



The European Region
of the International
Lesbian and Gay Association

Rights, not crimes: the EU's role in ending criminalisation of same-sex acts in third countries

ENGLISH

REPORT
June 2005





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Rights, not crimes:

the EU's role in ending
criminalisation of same-sex
acts in third countries

ILGA-EUROPE REPORT
June 2005

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I. Introduction

On a regular basis, states are contravening international human rights standards by criminalising consensual same-sex acts. The following press releases illustrate that the issue is widespread.

On the 5 of April 2005, Interfax¹ reported that Viktor Kuchynski, deputy of the chamber of representatives in Belarus, expressed the view that the Criminal Code needed to be amended and a penalty for consensual same-sex sexual acts introduced.

On the 6 of April 2005, the Fiji Times reported that an Australian tourist and a local man were each sentenced to two years in jail for having sex and taking nude pictures in an apartment. They were condemned on counts of "unnatural offence" and "indecent practice" between two males. This condemnation contravenes the Fijian constitution which protects against discrimination on grounds of sexual orientation.²

On the 7 of April 2005, Human Rights Watch and the International Commission of Jurists highlighted human rights violations of the right to privacy, fair trial and freedom from torture by Saudi Arabia for sentencing more than 100 men to imprisonment and flogging for reputed homosexual acts.³

Most of the countries which criminalise "homosexual acts" are signatories to international human rights Conventions and to development, cooperation or trade agreements with the EU which contain human rights clauses.

This report draws attention to the human rights standards violated by the criminalisation of consensual same-sex acts.

Although the countries which criminalise consensual same-sex acts are not members of the European Union, the EU has a certain role to play in ensuring that human rights are respected when dealing with third countries. This obligation is based on the following arguments,

¹ "Since early 1990s, Interfax has been the main provider of up-to-date news from Russia and countries of the former Soviet Union. We are the most frequently quoted source of information on the region." Interfax website <http://www.interfax.com/6/About.aspx>.

² See Human Rights News on Human Rights Watch's website <http://hrw.org/english/docs/2005/04/12/fiji10466.htm>.

³ The report states "On or about March 26, a Jeddah court, meeting in a closed session in which defense attorneys were excluded, sentenced 31 of the men to prison for six months to one year, and to 200 lashes each, for unreported offenses. Four other men received two years' imprisonment and 2,000 lashes. Police released more than 70 of the men not long after their initial arrest; reports in the Saudi press suggested that personal contacts with the government had intervened on their behalf. However, on April 3, police summoned the 70 men back to a local police station and informed them that they had been sentenced to one year's imprisonment. "

which are developed in the report:

- * The European Union is increasingly placing human rights at the core of its obligations.
- * This includes the respect for human rights in its relations with third countries.
- * Human rights clauses are a regular feature in development and cooperation agreements with third countries.
- * The European Union has issued several guidelines on the death penalty.

The European Union has a responsibility to promote human rights beyond its frontiers and can use different tools to ensure the end of prosecutions and persecutions on the sole basis of sexual orientation. It possesses political (political dialogue), legal (human rights clauses in agreements) and economic tools (withdrawal of aid or trade agreements) that can be used individually or cumulatively depending on the situation of the country and the relationships it has with the EU.

2. International human rights standards opposing criminalisation of consensual same-sex acts

Under international human rights standards, criminalisation of consensual same-sex acts amounts to degrading, inhumane treatment and torture; it constitutes a violation of the right to privacy and the right to be free from discrimination; it also impacts on the right to a fair trial. Furthermore, where the sanction for this act is the death penalty, this constitutes a violation of the right to life.

All these rights are protected under international human rights standards as defined by the European Convention of Human Rights and the United Nations human rights documents.

2.1. The Council of Europe and criminalisation of consensual same-sex acts

In 1981 two landmark decisions were taken in the Council of Europe which condemned the criminalisation of consensual same-sex acts:

- ★ Recommendation 924 of the Parliamentary Assembly on discrimination against homosexuals urged *inter alia* the decriminalisation of (homosexual acts) between consenting adults in private and the application of the same minimum age of consent for same sex and heterosexual acts and,

- ★ The *Dudgeon v. UK* case, where the European Court of Human Rights ruled that the legal ban on same-sex acts between consenting males in Northern Ireland violated the **right to private life** (Article 8 of the European Convention). This ruling was subsequently confirmed in the *Norris v. Ireland* and *Modinos v. Cyprus*⁴ cases. In all three cases, the European Court of Human Rights affirmed that the law that made illegal sexual acts between consenting men in private constituted unjustified interference with the right to respect for private life of the applicants. Following these cases, the Council of Europe has required States to modify their legislations. Since 2003, with the repeal of the legislation in Armenia, no country in the Council of Europe is criminalising same-sex consensual acts.

⁴Dudgeon v UK, 22 October 1981 (Series A, No.45), Norris v Ireland, 26 October 1988 (Series A, No.142), Modinos v Cyprus, 22 April 1993, (Series A, No.259).

2.2. The United Nations and criminalisation of consensual same-sex acts

2.1.1. The right to privacy and freedom from discrimination

In *Toonen v. Australia*⁵, Toonen, an activist promoting the rights of gay men, complained about provisions of Tasmania's criminal code which criminalised all forms of sexual contact between consenting adult gay men in private. Although no proceedings had been instituted for over a decade, the public prosecutor had stated in 1988 that proceedings would be initiated if there was sufficient

⁵ Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

evidence, and Toonen considered that the criminalisation of homosexuality had not permitted him to be open about his sexuality and his views on law reform.

The Human Rights Committee - the body monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR) - affirmed that criminalisation of consensual same-sex acts contravened the right to privacy - Article 17(1) of the ICCPR - and the right to be free from discrimination - Article 2(1) of the ICCPR.

