International Standards in the Field of LGBT Rights

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Introduction

"Those who are lesbian, gay or bisexual, those who are transgender, transsexual or intersex, are full and equal members of the human family, and are entitled to be treated as such."

High Commissioner for Human Rights at the United Nations 2008-2014
Mrs. Navanethem Pillay

When discussing the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) people, we do not talk about any special rights they are entitled to, apart from the existing corpus of human rights. We are talking about the same, universal rights which should apply to every individual anywhere in the world. The rights of LGBTI people should be protected in the same way as are the rights of all other people and no right should be denied to them.

In the last couple of years, many states have made a significant effort in strengthening the protection of human rights of LGBT people – from passing anti-discrimination laws, punishing hate crimes committed against LGBT people, educating public officials, acknowledging same-sex relationships and marriages to the extent of enabling same-sex couples to adopt children. Unfortunately, there are other states, systems, traditions and customs where even the right to live is being denied only because someone is a member of the LGBTI community.

International bodies, whose members we are (United Nations and the Council of Europe) or are striving to become (European Union), play an important role in shaping policies for the protection of every individual. However, those belonging to minority communities and their associations play an even larger role. The history of human rights is the history of marginalized groups. Their continued struggle testifies to the fact how far away the world is from the proclaimed universality of human rights.

The existing international system for the protection of human rights also protects the rights of LGBTI people, although not always in such an obvious manner. There are often specific actions and measures necessary in order to secure their full enjoyment of rights. Not one of the binding instruments of the United Nations for the protection of human rights (Conventions and Pacts) is dedicated exclusively to the rights of LGBTI people, nor are the LGBTI people directly mentioned in them. However, through the mechanisms for the application of these instruments, the corpus of international rights has started to see its application in cases of violating the rights of LGBT people, which starts changes and shapes policies. The issue of LGBTI people's rights is slowly entering the system of the United Nations, through resolutions in which they appear "bashfully" at first and with a lot of resistance, only to have thematical reports dedicated to this topic in recent years. The role of the Human Rights (HRC) and the United Nations Office of the High Commissioner for Human Rights (OHCHR) is indisputable in this process, as well as the role civil society organizations play.

The following text is an attempt at consolidating the existing international legislation in the area of human rights protection according to different sexual orientation and gender identity. Parallel to that, we hoped to present a review of the compatibility of domestic legislation, policy and actions for protecting the human rights of LGBT people in Serbia with international standards, and to present guidelines and recommendations and point at the protection of these rights.

In addition to the overview of binding international documents, there is also an overview of relevant declarations, recommendations and resolutions which, although not legally binding, offer guidance, recommendations and guidelines for states as well as activists. We have selected several documents which we present in their entirety, since they represent advocating instruments and give clear instructions regarding the rights of LGBT people. These documents are: Yogyakarta Principles for the implementation of the international framework for human rights protection regarding sexual orientation and gender identity;[1] EU Guidelines to promote and protect the enjoyment of all human rights by LGBT persons[2] and the Recommendation by the Council of Europe CM/Rec (2010) 5 on measures to combat discrimination on grounds of sexual orientation or gender identity.[3]

[1] http://www.yogyakartaprinciples.org/principles_en.pdf

[2] Council of the European Union, Guidelines to promote and protect the enjoyment of all human rights by LGBT persons, Luxembourg, 24 June 2013.

[3] Recommendation CM/Rec (2010) 5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies.

International System for the Protection of Human Rights

1. Universal instruments for the protection of human rights

The story of the human rights started with the founding of the United Nations and passing the **Charter of the United Nations** in 1945,[4] which established the aims and bodies of this organization. The Democratic Republic of Yugoslavia was part of this society and accepted the aims, principles and bodies of the United Nations[5], and among other aims, also the one about realizing international co-operation in resolving international issues of economic, social, cultural and humanitarian nature and *promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to* race, language or religion.

1.1. Universal Declaration of Human Rights[6]

The modern concept in the application of human rights begins with the passing of the Universal Declaration of Human Rights. The date the Universal Declaration was passed, 10 December, was declared as the International Human Rights Day. The General Assembly declared the Declaration as a joint standard to be achieved by all people and nations in order for every individual and every body of society to strive to contribute, through learning and upbringing, to the respect of these rights and freedoms and to guarantee their general and actual recognition through gradual domestic and international measures. The Universal Declaration expressed the fundamental rights which should be protected; it named the universal rights which everyone everywhere, rightfully, can hope to achieve.

The fundamental standard is that all human beings are born free and equal in dignity and rights[7]. The Universal Declaration proclaims the right to life, liberty and security of person; the prohibition of slavery and slave-trade; the prohibition of torture or cruel, inhuman or degrading treatment or punishment; the right to recognition as a person before the law; all are entitled to equal protection before the law without any discrimination and against any incitement to such discrimination[8]; protection against arbitrary interference with their privacy, family, home or correspondence and attacks upon their honour and reputation[9]. The declaration prescribes the right to marriage for all men and women of full age without any limitation (due to race, nationality or religion)[10]; freedom of opinion and

[4] Charter of the United Nations, passed in San Francisco, on 26 June 1945

[5] Law on the Charter of the United Nations ("Official Gazette DFY", no. 69/45). Article 1 – The Charter of the United Nations, passed in San Francisco on 26 June 1945, is approved and legally enforced in the Democratic Federative Yugoslavia…

[6] Passed on 10 December 1948 by the Resolution of the UN General Assembly A/RES/3/217 A

[7] Article 1 of the Universal Declaration of Human Rights

[8] Articles 3 to 7 of the Universal Declaration of Human Rights

[9] Article 12 of the Universal Declaration of Human Rights

[10] Article 16 of the Universal Declaration of Human Rights

expression, freedom of peaceful assembly and association[11]; the right to free and available education directed to the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms.[12]

Nonetheless, the Declaration sets limitations regarding practicing individual rights and freedoms: with the aim of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society[13]. With this limitation, the Declaration and its provisions are subject to various interpretations and present the basis for different states, invoking morality, public order and the rights and freedoms of others, to limit the full enjoyment of human rights of all individuals. However, in accordance with paragraph 3 of the same article, all the provisions in the Declaration should be interpreted according to the aims and principles of the United Nations.

The Universal Declaration sets standards, but it is not a legally binding document. The rights of the Declaration are operational through two UN instruments, passed in 1966 (enforced in 1976), which become the cornerstone for the international legislative framework in the area of human rights. Those are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[14] By ratifying, confirming or joining these international covenants, states pledge to respect and guarantee the rights set forth in the covenants.

1.2. International Covenant on Civil and Political Rights [15]

The Covenant demands from the member parties to guarantee to all people in their territory, and who are subject to their jurisdiction, the rights recognized in the Covenant without distinction to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[16]

The rights acknowledged by the Covenant to every individual are: equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant;[17] the right to life,[18] liberty and security of person;[19] the prohibition of torture or cruel, inhuman or degrading treatment and punishment;[20] the prohibition of slavery, slave-

[11] Article 19-20 of the Universal Declaration of Human Rights

[12] Article 26 of the Universal Declaration of Human Rights

[13] Article 29 of the Universal Declaration of Human Rights

[14] International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), passed in 1966, enforced in 1976.

[15] "Official Gazette SFRY – International Treaties", no. 7/71

[16] Article 2 of the International Covenant on Civil and Political Rights

[17] Article 3 of the International Covenant on Civil and Political Rights

[18] Article 6 of the International Covenant on Civil and Political Rights

[19] Article 9 of the International Covenant on Civil and Political Rights

[20] Article 7 of the International Covenant on Civil and Political Rights

trade and being held in servitude;[21] the liberty of movement and freedom to choose their residence,[22] the right to recognition as a person before the law;[23] the right to protect one's private and family life, honour and reputation;[24] freedom of opinion, peaceful assembly and association. The Covenant prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence[25]**.** The Covenant proclaims the family as the natural and fundamental group unit of society and is entitled to protection by society and the State, as are the children.[26]

The Covenant guarantees equality before the law and equal and effective protection without any discrimination, on any ground.[27] This binding document does not directly mention sexual orientation as grounds for protection, although it prohibits discrimination on any other ground,[28] which is enough for protection and if rights were harmed regarding sexual orientation.

