

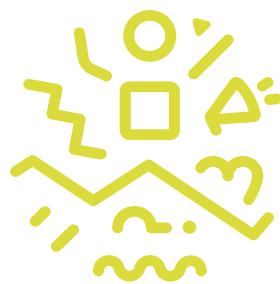
SO/GIE/SC

facilitators manual



MODULE 3

Legal frameworks



MODULE 3

This Module introduces participants to the legal and policy frameworks around how human rights relate to SO/GIE/SC. As we speak, approximately 70 countries still criminalize same-sex sexual conduct among consenting adults, and many do not provide for legal recognition of one's gender identity. Furthermore, in countries where there are no abjectly repressive laws in this regard, legislation that explicitly protects or promotes human rights of LGBTI persons is absent. In this Module, participants explore some central legal redress mechanisms.



FACILITATOR TIPS

For this Module, we advise you to consult or co-facilitate with a legal specialist or organization that has worked on the issue of decriminalization and/or equality before the law. Prepare this session together with this person or organization, and update them on the previous Modules.

If you cannot find such an organization, make sure to be sufficiently informed on the current situation relating to your context before you get started. You can prepare by collecting information from legal experts or organizations, through books and other media, or online.

The primary source for sexual orientation-related law in the world has been produced by ILGA.¹ Their research and mapping comprises criminalization laws, laws that protect, and laws that recognize same-sex relationships.

Legal situations pertaining to gender identity mostly refer to issues of legal gender recognition,² but also to criminalization of cross-dressing, of organizing, of gender reassignment surgeries, and the deployment of other laws that target trans persons.³

The range of unique legal provisions regarding the rights and protections related to sex characteristics (intersex) has also yet to be mapped: issues of consent for medical practices on infants and teenagers, parental rights, forced surgery, and a range of other issues that are particular to individuals with sex characteristic variations.



¹ https://ilga.org/downloads/2017/ILGA_WorldMap_ENGLISH_Overview_2017.pdf. Information is regularly updated. At the time of writing, the last update had taken place in October 2017.

² <https://ilga.org/trans-legal-mapping-report>

³ <https://transrespect.org/en/map/criminalization-and-prosecution-of-trans-people/>

MODULE 3

DESCRIPTION

The legal and policy environments that limit the enjoyment of basic human rights based on sexual orientation, gender identity and expression and intersex status differ widely across the globe. These are influenced by a country's history, culture and religious affinity. However, regional and international human rights mechanisms can be effectively used to promote and protect some rights of sexual, gender and sex minorities at the national level, even in some of the most repressive countries. Additionally, international human rights laws and mechanisms offer numerous legal remedies for persons that identify as LGBTI or another nomenclature that they self-identify with. These are the focus of this Module.

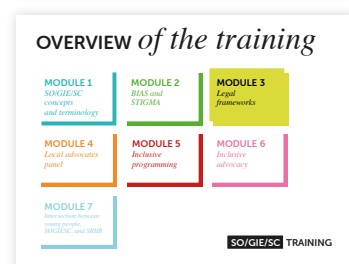
LEARNING OUTCOMES

At the end of Module 3, participants:

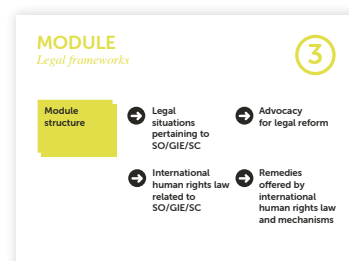
- Understand that laws criminalizing or negating sexual, gender and sex diversity have harmful life outcomes on individuals, and stand in violation of legally binding international human rights law.
- Are informed about the various international, regional and national legal frameworks related to SO/GIE/SC and how these can be accessed;
- Understand how the international, regional and national legal frameworks are relevant for their work;
- Are aware of legal progress on decriminalization of same-sex sexual relations, recognition of trans identities, and enactment of positive protective laws relating to SO/GIE/SC.

→ *Continue*









Slides:



Slide:



STRUCTURE

- | | | |
|------------|---|--|
| P6 | Module 3.1- <i>Legal situations pertaining to SO/GIE/SC</i> |  45 min. |
| P12 | Module 3.2- <i>Advocacy for legal reform</i>
<i>Optional: presentation of a case of strategic litigation and/or advocacy for legal reform</i> |  75 min.
 (30-60 min.) |
| P17 | Module 3.3- <i>International human rights law related to SO/GIE/SC</i>
<i>Optional: exercise on the Yogyakarta Principles</i> |  30 min.
 (90 min.) |
| P20 | Module 3.4- <i>Remedies offered by international human rights law and mechanisms</i>
<i>Optional: group exercise</i>
<i>Optional: group exercise</i> |  45 min.
 (90-120 min.)
 (75-90 min.) |
| P37 | <i>Sources overview</i> | |

MATERIALS REQUIRED

- Projector and/or LCD Screen
- Felt pens
- Sticky notes
- Flipcharts
- Printouts of name match cards
- Printouts for each participant of document "Working Materials and Handouts, main Conventions and treaties" (if possible, add relevant national legislation)

3.1

 45 min. total

Legal situation pertaining to SO/GIE/SC

FACILITATOR TIPS

The key takeaway of this Module, is that participants realize the vast range and complexity of sexual orientation, gender identity and expression, and sex characteristic-related laws across the globe. It is important that they differentiate SO/GIE/SC in their thinking and see each grouping has specific requirements from the law. Secondly, the weight of laws in countries differs (some mean death penalty, others mean a year in jail for the same crime), but in all cases it is important to account for the chilling effect the very presence of negative law has on both organizing, and on

public perception and sentiment.

We advise you to revise the ILGA website before the training and to look up your country so that you can refer to specificities of your country.⁴ Also, you can revise if an updated map becomes available and integrate it into your PowerPoint presentation.

Advise people to read the ILGA page and use it as a background document.



⁴ <https://ilga.org>

GROUP CONVERSATION



Purpose: Participants understand the relevance of legal frameworks and how criminalization or the lack of protection of the human rights of sexual, gender and sex minorities, negatively impacts the socio-economic situation and wellbeing of persons that belong to these minorities.

Kick-off with a joint conversation about human rights.

- Create some space and ask participants to stand up and form a large circle.
- Ask participants what comes to their mind when they hear the words “human rights”.
- Ask if someone wants to share an experience of having their rights violated. What happened and how did it make them feel? Were they able to go somewhere to denounce this violation or seek redress? If so, what happened? If not, were there any other actions that they were able to take? →



- Ask participants how they would feel if the law would not recognize their very identity and/or criminalizes their intimate relationship with their partner.
- Conclude by pointing out that in this Module you will jointly analyze how laws can criminalize or negate someone's sexual orientation or gender identity, and what the consequences of this criminalization/non-recognition are. Furthermore, you will study how laws and policies can contribute to legal equality of LGBTI persons.
- Ask everybody to sit down again.

EXPLANATION



1. The 1948 Universal Declaration of Human Rights (UDHR) is the seminal collection of human rights standards across the globe, and is more relied upon in some countries than others. The Declaration opens with the words: "All human beings are born free and equal in dignity and rights" (slide 5). This means the same rights are valid for all people. Equality and non-discrimination are the foundational principles that underpin all human rights law.



2. Explain that the UDHR is not in itself a legally binding document: it is a post-World War 2 consensus document of intention. However, the UDHR generated two major legally binding international agreements that countries sign up to: the 1966 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These cover many of the basic principles of freedom expression, association, etc., and rights to health, housing, education, employment and the like. Collectively, these three mechanisms are known as the "International Bill of Human Rights".
3. In many countries around the world, human rights are being violated on the basis of a person's sexual orientation, gender identity and expression, and sex characteristics (SO/GIE/SC): as a consequence, people are being persecuted, discriminated against, and subjected to extreme forms of violence in all parts of the world. Reporting of such discrimination or violence is generally low because people feel it is pointless to report, they fear further targeting, their state institutions have no category to account for crime based on SO/GIE/SC, the judiciary are heavily biased, or they cannot find a legal representative who is prepared to take on their case. In short, at the global level, reporting and documenting of offences motivated by SO/GIE/SC are severely undeveloped.