The Committee held:

(1) that Toonen was actually and currently affected by the continued existence of the prohibition even though no criminal proceedings had been instituted for over a decade, as there was no guarantee that action would not be taken against homosexuals in the future;
(2) that, as this interference with Toonen's privacy could not be justified on public health or moral grounds and as sexual orientation is included in the reference to 'sex' in Arts 2(1) and 26, there was a violation of Article 17 taken together with Article 2(1); (emphasis added)

This Communication also confirmed that discrimination on the grounds of sexual orientation is contrary to human rights standards. In its Communication, the Committee made several references to the case law of the European Court of Human Rights.

2.1.2. Freedom from torture and other cruel, inhuman or degrading treatment or punishment

According to international human rights law, the criminalisation of consensual same-sex acts can amount to torture. The right to be free from torture is a non-derogable right which means that it cannot be limited in its implementation. The following paragraphs illustrate the position of the UN Special Rapporteur on torture and the Committee Against Torture.

United Nations Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment

According to Sir Nigel Rodley - former Special Rapporteur of the United Nations Commission on Human Rights - there are two issues in relation to the detention of LGBT people. Firstly, the detention of people on the sole ground of their sexual orientation can amount to torture. Secondly, issues also arise in relation to the conditions of detention of LGBT people.

Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, 2001

Sir Nigel Rodley A/56/156

20. The Special Rapporteur is concerned that in a number of countries laws punish consensual same-sex relationships and transgendered behaviour by corporal punishment which, as stated by the Commission on Human Rights on several occasions, "can amount to cruel, inhuman or degrading punishment or even to torture".(...)

23. When detained, members of sexual minorities are often considered as a sub-category of prisoners and detained in **worse conditions of detention** than the larger prison population. The Special Rapporteur has received information according to which members of sexual minorities in detention have been subjected to considerable violence, especially sexual assault and rape, by fellow inmates and, at times, by prison guards. Prison guards are also said to fail to take reasonable measures to abate the risk of violence by fellow inmates or even to have encouraged sexual violence, by identifying members of sexual minorities to fellow inmates for that express purpose. Prison guards are believed to use threats of transfer to main detention areas, where members of sexual minorities would be at high risk of sexual attack by other inmates. In particular, transsexual and transgendered persons, especially male-to-female transsexual inmates, are said to be at great risk of physical and sexual abuse by prison guards and fellow prisoners if placed within the general prison population in men's prisons. (*emphasis added*)

Committee Against Torture

The Committee Against Torture - the body monitoring the implementation of the UN Convention Against Torture (CAT) - has also looked into the issue. For instance, in its review of Egypt in 2002, it voiced concern at "the reports received concerning ill-treatment inflicted on men because of their real or alleged homosexual inclinations, apparently encouraged by the lack of adequate clarity in penal legislation." It called on Egypt to "remove all ambiguity in legislation which might underpin the persecution of individuals because of their sexual orientation." The situation was not different in 2004, according to a report published by Human Rights Watch.⁶

⁶ In a Time of Torture, report published by Human Rights Watch, March 2004 available at <http://hrw.org/reports/2004/egypt0304/>.

2.1.3. Right to a fair trial

Laws criminalising consensual same-sex acts are often defined with negatively connoted words such as "unnatural offence" (Fiji), "unnatural acts" (India), "gross indecency" (Nigeria), "indecent act" (Libya) which themselves undermine the fair application of the law. This contravenes the protection offered by the right to a fair trial protected under Article 14 of the ICCPR and Article 10 of the Universal Declaration of Human Rights (UDHR) and the right to equality before the law (Article 26 ICCPR and Article 10 UDHR) because it impacts negatively on the outcomes of the trial.

2.1.4 Right to life and the use of the death penalty

In the situation where the punishment for consensual same-sex acts is the death penalty, this affects directly the right to life of the person (Article 6 of the ICCPR). The Human Rights Committee has said that the death penalty should be limited to the "most serious crimes."⁷ Furthermore, the UN Human Rights Commission issued several resolutions on the death penalty aiming at an abolition of the death penalty for all crimes and in particular for "sexual relations between consenting adults."⁸ This issue is further explored in section 3.4.

⁷CCPR General Comment No. 6 on the Right to Life 30/04/82, paragraphs 6 and 7.

⁸At the 2003 session of the Commission on Human Rights, the resolution on the question of the death penalty was adopted by a recorded vote of 24 votes to 18, with 10 abstentions. The resolution urged all States that still maintain the death penalty: "To ensure that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, non-violent religious practice or expression of conscience and sexual relations between consenting adults." At the 60th Session of the UN Commission on Human Rights, in 2004, this was reiterated in Article 4(f). Resolution 2004/67 Question of the death penalty.

3. The Responsibility of the European Union

Some examples of agreements signed with countries which violate human rights are presented in part 3.3. Without being exhaustive, this overview highlights the extent of the phenomenon and the number of countries which have signed treaties with the EU containing human rights clauses but which violate human rights and discriminate on grounds of sexual orientation. Finally, the last paragraph lists the countries which violate the human rights of LGB people by sentencing to death on grounds of sexual orientation. These receive financial support from the EU.

3.1. The European Union human rights policy

The European Union has for decades maintained its commitment to human rights and fundamental freedoms. It was however with the Treaty of Maastricht in 1993 that the Union set as one of the objectives of its Common Foreign and Security Policy (CFSP) the development and consolidation of the respect for human rights and fundamental freedoms, along with democracy and the rule of law. A further reference to human rights is present in the new title concerning development cooperation: "Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms."

In 1997, the European Union took another step in integrating the respect of human rights into the European Union legislation with the Treaty of Amsterdam. In Article 6 of the Treaty on European Union (TEU), the European Union reaffirms that it is 'founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.' If the Union finds the principles of this Article have been seriously and persistently breached by one of the Member States, it can suspend certain rights of the latter (Article 7 TEU). Article 49 TEU declares further that candidate countries have to

respect these principles in order to join the EU.