Monitoring mechanism: Human Rights Committee,[29] consisting of independent experts monitoring the implementation of the Convention in states parties. All State Parties shall submit regular reports to the Committee on the implementation of rights from the Convention. The Committee shall consider the reports and submit recommendations to the state in the form of *Final Comments*. Based on the Optional protocol, the Committee is authorized to consider individual cases of violated human rights of citizens.[30]

1.3. International Covenant on Economic, Social and Cultural Rights[31]

The Covenant expands the scope of rights to areas regarding economic, social and cultural life of every person. As the previous one, the Covenant is a binding document whose provisions set the individual and collective rights for monitoring the respect of rights. State Parties commit to respect the rights proclaimed by the Covenant without any discrimination,[32] sex was directly stated among other grounds. This document also does not explicitly state sexual

[21] Article 8 of the International Covenant on Civil and Political Rights

[22] Article 12 of the International Covenant on Civil and Political Rights

[23] Article 16 of the International Covenant on Civil and Political Rights

[24] Article 17 of the International Covenant on Civil and Political Rights

[25] Articles 19-22 of the International Covenant on Civil and Political Rights

[26] Article 23 of the International Covenant on Civil and Political Rights

[27] Article 26 of the International Covenant on Civil and Political Rights

[28] Discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status was clearly stated.

[29] Article 28 of the International Covenant on Civil and Political Rights

[30] Optional Protocol to the International Covenant on Civil and Political Rights, ratified by the Act on confirming the Optional Protocol to the International Covenant on Civil and Political Rights, "Official Gazette SRY – International Treaties", no. 4/2001 from 27.6.2001.

[31] "Official Gazette SFRY – International Treaties", no. 7/71

[32] Article 2 of the International Covenant on Economic, Social and Cultural Rights

orientation,[33] but the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present Covenant was directly emphasized.[34]

The following are guaranteed: the right to work and related to work;[35] the right to social security,[36] special protection of family, children and the youth; the right to a corresponding standard of life;[37] the right to physical and mental health;[38] the right to education; rights in the area of science and culture.[39]

Monitoring mechanism: The Committee for Economic and Social Rights. In accordance with the Covenant, the State Parties shall submit periodical reports to the Committee for Economic and Social Rights.

1.4. The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)[40]

CEDAW promotes the equality of women and sets steps states have to undertake in order to ensure the equality of women in the private and public life. As a Convention, CEDAW is legally binding in international law.

This Convention does not explicitly state sexual orientation, but it is in its entirety dedicated to human rights of women in different areas of social life. The Convention states that discrimination against women shall mean *any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*.[41]

State Parties shall pursue a policy of eliminating discrimination against women by all appropriate means and without delay. States shall commit to embodying the principle of equality of men and women in their constitutions and legislation, and ensure the practical realization of the principle; to adopt appropriate legislative and other measures, including sanctions when appropriate, prohibiting all discrimination against women; to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; to refrain from

[33] The following was directly expressed as basic grounds for discrimination: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[34] Article 3 of the International Covenant on Economic, Social and Cultural Rights

[35] Articles 6-8 of the International Covenant on Economic, Social and Cultural Rights

[36] Article 9 of the International Covenant on Economic, Social and Cultural Rights

[37] Article 11 of the International Covenant on Economic, Social and Cultural Rights

[38] Article 12 of the International Covenant on Economic, Social and Cultural Rights

[39] Article 15 of the International Covenant on Economic, Social and Cultural Rights

[40] "Official Gazette SFRY – International Treaties", no. 11/81

[41] Article 1 of The Convention on the Elimination of all Forms of Discrimination Against Women

engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; to repeal all national penal provisions which constitute discrimination against women.[42]
States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.[43]

Monitoring mechanism: Committee on the Elimination of Discrimination against Women

1.5. Convention on the Rights of Persons with Disabilities (CRPD)[44]

CRPD protects the rights and dignity of persons with disabilities. The aim of this binding Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.[45] The General principles of the Convention also state non-discrimination and respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women.[46]

Monitoring mechanism: Committee on the Rights of Persons with Disabilities

1.6. Convention on the Rights of the Child (CRC)[47]

The Convention on the Rights of the Child is a legally binding instrument which encompasses civil, economic, social and other rights of children and sets standards and commitments of states in this area. The Convention is based on the principle of non-discrimination, the best interest of the child and the participation of children. A child is defined as every human being below the age of eighteen years. The Convention prescribes that every state has

[42] Article 2 of The Convention on the Elimination of all Forms of Discrimination Against Women

[43] Article 3 of The Convention on the Elimination of all Forms of Discrimination Against Women

[44] Adopted on 13 December 2006, enforced on 3 May 2008. Ratified by Serbia on 31 July 2009. ("Official Gazette RS – International Treaties", no. 42/2009).

[45] Article 1 of the Convention on the Rights of Persons with Disabilities

[46] Article 3 of the Convention on the Rights of Persons with Disabilities

[47] Adopted on 20 November 1989 by the UN General Assembly Resolution 44/25. The Republic of Serbia has been by right of succession Member State of the Convention on the Rights of the Child since 2001 ("Official Gazette SFRY – International Treaties, no. 15/90 and "Official Gazette SRY" no. 4/96 and 2/97) and both its Protocols – Optional Protocol on the sale of children, child prostitution and child pornography and Optional Protocol on the involvement of children in armed conflict, in July 2002 ("Official Gazette SRY", no. 7/2002).

to respect and ensure the rights set forth in the Convention to each child under their jurisdiction, without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth **or other status or that of their parent or legal guardian.** State Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.[48]

The Convention recognizes the family as the primary place of care and responsibility for the child. The Convention ensures that the states and those taking care of children always have to act to the best interest of the child, including the prohibition of corporal punishment, violence and abuse, including sexual violence.

Monitoring mechanism: Committee on the Rights of the Child

1.7. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[49]

This legally binding Convention defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. The Convention binds the states to act in order to ensure the adequate development of certain racial or ethnic groups and rescind the spread of ideas based on racial superiority or ideas which incite racial hatred, making them punishable before law.

It could be noted that this Convention is not relevant to the area of LGBT law, although it should not be neglected, because if you understand that there are members of the LGBT community among different racial or ethnic communities, the Convention gains importance, thus the reports should encompass people who are discriminated on many grounds.

Monitoring mechanism: The Committee on the Elimination of Racial Discrimination

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[48] Article 2 of the Convention on the Rights of the Child

[49] UN General Assembly adopted the International Convention on the Elimimnation of All Forms of Racial Discrimination on 21 December 1965, and it was enforced on 4 January 1969. SFRY ratified the International Convention on the Elimination of All Forms of Racial Discrimination in 1967 ("Official Gazette SFRY – International Treaties and other agreements", no. 6/67). By right of succession, Republic of Serbia has been a State Party of the Convention since 2001.
http://www.ljudskaprava.gov.rs/images/Zakon_o_ratifikaciji_konvencije_o_ukidanju_svih_oblika_rasne_diskriminacije.pdf

1.8. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[50]

The Convention against Torture and its Optional Protocols outlaw torture and cruelty in criminal and other procedures before competent state bodies and in institutions. The Convention is a legally binding instrument which defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from them information or a confession, punishing them for an act they are suspected of having committed, or intimidating etc. When such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official. The term torture does not include pain or suffering arising from lawful sanctions.[51]

States shall undertake effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory, and justifications cannot be any exceptional circumstances (a state of war, a threat of war, internal political instability, other public emergency, an order from a superior officer or a public authority).[52] Victims of torture shall be guaranteed the right to redress and fair and adequate compensation.[53]

On the International Day in Support of Victims of Torture, 23 June 2016, a group of UN human rights experts urged State Parties to offer greater support to LGBT people in detention[54] which points at the importance of this Convention in protecting LGBT rights. The experts called on states to double their efforts in preventing abuse and torture which LGBT people face in detention.