4. At the time of writing, same-sex sexual acts are forbidden in 70 countries, under a variety of laws (buggery, sodomy, 'unnatural acts', etc.). In these countries consenting adults engaging in same-sex relations can be punished with (long-term) imprisonment or even the death penalty (currently in five countries, or parts of countries).⁵ This number is constantly changing: for example, on September 6, 2018, India has decriminalized same-sex sexual acts, and it is likely that Trinidad and Lebanon will also decriminalize these in 2018, while at the same time Indonesia is considering criminalization nationwide. At the time of writing of this training, the most recent map is of May 2017, so not all changes will be integrated in it yet.



5. Explain that the global situation regarding gender identity is not as clear and little mapping has been done as yet. ILGA Trans Legal Mapping report sets out whether a gender recognition process is established in primary legislation, through a court application, in an administrative rule, in policy, or simply not defined.⁶ The different processes for sex/gender marker change and name change, and the links between the two, if any, are also set out. Name change processes are especially relevant for countries where the sex/gender marker change process is absent or, if present, is onerous, medicalized, pathologized and, therefore, restrictive. As the report reveals, in some countries, name change processes are equally onerous. Criminalization of cross-dressing exists in eight states. Gender reassignment surgery can be criminalized in six states, and often other laws are used to target trans people.



6. Explain that evidence shows that in countries where same-sex sexual acts are criminalized and/or where trans identities are not recognized or even targeted by law, relevant persons encounter more widespread forms of human rights violations on a daily basis. These include the apparent normalization of violence (both physical and verbal), denial of services, and the delegitimization of claims to equal treatment and protection before the law.



⁵ https://ilga.org/downloads/2017/ILGA_WorldMap_ENGLISH_Criminalization_2017.pdf

⁶ https://ilga.org/downloads/ILGA_Trans_Legal_Mapping_Report_2017_ENG.pdf

GROUP CONVERSATION



7. Look jointly at the Trans Murder Monitoring Map. Explain that this monitoring tool shows the number of trans persons that become victim of the most extreme form of violence. It is important to be aware that official numbers about violence or discrimination for persons that belong to a sexual, gender or sex minority is often absent, particularly so in countries with a repressive legal environment. For example, Brazil shows as the darkest (most murders) place.⁷ While in this country the numbers of murders of trans persons are indeed worryingly high, it should not be assumed that less trans murders happen elsewhere in the world. Few countries record the murders as transphobic crime. Still, we consider the map of use, since it does provide an initial idea of the actual numbers of trans persons that are being murdered and can be used as an advocacy tool to push for better recording. But most of all it shows the urgency to ensure better protection of persons that are being targeted of their SO/GIE/SC, and particularly of trans people.
8. Ask participants if they think the map is of use, despite these limitations. Discuss if and how they could use this map to advocate for changes in their own working environment. Indicate that at the site of Trans Respect they can find more data.⁸
9. As a final discussion about these maps, jointly look at the sexual orientation global overview map and refer the country you are in. Take some time to discuss other issues that people notice.



SHORT LECTURE



Proceed by sharing knowledge on criminalization:

10. Explain that also in non-criminalizing countries, there are still big legal gaps in relation to protection from discrimination and violence: lack of equal rights in health, inheritance rights, or the right to a family, for example. Some countries require a person to undergo sterilization before their true gender can be officially recognized on documentation. At the time of writing this is still the case in 14 of the 48 members of the Council of Europe.⁹



⁷ <https://transrespect.org/en/map/trans-murder-monitoring/#>

⁸ <https://transrespect.org/en/about/tvt-project/>

⁹ https://tgeu.org/wp-content/uploads/2018/05/MapB_TGEU2018_Online.pdf

11. In those countries where progress is made towards legal equality for LGBTI people, they are often still not free to openly be themselves. In most places around the world, such persons experience stigma, discrimination, exclusion, and even violence on a regular basis.¹⁰ This can act as an obstacle for people to organize together to articulate and claim their rights. Add to this, as of 2017, at least 25 states around the world have created legal barriers to the formation, establishment, registration or funding of SO/GIE/SC non-governmental organizations (NGOs), and increasingly more parliaments are considering such measures.

12. Explain that laws criminalizing different aspects of LGBTI people's lives or denying them equal rights because of their SO/GIE/SC, vary from country to country. A common denominator in all of these laws is the discrimination and unfair treatment of persons merely on account of their sexual orientation and/or gender identity and the way they express this, and/or because of their sexual characteristics.

13. Ask participants to say what comes to their minds when they look at the graph of criminalization/decriminalization.



11

14. Explain that there seem to be changing dynamics over time in terms of the legacy of criminalization. The British 1861 Offences Against the Person Act, which outlawed private consensual same-sex relations between males was exported to 53 Commonwealth countries around the world, and was a model law picked up by other states also. Throughout the 20th century as independence has come to these countries, they retained the offending act in their codes (as of 2018, 36 of these still do so). It is only towards the end of the century that these have begun to be unpicked.

15. Advocates, in drawing up materials from their nation's pre-colonial past, point to the fact that homophobia is what was imported with colonization, and not same-sex desire itself, as many political and religious leaders continuously claim. For example, the British Prime Minister Theresa May expressed her "deep regret" at the 2018 Commonwealth Summit, and stated that Britain had a special responsibility to help change "hearts and minds" about legislation targeting sexual and gender diversity.¹²

16. Explain that laws that relate to protection of gender identity and gender expression are only being formulated in the early 21st century: for example, the world's first law that allowed someone to self-determine their gender identity was introduced in Argentina in 2010, setting a global standard that to date has been replicated only by six other states.



¹⁰ PEW Research Center, "The Global Divide on Homosexuality, Greater Acceptance in More Secular and Affluent Countries" (revised version, 2014). <http://www.pewresearch.org/wp-content/uploads/sites/2/2014/05/Pew-Global-Attitudes-Homosexuality-Report-REVISED-MAY-27-2014.pdf>

¹¹ Source: <http://www.bbc.com/news/world-25927595>

¹² <https://www.theguardian.com/world/2018/apr/17/theresa-may-deeply-regrets-britain-legacy-anti-gay-laws-commonwealth-nations-urged-overhaul-legislation>

17. Also, in the 21st century, a growing trend is the enactment of laws that guarantee equality before the law, such as non-discrimination in employment.

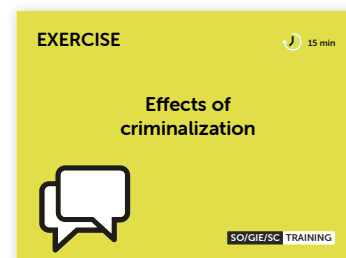
GROUP EXERCISE



15 min.

Effects of criminalization

18. In groups of three to five participants, discuss the following question: What are some of the effects of criminalization based on SO/GIE on a person's life? **(5 min)**
19. Ask participants to share their conclusions.
20. Proceed to the next slide. Point out that, as we have seen, there are many countries around the world where same-sex sexual conduct is criminalized and trans identities are not recognized. This is a breach of the human rights and dignity of people, and negatively impacts their life outcomes and wellbeing. It is therefore important to advocate for the removal of these laws and for the approval and enactment of a legal framework that guarantees that all people, regardless of their SO/GIE/SC, have and can claim the same rights.
21. Also point out, that even in countries where this is not criminalized, LGBT persons are generally not free to openly be themselves. So improving the legal situation is an important step, but more needs to be done to ensure socio-economic equality and inclusion.