Nevertheless, the biggest contribution of the Treaty of Amsterdam to human rights for LGBT people is Article 13 of the Treaty of the European Community, which refers to the adoption of provisions on non-discrimination, and authorises the Council, acting unanimously and after consulting the European Parliament, to "take appropriate action to combat discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation."

Lastly, the Amsterdam Treaty, which came into force in May 1999, gives the European Court of Justice the power to ensure respect for fundamental rights and freedoms by the European institutions (Article 46 TEU).

More recently, during the Nice Summit in 2000, the European Union approved its Charter of Fundamental Rights set to guide the Commission's action in the field of external relations. The Charter of Fundamental Rights is integrated in the EU's Human Rights Policy spectrum despite being a political declaration. For the Commission, the Charter must be seen in "the wider context of the EU's long lasting commitment to human rights and fundamental freedoms..." In its preamble the Charter states that the Union is "founded on the indivisible, universal values of human dignity, freedom, equality and solidarity..." It makes further reference to the international commitments to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Social Charter of the Council of Europe, as well as the jurisprudence of the European Court of Human Rights.

According to Article 20 of the Charter, "Everyone is equal before the law." Furthermore, discrimination is prohibited in Article 21: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited." Also, respect for private life is enshrined in Article 7 of the Charter in terms very

similar to the European Convention of Human Rights.

The Commission has declared that international human rights standards represent a priority in the EU.

"The European Union respects and promotes the universal principles as laid down in the **Universal Declaration on Human Rights and its complementary International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. The Union's activities are also based on the main international and regional instruments for the protection of human rights, including the European Convention on Human Rights. These instruments enshrine common values regarding fundamental freedoms and democratic principles, which are universal, indivisible and interdependent. Respect for these values is a condition for efficient development in any society. Other important sources with regard to defining the priorities of the EU are the declaration and the programme of action of the World Conference on Human Rights (Vienna, 1993), the declarations of the International Conference on Population and Development (Cairo, 1994), of the World Summit for Social Development (Copenhagen, 1995) and of the Fourth World Conference on Women (Beijing 1995)."** *(emphasis added)*

Source: EU's human rights and democratization policy on the website of the EU Commission

http://europa.eu.int/comm/external_relations/human_rights/intro/index.htm

According to the EU Network of Independent Experts in Fundamental Rights, the Charter is applicable to all the activities of the EU institutions, even in their relationships with third countries.

⁹EU Network of Independent Experts on Fundamental Rights "Fundamental Rights in the External Activities of the European Union in the Field of Justice and Asylum and Immigration in 2003", 4 February 2004, CFR-CDF. Them.Com.2003.en. p. 9.

"Article 51 of the EU Charter of Fundamental Rights provides, *inter alia*, that "the institutions and bodies of the Union ... shall respect the rights, observe the principles and promote the application thereof". It further notes that "no policy areas are excluded from this general obligation, and that there is no indication that there are specific types of activities where the institutions and bodies of the Union would be released from their obligation to respect the rights of the Charter. This implies that the Charter applies with equal force to the Union institutions and bodies when negotiating or concluding a treaty."⁹

3.2. Human rights are central in relationships with third countries

3.2.1. Human Rights clauses in trade, cooperation and development agreements

Since 1989, the human rights clause has been a regular feature of most agreements and in 1995, the European Commission declared this clause to be an 'essential element' of all EU agreements with third countries. This is a very important aspect because if there is a violation of this Article by one of the parties, the other parties can suspend the agreement partially or totally.

The first reference to the EC's commitment to human rights in the body of a trade or cooperation agreement occurred in 1989 in the fourth Lomé Convention (Article 5). In the following years the EU included, with more or less consistency, a human rights clause in its agreements with third countries in the areas of trade and development.

In its Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries,¹⁰ the Commission declares the commitment to respect, promote and protect human rights and democratic principles to

¹⁰COM (95) 216 of 23 May 1995.

be a 'key element' of the European Community's relations with third countries.

The main innovation of this Communication is the suggestion to include various clauses in all Community agreements with third countries so as to promote the Community's growing commitment to human rights in its relations with non-members in a more explicit, transparent and consistent way. Apart from general references to human rights and democratic values in the preamble, the body of the agreements should include:

- * An Article stating respect for human rights as an 'essential element' of the agreement;**
- * An Article referring to the appropriate measures to be taken in case of the non-execution of an obligation under the agreement; and**
- * An Article whereby a 'material breach'¹¹ is defined to occur when, *inter alia*, a violation of essential elements takes place.**

¹¹According to the Vienna Convention, a material breach of a treaty consists in "the violation of a provision essential to the accomplishment of the objective or purpose of the treaty" (Article 60(3)) and 3), and it "entitles the other party [the respecting one] to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part." (Article 60(1))

This clause has been included in all subsequently negotiated bilateral agreements of a general nature.

The Communication states that such an innovation allows:

- * Human rights to be the subject of common interests, part of the dialogue between the contracting parties and an instrument for implementation.**
- * The parties, where necessary, to take restrictive measures in proportion to gravity of the offences. Measures should not only be based on objective and fair but also be adapted to the variety of the situations that can arise - the aim is to keep a dialogue ongoing.**
- * The parties to regard serious and persistent human rights violations and serious interruptions of democratic process as a "material breach" of the agreement.**

In general there will be a clause in the agreement, specifying the relation between the Community and the country concerned, which constitutes an "essential element" of the agreement. It also includes general references to human rights instruments and values in the preamble of the agreement.

¹²COM (2001) 252 of 8 May 2001.