"Lesbian, gay, bisexual, transgender and intersex persons face multiple and extreme forms of violence and discrimination, including torture and ill-treatment, and this is exacerbated when they are deprived of their liberty, for example in prisons where they are often subjected to abuse both by fellow inmates and staff," said Sir Malcolm Evans, Chair of the UN Subcommittee on Prevention of Torture.

Monitoring mechanism: Committee against Torture

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[50] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by UN General Assembly Resolution no. 39/46 from 10 December 1984, and was enforced on 26 June 1987. SFRY ratified the Convention in 1991. ("Official Gazette SFRY – International Treaties", no. 9/1991) http://www.ljudskaprava.gov.rs/index.php/yu/ljudska-prava/konvencije/58-konvencija-protiv-torture-un

[51] Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

[52] Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

[53] Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

[54] http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20165&LangID=E

1.9. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[55]

The Convention defines migrant workers, special categories of these workers and the members of their families, the prohibition of forced labour and the protection of their rights without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.[56]

Monitoring Mechanism: Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.

1.10. Conventions of the International Labour Organization (ILO)

Discrimination in the area of labour is regulated through special Conventions of the International Labour Organization:

- **ILO Convention no. 111** concerning discrimination in respect to employment and occupation.[57] Article 1 of the Convention defines discrimination, and the implementation of the provisions of this Convention led to the elimination of discrimination in respect to employment in the army, i.e. the custom that gays and lesbians were not eligible to become military officers in Australia.[58]
- **ILO Convention no. 100** about equal remuneration for work of equal value[59] refers to equal remuneration of male and female work force without discrimination based on sex.[60]

1.11. International Convention for the Protection of All Persons from Enforced Disappearance (ICPED)[61]

The Convention is a legally binding instrument for the protection of individuals from enforced disappearance. It defines enforced disappearance as arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State,

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[55] Adopted by the UN General Assembly Resolution 45/158 from 18 December 1990, enforced on 1 July 2003.

[56] Article 7 of The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

[57] Passed on 25 June 1960, in Geneva, the regulation on the ratification of the Convention ("Official Gazette FPRY – International Treaties no. 3/61) available at https://goo.gl/aoxkn9

[58] Source: *Čitanka od A do Š o lezbejskim i gej ljudskim pravima*, Labris – Organization for lesbian human rights, Belgrade 2009 in "Pravni položaj seksualnih manjina u Srbiji", Goran Miletić, p. 151

[59] Adopted on 29 June 1951, available at https://goo.gl/4d9SWF

[60] Article 1 of the ILO Convention no. 100

[61] Adopted through the UN General Assembly Resolution no. 61/177 from 6 February 2007, enforced on 10 December 2010. Serbia confirmed the Convention in May 2011 ("Official Gazette RS – International Treaties" no. 1/2011)

followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[62] The Convention requires the incrimination of the act and its prevention, as well as the protection of the victims.

Monitoring mechanism: Committee on Enforced Disappearances

1.12. UNESCO Convention against Discrimination in Education[63]

UNESCO is a specialized UN agency whose main objective is to keep and promote peace and security in the world through education, scientific and cultural collaboration among nations in order to further universal respect for justice, for the rule of law, for the human rights and fundamental freedoms for all, without distinction of race, sex, language or religion. This Convention was adopted with the aim of overcoming discrimination and segregation in education, it describes discrimination in education on different grounds, including sex. Apart from limiting any person or group of persons to any kind or level of education; establishing or maintaining separate educational systems or institutions for persons or groups of persons, the Convention also states as discrimination **inflicting on any person or group of persons conditions which are incompatible with the dignity of man** State Parties are committed to formulate, develop and apply national policies which will tend to promote equality of opportunity and of treatment in the matter of education.[64]

Monitoring mechanism: Committee on Conventions and Recommendations

2. The development of the right to different sexual orientation and gender identity through United Nations documents

In 2003, the UN General Assembly adopted the **Resolution on extrajudicial, summary or arbitrary executions**[65] in which it **pointed for the first time at the killing of people due to their sexual orientation,** as well as the obligation of Governments to ensure the protection of the right to life of all persons under their jurisdiction and bring those responsible to justice.[66] The Organization of the Islamic Conference tried to have the phrase "sexual

[62] Article 2 of the International Convention on Protection of All Persons from Enforced Disappearances

[63] Adopted in 1960, enforced in 1962. SFRY ratified it in 1964 "Official Gazette SFRY – International Treaties" no. 04/64

[64] Article 4 of the Convention against Discrimination in Education

[65] General Assembly resolution - Extrajudicial, summary or arbitrary executions **- A/RES/57/214 (**adopted by the General Assembly 25 February 2003)

[66] General Assembly … 6. *Reaffirms* the obligation of Governments to ensure the protection of the right to life of all persons under their jurisdiction, and calls upon Governments concerned **to investigate promptly and thoroughly all cases of killings committed** in the name of passion or in the name of honour, **all killings committed for any discriminatory reason, including sexual orientation,** racially motivated violence leading to the death of the victim, killings of persons for reasons related to their peaceful activities as human rights defenders or as journalists, as well as other cases where a person's right to life has been violated, and to bring those responsible to justice before a competent, independent and impartial judiciary and ensure that such killings, including killings committed by security forces, paramilitary groups or private forces, are neither condoned nor sanctioned by government officials or ersonnel;

orientation" erased from the Resolution, however, the attempt failed. Afterwards, the General Assembly repeated this condition to State Parties in **6 Resolutions regrading extrajudicial executions**, including refusing the right to live **on the grounds of gender identity**, with the obligation to ensure **efficient protection of the right to life for everyone**, and to develop **relevant educational programs which include the issue of gender**.[67]

One of the first debates held at the General Assembly regarding the rights of LGBTI persons was about the **Declaration on Sexual Orientation and Gender Identity** put forward by France and the Netherlands with the support by the European Union,[68] read by the Argentinian ambassador at the General Assembly on 18 December 2008. It was the first Declaration about LGBT human rights at the UN General Assembly. The Declaration condemns violence, harassment, discrimination, exclusion, stigmatization and prejudice because of sexual orientation or gender identity. The Declaration was praised as an advancement in the area of human rights for breaking taboos regarding talking about the rights of LGBT persons at the United Nations. The Declaration instantly caused resistance by the Organization of the Islamic Conference, which presented its document in return – the statement of opposing it. Out of 193 State Parties, 68 have signed the Declaration, 57 State Parties have signed a statement opposing it, both documents are still available for signing.[69]

The first officially adopted document on the global level, regarding **explicitly sexual orientation and gender identity** was adopted by the Human Rights Council in June 2011 based on the authority to promote the universal respect and protection of all human rights and fundamental freedoms for all, without distinction of any kind in a fair and equal manner.[70] **The Resolution on Human Rights, Sexual Orientation and Gender Identity (R 17/19)**[71] expressed grave concern over violence and discrimination of individuals regarding their sexual orientation and gender identity. The Resolution orders the High Commissioner for Human Rights to prepare **the first official report of the United Nations regarding the position of LGBT persons,**[72] to document discriminatory laws and practices and acts of violence against Individuals based on their sexual orientation and gender identity. Based on the report, a panel discussion was organized at the Human Rights Council in March 2012 – it was the first time that an intergovernmental body of the United Nations held a formal debate on this topic.