3.2

 60 min. total

Advocacy for legal reform

Optional: Present, analyze, and discuss a legal case (30- 60min).

INFORMATION SHARING



FACILITATOR TIPS

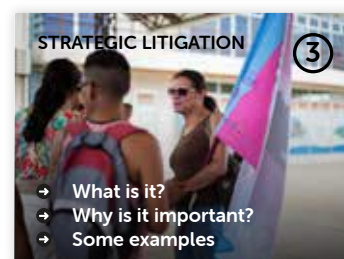
This may be an appropriate moment to have a brief discussion on the language used by activists and allies regarding “LGBTI rights”.

22. Emphasize that LGBTI persons do not seek special treatment, but to be treated equal to all other citizens, with dignity and equality.
23. Explain that sometimes existing national and international laws can be used to not only seek legal redress, but can also be called upon to challenge an existing discriminatory legal situation through the courts. Such cases are taken in order to ensure that national laws are updated, or interpreted, in line with international law that the state is obligated to align to - by virtue of being a signatory to a Convention - and thus lead to changes in these laws. Cases such as these have impact for the wider (sexual or gender diverse) communities, rather than just redress for the plaintiff, and for this reason such legal campaigns are known as ‘strategic litigation’ or ‘impact litigation’.
24. If you have been able to identify and invite a legal expert to this session, ask him/her/ them to present a case of strategic litigation. If not, you can use and build on the following text:

NOTE



- ❶ LGBTI persons do not seek any special treatment
- ❷ they / we just seek equal treatment and protection with dignity and equality



There are numerous examples of successful strategic litigation. For example, the intimidation tactics used for years by Kenyan police to target men they suspect of being gay of forced anal examinations (a tactic often visited upon those who refused to pay bribes), was, in March 2018, judged to be cruel and inhumane treatment, and thereby unlawful.¹³ Likewise, an on-going case in Lebanon against



¹³ <https://76crimes.com/2018/03/22/kenya-court-nixes-forced-anal-exams/>

the Article 534 (enacted in 1943, and which outlaws “[a]ny sexual intercourse against nature...”) was eventually heard at that state’s highest court, the Court of Cassation. The question of what comprises ‘nature’ as regards sexuality was the key point in the court’s finding for the plaintiff. As you see from the criminalization map above (paragraph 4), 30 countries use this ‘against nature’ paradigm to criminalize same-sex sexual activity. As a result, the finding of this Lebanese case may have huge impact in litigations taken in each of these states.¹⁴ The recent well-founded and momentous ruling of the Indian Supreme Court, that states that same-sex sexual acts are not against the order of nature, and therefore cannot be criminalized under penal code section 377, adds to this jurisprudence.¹⁵ In the Kenyan, Lebanese and Indian cases, the judgments affect both the plaintiff and the general population. It is also important to note that the legal reasonings employed by these courts can, and often do, influence jurisprudence (or judicial thinking) in other countries, and will often be quoted as part of the reasoning in coming to judgment.

25. Explain that strategic litigation, and indeed in many other forms of advocacy (lobbying, education and awareness, media work, etc.), will often rely on the fact that regional and international human rights law, as constituted in the United Nations Conventions and regional standards (see paragraph 52 and 53), is binding on signatory states. This means that states need to align their national law with at least the minimum standards encoded in the treaties, and indeed signatory states are obligated to stay abreast with development in the thinking and statements of the committees overseeing the Conventions (their General Comments and Concluding Observations).
26. Appealing to the international and regional mechanisms has proved highly effective in triggering dialogue and inclusion at the national level. Going to the international bodies, after attempts at the national level have failed, acts as a loudspeaker that tells the world the issue, and validates the importance of the human rights claim at the national level. On the negative side, this attention also has a polarizing effect amongst states that reject sexual and gender diversity on the grounds of ‘traditional values’ (usually expressed as cultural, religious or political concerns) – they refuse to accept that binding human rights law extends to SO/GIE/SC issues.



¹⁴ <https://www.hrw.org/news/2017/02/02/lebanon-edges-closer-decriminalizing-same-sex-conduct>

¹⁵ https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf


Presentation and analysis of a legal case

27. To help participants understand more deeply what advocacy for legal change entails, we advise you to **prepare, present and discuss one exemplary case of strategic litigation** and/or **one exemplary case of advocacy for legal change**. Such a case should be relevant to the specific country or region of your participants, and if possible involve international legal frameworks. Analyze how this case has developed, which actors were involved, what successes and pitfalls you see and in doing so, also consider the impact on the LGBTI movement and the wider society. Seek contact with a legal organization or expert to help you prepare this, or invite this person to the meeting.

Facilitator tip: In case you have found a legal expert who joins this session, ask them to either present a case of strategic litigation as mentioned under paragraph 31, and/or to reflect on the above. The expert can provide

valuable insights on the current (national, regional, international) legal situation regarding the human rights of sexually or gender diverse persons.

Continue to share the following:

28. Explain that legal reforms are important, but they are only one element in realizing equality, inclusion and non-discrimination. Emphasize that after legal success, there is still a lot of work to be done in order to develop and implement policies. The scale of this element of the fight for full equality cannot be underestimated. In many cases, successful implementation will require training of key staffs – be they police, judiciary, the legal profession, civil servants, health workers, or medical professionals, among others. Furthermore, there is the consideration of the general society, and how such implementation processes are mediated or discussed in media or the public space.
29. Inform participants that in 2012, the Office of the United Nations High Commissioner for Human Rights (OHCHR) formulated five core legal obligations of states with respect to the human rights as they apply to sexual orientation and gender identity (slide 15). These obligations are reflected in the report “Born Free and Equal”.¹⁷ 

FIVE RECOMMENDATIONS

from the Office of the United Nations High Commissioner for Human Rights (OHCHR)

- 1 **Protect** people from homophobic and transphobic violence.
- 2 **Prevent** the torture and cruel, inhuman and degrading treatment of LGBT persons in detention.
- 3 **Repeal** laws criminalizing homosexuality.
- 4 **Prohibit** discrimination on the basis of sexual orientation and gender identity.
- 5 **Safeguard** freedom of expression, association and peaceful assembly for LGBTI people.



¹⁶ Contact Hivos in case you think it can be helpful to support you in this and/or to mobilise our networks.

¹⁷ <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>.

It is notable that prior to 2012, the OHCHR (basically the standard setting secretariat for the UN) had produced no substantial guidance documentation on sexual orientation and gender identity.

30. Read the five legal obligations quoted here as they are formulated in the 2012 OHCHR report. Briefly look at each of these, but do not dive too deep. In the following exercise there will be a chance to look more in-depth to these elements.

- Protect people from homophobic and transphobic violence. Include sexual orientation and gender identity in hate crime laws.
- On policy and implementation: Establish effective systems to record and report hate-motivated acts of violence. Ensure effective investigation and prosecution of perpetrators and redress for victims of such violence. Asylum laws and policies should recognize that persecution on account of one's sexual orientation or gender identity may be a valid basis for an asylum claim.
- Prevent the torture and cruel, inhumane and degrading treatment of LGBT persons in detention by prohibiting and punishing such acts, and ensuring that victims are provided with redress.
- On policy and implementation: Investigate all acts of mistreatment by state agents and bring those responsible to justice. Provide appropriate training to law enforcement officers and ensure effective monitoring of places of detention.
- Repeal laws criminalizing homosexuality, including all laws that prohibit private sexual conduct between consenting adults of the same sex. Anal exams to determine commission of same-sex sexual activity should be considered as a cruel, inhumane, and degrading treatment.
- On policy and implementation: Ensure that individuals are not arrested or detained on the basis of their sexual orientation or gender identity, and are not subjected to baseless and degrading physical examinations intended to determine their sexual orientation.
- Prohibit discrimination on the basis of sexual orientation and gender identity. Governments should enact comprehensive laws that include sexual orientation and gender identity as prohibited grounds of discrimination. In particular, ensure non-discriminatory access to basic services, including in the context of employment and healthcare. But one should also consider inheritance rights, labor rights, etc.