In the Communication on the European Union's role in promoting human rights and democratisation in third countries¹², the Commission identifies three areas where it can act effectively:

- * By promoting coherent and consistent policies in support of human rights and democratisation.**
- * Through placing a higher priority on human rights and democratisation in the EU's relation with third countries and taking a more pro-active approach, in particular by using the opportunities offered by political dialogue, trade and external assistance.**
- * By adopting a more strategic approach to the European Initiative for Democracy and Human Rights (EIDHR)**

In the latter document, the Commission concludes that it will promote coherence and consistency both between EU actions under the different Treaty pillars and also between EC actions and those of Member States. The Commission's dialogue with third countries should be pursued in a consistent and coherent way and be based on internationally agreed human rights standards and instruments. The Commission will also seek opportunities in other areas of Community policies such as trade, immigration and the environment to propose policies and initiatives which favour respect for human rights and democratisation. Also the Commission should ensure that all EC assistance instruments are mobilised in support of human rights and democratisation. The Constitution for Europe reiterates the obligations for respect for human rights and international obligations of the member states in Article III-316.

3.3. Examples of Agreements with third countries which criminalise same-sex acts

The following paragraphs detail multilateral agreements signed with countries which do not respect basic human rights by criminalising consensual same-sex acts. Given the high number of treaties existing between the EU and third countries these examples are purely indicative and the list is far from exhaustive. A list of countries which criminalise same-sex consensual acts and their participation in agreements with the EU is available in the Appendix 1 and a detailed list is also available on ILGA-Europe's website.

(www.ilga-europe.org).

3.3.1. ACP-EU Partnership agreement

ACP stands for African, Caribbean and Pacific countries. Relations between the EU and ACP countries are dealt with in the Cotonou agreement concluded in 2000.¹³ This Agreement followed from the Lomé Conventions that were regularly updated since 1975.

The Cotonou Agreement contains various clauses dealing with human rights. Under the title **Political Dialogue (Essential elements)**, it is mentioned that:

- * **Respect for human rights, democratic principles and the rule of law are essential elements of the partnership; and**
- * **A new procedure has been drawn up to deal with violations. It puts more emphasis on the responsibility of the State concerned and allows for greater flexibility in the consultation process. In cases of special urgency - serious violations of one of the essential elements - measures will be taken immediately and the other party notified.**

¹³http://europa.eu.int/comm/development/body/cotonou/agreement_en.htm.

Moreover, on **Financial Reform (Programming reform)**, one of the criteria for accessing the performance on these issues is:

Progress in implementing institutional reforms, which relates to efforts of the country concerned in reforming its institutions, including, to ensure respect for human rights and create a climate of democracy and rule of law / fight against corruption. This links to essential elements without creating a double conditionality.

Despite these commitments, out of the 77 ACP countries which have signed the Cotonou Agreement, 39 states still criminalise consensual same-sex acts. These are:

Angola, Barbados, Benin, Botswana, Cameroon, Cape Verde, Ethiopia, Fiji, Gambia, Guinea, Guyana, Jamaica, Kenya, Kiribati, Malawi, Mauritania, Mozambique, Namibia, Nauru, Nigeria, Palau, Papua New Guinea, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Seychelles, Sierra Leone, Solomon Islands, Somalia, Sudan, Swaziland, Tanzania, Togo, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Zambia, Zimbabwe.

In five countries (Bahamas, Democratic Republic of the Congo, Eritrea, Niger, Vanuatu) reports on the issue are contradictory. Most of these countries have also ratified the ICCPR and CAT and therefore, by criminalising consensual same-sex acts, they are contravening their international obligations. Without asking the EU to become guardian of human rights treaties, it has a role to play to exercise "peer pressure" on those states.

3.3.2. Central America Framework Agreement

The Agreement states:

"Cooperation in assistance for refugees, displaced persons and returnees is also provided for, as is the consolidation of the democratic process in Central America. To this end, the parties agree to support the organisation and monitoring of free and transparent elections, the consolidation of the rule of law, respect for human rights and the participation of the entire population without discrimination."

However, Nicaragua re-criminalised same-sex relationships in 1992. Its criminal law provides for punishment of up to 3 years' imprisonment for anyone engaging in consensual same-sex intercourse. Attempts to overturn the law have failed in Nicaraguan High Courts.

3.3.3. EUROMED

The EU's proximity policy towards the Mediterranean region is governed by the global and comprehensive Euro-Mediterranean Partnership launched at the 1995 Barcelona Conference, between the European Union and its 12 Mediterranean Partners (hence called the Barcelona Process, overarching bilateral and multilateral EU relations). Two of the Mediterranean Partners entered the EU in May 2005 (Cyprus and Malta) the ten Mediterranean partners are Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey. Libya is currently negotiating an agreement with the EU.

Extracts of the Barcelona Declaration relevant to human rights

Preamble

The signatories [...]

"convinced that the general objective of turning the Mediterranean basin into an area of dialogue, exchange and cooperation guaranteeing peace, stability and prosperity requires a strengthening of democracy and respect for human rights, sustainable and balanced economic and social development, measures to combat poverty and promotion of greater understanding between cultures, which are all essential aspects of partnership."

Political & security partnership: Establishing a common area of peace & stability

[...]