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67 **General Assembly Resolution - Extrajudicial, summary or arbitrary executions - A/RES/59/197** (adopted on 20 December 2004); **A/RES/61/173 (**19 December 2006); **A/RES/63/182 (**18 December 2008); **A/RES/65/208 (**21 December 2010); **A/RES/67/168 (**20 December 2012); **A/RES/69/182** (18 December 2014)

68 http://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/sexual-orientation-and-gender/

69 https://sh.wikipedia.org/wiki/Deklaracija_Ujedinjenih_nacija_o_seksualnoj_orijentaciji_i_rodnom_identitetu

70 Authorization given by the UN General Assembly UN 60/251 from 15 March 2006

71 Human Rights Council Resolution - Human rights, sexual orientation and gender identity (adopted on 17 June 2011) **- A/HRC/RES/17/19**

72 UN Human Rights Council Report on Discriminatory Laws and Practices and Acts of Violence against Individuals Based on LGBT Identity **A/HRC/19/41**[in response to A/HRC/RES/17/19], available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf

The New Resolution on Human Rights, Sexual Orientation and Gender Identity (27/32)[73] followed the report, in September 2014 and the concern over violating LGBT rights was expressed and the High Commissioner for Human Rights was asked to update the previous report with the aim of identifying good practices and ways of overcoming violence and discrimination of LGBT persons, through the application of existing international law and standards, and to present the report to the Council.

The Report on Discrimination and Violence against Individuals based on their Sexual Orientation and Gender Identity[74] was created and presented at the 29th session of the Human Rights Council in May 2015. As was ordered by Resolution 27/32, the report dealt with the positive development since 2011 and ways of overcoming violence and discrimination of LGBT persons, through the application of existing international law and standards. The report mentions Serbia as a positive example of developing legislation on combatting hate crimes, developing materials and manuals for the training of police, teachers and/or other officials and for launching national campaigns for fighting transphobia and homophobia.

The report gives recommendations to State Parties which refer to the right to life and safety of LGBT persons:

a) Enacting hate crime laws that establish homophobia and transphobia as aggravating factors for purposes of sentencing;

b) Conducting prompt, thorough investigations of incidents of hate-motivated violence against and torture of LGBT persons, holding perpetrators to account, and providing redress to victims;

c) Collecting and publishing data on the number and types of incidents, while providing for the security of those reporting;

d) Prohibiting incitement of hatred and violence on the grounds of sexual orientation and gender identity, and holding to account those responsible for related hate speech;

e) Training law enforcement personnel and judges in gender-sensitive approaches to address violations related to sexual orientation and gender identity;

f) Ensuring that police and prison officers are trained to protect the safety of LGBT detainees, and holding to account State officials involved or complicit in incidents of violence;

g) Banning "conversion" therapy, involuntary treatment, forced sterilization and forced genital and anal examinations;

h) Prohibiting medically unnecessary procedures on intersex children;

[73] Human Rights Council resolution - Human rights, sexual orientation and gender identity (adopted 26 September 2014) **- A/HRC/RES/27/32**

[74] Discrimination and violence against individuals based on their sexual orientation and gender identity, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/29/23, 4 May 2015

i) Ensuring that no one fleeing persecution on grounds of sexual orientation or gender identity is returned to a territory where his or her life or freedom would be threatened, that asylum laws and policies recognize that persecution on account of sexual orientation or gender identity may be a valid basis for an asylum claim; and eliminating intrusive, inappropriate questioning on asylum applicants' sexual histories, and sensitizing refugee and asylum personnel.

In addition, the report gives a number of specific recommendations for states to address discrimination against LGBT persons:

a) Revising criminal laws to remove offences relating to consensual same-sex conduct and other offences used to arrest and punish persons on the basis of their sexual orientation and gender identity or expression; ordering an immediate moratorium on related prosecution; and expunging the criminal records of individuals convicted of such offences;

b) Repealing so-called "anti-propaganda" and other laws that impose discriminatory restrictions on freedom of expression, association and assembly;

c) Ensuring that anti-discrimination legislation includes sexual orientation and gender identity among prohibited grounds, and also protects intersex persons from discrimination;

d) Integrating analysis of violations based on sexual orientation and gender identity in national plans of action, thereby ensuring coordination and adequate resourcing of related activities, accountability for perpetrators, and redress for victims;

e) Sensitizing health-care workers to the health needs of LGBT and intersex persons, including in the areas of sexual and reproductive health and rights, suicide prevention, HIV/AIDS and trauma counselling;

f) Establishing national standards on non-discrimination in education; developing anti-bullying programmes and establishing helplines and other services to support LGBT and gender-non-conforming youth; and providing comprehensive, age-appropriate sexuality education;

g) Ensuring that housing policies do not discriminate against tenants based on sexual orientation and gender identity; and establishing shelters for homeless LGBT persons, with specific attention to youth, older persons and those in emergency situations;

h) Providing legal recognition to same-sex couples and their children, ensuring that benefits traditionally accorded married partners – including those related to benefits, pensions, and taxation and inheritance – are accorded on a non-discriminatory basis;

i) Issuing legal identity documents, upon request, that reflect preferred gender, eliminating abusive preconditions, such as sterilization, forced treatment and divorce;

j) Supporting public education campaigns to counter homophobic and transphobic attitudes, and addressing negative, stereotypical portrayals of LGBT persons in the media;

k) Ensuring that LGBT and intersex persons and organizations are consulted with regard to legislation and policies that have an impact on their rights.

The High Commissioner recommends that national human rights institutions address violence and discrimination

against LGBT and intersex persons in the context of their respective mandates to promote and monitor effective implementation of international human rights standards at the national level.

The final Resolution to have been adopted (June 2016) was the **Human Rights Council Resolution 32/2, on the Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity**[75], which specifies an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity who will, annually, report to the Council and the UN General Assembly on the state of human rights of LGBT persons.

Through this Resolution, the Council strongly deplores acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation or gender identity and appoints a three-year mandate:

a) to assess the implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, while identifying both best practices and gaps;
b) to raise awareness, identify and address the root causes of violence and discrimination of LGBT persons;
c) to engage in dialogue and to consult with States and other stakeholders, including civil society organizations;
d) to work in cooperation with States in order to foster the implementation of measures;
e) to address the multiple, intersecting and aggravated forms of violence and discrimination faced by persons on the basis of their sexual orientation and gender identity;
f) to conduct, facilitate and support the provision of advisory services, technical assistance, capacity-building and international cooperation in support of national efforts to combat violence and discrimination against persons on the basis of their sexual orientation or gender identity.

The Independent Expert shall report annually to the Human Rights Council (starting from its thirty-fifth session), and to the General Assembly (starting from its seventy-second session). The States are called on to cooperate (by providing all information, enable visits and implement the recommendations from the report), and all stakeholders (including NGOs) to cooperate fully to enable the mandate holder to fulfil his or her mandate.

Mr. **Vitit MUNTARBHORN from Thailand**[76] was appointed as the first Independent expert with this mandate.

[75] Resolution the Human Rights Council 32/2, Protection against violence and discrimination based on sexual orientation and gender identity A/HRC/RES/32/2, adopted on 30 June 2016

[76] http://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/Index.aspx

In addition to the Independent expert for protection from discrimination based on sexual orientation and gender identity, **other special procedures can be used for the area of LGBT rights**.[77]

In March 2007, a group of 29 experts from 25 countries, including international committees of lawyers and international services for human rights adopted the **Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles)** in order to comprehensively affirm every individual right of LGBT persons and emphasize the commitments of states regarding their implementation. The Principles are universal, unite rights and obligations of states from all the binding international instruments and are therefore presented in their entirety.

On 17 May 1990, the General Assembly of the World Health Organization (WHO) approved the review of the International Classification of Diseases (ICD-10). This review ousts sexual orientation (heterosexual, homosexual or bisexual) from the classification of health disorders. The earlier classification ICD-9 (1977) presented homosexuality as a mental illness and classified it as a "sexual disorder". In 1993, WHO added to the MKB-10 ego-dystonic sexual orientation referring to persons who want to change their sexual identity or sexual orientation due to psychological disorders or disorders in behaviour.