- On policy and implementation: Provide education and training to prevent discrimination and stigmatization of LGBT and intersex people.
- Safeguard freedom of expression, association and peaceful assembly for LGBT and intersex people. Any limitations on these rights must be compatible with international law and must not be discriminatory. Protect individuals who exercise their rights to freedom of expression, association and freedom of assembly from acts of violence and intimidation by private parties.

GROUP EXERCISE



30-45 min.

“Laws and policies that discriminate, fail to protect or criminalize persons based on their real or perceived SO/GIE/SC”

Materials:

- Felt pens
- Sticky notes
- Flipcharts or other large sheets with the five OHCHR obligations

EXERCISE

30 min

Laws and policies that criminalize discriminate or fail to protect persons based on their real or perceived SO/GIE/SC?

SO/GIE/SC TRAINING

31. Hand out post-its and pens to the participants.
32. Ask the group to identify what laws and policies they are aware of that discriminate or criminalize SO/GIE/SC related issues? Do they see possibilities to challenge and improve the current legal framework, so that it better responds to issues related to SO/GIE/SC? Can they relate these to the five obligations as defined here above? What laws are already in place to build on?
33. Ask each person to write these down for themselves (one idea or possibility per post-it), and to keep in mind the five obligations as mentioned in the OHCHR report. **(10-15 min)**
34. While participants are writing, put up the flipcharts or other large sheets in a place where everybody can see them. Or, if you have not prepared these yet, quickly write them down and put up the sheets.
35. After 10 minutes, ask participants to put their post-its in the category where they think it fits best.
36. Discuss the different post-its and the obligation they contribute to. Take care to distinguish between legal matters and policy recommendations. Are there any specific opportunities that emerge? Any gaps? **(15-20 min)**

3.3

 30 min. total

International human rights law

KNOWLEDGE SHARING



Share knowledge on international legal developments

37. Start by reading out Article 2 of the Universal Declaration of Human Rights (UDHR), which states “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The phrase “other status” is a key phrase for SO/GIE/SC advocacy – it is where we insist inclusion is pre-determined, albeit not enumerated - and has proved contentious because some states agree that SO/GIE/SC should be included, while other states voraciously disagree. To establish this reading of “other status” as being inclusive of sexual and gender diversity, between 2003 and 2009, a number of Resolutions and Declarations were put before the United Nations Human Rights Council (in Geneva) and the UN General Assembly (in New York), all of which were rejected. However, in 2011 the first one was accepted, and there have been three since.



38. Explain that, after the first three of these Resolutions and Declarations were introduced (2003, 2005 and 2006), a group of prominent human rights lawyers, United Nations representatives and activists convened to create clear guidance for all states on legal standards pertaining to sexual orientation and gender identity under international human rights law. This authoritative compilation, created at expert meetings in Yogyakarta, Indonesia in late 2006, identified 29 Principles and provided detailed recommendations to states. These are known as the Yogyakarta Principles, adopted in late 2007.¹⁸ The experts emphasize that **not only states, but all actors** have responsibilities to promote and protect human rights. Consequently, they include further recommendations to the UN human rights system, national human rights institutions, the media, non-governmental organizations, and funders.



¹⁸ <https://yogyakartaprinciples.org>

39. Explain that, in 2016, ten years after the creation of the Yogyakarta Principles, it was deemed necessary to update the earlier version to adequately “reflect significant developments in international human rights law and in the understanding of violations affecting persons of ‘diverse sexual orientations and gender identities’, as well as a recognition of the often-distinct violations affecting persons on grounds of ‘gender expression’ and ‘sex characteristics’”.¹⁹ This resulted in the Yogyakarta Principles plus 10 (YP+10). This set of nine Principles begins at Principal 30, indicating that the two documents should be read in tandem (Principles 1-38 in total). They are specifically designed to ensure sufficient attention is given to **the human rights relating to gender identity, gender expression and sex characteristics** – the areas the original 2007 Yogyakarta Principles had not fully explored. The YP+10 were adopted on November 10, 2017.²⁰
40. It is important to note that the two sets of Yogyakarta Principles find root in binding international law (found in Conventions and Treaties). The recommendations offered, however, are simply that: guidance for states. This means states are not obliged to adopt the Principles – this makes them ‘soft law’ (as opposed to binding ‘hard law’). Yet, they offer a tool for advocacy and can be used to challenge current discriminatory legislation; the Principles offer consistent, realistic standards that are used to measure states’ performance, and to hold states to account.

➔ *Continue to optional group exercise*



¹⁹ Press release on the Yogyakarta Principles + 10. <http://yogyakartaprinciples.org/principles-en/press-release/>

²⁰ These can also be accessed at <https://yogyakartaprinciples.org>

**OPTIONAL GROUP EXERCISE***Yogyakarta Principles plus 10*

41. If time permits, go over the main elements of the 38 Principles, and consider doing a short case study. Depending on the size of the group, you could divide the participants into smaller groups of up to five people.
42. Provide each group with a current national level discriminatory legal article relating to sexual orientation, gender identity or sex characteristics (perhaps to do with criminalization or non-inclusion, e.g. employment rights or partnership rights). Ask them to identify which sections and articles in the YP+10 might help to challenge this law.
43. Ask participants to identify the international Conventions being referenced, and try to locate whether these have been ratified (legally binding) by the participants' country. If you decide to do this, you will need sound preparation, and you might want to ask support from a legal expert.²¹
44. Encourage participants to further study the document in their free time. Depending on the set-up of the training, you could even give it out as a home assignment.



²¹ Contact Hivos in case you think it can be helpful to support you in this and/or to mobilise our networks.

3.4

 45 min. total

Remedies offered by international human rights law and mechanisms

EXPLANATION



Introduce the concept of remedies. Explain that there are four main areas available and effective for SO/GIE/SC advocacy at the international level:

- 1) the Treaty Bodies (10 in total)
- 2) the Universal Periodic Review
- 3) Special Procedures (including the Independent Expert on SOGI)
- 4) Regional human rights mechanisms

Remedies in International Human Rights Law

- Treaty Bodies
- Universal Periodic Review
- Special Procedures (including the Independent Expert on SOGI)
- Regional human rights mechanisms



45. Explain that remedies offered for alleged violations based on SO/GIE/SC must start at the national level, even in those cases where the legal context at national level is not conducive or the independence of the judiciary is questioned. Why?

- Because national laws and policies are the primary locus for remedy of rights violations in the country where the problem exists.
- Because there may be avenues of appeal through focus on the state's constitutional provisions that can be explored. Constitutions are the supreme source of law in states, to which all state laws must adhere.
- Because the Treaty Bodies and regional human rights mechanisms require petitioners to exhaust domestic remedies, to limit the volumes of case work.

The Treaty Bodies

46. The **United Nations Treaty Bodies**²² are concerned with promoting and protecting human rights, and each views human rights issues through their specific 'umbrella' or **lens**; one looks at discrimination against women, another looks at torture, another civil and political rights, etc. Increasingly over recent years, the Treaty Bodies have applied →



²² <https://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>

their various lenses to SO/GIE/SC issues. The regional Conventions (European Convention on Human Rights, Inter-American Convention, etc) group all of these lenses into one Convention. Treaty Bodies have proved to be especially important for human rights recognition and standard setting in the arena of SO/GIE/SC. As many UN Member States strongly reject that international human rights law applies to SO/GIE/SC, it is of great relevance when the Treaty Bodies focus and comment on States' obligations around various elements of LGBTI people's lived reality (health, education, torture, etc).