In this spirit they undertake in the following declaration of principles to:

- * act in accordance with the United Nations Charter and the Universal Declaration of Human Rights, as well as other obligations under international law, in particular those arising out of regional and international instruments to which they are party;
 - * develop the rule of law and democracy in their political systems, while recognizing in this framework the right of each of them to choose and freely develop its own political, socio-cultural, economic and judicial system;
 - * respect human rights and fundamental freedoms and guarantee the effective legitimate exercise of such rights and freedoms, including freedom of expression, freedom of association for peaceful purposes and freedom of thought, conscience and religion, both individually and together with other members of the same group, without any discrimination on grounds of race, nationality, language, religion or sex; give favourable consideration, through dialogue between the parties, to exchanges of information on matters relating to human rights, fundamental freedoms, racism and xenophobia;
 - * respect and ensure respect for diversity and pluralism in their societies, promote tolerance between different groups in society and combat manifestations of intolerance, racism and xenophobia. The participants stress the importance of proper education in the matter of human rights and fundamental freedoms;
 - * respect their sovereign equality and all rights inherent in their sovereignty, and fulfil in good faith the obligations they have assumed under international law;
 - * respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States, as
 - * reflected in agreements between relevant parties;
- refrain, in accordance with the rules of international law, from any direct or indirect intervention in the internal affairs of another partner.

Five countries (Algeria, Lebanon, Morocco, Syria and Tunisia) which have signed this agreement still criminalise same-sex consensual sexual relationships between adults. Furthermore, a report published by Human Rights Watch in 2004 provided evidence that Egyptian gay men engaging in consensual sex are often arrested and tortured despite there being no explicit laws outlawing same-sex relations.¹⁴

¹⁴In a Time of Torture, report published by Human Rights Watch, March 2004 available at <http://hrw.org/reports/2004/egypt0304/>.

Libya, which is currently a candidate for signature of the Barcelona declaration, also criminalises consensual same-sex acts.¹⁵ This criminalisation occurs in violation of its international obligations under the International Covenant on Civil and Political Rights and the United Nations Convention Against Torture, both of which it has ratified. It is important that, in the negotiation process with Libya, the EU apply clear conditionality for the respect of human rights.

¹⁵Sections 407(4) of the Penal Code. Punishment is imprisonment of both individuals for up to five years.

3.3.4. European Neighbourhood Policy

The European Neighbourhood Policy is an agreement between the EU and the 16 following countries: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Russian Federation, Syria, Tunisia, Ukraine and also the Palestinian Authority.

The European Neighbourhood Policy is set up to "offer a privileged relationship with neighbours, which will build on mutual commitment to common values principally within the fields of the rule of law, good governance, the respect for human rights, including minority rights, the promotion of good neighbourly relations, and the principles of market economy and sustainable development."

Six countries (Algeria, Lebanon, Libya, Morocco, Syria and Tunisia) which have signed this agreement still criminalise same-sex consensual sexual relationships between adults. Egypt, which allegedly tortures gay men, is also party to the agreement. Despite condemnation by the European Parliament in 2002 in the resolution on the persecution of homosexuals in Egypt, Egypt still contravenes international law.¹⁶

¹⁶Resolution of the 4th of July 2002, P5_TA (2002) 0378.

Many bilateral or multilateral agreements exist between the EU and third countries which contain the clauses. They can be found on the Commission's website in the page: the European Union in the world, <http://europa.eu.int/comm/world/>.

3.4. Death Penalty

The abolition of the death penalty is a central human rights issue that has been taken up by the EU. In 1998, the EU decided as an integral part of its human rights policy to strengthen its international activities in opposition to the death penalty.

Guidelines on EU policy towards third countries on the death penalty (extract)

General Affairs Council - Luxembourg, 29 June 1998

The EU's objective, where possible, is to persuade third countries to abolish the death penalty. To this end, the EU will encourage countries to consider acceding to the Second Optional Protocol to the ICCPR and comparable regional instruments. Additionally, where this is not possible, the EU will nevertheless maintain abolition as an objective, and will:

- * Encourage states to ratify and comply with international human rights instruments, especially those relating to the use of the death penalty, including the ICCPR;
- * Raise the issue in multilateral fora and work towards moratoria on the use of the death penalty and, in due course, abolition;
- * Encourage relevant international organisations to take appropriate steps to encourage states to ratify and comply with international standards relating to the death penalty;
- * Encourage and offer bilateral and multilateral cooperation, *inter alia* in collaboration with civil society, including in the legal field with the aim of establishing a fair and impartial judicial process for criminal cases.

http://europa.eu.int/comm/external_relations/human_rights/adp/guide_en.htm

As part of these guidelines the General Council issued **a list of minimum standards**:

Where states insist on maintaining the death penalty, the EU considers it important that the following minimum standards should be met:

(i) Capital punishment may be imposed **only for the most serious crimes**, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences. The death penalty should not be imposed for non-violent financial crimes or for non-violent religious practice or expression of conscience.

(...)

(iv) Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for alternative explanation of the facts. *(emphasis added)*

This commitment was reaffirmed in 2000 with the EU Charter on Fundamental Rights which states in Article 2.2. "No one shall be condemned to the death penalty, or executed."

The EU has also taken a position in relation to practices in certain countries. On 21 August 2002, the EU Presidency issued a declaration noting that the sentencing to death by stoning was manifestly incompatible with the human rights conventions to which Nigeria is a signatory. This sentence is applied in accordance with some interpretations of Sharia law¹⁷ to people accused of having same-sex relationships.

In its yearly reports on human rights in the world, the European Parliament reiterates its commitment to the elimination of the death penalty in the world.¹⁸

¹⁷"The word sharia means "the path to a watering hole". It denotes an Islamic way of life that is more than a system of criminal justice. Sharia is a religious code for living, in the same way that the Bible offers a moral system for Christians. It is adopted by most Muslims to a greater or lesser degree as a matter of personal conscience, but it can also be formally instituted as law by certain states and enforced by the courts. Many Islamic countries have adopted elements of sharia law, governing areas such as inheritance, banking and contract law." Susie Steiner, Guardian, 20th August 2002.

¹⁸European Parliament's annual reports on human rights in the world available at http://www.europarl.eu.int/comp/afet/droi/annual_reports.htm.

¹⁹(2004/2151(INI)).