In the honour of the 10th revision of the WHO ICD, civil society organizations, led by **Louis George Tin** proclaimed **17 May as International Day against Homophobia, Transphobia and Biphobia** (IDAHO).[78]

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[77] Special Rapporteur on the right ot education, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Special Rapporteur on the rights to freedom of peaceful assembly and association, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Special Rapporteur on the situation of human rights defenders, Special Rapporteur on the human rights of migrants, Special Rapporteur on minority issues, Special Rapporteur on the right to privacy, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Special Rapporteur on the sale of children, child prostitution and child pornography, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Special Rapporteur on trafficking in persons, especially women and children, Special Rapporteur on violence against women, its causes and consequences. For more information on special procedures follow http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx

[78] IDAHO - International Day against Homophobia, Transphobia and Biphobia

2. Documents and mechanisms for the protection of human rights by the Council of Europe

The Council of Europe was founded in 1949 as a regional international organization of European countries, with its headquarters in Strasbourg. The Council of Europe is the leading organization for human rights in Europe whose main aims are: **the improvement of parliamentary democracy, the respect of human rights and establishment of the rule of law.** The Council of Europe has 47 member states, 28 of which are members of the European Union. The standards and mechanisms of the Council of Europe strive to promote and ensure the respect of the human rights of every individual. This includes equal rights and dignity of all, including lesbians, gays, bisexuals and transgender persons. The most important document for the protection of human rights in the Council of Europe is the European Convention for the Protection of Human Rights and Fundamental Freedoms. The **European Court of Human Rights** monitors the application of binding standards based on the Convention on Human Rights and Fundamental Freedoms (and corresponding protocols) in individual cases through its rulings. All the adopted documents by the Council of Europe (and broader) rely on the rulings of the European Court of Human Rights. **Special Supervision Committees** were established to monitor the application of some instruments by the Council of Europe (e.g. the European Social Charter or the European Convention for the Prevention of Torture), while the monitoring of the entire state of human rights in state parties of the Council of Europe is conducted by the **Commissioner for Human Rights of the Council of Europe**.

1. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[79]

European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in 1950 and is **the most important instrument for the protection of human rights on the European level.** All Member states of the Council of Europe are signatories of the Convention.

Following the Universal Declaration on Human Rights, the Convention guarantees the right to life,[80] the right to liberty and security of person,[81] the right to respect for private and family life,[82] prohibition of torture, slavery and forced labour,[83] the right to a fair trial,[84] the freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association.[85] Men and women of marriageable age have the right to marry according to the national laws governing the

[79] The Convention was adopted in Rome on 4 November 1950; it was enforced on 3 September 1953. Serbia and Monte Negro ratified it in 2003, and it was enforced in 2004 "Official Gazette – International Treaties", no. 9/03. It is available in Serbian at: http://www.echr.coe.int/Documents/Convention_SRP.pdf and in English at: http://www.echr.coe.int/Documents/Convention_ENG.pdf

[80] Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

[81] Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

[82] Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

[83] Articles 3 and 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

[84] Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

[85] Articles 9 to 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

exercise of this right.[86] The enjoyment of the rights and freedoms set forth in the Convention shall be secured **without discrimination on any ground** such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth **or other status**.[87] This "other status" was the ground for the first rulings by the European Court of Human Rights which established the violation of the rights of LGBT persons on the grounds of their sexual orientation and gender identity. Although sexual orientation was not explicitly stated as one of the grounds for discrimination, the Court developed a broad practice to present sexual orientation as banned grounds for discrimination mostly in cases of violating Article 8 of the Convention (Right to respect for private and family life) regarding Article 14 (Prohibition of discrimination), but also for the violation of Articles 11 (Freedom of assembly and association); 12 (Right to marry); 13 (Right to an effective remedy).

The Convention was amended several times by Protocols which broadened the protection of human rights to the protection of property, the area of education, culture and right to free elections,[88] freedom of movement, prohibition of imprisonment for debt, prohibition of expulsion of nationals and collective expulsion of aliens,[89] abortion of the death penalty,[90] the right to compensation for wrongful conviction, equality between spouses regarding rights and responsibilities of a private law character and in their relations with their children.[91] The Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms sets a general prohibition of discrimination and **the public authorities are committed not to discriminate** on any ground.[92]

Monitoring mechanism: European Court of Human Rights

2. The European Social Charter[93]

Another important instrument for the protection of human rights in the area of the Council of Europe is the European Social Charter, adopted in 1965, revised in 1996. While the Convention deals with rights of political and private law character, the European Social Charter focuses on the economic, social and cultural rights as does the International Covenant on Economic, Social and Cultural Rights (UN). This is the most important document of the Council of Europe regarding the protection of labour and social rights. The enjoyment of the rights set forth in the Charter are to be secured **without any discrimination** on grounds such as race, colour, sex, language, religion, po-

[86] Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

[87] Article 14 European Convention for the Protection of Human Rights and Fundamental Freedoms, Prohibiting discrimination

[88] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1952

[89] Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms which ensures certain rights and freedoms not included in the Convention and the First Protocol to it, Strasbourg, 16 September 1963

[90] Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 28 April 1983) and Protocol 13 on the abortion of the death penalty in all circumstances (Vilnius, 3 May 2002)

[91] Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984

[92] Article 1 of the Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 2000

[93] Serbia ratifies it in 2009 – the Law on confirming the revised European Social Charter ("Official Gazette RS – International Treaties" no. 42/2009)

litical or other opinion, national or social origin, health, association with a national minority, birth or other status.[94] The Charter proclaims the right to work and regarding work (just, safe and healthy working conditions, fair remuneration, the right to organize, to bargain collectively, special protection of children, young persons and women etc.),[95] the right to education, the right to protection of health and social security,[96] protection against poverty, the right to housing.[97]

Monitoring mechanism: European Committee of Social Rights

3. **Council of Europe Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment** [98]

The Convention is an international instrument on human rights of a legislative nature and recalls Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms which sets the prohibition of torture or inhuman, or degrading treatment or punishment.

Monitoring mechanism: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[99].

4. **Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence (Istanbul Convention)[100]**

The Istanbul Convention refers to all forms of violence against women, including domestic violence which does not affect women equally.[101] The Convention defines violence against women as "violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." In addition, the Convention

[94] European Social Charter, PART V, Article E – Non-discrimination

[95] Articles 1-8 of the Revised European Social Charter

[96] Articles 11-18 of the Revised European Social Charter

[97] Articles 30-31 of the Revised European Social Charter

[98] The European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment was signed on 26 November 1987; it was enforced on 1 February 1989. The Convention was amended in 1993 (Protocol I - ETS 151 and Protocol II – ETS 152). The state union of Serbia and Monte Negro ratified the Convention in 2003 ("Official Gazette SMN – International Treaties", no. 9/2003).

[99] Article 1 of the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment

[100] Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence, signed in Istanbul on 11 May 2011; it was enforced on 1 August 2014. Serbia ratified it on 31 October 2013, with 2 reserves (to Article 30 paragraph 2 and Article 44 paragraph 1 item e. and paragraphs 3 and 4) (Official Gazette – International Treaties no. 12/2013)

[101] Article 2 of the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence (Scope of the Convention)

defines domestic violence, gender, gender-based violence and women which as a term includes girls under the age of 18.[102]

Parties shall take the necessary legislative or other measures and ensure the implementation of the provisions of this Convention in particular measures to protect the rights of victims without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, **sexual orientation, gender identity**, age, state of health, disability, marital status, migrant or refugee status, or other status.[103]

Monitoring mechanism: GREVIO - an independent expert body to monitor the implementation of the Convention.

