Constitution provides that “all citizens, without discrimination on any group whatsoever,” are ensured the opportunity for adequate means of livelihood, an opportunity to secure suitable employment, adequate medical and health

⁵⁰ Reps Vote Against Gay Marriage, Sun News, January 16, 2009

⁵¹ Nigeria tells UN that Gays Don’t Exist in Their Country, Pink News, February 16, 2009.

⁵² Anglican primate calls for withdrawal from UN for supporting gay rights, at www.channelstv.com, June 29th, 2011.

⁵³ African Commission on Human and People’s Rights. Concluding Observations and Recommendations on the Periodic Report of the Republic Cameroon. Thirty-Ninth Ordinary Session 11 – 25 May 2005, Banjul, The Gambia. Para 14. Available at: http://www.achpr.org/english/other/Con_Observations/Cameroon/2nd_COs_Cameroon.pdf

⁵⁴ Nigerian Constitution available at: <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>

facilities for all persons, equal pay for equal work without discrimination on account of sex, or on “any other ground whatsoever.”⁵⁵

In the twelve northern states of Nigeria that have adopted Shari’a law, sexual intercourse amongst men can be punishable by death: “*Whoever has carnal intercourse against the order of nature with any man or woman is said to commit the offence of sodomy: Provided that whoever is compelled by the use of force or threats or without his consent to commit the act of sodomy upon the person of another or be the subject of the act of sodomy, shall not be deemed to have committed the offence...whoever commits the offence of sodomy shall be punished:-*

(a) With caning of one hundred lashes if unmarried, and shall also be liable to imprisonment for the term of one year; or

(b) if married with stoning to death (rajm).”

Violations and Effects of Discrimination Based on Sexual Orientation and Gender Identity

While numerous violations of Article 4 have been discovered, incidents of harassment, violence, torture and cruel inhuman or degrading punishment and treatment motivated by the victim’s sexual orientation are greatly underreported. This is largely due to the fear of being “out-ed” in a culture of intolerance and stigmatization perpetuated by the government’s homophobic statements and actions, lack of police protection and fear of prosecution under both the Federal Penal Code and Shari’a law.

Nevertheless, there are several documented instances of violations of Article 4’s right to life and integrity of person. For instance, in a case involving the military, six men – four from the military and two civilians, -- were arrested in Kano under charges of sodomy and other related acts, and put in military detention in Kaduna. The two civilians were severely beaten and forcibly confessed. The four military men were kept in detention and suffered severe health repercussions because they were not given medical attention. They were eventually released on bail; however, they have not been issued orders to return to their job posts and are suffering from a lack of livelihood.⁵⁶

In 2001, a gay man in Nigeria named Attahiru Umar was sentenced to death via stoning after his neighbors accused him of having sex with an underage boy.⁵⁷ In Lagos, Omotayo Joshua was attacked by a group of individuals who claimed to be “cleansing Lagos of Homosexuals.”⁵⁸ He later died of his injuries. In 2005, Yusuf Kabir, aged 40, and Usman Sani, aged 18, were brought before a judge at Katsina’s Shari’a Court Number 3 for a hearing after being charged with committing sodomy.⁵⁹ The fact that these individuals were persecuted and had their right to life infringed upon is clearly a violation of Article 4.

⁵⁵ Chapter II, Section 17, clause 3 of Nigerian Constitution

⁵⁶ Global Rights, Fighting human rights abuses against lesbian, gay, bisexual and transgender (LGBT) individuals, communities and human rights defenders in Nigeria, April 2009.

⁵⁷ <http://allafrica.com/stories/200109270122.html>

⁵⁸ <http://www.edgeboston.com/index.php?ch=news&sc=glbt&sc3=&id=73209&pg=2>

⁵⁹ <http://mg.co.za/article/2005-07-13-gay-nigerian-men-face-being-stoned-to-death>

Articles 5 (Dignity), 6 (Liberty and Security of the Person) and 7 (Fair trial)

Relevant Law and Jurisprudence

Articles 5 and 6 of the African Charter provide for the right to “respect of the dignity inherent in a human being,” and the right to “liberty and security of his person.”