²⁰European Parliament resolution on the Annual Report on Human Rights in the World 2004 and the EU's policy on the matter (2004/2151(INI)), paragraph 165.

In the resolution on the Annual Report on Human Rights in the World 2004 and the EU's policy on the matter,¹⁹ the European Parliament:

"Urges states which impose the death penalty on persons accused of same-sex consensual sexual relationships to abolish such laws and judicial practices;"²⁰

Despite these texts, the European Union institutions are providing financial supports to countries which punish consensual same-sex acts with the death penalty.

This table illustrates the fact that countries which violate a basic human right **by sentencing to death** people who are accused of consensual same-sex acts receive aid from and are in trade agreements with the EU.

Country	Aid from the EU
Afghanistan	At the Berlin conference in spring 2004, the EU updated its reconstruction pledge, committing \$ 2.2 billion for the period 2004-2006. http://www.europa.eu.int/comm/external_relations/afghanistan/intro/index.htm
Mauritania	For the period 2001-2007 191 million euros in accordance with ACP-EC partnership http://www.europa.eu.int/comm/development/body/csp_rsp/scanned/mr_csp_fr.pdf#zoom=100
Nigeria (Sharia law)	For the period 2001-2007 266 million euros in accordance with ACP-EU partnership http://www.europa.eu.int/comm/development/body/csp_rsp/scanned/ng_csp_en.pdf#zoom=100
Pakistan	"In response to the crisis in the region, Commission services were asked to provide an aid package which could both have a quick economic impact and meet overall EC development

policies. With this objective in mind, an additional Euros 50 M were earmarked for 2002 from the Asia budget. The funds will be provided as quick-disbursing budgetary support under a Financial Services Sector Reform Programme aiming to assist the reform and expansion of financial services in Pakistan. Further measures included accelerated disbursement of Euros 31 million under the ongoing Social Action Programme (SAP) and commitment of a Euros 22.9 million project aimed at strengthening livestock services."

http://www.europa.eu.int/comm/external_relations/pakistan/intro/index.htm

Saudi Arabia	<p>No Aid but Trade agreements with the EU 15th GCC - EU Joint Council and Ministerial Meeting (Manama, 5 April 2005) The Cooperation Council for the Arab States of the Gulf (to which Saudi Arabia is party) and the EU emphasised the importance of respect and tolerance among people and called on all their members to fight any kind of extremism, intolerance and discrimination and to foster better understanding between peoples, religions and cultures.</p> <p>http://www.europa.eu.int/comm/external_relations/gulf_cooperation/intro/finaldecl_050405.pdf</p>
Sudan (for married men)	<p>The EU will give 135 million euros to Sudan once the peace agreement is signed.</p> <p>http://www.europa.eu.int/comm/development/body/country/country_home_en.cfm?cid=sd&lng=en&status=old#edf9findata</p>
United Arab Emirates	<p>See Saudi Arabia</p> <p>http://www.europa.eu.int/comm/external_relations/gulf_cooperation/intro/index.htm</p>
Yemen	<p>The National indicative Programme 2005-2006 has been adopted in July 2004 and focuses on two priority areas: poverty reduction and strengthening pluralism and civil society; projects will be launched in the field of fishery, civil society, election support, reproductive health and food security. The indicative financial envelope amounts to Euros 27 million, without taking into regard possible allocations under horizontal budget lines.</p> <p>http://www.europa.eu.int/comm/external_relations/yemen/intro/index.htm</p>

The granting of aid by and trade agreements with the European Union should be conditional upon respect for basic human rights such as the right to life, the right to be free from torture, the right to private life, the right to be free from discrimination and the right to a fair trial. These rights are central to the existence of democracy and can be enforced by states without cost, in a relatively short time-frame. Such important rights should not be trumped by arguments based on cultural relativism or religious beliefs.

4. Recommendations

1. Pressure governments to stop violations of the human rights of people because of their sexual orientation.

1.1. In the report on human rights in the world in 2004, the European Parliament "Calls upon the Council and the Commission to address and take concrete measures in respect of those countries which have laws that discriminate on the grounds of sexual orientation; calls on those countries which have laws that make same-sex consensual sexual relationships between adults a criminal offence to abolish them."²¹

²¹In the Report on Human Rights in the world in 2004, paragraph 215 see at

http://www.europarl.eu.int/comp/afet/droi/annual_reports.htm

1.2. The Council and the Commission should increase their role in promoting human rights and democracy in the world by ensuring that the EU's commitment to promote human rights and democracy in third countries is at the heart of the EU's Common Foreign and Security Policy and by transforming the human rights clauses of agreement with third countries into obligations that must be complied with in order to receive aid.

1.3. Countries mentioned in this report need to be regularly reminded of their obligations under international human rights law and the terms of the agreements signed by the EU. The EU Presidencies should exercise political pressure during the regular meetings they hold with third countries.

1.4. Agreements with third countries should be considered in the fundamental rights impact assessment conducted by the Commission particularly at the time of negotiations or revisions.

1.5. The European Parliament should continue raising awareness on the violations of human rights of lesbian, gay, bisexual and transgender (LGBT) people in its report on human rights in the world.

2. Raise awareness and visibility on the fact that rights of LGBT people are human rights.

2.1. ILGA-Europe welcomed the position presented by the Luxembourg presidency at the 61st Session of the UNHCR to condemn discrimination on the basis of sexual orientation in a statement

under item 6 and for the first time to support the issue of gender identity at the UN in the context of the Resolution on extrajudicial, summary or arbitrary executions.

2.2. Further action is needed to eradicate discrimination. For instance, the EU should further its support in favour of a Resolution on Human Rights, Sexual Orientation and Gender Identity at the UN Commission on Human Rights and support the introduction of a day against homophobia.

2.3. The EU should fund lesbian, gay, bisexual and transgender (LGBT) groups under the European Initiative for Democracy and Human Rights (EIDHR) on the same basis as other human rights groups.