In addition to this Convention, the following are important and binding in the area of protection against violence, exploitation and discrimination:

5. **Council of Europe Convention on Action against Trafficking in Human Beings**[104]

The implementation of the provisions of this Convention, in particular the enjoyment of measures to protect and promote the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[105]

6. **Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention**)[106]

The provisions of this Convention, in particular the measures to protect the rights of victims,[107] shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, **sexual orientation**, state of health, disability or other status.

In addition to having sexual orientation and gender identity explicitly stated as grounds for protection, it is certain that LGBT persons belong to especially vulnerable groups, and that they are as such exposed to various forms of

[102] Article 3 of the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence (Definitions)

[103] Article 4 of the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence (Fundamental rihgts, equality and non-discrimination)

[104] Council of Europe Convention on Action against Trafficking in Human Beings was adopted in 2005 (ETS no. 197, 2005), Serbia ratified it in 2009 ("Official Gazette RS – International Treaties", no. 19/2009*)*

[105] Article 3 of the Council of Europe Convention on Action against Trafficking in Human Beings

[106] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse was adopted in 2007 (ETS No. 201, 2007), Serbia ratified it in 2010 ("Official Gazette RS – International Treaties", no. 1/ 2010)

[107] Article 2 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Non-discrimination principle)

violence, abuse and exploitation in the private and public life, and states are obliged to protect their rights set forth in these Conventions without any discrimination.

7. Other relevant documents by the Council of Europe regarding LGBT rights

The Parliamentary Assembly of the Council of Europe has been active regarding LGBT rights since 1981 when it passed its first recommendation on this topic, based on the report by the Committee on Social and Health Questions and the practice of the European Court of Human Rights.[108] This first recommendation was followed by two more for transsexual persons, and numerous other out of which we select a few.

7.1. Through the Recommendation 924 (1981): Discrimination against homosexuals[109] the Parliamentary Assembly of the Council of Europe calls on the Committee of Ministers:

- to urge those member states where homosexual acts between consenting adults are liable to criminal prosecution, to abolish those laws and practices;
- to urge member states to apply the same minimum age of consent for homosexual and heterosexual acts;
- to call on member states to: abolish the practice of keeping records on homosexuals; to assure equality of treatment for homosexuals with regard to employment, pay and job security, particularly in the public sector; to cease with research and medical practice designed to alter the sexual orientation of adults; to ensure that custody of children by their parents should not be restricted on the sole grounds of the homosexual tendencies of one of them; to ask prison and other public authorities to be vigilant against the risk of rape, violence and sexual offences in prisons.

7.2. Recommendation 1117 (1989): The conditions of transsexuals[110] was passed based on the report by the Legal Affairs Committee,[111] rulings of the European Court of Human Rights and the European Parliament Resolution from 1989 which calls upon the Council of Europe to adopt the Convention for the protection of rights of transsexuals. The Recommendation calls upon the Committee of Ministers to recommend member states to introduce national legislation in order to:

- the reference to the sex of the person concerned is to be rectified in the register of births and in the identity papers; a change of forename is to be authorized;
- the person's private life is to be protected;
- all discrimination in the enjoyment of fundamental rights and freedoms is prohibited in accordance with Article 14 of the European Convention on Human Rights.

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[108] Report of the Committee on Social and Health Questions Doc. 4755

[109] Recommendation 924 (1981) Discrimination against homosexuals, Parliamentary Assembly, debate on 1 October 1981 (10th Sitting), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14958&lang=en

[110] Recommendation 1117 (1989) Condition of transsexuals, Parliamentary Assembly, debate on 29 September 1989 (21st Sitting) http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15151&lang=en

[111] Report of the Legal Affairs Committee, Doc. 6100

7.3. Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech" [112]

The Committee of Ministers adopted this Recommendation by recalling the shared adopted ideals and principles of member states in combatting racism and intolerance, respecting the proclaimed freedom of expression regarding the media and media reporting. The Recommendation sets forth seven principles and calls on member states to ensure the implementation of the principles by taking specific steps in combatting hate speech and ensuring a more comprehensive approach to the phenomenon, directed at social, economic, political, cultural and other causes of hate speech. In addition, the member states are called upon to review their domestic legislation and practice in order to ensure that they comply with these principles.

The Recommendation defines the term "hate speech" as "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or **other forms of hatred based on intolerance**, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin." The Principles prohibit hate speech by state officials; the governments of the member states should establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions for the protection of the dignity or rights of others injured through hate speech. **The Recommendation does not recognize homophobia** as a form of expression which spreads, incites, promotes or justifies hatred towards LGBTI persons, but **recognizes other forms of hatred based on intolerance,** and all other recommendations to member states are also applicable in cases of homophobia and transphobia.

7.4. During 2000, the action of the Parliamentary Assembly of the Council of Europe intensified regarding the topic of LGBT rights. The Committee on Legal Affairs and Human Rights presented the **Report on the situation of lesbians and gays in Council of Europe member states,**[113] which states numerous obstacles for the enjoyment of their rights, an analysis in the member states and presented a draft recommendation for member states:

- to include sexual orientation among the prohibited grounds for discrimination in their national legislation;
- to revoke all legislative provisions rendering homosexual acts between consenting adults liable to criminal prosecution;
- to release with immediate effect anyone imprisoned for sexual acts between consenting homosexual adults;
- to apply the same minimum age of consent for homosexual and heterosexual acts;
- to take positive measures to combat homophobic attitudes;

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[112] Adopted by the Committee of Ministers on 30 October 1997 at the 607th sitting of Deputy Ministers, available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf

[113] **Situation of lesbians and gays in Council of Europe member states, Doc. 8755,** Report of the Committee on Legal Affairs and Human Rights, 6 June 2000 http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8950&lang=EN

- to take disciplinary action against anyone discriminating against homosexuals;
- to ensure equal treatment for homosexuals with regard to employment;
- to adopt legislation which foresees registered partnership;
- to recognize persecution against homosexuals as a ground for granting asylum.

7.5. **Through Recommendation 1470 (2000) on the Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe,**[114] the Parliamentary Assembly recommends that the Committee of Ministers include sexual orientation as ground for prohibiting discrimination according to the European Convention;[115] to expand the scope of the European Commission against Racism and Intolerance to issues of homophobia and to call on member states to comply to all the recommendations set forth in the previously stated report.

During 2007, a certain number of members of the Parliamentary Assembly recommended the revision of the Report on the conditions of LGBT rights and set forth the recommendation on this topic[116] in accordance with the Yogyakarta Principles, due to a more pronounced hostility towards LGBT persons in member states, which is illustrated in Patriarch Alexy II's response to a question in the Parliamentary Assembly, in which he described homosexuality as an illness and an abnormality comparable to kleptomania.

7.6. In 2009, The Committee on Legal Affairs and Human Rights submitted the **Report on Discrimination on the basis of sexual orientation and gender identity**[117] which created a draft recommendation and draft resolution in this area. The Committee on Equal Opportunities for Women and Men[118] expressed their positive opinion on the report pointing out that discrimination on the basis of sexual orientation and gender identity can be magnified on the basis of sex and gender, with lesbian, bisexual and transgender women, in particular, running an increased risk of violence. The Committee also pointed out that there can be instances of sex discrimination also within the LGBT community. In 2010, the Committee

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[114] Recommendation 1470 (2000) Situation of gays and lesbians and their partners in respect to asylum and immigration in the member states of the Council of Europe, Parliamentary Assembly, debate on 30 June 2000 (24th Sitting), **http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16822&lang=en**

[115] In accordance with the opinion of the Parliamentary Assembly no. 216 (2000)

116 Discrimination on the basis of sexual orientation and gender identity, Motion for a recommendation, Doc. 11423, 8 October 2007, it was not debated at the Parliamentary assembly and it was binding only for the signatory member states http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11716&lang=EN

[117] Discrimination on the basis of sexual orientation and gender identity, **Committee on Legal Affairs and Human Rights,** Report (Doc. 12087) 08 December 2009, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12351&lang=en

[118] Discrimination on the basis of sexual orientation and gender identity (Former) Committee on Equal Opportunities for Women and Men, Committee Opinion (Doc. 12099) 15 December 2009 **http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=12717&lang=EN**

on Legal Affairs and Human Rights revised their Report on Discrimination on the basis of sexual orientation and gender identity,[119] accepting the opinions and amendments of the Committee on Equal Opportunities for Women and Men to point out the importance of special vulnerability of women, the members of the LGBT community, in the Resolution.[120] Based on all these activities and reports, **two final documents** of the Council of Europe were adopted regarding LGBT rights, one by the Committee of Ministers and the other by the General Assembly, which we present in their entirety due to their importance.