47. People generally appeal to the Treaty Bodies when they find they **cannot get a fair hearing** at the national level and/or may have **exhausted appeals at the national level (domestic remedy)**. In other words: if their national mechanisms reject or deny a human rights claim, people then move to the international arena. This can have a loud-speaker effect, perhaps drawing attention to issues that a state neglects or may want to keep silent on.

48. Explain that each Treaty Body has a **reporting cycle** whereby every country that is a signatory to the binding Convention (state party) submits a report periodically. The government report will generally provide as positive a light as possible on developments in the period under question, and will show how it has addressed prior issues that have emerged at earlier hearings. It is important to note that not every country signs up to, or ratifies, each Convention, and is therefore not subject to its binding law.



23

49. After the government report is submitted, civil society has the opportunity to submit what are known as '**shadow reports**' – reports that shadow the government report. These tend to be more critical of government policy, action or inaction, and thus provide material to the Treaty Body's committee members in their questioning of the state. Civil society shadow reports must be submitted through NGOs that have been recognized by the UN system (those with what is called ECOSOC status), in set formats.

50. Treaty Bodies make **authoritative jurisprudential human rights Concluding Observations** directly to individual States, or General Comments on a subject applicable to all States. This is key to understanding their force and value, and the forms of redress they can offer. Their work is to test if Treaty obligations are being violated in the claims that come before them. It is only in recent years that SO/GIE/SC have emerged in these Treaty Bodies, so they must elaborate what is the scope of the human rights they protect. This is new work and these first-principle findings are subject to elaboration and addition as years go by.



23 <https://www2.ohchr.org/english/bodies/docs/ReportingCycle.gif>

51. This table illustrates the themes that nine of the Treaty Bodies have addressed to date. The tenth Treaty Body, the Sub-Committee on the Prevention of Torture, operates differently from the other nine – SO/GIE/SC issues have emerged in this forum in recent years. The table also offers a non-exhaustive overview of which sub-group in the SO/GIE/SC acronym has been specifically enumerated in the commentaries offered by the Treaty Body (for example, under CRC to date they have commented on survival and development specifically enumerating SO and GIE, but as yet they have not mentioned SC in this regard). These tables can be reproduced as hand-outs. The Articles cited are for illustrative purposes, as this is not an exhaustive list of references.

52. International Legal Instruments

INTERNATIONAL CONVENTIONS	SAMPLE ARTICLES (themes) quoted by Treaty Bodies re: SO/GIE/SC	Specific reference to:		
		SO	GIE	SC
Convention of the Rights of the Child (CRC), 1989	Art. 2: non-discrimination Art. 6: survival and development Art. 8: right to identity Art. 19: freedom from violence Art. 24: health	X X X X	X X X X	X X X X
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979	Art. 1: discrimination (& asylum) Art. 2: policy (re: violence) Art. 5: sex role and stereotyping Art. 10: education Art. 11: employment Art. 12: health Art. 13: economic/social benefit	X X X X X X X	X X X X X	X X X X
International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966	Art. 1: self-determination Art. 2: discrimination Art. 3: equal rights Art. 7: employment Art. 11: standard of living Art. 12: health Art. 15: education Art. 14: implementation	X X X X X X X X	X X X X X X X	
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965	Art. 2: racial discrimination Art. 5: comprehensive non-discrimination based on race in multiple areas (including freedom of movement, marriage, work, education, health, justice, etc.)	X X	X X	
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984	Art. 1: prohibition of torture Art. 2: adequate measures Art. 3: non-refoulement Art. 6: right to life Art. 10: education on torture Art. 12: impartial investigation Art. 13: access to justice Art. 14: redress Art. 16: adequate prevention	X X X X X X X X	X X X X X X X	X X X X X X X

International Covenant on Civil and Political Rights (ICCPR), 1966	Art. 1: self-determination		X	X
	Art. 2: access to recourse	X	X	
	Art. 3: equal rights	X	X	X
	Art. 6: right to life	X	X	X
	Art. 7: freedom from torture	X	X	X
	Art. 9: arbitrary detention	X	X	
	Art. 10: inherent dignity	X	X	X
	Art. 12: freedom of movement	X	X	
	Art. 14: equality in justice	X	X	
	Art. 16: right to recognition	X	X	X
	Art. 17: privacy	X	X	X
	Art. 18: freedom of religion	X	X	
	Art. 19: freedom of expression	X	X	
	Art. 20: freedom from hatred	X	X	X
	Art. 21: freedom of assembly	X	X	
	Art. 22: freedom of association	X	X	
	Art. 24: children's rights	X	X	X
	Art. 26: discrimination	X	X	X
Convention on the Rights of Persons with Disabilities (CRPD), 2006	Art. 3: consultation	X	X	X
	Art. 5: equality & discrimination	X	X	X
	Art. 6: intersectionality	X	X	
	Art. 17: integrity of the person			X
	Art. 25: health	X	X	X
International Convention for the Protection of All Persons from Enforced Disappearance (CED), 2006	Art. 7: reparations	X	X	
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 1990	Arts. 8-22: comprehensive protections	X	X	X
	Art. 24: personhood	X	X	X

53. Regional Legal Instruments

The regional human rights mechanisms are constructed as formal courts, so a country can be fined or sanctioned, and a victim can receive financial or other compensation for harms done. You must have **exhausted appeals at the national level before proceeding to the regional courts**. The Treaty Bodies do not possess such judicial force – their authority is vested in their pronouncement on state obligation.

INTERNATIONAL CONVENTIONS	SAMPLE ARTICLES (themes) quoted by Treaty Bodies re: SO/GIE/SC	Specific reference to:		
		SO	GIE	SC
American Convention of Human Rights, 1978	Art.3: right to legal personality	X	X	X
	Art. 4: right to life	X	X	X
	Art. 7: personal liberty	X	X	X
	Art. 11 privacy	X	X	X
	Art. 17: family life	X	X	X
	Art. 18: right to name	X	X	X
African Charter on Human and People's Rights, 1981	No jurisprudence on SO/GIE/SC as yet			
European Convention on Human Rights (ECHR), 1953	Art. 2: right to life	X		
	Art. 3: freedom from torture	X		
	Art. 5: right to liberty	X		
	Art. 6: right to fair hearing		X	
	Art. 8: private and family life	X	X	X
	Art. 9: freedom of religion	X		
	Art. 10: freedom of expression	X		
	Art. 11: assembly and association	X	X	
	Art. 12: right to marry	X		
	Art. 13: effective remedy		X	X
Treaty on Functioning of the European Union (TFEU), 2010	Art. 14: discrimination			
	note: TFEU is rarely petitioned on SO/GIE/SC. Hearings at the European Court of Justice	X		
Charter of Fundamental Rights of the European Union (CRFEU), 2000	Art. 1: human dignity	X		X
	Art. 2: right to life / spouse	X		
	Art. 3: beneficiaries	X	X	
	Art. 4: privacy/degraded treatment	X		
	Art. 7: right to residence	X	X	
	Art. 9: right to marry/family	X		
	Art. 11: freedom – expression	X	X	
	Art. 12: freedom – association	X		
	Art. 21: discrimination /gender equality			
	Art. 45: free movement			
	note: CFREU hearings are at the European Court of Justice			

➔ *Optional group exercise on the next page*



OPTIONAL GROUP EXERCISE



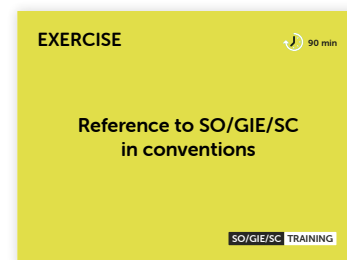
75-90 min.