3. Protect people fleeing persecution.

3.1. The directive on the definition of refugee²¹ includes under the concept of "social group", groups defined by sexual orientation. It is important for this directive to be transposed at national level as soon as possible in order to offer protection to people who are persecuted on the basis of their sexual orientation.

3.2. The Commission should monitor and ensure the rapid and inclusive implementation of the disposition on social groups into national legislation of the EU member States.

Appendix I

Lists of countries which criminalise same-sex consensual sexual acts

Countries	Agreement with the EU	Human Rights Clause	International Treaty
Afghanistan	Bonn Agreement	Yes	Ratified CAT
Algeria	EUROMED, ENP	Yes	Ratified CAT, ICCPR
Angola	ACP-EC Partnership	Yes	Ratified CAT, ICCPR
Bahamas	ACP-EC Partnership	Yes	
Bahrain	EC-GCC Agreement	Commitment to human rights and non-discrimination in the 15th EU-GCC meeting (April 2005)	Ratified CAT
Bangladesh	EC-Bangladesh Cooperation	Yes	Ratified CAT
Barbados	ACP-EC Partnership	Yes	Ratified ICCPR
Benin	ACP-EC Partnership	Yes	Ratified CAT, ICCPR
Bhutan	Negotiating a treaty	N/A	
Botswana	ACP-EC Partnership	Yes	Ratified CAT
Brunei	ASEM, EC-ASEAN Partnership	In its Communication: A New Partnership for South East Asia. Reminds partners: that respect for fundamental human rights and democratic principles, as laid down in the Universal Declaration on Human Rights, underpins the internal and external policies of the parties and constitutes an "essential element" of the agreement.	
Burma/Myanmar	None	N/A	
Cameroon	ACP-EC Partnership	Yes	Ratified CAT, ICCPR
Cape Verde	ACP-EC Partnership	Yes	Ratified CAT, ICCPR
Democratic Republic of the Congo	ACP-EC Partnership	Yes	Ratified CAT, ICCPR
Dominica	None	N/A	
Eritrea	ACP-EC Partnership	Yes	
Ethiopia	ACP-EC Partnership	Yes	Ratified CAT
Fiji	ACP-EC Partnership	Yes	
Gambia	ACP-EC Partnership	Yes	Signed CAT, Ratified ICCPR

Guinea	ACP-EC Partnership	Yes	Ratified CAT, ICCPR
Guyana	ACP-EC Partnership	Yes	Ratified CAT, ICCPR
India	EC-India Cooperation	Yes	Signed CAT
Iran	Negotiating a Treaty	N/A	
Jamaica	ACP-EC Partnership	Yes	Renounced ICCPR
Kenya	ACP-EC Partnership	Yes	Ratified CAT
Kiribati	ACP-EC Partnership	Yes	
Kuwait	EC-GCC Agreement	Commitment to human rights and non-discrimination in the 15th EU-GCC meeting (April 2005)	Ratified CAT
Laos	EC-ASEAN Cooperation, EC-Laos Cooperation	Yes	
Lebanon	EUROMED, ENP	Yes	
Libya	ENP	Yes	Ratified CAT, ICCPR
Malawi	ACP	Yes	Ratified CAT, ICCPR
Malaysia	ASEM, EC-ASEAN Partnership	In its Communication: A New Partnership for South East Asia. Reminds partners: that respect for fundamental human rights and democratic principles, as laid down in the Universal Declaration on Human Rights, underpins the internal and external policies of the parties and constitutes an "essential element" of the agreement.	
Maldives	None	NA	Ratified CAT
Mauritania	ACP-EC Agreement	Yes	
Morocco	EUROMED, ENP	Yes	Ratified CAT
Mozambique	ACP-EC Agreement	Yes	Ratified CAT
Namibia	ACP-EC Agreement	Yes	Ratified CAT, ICCPR
Nauru	ACP-EC Agreement	Yes	Signed CAT, ICCPR
Nepal	EC-Nepal Cooperation	No	Ratified CAT, ICCPR
Nicaragua	EEC-Central America Framework	"Parties agree to support respect for human rights and the participation of the entire population without discrimination."	Signed CAT, ratified ICCPR
Niger	ACP-EC Agreement	Yes	Ratified CAT, ICCPR
Nigeria	ACP-EC Agreement	Yes	Ratified CAT

Oman	EC-GCC Cooperation	Commitment to human rights and non-discrimination in the 15th EU-GCC meeting (April 2005)	
Pakistan	EC-Pakistan Cooperation	Yes	Ratified CAT
Palau	ACP-EC Agreement	Yes	
Papua New Guinea	ACP-EC Agreement	Yes	Ratified CAT
Qatar	EC-GCC Cooperation	Commitment to human rights and non-discrimination in the 15th EU-GCC meeting (April 2005)	Ratified CAT
Saint Lucia	ACP-EC Agreement	Yes	
Saint Vincent and the Grenadines	ACP-EC Agreement	Yes	Ratified CAT, ICCPR
Saudi Arabia	EC-GCC Cooperation	Commitment to human rights and non-discrimination in the 15th EU-GCC meeting (April 2005)	Ratified CAT
Senegal	ACP-EC Agreement	Yes	Ratified CAT, ICCPR
Seychelles	ACP-EC Agreement	Yes	Ratified CAT, ICCPR
Sierra Leone	ACP-EC Agreement	Yes	Ratified CAT, ICCPR
Singapore	ASEM, EC-ASEAN Partnership	In its Communication: A New Partnership for South East Asia. Reminds partners: that respect for fundamental human rights and democratic principles, as laid down in the Universal Declaration on Human Rights, underpins the internal and external policies of the parties and constitutes an "essential element" of the agreement.	
Solomon Islands	ACP-EC Agreement	Yes	
Somalia	ACP-EC Agreement	Yes	Ratified CAT, ICCPR
Sri Lanka	Commercial Cooperation Agreement	Yes	Ratified CAT, ICCPR
The Sudan	ACP-EC Agreement	Yes	Signed CAT
Swaziland	ACP-EC Agreement	Yes	Ratified CAT
Syria	EUROMED, ENP	Yes	Ratified CAT
Tanzania	ACP-EC Agreement	Yes	
Togo	ACP-EC Agreement	Yes	Ratified CAT, ICCPR
Tonga	ACP-EC Agreement	Yes	
Trinidad and Tobago	ACP-EC Agreement	Yes	Renounced ICCPR
Tunisia	EUROMED, ENP	Yes	Ratified CAT