Article 5 of the African Charter also specifically prohibits all forms of “exploitation and degradation of man particularly slavery, slave trade, torture, cruel inhuman or degrading punishment and treatment.”⁶⁰ The African Commission has held that Article 5 of the Charter prohibits “not only cruel, but also inhuman and degrading treatment...[which] includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience.”⁶¹ This prohibition encompasses a wide array of abusive conduct. In *Curtis Francis Doebbler v Sudan*, the Commission held that whether an act constitutes a violation of Article 5 will depend on the circumstances of the particular case, but it also decided that “torture, cruel, inhuman or degrading treatment or punishment is to be interpreted as widely as possible to *encompass the widest possible array of physical and mental abuses*.”⁶² This broad interpretation of what behaviour is prohibited is also complemented by the Human Rights Committee’s interpretations of the correlative provisions under the ICCPR. The Human Rights Committee’s General Comment No. 20 established that the purpose of the prohibition against torture and cruel, inhuman or degrading treatment is to “protect both the dignity and the physical and mental integrity of the individual.”⁶³

Article 6 of the African Charter establishes that “no one may be deprived of his freedom except for reasons and conditions previously laid down by the law,” expressly banning arbitrary arrest and detention.

Finally, article 7 establishes the right for every individual to a fair trial, including the right to an appeal, the presumption of innocence, the right to defence, and the right to be tried within reasonable time by an impartial court or tribunal.

Violations and Effects of Discrimination Based on Sexual Orientation and Gender Identity

The above mentioned account of the eighteen men arrested in Bauchi highlights breaches of article 5 of the Charter. Furthermore, serious questions arise with reference to whether their right to security and to a fair trial of the defendant had been respected. After their arraignment on the sole account of idleness (that includes in its definition the act of cross-dressing), the eighteen men were bailed, and rearrested immediately after the bail hearing; they were lately re-arraigned with 4 count charges (conspiracy, unlawful gathering, indecent acts, and—again—idleness), and re-bailed. Their trial has been postponed on a monthly basis, on request of the prosecution.

⁶⁰ Article 5, African Charter on Human and Peoples’ Rights.

⁶¹ *Curtis Francis Doebbler v Sudan*, [Communication 236/2000 – 16th Annual Activity Report], at 36.

⁶² *Id.* (emphasis added)

⁶³ OHCHR, “General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art 7):. 10/03/92.” Available at:

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument), accessed on 8 October 2011.

between 2007 and 2010, and has been adjourned *sine die* in late 2010, following the ethnic and religious incidents occurred in Bauchi and Plateau states.⁶⁴ During the arraignment hearing the judge referred to the defendants as ‘yan daudu, an Hausa derogatory term to address homosexuals and transgender individuals⁶⁵. These patterns of behaviors by the judiciary are in contradiction with article 7(1)(d) of the Charter.

The existence of laws criminalizing same-sex conducts is cause in some instances of arbitrary arrests and degrading treatment. In a more recent incident occurred in the city of Bauchi on June 5th, 2010, five young men were arrested by the Hisbah on grounds of allegedly being about to perform a same sex wedding. According to the account of one of the victims, Ibrahim,⁶⁶ the anti-vice police raided the venue where a party was taking place, two DJs and two guests were arrested. Several participants were severely beaten by the Hisbah, which also confiscated their phones and some money. Ibrahim escaped the arrest, but was later arrested at his home for allegedly organizing a same sex marriage. Ibrahim was bailed by his parents, and was intimated to appear before the Shari’a Commission on the following Monday. The others were detained and interrogated several time. In absence of evidence of a crime, the case was transferred to the Criminal Investigation Department that disposed the release of the men without any charge being pressed against them.⁶⁷

In April 2008. two women (H.H. 28yrs & A.Y. 24yrs⁶⁸) were arraigned before the Upper Shari’ah Court located at Tudun Wada, Kaduna, found guilty of lesbianism and sentenced to 20 lashes of the cane and 6 months imprisonment without bail.⁶⁹ The two women were immediately lashed in public in front of the court and were immediately taken to the prison house located at the Independence way, Kaduna to commence their sentence⁷⁰. In *Curtis Francis Doebbler v. Sudan* the Commission stated that “there is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences,⁷¹” requesting to the Republic of Sudan to abolish the penalty of lashes: there is no doubt, therefore, that the corporal punishment that was administered to the women constitutes cruel and degrading punishment under international law and violates article 5 of the Charter.

The two women had been allegedly married for five years according to a customary form of marriage between women that is traditional in certain areas of the country. The case became publish after one of the two women wanted to break the marriage and therefore demanded the

⁶⁴ According to the U.S. State Department Human Rights Report, as of the end of 2010, the case still had not in fact been resolved and the trial had been postponed several times with the defendants being out on bail (US State Depart 2010 Human Rights Report).