Reference to SO/GIE/SC in Conventions

Purpose: Participants are able to identify and make reference to relevant references to issues related to SO, GIE and / or SC in conventions.

Materials:

- Number of printed Conventions



54. Divide the participants in groups of three to four persons. Ask each group to assign a rapporteur that reports back to the bigger group.

55. Provide each group with a specific Convention. Ask them: **(45–60 min)**

- To find out if their country has ratified the Convention (it is preferable to select Conventions that indeed have been signed and ratified by the country where the training takes place or where participants come from).
- To find out if any official and shadow-reports were submitted.
- And if so, if these reports made reference to issues related to SO/GIE/SC.
- To look at four to five articles of that Convention, and identify if it covers issues related to SO, GIE and/or SC.
- To imagine or illustrate situations where such protections would be needed.
- If these articles would be relevant for legal cases and/or shadow-reporting.

56. Debrief: Ask each group to share their findings and discuss the overall picture that emerges. **(30 min)**

Is attention for SO/GIE/SC well-covered? What can we use to strengthen our national level advocacy? What would be interesting to refer to in shadow-reports?

57. Now, as a way of concluding this section, ask participants to turn their attention to three other remedies offered by international human rights mechanisms: the Universal Periodic Review, Special Procedures (including the SOGI Independent Expert) and regional mechanisms.

The Human Rights Council and the Universal Periodic Review (UPR)

58. The **Human Rights Council** is the **United Nations' coordinating organization for the promotion and protection of human rights around the globe**. It oversees the Treaty Bodies and a number of other mechanisms that provide opportunity for remedy and redress. As an inter-governmental body made of 47 UN member states, rotating periodically following General Assembly election, it has often been accused of being overly political and divorced from realities on-the-ground.

59. Explain that, to counter this critique, a mechanism that allows civil society direct voice in processes that affect them, the **Universal Periodic Review (UPR)** was set up, and came into action first in 2008. Its process of reporting and responding is very different than the Treaty Bodies. For creating awareness of the subtle and not-so-subtle violations and discriminations based on SO/GIE/SC, the UPR has been invaluable over the past decade.

60. In short, its cycle works like this: **all 193 UN member states come up for review** every 4.5 years, no matter what UN Conventions they have or have not ratified. Under this mechanism, the human rights situation of all UN member states is reviewed. Each year 42 states are reviewed during three Working Group sessions dedicated to 14 States each. These three sessions are usually held in January/February, May/June and October/November.

61. The review process is unique in human rights mechanisms because it is a **discursive or dialogic process**. The state reports, civil society makes submissions (written and oral), and a working group reviews and questions the state. Civil society and other states also have a chance to question the state or comment on its actions. The state then has a chance to respond. All in all the various steps generally take up to nine months before any single country review is complete and a final report is produced.

The Human Rights Council 3

- ➔ is United Nations coordinating organisations for the promotion and protection of human rights
- ➔ oversees the Treaty Bodies and a number of other mechanisms that provide opportunity for remedy and redress
- ➔ is an intergovernmental body made up of 47 member states, rotating periodically
- ➔ has been accused of being overly political and divorced from realities on the ground

The Universal Periodic Review 3

- ➔ Was set up in response to accusations towards the HRC
- ➔ First came to action first in 2008
- ➔ All 193 UN member states are up for review every 4 and a half years, regardless of the Conventions they have or have not ratified
- ➔ Three sessions (January/February, May/June and October/November)
- ➔ In each session 14 countries get reviewed

The Universal Periodic Review 3

Review process is dialogic process:

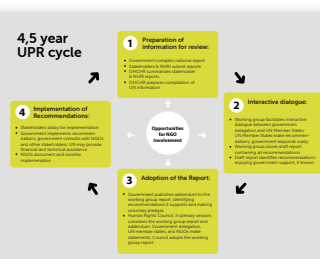
- ➔ State reports
- ➔ Civil society makes submissions (written and oral)
- ➔ Working group reviews and questions the state, civil society and other states also have a chance to question the state or comment on its actions
- ➔ State has a possibility to respond

The Universal Periodic Review 3

Most unique feature:

- ➔ It offers states an opportunity to review their peers' human rights records, and be reviewed by them.
- ➔ This creates new dialogic opportunities
- ➔ This differs from the Treaty Bodies

SO/GIE/SC TRAINING



62. Its most unique feature is that the UPR offers states an opportunity to review their peers' human rights records, and be reviewed by them. In this light, the UPR has opened up **new dialogic opportunities** to address issues from what is essentially a political and diplomatic perspective. This differs from the Treaty Bodies who make authoritative jurisprudential human rights Concluding Observations directly to individual states, or General Comments on a subject applicable to all states.
63. The UPR process by its very structure seems to facilitate an expansive understanding of the multiple perspectives existing in any one state on human rights issues, and how they intersect or relate to each other. Although the UPR is a state-centric process, the extensive civil society access reveals how cultural values interact with the diversity of populations living under the states' authority. The preparation for, and follow on from, the act of articulating such perspectives in the UPR reporting cycle builds capacity and strengthens networking of civil society organizations. As the process essentially critiques the state overtly, it can also open human rights defenders and particular minorities to **considerable risk**.
64. The UPR has been **extremely valuable to SO/GIE/SC advocacy** in the past ten years. SO/GIE/SC organizations, especially from countries without any recognized form of supra-national mechanisms for enforcing rights pertaining to sexual and gender diversity, have found the UPR process particularly beneficial in holding governments to account on their human rights exclusions.
65. The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) has developed a very detailed SOGIESC Toolkit for engaging with the UPR – a must read for any advocacy group engaging with this advocacy route.²⁴
66. A note of interest: **National Human Rights Institutions** (NHRIs) play an important and unique role in promoting and monitoring the effective implementation of international human rights standards at the national level. This is their core function, the relevance of which is increasingly being recognized by the international community.²⁵ NHRIs may be equality commissions, ombudsman offices, human rights commissions, etc., and they are always government-appointed. As regards presenting SO/GIE/SC issues within the human rights framework, they have proven to be key actors because they often function as the very first point of contact between LGBTI civil society and the state. They act as a validating force, and often a bridge for tentative and under-resourced ➔



²⁴ Prado Mosquera, Diana Carolina, "SOGIESC UPR Advocacy toolkit, a guide for defenders working on sexual orientation, gender identity and expression and sex characteristics", (ILGA, 2017). http://ilga.org/downloads/SOGIESC_UPR_Advocacy_Toolkit.pdf.

²⁵ <http://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx>

civil society groups to access to legal, technical, and policy skills and supports. With this function in mind, it is interesting to note that in some criminalizing states, the NRHIs include SOGI within the scope of their mandates.

Special Procedures

including the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

67. A separate function of the Human Rights Council is overseeing a network of Special Procedures. These are independent human rights experts (called Special Rapporteurs or Independent Experts) or Working Groups, with mandates to report and advise on human rights from either a thematic or a country-specific perspective. Currently there are 44 thematic and 12 country mandates.²⁶ Their tasks and mandates are defined or extended in Resolutions. With the support of the OHCHR, these experts are able to:

- Embark on country visits.
- Take action on individual cases of alleged violations.
- Conduct thematic studies and convene expert consultations, contributing to the development of international human rights standards.
- Engage in advocacy and raise public awareness.
- Provide advice for technical cooperation.

Special Procedures:
A network of Special Rapporteurs, Independent Experts and Working Groups that focus on a specific theme or country.