7.7. Recommendation by the Committee of Ministers to member states CM/Rec (2010) 5 on the measures of combatting discrimination based on sexual orientation and gender identity[121]

In March 2010. the Council of Europe made an important step by providing legal support for people of different sexual orientation and gender identity by introducing the Committee of Ministers Recommendation to the member states on the measures for combatting discrimination on the basis of sexual orientation and gender identity. The recommendation sets forth a wide range of human rights applied in ensuring equal dignity of people of different sexual orientation and gender identities. It also includes practical measures member states have to take in order to ensure, in due time, full enjoyment of human rights. The Recommendation is also important because of recognizing important principles and facts, including the principle of universality of human rights which is the same for everyone; long-time exposure of LGBT persons to intolerance, discrimination and violence; as well as the fact that discrimination based on sexual orientation or gender identity cannot be justified by any cultural, traditional or religious values, nor the rules of the dominant culture. Since the adoption of the Recommendation, the issues of LGBT rights have been on the agenda of the Committee of Ministers through numerous meetings, documents or monitoring guidelines.[122]

7.8. Following the adoption of Recommendation CM/Rec (2010) 5, the Parliamentary Assembly of the Council of Europe adopted Recommendations,[123] as well as **Resolution 1728 (2010) on Discrimination on the basis of sexual orientation and gender identity**[124]. Through this Resolution, the Parliamentary

[119] Discrimination on the basis of sexual orientation and gender identity, Committee on Legal Affairs and Human Rights Report (Doc. 12185) 23 March 2010 http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12403&lang=en

[120] Discrimination on the basis of sexual orientation and gender identity, (Former) Committee on Equal Opportunities for Women and Men, Committee Opinion (Doc. 12197) 07 April 2010 http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12801&lang=en

[121] https://wcd.coe.int/ViewDoc.jsp?id=1606669

122 CM/Rec(2010)5E,CM(2010)4add3finalE, CM(2013)36add1E, CM(2013)36E, CM/Del/Dec(2014)1189/4.1E, CM/Notes/1189/4.1E,CM/Del/Dec(2013)1175/4.3E, CM/Del/Dec(2013)1173/4.1cE,CM/Del/Dec(2013)1173/4.1aE, - 02 May 2013; available at: https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)5&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true

[123] **Recommendation 1915 (2010)** Discrimination on the basis of sexual orientation and gender identity

[124] Resolution 1728 (2010), Final version, Discrimination on the basis of sexual orientation and gender identity, *Assembly debate* on 29 April 2010. Available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17853&lang=en

Assembly strengthens the foundations of LGBT rights, setting forth specific measures for the member states to take in order to secure *de jure* and *de facto* respect of the rights of LGBTI persons.

7.9. Resolution 2048 (2015) on the Discrimination of transgender people in Europe[125]

In 2015, the Parliamentary Assembly of the Council of Europe adopted the Resolution which condemns the widespread discrimination transgender people face in different areas of social life and the violation of their fundamental rights to private life and to physical integrity faced by transgender people when applying for legal gender recognition. The Assembly **calls on member states** to implement specific measures in prohibiting discrimination on the basis of gender identity, to implement international human rights standards, including the case law of the European Court of Human Rights; to collect and analyse information and data; to enact hate crime legislation for transgender persons; to provide effective protection against discrimination; to develop quick and accessible procedures for changing the name in all documents; to abolish compulsory medical treatment; remove any restrictions on the right of transgender people to remain in an existing marriage upon recognition of their gender; ensure that spouses or children do not lose certain rights; to make gender reassignment procedures accessible for transgender people, and ensure that they are reimbursed by public health insurance schemes; to include transgender people explicitly in suicide prevention research, plans and measures; to conduct awareness-raising campaigns aimed at the general public.

7.10. Nowadays, the Council of Europe also has the **Sexual Orientation and Gender Identity Unit**[126] which promotes LGBT rights[127] and collects good practices in the area of LGBT rights, including the **database on good practices and promising policies of member states in the area of LGBT rights.** Serbia is represented in this database through the Anti-Discrimination Strategy.

[125] **Resolution 2048 (2015)** Discrimination against transgender people in Europe, Parliamentary Assembly, 22 April 2015 (15th Sitting), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736&lang=en

[126] http://www.coe.int/en/web/sogi/home

[127] E.g. *Equal opportunities for all children: Non-discrimination of LGBT children and young people*. The publication presents a concise analysis of challenges, shortcomings and opportunities in the area of LGBT rihgts of children and young people and offers an overview of good practices and policies in combattingg discrimination against children on the basis of their sexual orientation and gender identity. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806a8d8f

3. Legislation and European Union policies for the protection of LGBT rights

The founding treaties of the European Union ascertain a broad scope of tasks including: reaching a high level of employment and social protection, equality among men and women, raising the standard and quality of life, reaching economic and social cohesion and solidarity among member states, and combatting discrimination. The preamble of the Single European Act from 1986 and the Treaty on European Union from 1993 formally introduced the protection of human rights as an obligation of the EU.

The Treaty on the Functioning of the European Union (UFEU)[128] anticipates that in defining and implementing its policies and activities, the Union shall aim to **combat discrimination explicitly stating, among other ground, discrimination based on sex and sexual orientation** (Article 10 of UFEU). Article 19 of this Treaty enables the European Union to support and supplement member states' activities, as well as regulate this issue legally with the aim of combatting discrimination **including discrimination based on sex and sexual orientation.**

The rights of every individual inside the EU were established and regulated at different times, in different manners and in different forms. For that reason, the EU decided to clarify issues and consolidate them in a single document which was updated in accordance with the changes and advancement of society and scientific and technological development. The Charter of Fundamental Rights of the European Union (hereinafter the Charter)[129] was adopted, and it consolidates and protects the general human, civil, economic, social rights (the right to human dignity, life, integrity, freedom, security, private and family life etc.). **Article 21 of the Charter prohibits discrimination on the ground of sexual orientation as well.** The Charter enhances the protection of fundamental rights and freedoms by making them more visible and explicit for citizens. The Charter is in compliance with the European Convention on Human Rights and Minority Rights and relies on the rulings of the European Court of Human Rights. Member states shall report annually on the application of the Charter, including Article 21 when implementing EU legislation.[130]

In addition, the Council of Europe adopted a **Directive on establishing a general framework for equal treatment in employment and occupation**[131] in 2000, which prohibits discrimination on the basis of sexual orientation in the areas set forth in the Directive. This legislation raised the level of protection of LGBT persons in EU countries.

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[128] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01

[129] CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION**,** 2012/C 326/02. The Charter was proclaimed in 2000, and it was enforced by the Lisbon Treaty in in 2009.
http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN

[130] Communication from the Commission Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, adopted on 19 October 2010 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52010DC0573

[131] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML

European Parliament Resolution on the Fight against Homophobia in Europe (2012)[132] condemns any form of discrimination on grounds of sexual orientation and gender identity and expresses regret that in the European Union the fundamental rights of LGBT people are not yet always fully upheld. Member States are called on to ensure that lesbian, gay, bisexual and transgender people are protected from homophobic hate speech and violence, and ensure that same-sex partners enjoy the same respect, dignity and protection as the rest of society.