Turkmenistan	Tacis	Yes	Ratified CAT, ICCPR
Tuvalu	ACP-EC Agreement	Yes	
Uganda	ACP-EC Agreement	Yes	Ratified CAT, ICCPR
United Arab Emirates	EC-GCC Cooperation	Commitment to human rights and non-discrimination in the 15th EU-GCC meeting (April 2005)	
Uzbekistan	Tacis	Yes	Ratified CAT, ICCPR
Vanuatu	ACP-EC Agreement	Yes	
Yemen	EC-Yemen Cooperation	Yes	
Zambia	ACP-EC Agreement	Yes	Ratified ICCPR
Zimbabwe	ACP-EC Agreement	Yes	

Appendix 2

List of countries with death penalties for same-sex consensual sexual acts

Countries	Agreement with the EU	Human Rights Clause	International Treaty
Afghanistan	Bonn Agreement	Yes	Ratified CAT
Iran	Negotiating a trade and co-operation agreement	N/A	Neither ICCPR, nor CAT
Mauritania	ACP-EC partnership	Yes	Neither ICCPR, nor CAT
Nigeria	ACP-EC partnership	Yes	Ratified CAT
Pakistan	EC-Pakistan Cooperation agreement	Yes	Ratified CAT
Saudi Arabia	EC-GCC agreement	Commitment to human rights and non-discrimination in the 15th EU-GCC meeting (April 2005)	Ratified CAT
Sudan	ACP-EU partnership	Yes	Signed CAT
United Arab Emirates	EC-GCC agreement	Commitment to human rights and non-discrimination in the 15th EU-GCC meeting (April 2005)	Neither ICCPR, nor CAT
Yemen	EC-Yemen agreement	Yes	Neither ICCPR, nor CAT

For further information on UN standards in relation to LGBT people

ARC, UN Commission on Human Rights: Brazilian Resolution on Human Rights and Sexual Orientation. Government Briefing Kit,

<http://www.arc-international.net/brief.html>

International Commission of Jurists, "International Human Rights References To Human Rights Violations On The Grounds Of Sexual Orientation And Gender Identity", 61st Session of the United Nations Commission on Human Rights, March - April 2005,

http://www.icj.org/IMG/pdf/Compilation_on_SO.pdf

International Gay and Lesbian Human Rights Commission, Sexual Rights and Sexual Orientation at the United Nations Commission on Human Rights,

http://www.iglhrc.org/files/iglhrc/UNCHR%20Action_Kit_2005.doc

International Lesbian and Gay Association, A list of resources to better understand the debate on sexual orientation and gender identity at the UN,

http://www.ilga.org/news_results.asp?LanguageID=1&FileID=576&ZoneID=7&FileCategory=61

Professor Douglas Sander, Human Rights and Sexual Orientation in International Law,

http://ilga.org/news_results.asp?LanguageID=1&FileCategoryID=44&FileID=577&ZoneID=7

Information on specific countries

Behind the Mask website: a website on lesbian and gay affairs in Africa

<http://www.mask.org.za/>

Human Rights Watch, In a time of Torture: The Assault on Justice In Egypt's Crackdown on Homosexual Conduct, March 2004

<http://hrw.org/reports/2004/egypt0304/>

Human Rights Watch, Hated to Death: Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic, Vol. 16, No. 6(B) November 2004

<http://hrw.org/reports/2004/jamaica1104/>

Human Rights Watch, More Than a Name State-Sponsored Homophobia and Its Consequences in Southern Africa

<http://hrw.org/reports/2003/safrica/>

ILGA-Europe, List of countries criminalising same-sex acts,

www.ilga-europe.org

This report looks into the role of the European Unions (EU) institutions can play towards countries which still criminalise consensual same-sex acts.

The document first highlights that such legislation contravene international standards of human rights. In particular, breaches of the right to private life and the discriminatory aspect of these laws have been established at European and United Nations (UN) level. Furthermore, several UN bodies have declared that criminalisation of consensual same-sex acts amounts to degrading, inhumane treatment and torture.

The report argues that the EU institutions have a responsibility in relation to human rights of lesbian, gay, bisexual and transgender people in several third countries. This responsibility flows from the fact that the EU member states have signed agreements with those countries which contains human rights clauses. To ensure the respect for human rights in those countries, the EU institutions have several tools: economical (withdrawal of aid), political (political dialogues) and legal (human rights clauses in agreements). The report gives a few examples of agreements with countries which criminalise consensual same-sex acts.

The paper then turns the issue of death penalty as a sentence for consensual same-sex acts. Despite guidelines and declarations condemning the use of the death penalty, the EU has signed agreements with countries which execute people on the sole basis of their sexual orientation. The report provides a list of these countries which receive financial help from the EU.

Finally, it contains a list of recommendations targeted at the EU institutions. They are ordered of three kind: to put pressure on governments to stop violations of the human rights of people because of their sexual orientation; to raise awareness and visibility on the fact that rights of LGBT people are human rights and to protect people fleeing persecution.