They are able to:

- ➔ Embark on country visits
- ➔ Take action on individual cases of alleged violations
- ➔ Conduct thematic studies and convene expert consultations
- ➔ Engage in advocacy and raise public awareness
- ➔ Provide advice for technical cooperation

68. Persons appointed through these Special Procedures report annually to the Human Rights Council, and the majority of the mandates also report to the General Assembly.²⁷ The full list of special mechanisms, which includes Special Rapporteurs, Independent Experts and Working Groups, are available on the OHCHR website.²⁸

69. As previously noted, the very idea of SO/GIE/SC issues as human rights issues has been heavily contested for years at the United Nations. When, in 2001, Asma Jahangir, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, included information on sexual minorities in her report, some states objected ➔

SO/GIE/SC
issues heavily contested

2001
first mention of sexual minorities in a report

UN established the **right of sexual and gender minorities to frame and deliver their information to human rights mechanisms** and the **duty of the UN to receive this information**

2003
Brazil to table first resolution on SO/GI at HRC, but it failed



²⁶ According to information of the website of the Human Rights Council, last updated on August 1st, 2017: <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>

²⁷ <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>

²⁸ <http://www.ohchr.org/EN/HRBodies/SP/Pages/Currentmandateholders.aspx>

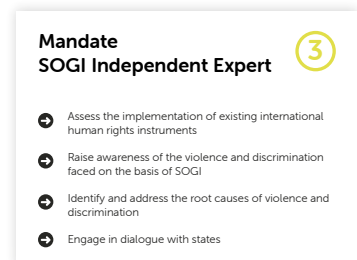
forcibly to this initiative and demanded the deletion of the language that referred to sexual orientation in the resolution renewing her mandate (to be clear, they were attempting to have her removed for this ‘gross indiscretion’).

- 70.** However later in 2001, coordinated by the High Commissioner for Human Rights Mary Robinson, six thematic Special Rapporteurs indicated their willingness to receive and consider information on human rights violations based on sexual orientation within their mandates. Thus, it was established at the UN institutional level, albeit in the face of ardent disagreement, **the right of sexual and gender minorities to frame and deliver their information to human rights mechanisms, and the duty of the UN to accept the information.** These inclusions motivated Brazil to table the first resolution at the Human Rights Council in 2003 (which failed, but remarkable that such an initiative was even attempted in such an hostile environment). It would take another 13 years before a Special Procedure dealing with sexual and gender diversity would be set up.



The Independent Expert *on protection against violence and discrimination* *based on sexual orientation and gender identity*

- 71.** After a very long struggle to get this mandate in place, against much resistance at the UN level, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity was established in 2016, when the Human Rights Council passed resolution 32/2.²⁹ →



! FACILITATOR TIPS

Look up if the Independent Expert on SOGI has done any official (invited by the government) or unofficial visits (for example for an event) to the country. Also find out if the country has a

standing invitation to the special procedures, which means there is an open invitation of their country to all thematic special procedures to undertake country visits.



²⁹ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/32/2

The expert's mandate is to assess the implementation of existing international human rights instruments in this respect, and to identify and address the root causes of violence and discrimination. The Independent Expert follows the same procedures established for other special mechanisms including:

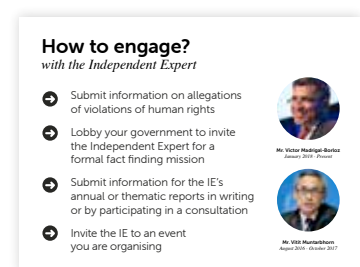
- Transmitting urgent appeals and letters of allegation to states with regards to cases of violence and discrimination against persons on the basis of their sexual orientation or gender identity.
- Undertaking fact-finding country visits.
- Submitting annual reports to the Human Rights Council and the General Assembly.

72. Explain that there are some particularly important functions that the mandate covers, including **raising awareness of the violence and discrimination faced on the basis of SOGI** and **to identify and address the root causes**. The Independent Expert is asked 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. This is such an important element to the work: SOGI issues are connected with a broad range of issues such as gender equality, poverty, class, bodily autonomy, sexual health and rights, among many others. A third aspect of the mandate is also of great importance and that is to simply **engage in dialogue with states**. Establishing such dialogue is so clearly needed as a matter of urgency in many states, especially with those who felt that they could not support the creation of the mandate, and those that are particularly hostile to the visibility of sexual and gender diversity.

73. The first Independent Expert was Mr. Vitit Muntarbhorn (August 2016 to October 2017). He had to step down because of problems with his health. The current independent expert is Mr. Victor Madrigal-Borloz.

How to engage with the Independent Expert?

74. There are different ways in which you can engage with the Special Procedures. Here we focus on the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, since he holds the most directly relevant mandate for our work.³⁰ However, there are many intersections with other thematic experts that you might want to explore. Think, for example, about the mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, which is very relevant in cases where an organization working on SO/GIE/SC-related issues is denied official registration or an event is cancelled.



³⁰ We speak here about “he”, since the current Independent Expert on SOGI identifies as male person, but a future Independent Expert might not.

75. You can **communicate directly** with an Independent Expert by **submitting information on allegations of violations of human rights** that come within their mandate. There is a specific website where you can submit information.³¹ For a **fact-finding visit to a specific country**, an Independent Expert has to do an official request to the government of that country, and then be officially invited. Various countries have standing invitations for the Special Procedures, which means that they, in principle, are prepared to receive a visit from any thematic mandate holder. If your country has such a standing invitation, it becomes somewhat easier to lobby with your government to invite a mandate-holder.³² It is wise to coordinate this with the Independent Expert before you start your lobby, because such a visit also has to fit his or her agenda. The Independent Experts submit **annual reports** to the Human Rights Council and the General Assembly. They also write **thematic reports and country reports**. For these you can **submit information in writing** or by **participating in public consultations**. Successful submissions are ones which contain credible, concise, and accurate data or information that is relevant to the Independent Expert's mandate. Submissions that are made with other ally organisations or coalition partners tend to carry weight. Moreover, you can **invite an Independent Expert for relevant events**. Note that, since the Independent Experts undertake this work as an honorary job, and often have very limited budgets, you should consider to pay for their travel costs.

Regional human rights mechanisms

76. Explain that regional human rights mechanisms are very important spaces for pursuing strategic (or impact) litigation and for providing remedies for human rights violations based on SO/GIE/SC. **A ruling from the regional court is legally binding** on the state under question, but crucial to **all other member states** covered under the relevant regional Convention. In Europe, the European Court of Human Rights (ECHR) applies the European Convention on Human Rights to 47 countries (Council of Europe Member States). In the Americas, rulings from the Inter-American Court of Human Rights (IACHR) apply the relevant Convention to 35 States in total, and in Africa, the judgments from the African Court on Human and Peoples' Rights (ACHPR) applies to 53 States. Asia does not currently have a regional court, or a fully regional Convention to be upheld. In total, this means that **legal redress is available for 136 of the world's 193 States**, within **three regional courts**.



FACILITATOR TIPS

Since this is quite a 'dense' Module already, it is advisable to dive deeper into the regional mechanism that is relevant for your group, and to only briefly mention the other regional mechanisms.



³¹ <https://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>

³² You can find the list of standing invitations here: https://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/StandingInvitations.aspx

77. In Europe and the Americas, **standards and jurisprudence** concerning SO/GIE/SC is relatively developed, and there is a **cross-fertilization effect** visible in some of the findings of the African Court (decisions and legal reasoning from ECHR and IACHR are being quoted by the ACHPR).