⁶⁵ Account of human rights activist present at the hearing, August 2007, on file with the International Human Rights Clinic and Human Rights Program at Harvard Law School.

⁶⁶ Ibrahim is not the real name; the real name is not published to protect the privacy and the security of the victim.

⁶⁷ Account of the victim, June 2010, on file with the International Human Rights Clinic and Human Rights Program at Harvard Law School.

⁶⁸ Although the names have been made public, we deliberately decided not to publish them to respect their right to privacy that had been violated by newspapers publishing names and pictures of the two women.

⁶⁹ Aminiya, April 11th, 2008.

⁷⁰ Daily Trust, April 13th, 2008.

⁷¹ Communication no. 236/2000, para. 42.

dowry price of N5, 000 which she had paid before the marriage. The women were condemned despite the lack of evidence that any sexual act had been consummated and despite the fact that they were not given any option of seeking legal assistance of a defense lawyer,⁷² in contradiction with article 7 of the Charter.

In 2008, in Port Harcourt, a group of young men went to the place of work of Azubuike Wokoma (name not real) with policemen to arrest him. Wokoma is a gay man and for this reason was accused of sodomy and cultism; he was tortured while in police custody to the point of confessing all he has never done. He was assisted by pro bono lawyers who ensured his release from police custody and cautioned the police to desist from further acts of harassment of his person⁷³.

Article 10 (Freedom of Association)

Relevant Law and Jurisprudence

Article 10 of the Charter establishes that “Every individual shall have the right to free association provided that he abides by the law.”

Violations and Effects of Discrimination Based on Sexual Orientation and Gender Identity

The existence of legislation criminalizing same sex conducts and the hostile environment that surrounds individuals on grounds of their real or perceived sexual orientation or gender identity has an impact on members of the LGBT community to freely associate for social activities and for claiming their rights.

The case described above of the attacks to the members of the House of Rainbow and the inaction or the complicity of State authorities shows the precarious situation of LGBT activists who choose to organize. One member of the House of Rainbow denounced: “*At the moment we are reviewing the repercussions which has reached and prompted reactions from the State government and the State Police. If our events are investigated and eventually closed down by the police, we have to begin considering the alternative actions we can follow.*”⁷⁴

Article 15 (Work)

Relevant Law and Jurisprudence

Article 15 of the Charter establishes that every individual has a “right to work under equitable and satisfactory conditions.” This provision, combined with the principle of non discrimination of article 2, highlights how discrimination at the workplace on grounds of real or perceived sexual orientation or gender identity is contrary to the African Charter.

⁷² Communication with the victims, April 2008.

⁷³ Communication with the lawyers, October 2011, on file with the International Human Rights Clinic and Human Rights Program at Harvard Law School.

⁷⁴ Private communication, September 23rd, 2008.

Violations and Effects of Discrimination Based on Sexual Orientation and Gender Identity

According to the accounts of several newspapers, two policewomen, R.S. and C.J., were dismissed from the Nigerian Police on grounds of their alleged sexual orientation in Maiduguri, Borno state, in December 2008. The two women's alleged relationship had been reported by the boyfriend of one of the two to their supervisor, who dismissed them from service regardless of the fact that both denied the allegations.⁷⁵

Article 16 (Health)

Relevant Law and Jurisprudence

Under Article 16 of the African Charter of Human and Peoples' Rights, "every individual shall have the right to enjoy the best attainable state of physical and mental health." Additionally, the Charter implores that all State Parties involved take "necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick." The Committee of People Living with HIV/AIDS, and persons at risk, vulnerable and affected by HIV/AIDS created by the African Commission also mandates special attention should be given to vulnerable groups, including men who have sex with men ("MSM"), in the fight against HIV/AIDS.⁷⁶ However, there are few safeguards to ensure that this happens in Nigeria and individuals suspected of homosexuality are often denied access to health care because of their perceived sexual orientation.

Violations and Effects of Discrimination Based on Sexual Orientation

Although the Nigerian Constitution does not explicitly protect LGBT rights, it does, like the African Charter, provide all citizens equal rights, including the right to ensure that an individual's right to health is not "endangered or abused." Despite this claim, there are many instances where individuals who were suspected of homosexuality were denied access to health care. The stigma associated with homosexuality in Nigeria is one that often prevents individuals from seeking medical treatment. Given both the federal penal code and the Shari'a law penalties associated with homosexuality, it is easy to see why many homosexuals living in Nigeria would fear both persecution and prosecution if they were to attempt to visit a public hospital.