The Commission made their dedication to combatting discrimination against LGBT persons even clearer by defining **Guidelines to promote and protect the enjoyment of all human rights by LGBT persons (2013)**[133] which will be presented in their entirety and **Actions to advance LGBTI equality for the period 2016-2019**.[134]

[132] European Parliament resolution on the fight against homophobia in Europe 2012/2657(RSP) http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0222+0+DOC+XML+V0//EN

[133] Council of the European Union, Guidelines to promote and protect the enjoyment of all human rights by LGBT persons, Luxembourg, 24 June 2013

[134] This list of actions (2016-2019) has 6 chapters referring to: Improving rights and ensuring legal protection of LGBT people and their families in key areas of EU competence; 2. Strong monitoring and enforcement of existing rights of LGBT people and their families under EU law; 3. Reaching citizens, fostering diversity and non-discrimination; 4. Supporting key actors responsible to promote and advance equal rights for LGBTI people in the EU; 5. Data collection and research activities; 6. LGBTI issues in Enlargement, Neighbourhood and Third countries. Available at: http://ec.europa.eu/justice/discrimination/files/lgbti_actionlist_en.pdf

4. Documents by the Organization for Security and Co-operation in Europe (OSCE)

The Organization for Security and Co-operation in Europe (OSCE) has a comprehensive approach towards security encompassing politico-military, economic and environmental and human dimensions. OSCE deals with a broad range of issues regarding security which, apart from arms control, policing, countering terrorism, corruption, elections, human trafficking, also include the respect of human rights and fundamental freedoms which are key to a comprehensive concept of security.[135]

The OSCE traces its origins to the détente phase of the early 1970s when the Conference on Security and Co-operation in Europe (CSCE) was created to serve as a multilateral forum for dialogue and negotiation between East and West. Meeting over two years in Helsinki and Geneva, the CSCE reached agreement on the **Helsinki Final Act.**[136] This document established ten fundamental principles in the politico-military, the economic and environmental and the human rights dimensions.

Through its **Office for Democratic Institutions and Human Rights (ODIHR),** the OSCE monitors the state of human rights in participating states which recognize that human rights are the birth right of all human beings, are inalienable and are guaranteed by law. The ODIHR covers a broad spectrum of rights, ranging from the freedoms of religion or belief, movement, assembly and association, to reporting on the use of the death penalty, monitoring trials, and preventing torture and other forms of ill-treatment. The work of the OSCE in the field includes activities regarding human rights especially: activities on abolishing discriminatory legislation, policies and practices; supporting the implementation of legislation protecting the rights of persons belonging to minorities; technical assistance to human rights bodies; ensuring compliance with OSCE commitments and international human rights standards; analysing and advising on human rights compliance; monitoring and helping strengthen executive, judicial, legislative and law enforcement institutions; sharing best practices and supporting efforts to ensure international human rights standards are met; promoting gender equality; preventing human trafficking and torture; supporting civil society organizations; monitoring hate crimes and hate speech.

All 57 participating States enjoy equal status and decisions are taken by consensus on a politically, but not legally binding basis.

The OSCE has a number of documents regarding human rights, tolerance and non-discrimination.[137] **The Helsinki Final Act or Conference on Security and Co-operation in Europe Final Act[138]** promotes the respect for human

[135] http://www.osce.org/what/human-rights

[136] Conference on Security and Co-operation in Europe Final Act, Helsinki 1975. Signed on 1 August 1975.

[137] http://tandis.odihr.pl/?p=qu-os,dec
http://tandis.odihr.pl/?p=quos,dec&qid=481d0341091f9ab06eadc2a17ba941e4&format=doc_list&sort=pubdate&items=20&offset=0

[138] Principle VII of the Helsinki Final Act - the respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief

rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief. The participating States will respect human rights and fundamental freedoms without distinction as to race, sex, language or religion, promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development. With this Act, the participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States. The States shall constantly respect these rights and freedoms in their mutual relations and will endeavour jointly and separately, including in co-operation with the United Nations, to promote universal and effective respect for them.

The Helsinki Final Act also calls on fulfilling international obligations set forth in the Charter of the United Nations, the Universal Declaration of Human Rights and international declarations and covenants on human rights.

Following the Helsinki Final Act, there were the **Charter of Paris for a New Europe** (1990)[139] and the **Charter for European Security** (1999)[140] which affirm that, without discrimination, every individual has the right to freedom of thought, conscience and religion or belief, freedom of expression, freedom of association and peaceful assembly, freedom of movement; the right to protection against arbitrary arrest or detention, torture or other cruel, inhuman or degrading treatment and punishment; as well as other civil, social and cultural rights.

Since 2002, the OSCE Committee of Ministers has, on several occasions, passed **Decisions regarding tolerance and non-discrimination**[141] reminding participating states of the obligations by international documents, affirming dedication in promoting tolerance and combatting discrimination based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, property, birth or other circumstances. The fight against all forms of aggressive nationalism, racism, chauvinism, xenophobia, anti-Semitism and violent extremism is also emphasized in all participating states and all authorities are called on to publicly judge, on an appropriate level an appropriate manner, acts of violence motivated by discrimination and intolerance. All these decisions contain a range of specific measures and obligations which participating states have to undertake when fighting discrimination and hate speech (legislation changes, implementing training, promoting tolerance, NGO support, incriminating hate speech, keeping records and statistics, etc.). However, **not a single decision explicitly mentions LGBT persons or homophobia.**

[139] Charter of Paris for a New Europe, Paris 1990

[140] Charter for European Security, Istanbul 1999

[141] Decision No. 6/02 on Tolerance and Non-discrimination; Decision No. 4/03 on Tolerance and Non-discrimination; Decision No. 12/04 on Tolerance and Non-discrimination; Decision No. 10/05 on Tolerance and Non-discrimination: Promoting mutual respect and understanding; Decision No. 13/06 Combating Tolerance and Non-discrimination and Promoting mutual respect and understanding; Decision No. 10/07 on Tolerance and Non-discrimination: Promoting mutual respect and understanding; Decision No. 10/09 on Tolerance and Non-discrimination; Decision No. 9/09 on Combating Hate Crimes.

In 2010, at the session in Oslo, the OSCE Parliamentary Assembly adopted the **Resolution on the prohibition of Discrimination on Grounds of Sexual Orientation or Gender Identity**[142] calling on international law which established that all human beings are born free and equal. The Resolution reminds that **there is no exception to this principle and it includes the right to free expression of sexual orientation and gender identity, which are important elements of every person's integrity.** In addition, the OSCE Parliamentary Assembly notes that homophobia is present in a large number of states, as well as denying fundamental rights to (freedom of expression, association, etc.) LGBT persons. Since OSCE's task is to promote and send a clear message on behalf of respect of rights and non-discrimination, in order for all people in the participating states to live with dignity, regardless of their sexual orientation or gender identity, the Parliamentary Assembly called on Participating States to:

- ensure that the fundamental rights of LGBT persons, including freedom of expression, freedom of assembly and freedom of association, are respected in accordance with international human rights standards;
- condemn any incitement to hatred and any discriminatory or abusive statement against LGBT persons or groups;
- adopt legislation banning any form of discrimination on grounds of sexual orientation or gender identity;
- repeal legislation that is discriminatory against LGBT persons, **in line with the rulings of the European Court of Human Rights**;
- sign and ratify **Protocol number 12 to the European Convention** on Human Rights, which establishes a comprehensive prohibition of discrimination;
- recognize persecution due to a person's sexual orientation or gender identity as grounds for granting asylum, in application of the **UNHCR Guidance Note on refugee claims relating to sexual orientation and gender identity** of 21 November 2008.

[142] **Oslo Declaration of the OSCE Parliamentary Assembly and Resolutions adopted** at the Nineteenth Annual Session, OSLO, 6 to 10 July 2010; **Resolution on the prohibition of Discrimination on Grounds of Sexual Orientation or Gender Identity**.

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