For instance, on 2 February, 2011, in Lagos, a young man was denied access to health care and was chased out of a hospital when he expressed having experienced pain in his buttocks. Upon visiting a government run hospital, a doctor began an examination of the patient before abruptly leaving. The patient was later told by the nurse that they "don't treat homosexuals," that he "should just leave." The young man has since been too scared to go to any hospital because of this problem.

⁷⁵ Vanguard, January 1st, 2009; Daily Trust, December 30th, 2008.

⁷⁶ The African Commission on Human and Peoples' Rights, meeting at its 47th Ordinary Session held in Banjul, The Gambia, from 12 to 26 May 2010. Available at:http://www.achpr.org/english/resolutions/Resolution163_en.htm

One Mr. Kelly Briggs was recently denied medical attention in a hospital in Port Harcourt he went to acquire medical services and told the doctor he was gay. The said Mr. Briggs had over a period of time experiencing some discomfort at in the anal region, which he suspected could be due to Sexual Transmitted Infection (STI). After a period of 18 months he decided to go to a hospital wherein he satisfied pre-consultation requirement, went in to see the doctor but the doctor upon being informed by the patient of his sexuality refused to attend to him. The doctor explicitly stated he did not attend to deviants and/or perpetrators of abominable acts. The patient lodged a complaint with the assistance of a lawyer and was consequently treated⁷⁷.

⁷⁷ Communication with the lawyers, October 2011, on file with the International Human Rights Clinic and Human Rights Program at Harvard Law School.

IV. Concluding Notes and Observations

As a State Party to the African Charter, Nigeria is bound to its Article 1 obligation to “recognize the rights, duties and freedoms enshrined in the Charter and...to adopt legislative or other measures to give effect to them.”⁷⁸ However, through its criminalization of same sex conduct and behaviors, discriminatory arrests, failure to address private actors’ violence and intimidation of sexual minorities, and neglect of sexual minority communities, Nigeria has failed to fulfill this obligation. Both the cultural and political landscapes are hostile towards individuals on grounds of real or alleged sexual orientation and gender identity, and discriminate against and exclude individuals on the basis of their sexual orientation and gender identity. In terms of criminalization and discriminatory law enforcement, the government actively sponsors this discrimination while, in other cases, it passively neglects its duty to provide protection to gay and lesbian individuals equal to that received by their heterosexual counterparts. These state actions have resulted in serious and oftentimes violent violations of political and social rights as well as basic rights to life, health, and dignity of persons and individuals.

⁷⁸ African Charter, Article 1

V. Recommendations

1. The government of the Republic of Nigeria should amend the Federal Code and repeal Sections 214 and 217 to decriminalize private, consensual, adult same-sex sexual activity.
2. The government of the Republic of Nigeria should enforce the non-discrimination and equal protection provisions of the 1999 Constitution especially with regard to penalties established by Shari'a Penal Codes regarding same-sex conducts.
3. The government should implement extensive police trainings on sexual orientation and gender identity issues and instill a disciplinary system for police officers who omit investigating acts of violence based on real or presumed sexual orientation or gender identity, or engage in discriminatory law enforcement against individuals because of their real or presumed sexual orientation or gender identity.
4. The government should fulfill its international obligations ensuring equal access health regardless of an individual's sexual orientation.

VI. Proposed Questions for the Government

1. What steps does the government intend to take to protect individuals subject to harassment, violence, and discrimination on account of their sexual orientation and gender identity and in violation of the rights to life, integrity, and dignity, in the light of the numerous documented cases of violence?
2. How does the government intend to react to the Same Gender Marriage (Prohibition) Bill 2011, with particular reference to the provisions that have the potential to limit the freedom of association, and to increase the level of abuses by state and non-state actors in the country?
3. What steps does the government intend to take to ensure that individuals are not arbitrarily arrested and detained, that are not subjected to cruel, inhuman and degrading treatments and punishments, including corporal punishments, that are not denied the right to fair and speedy trial because of their presumed or real sexual orientation?
4. How does the government justify maintaining Sections 214 and 217 of the Federal Penal Code and Section 130 of the Shar'ia Penal Code given its inconformity with international and regional human rights law?
5. How will the government ensure, in the future, that sexual minorities are able to access essential health services and HIV/AIDS prevention programs?