78. Inform that, in Europe, the **European Convention on Human Rights** is the primary tool that can be used in the fight for attainment of rights or to seek redress for harms done. It is the first Council of Europe's Convention and the cornerstone of all its activities. It was adopted in 1950 and entered into force in 1953. It is a prerequisite for states to ratify this Convention if they want to become a member of the Council of Europe. The European Court of Human Rights oversees the implementation of the Convention in the 47 Council of Europe member states. Individuals can bring complaints of human rights violations to the Strasbourg Court once all possibilities of appeal have been exhausted in the member state concerned. The European Union is preparing to sign the European Convention on Human Rights, creating a common European legal space for over 830 million citizens.³³

79. Under the European Convention, rights to privacy and to non-discrimination (Arts. 8 and 14) have been appealed to in order to remove criminalization legislation (same-sex sexual activity) in the 1980s and 1990s. Art. 8, Art. 12 (right to marry) and Art. 13 (effective remedy) have been used in various trans cases. Art. 3 (freedom from torture) and other articles have been used in cases regarding sex characteristics and intersex variations.

80. In the Americas the main human rights instruments include the American Declaration on the Rights and Duties of Man and the legally binding American Convention on Human Rights (ACHR). The ACHR is overseen by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. In November 2011, the Organization of American States (OAS) became the first regional human rights body to

Regional human rights mechanisms

3

- ➔ Important space for strategic litigation and providing remedies for human rights violations
- ➔ Legally binding on the state under question but crucially to all member states covered under that particular convention
- ➔ Allow for legal redress for inhabitants of 136 of all 193 states worldwide

Regional human rights mechanisms



Europe

European Convention on Human Rights

ratification is a prerequisite for member states

implementation is overseen by the European Court of Human Rights

SO/GIE/SC TRAINING

Regional human rights mechanisms

3

Americas

American Declaration on the Rights and Duties of Man American Convention on Human Rights (binding)

ACHR is overseen by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights

2011 – First regional human rights body with a special rapporteur on the rights of LGBTI persons



³³ <https://www.coe.int/en/web/human-rights-convention/home>

establish the position of Rapporteur on the Rights of Lesbians, Gays, Bisexuals, Trans and Intersex Persons.

81. In January 2018, the Inter-American Court of Human Rights released an Advisory Opinion, requested by Costa Rica in 2016, **recognizing important features of the right to gender identity and non-discrimination against same-sex couples**.³⁴ In previous cases of *Atala Riffo and daughters v. Chile* (2012)³⁵, and *Flor Freire v. Ecuador* (2016)³⁶, the Inter-American Court of Human Rights declared that sexual orientation and gender identity are categories protected by the American Convention on Human Rights. Therefore any discriminatory norm, act or practice based on these categories are prohibited by it. There has been **extensive jurisprudence** regarding SO/GIE/SC at the IACHR, often centering on the issues of non-discrimination, privacy, freedom of expression, association, bodily integrity and freedom from torture.

Regional human rights mechanisms

3

Americas

Extensive jurisprudence regarding SO/GIE/SC

Advisory Opinion 24 (January 2018) ↓

- ➊ Recognizes important features of the right to gender identity and non-discrimination against same-sex couples, such as same-sex marriage
- ➋ Binding for all member states

82. In Africa, the main regional human rights instrument is the 1981 **African Charter on Human and Peoples' Rights**. Its main mechanisms include the **African Commission on Human and Peoples' Rights** and the **African Court on Human and Peoples' Rights**. In 2014, at the 55th Ordinary Session the African Commission on Human and Peoples' Rights adopted a '**Resolution on Protection against Violence and Other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity**', Resolution 275.³⁷ This resolution condemns "**the increasing incidences of violence and other human rights violations**, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their real or imputed sexual orientation or gender identity". It specifically condemns the situation of **systematic attacks by state and non-state actors** against person on said basis. It calls on all states parties to ensure that human rights defenders work in an enabling environment, that is free of stigma, reprisals or criminal prosecution as a result of their human rights →

Regional human rights mechanisms

3

Africa

African Charter on Human and Peoples' Rights

overseen by
African Commission on Human and Peoples' Rights
African Court on Human and Peoples' Rights

SO/GIE/SC TRAINING



³⁴ http://www.corteidh.or.cr/docs/asuntos/solicitud_31_03_17.pdf

³⁵ www.corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf

³⁶ <http://www.ijrcenter.org/2016/11/14/inter-american-court-ecuador-discriminatorily-discharged-soldier-for-sexual-orientation/>

³⁷ <http://www.achpr.org/sessions/55th/resolutions/275>

protection activities, including the rights of sexual minorities. It also strongly urges states to end all acts of violence and abuse, whether committed by state or non-state actors. This includes enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence, including those targeting persons on the basis of their sexual orientation or gender identities.

83. Unfortunately, these noble sentiments **have not been adhered to**. Over two thirds of the continent criminalizes same-sex sexual relations, and state-level transphobia is rampant.³⁸ Case law regarding the human rights relevant to SO/GIE/SC has not developed in this court as yet. It is important to note that **national Supreme Courts have made progressive decisions** regarding the ability of LGBTI organizations to register as NGOs (in Kenya, Botswana, Uganda, for example), forced anal examination (Kenya) and a number of other important decisions that have not needed to progress to the African Court.

84. Finally, while Asia has no legally binding regional human rights mechanism, the **Association of Southeast Asian Nations (ASEAN)** established a (political) consultative body in October 2009: the **ASEAN Intergovernmental Commission on Human Rights (AICHR)**.³⁹ Although not a judicial body, this Commission works to promote and protect human rights very effectively, and promotes regional co-operation on human rights in the member states: Brunei Darussalam, Cambodia, Indonesia, Laos PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

Regional human rights mechanisms

3

Africa

2014 – Resolution 275

"Protection against Violence and Other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity"

But... it has not been adhered to

National Supreme Courts have recently made progressive decisions

Regional human rights mechanisms

3

Asia

No legally binding regional human rights mechanism

In 2009 the **Association of Southeast Asian Nations (ASEAN)** established a (political) consultative body called the **ASEAN Intergovernmental Commission on Human Rights (AICHR)**

Promotes and protects human rights and Promotes co-operation on human rights in member states

➡ *Optional group exercise on the next page*



³⁸ <https://www.pambazuka.org/gender-minorities/african-commission-tackles-sexual-orientation-gender-identity>

³⁹ <http://aichr.org>



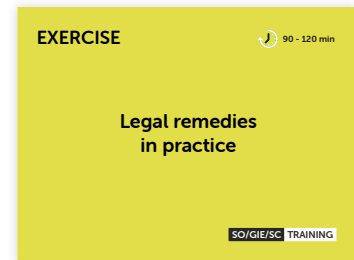
OPTIONAL GROUP EXERCISE



90-120 min.

Legal remedies in practice

Purpose: Participants experience in practice which legal instruments they can use to challenge a law that discriminates against, or that criminalizes acts, identities or expressions of sexual, gender or sex minorities.



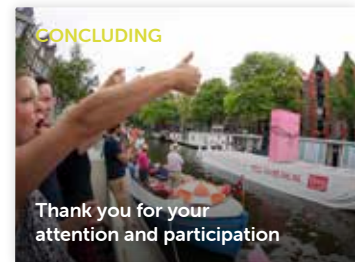
Facilitator tip: Prepare for this section in advance, preferably together with a legal expert. Also, internet access is needed. Identify one particularly law, or part of a law, that is discriminatory in relation to SO/GIE/SC or that criminalizes acts, identities or expressions of LGBTI persons. Choose a law that is

relevant in the context of your participants. Read it carefully. Consider through which (national, regional and international) instruments and/or procedures this law could be challenged. Select several instruments and procedures that you want the group to work on to challenge this law.

85. Present the selected law, or part of the law, to the group. Discuss the meaning and relevance of this law or article in relation to SO/GIE/SC.
86. Divide the participants into smaller groups of three to six people. Ask them to agree on a how they want to report back to the group later on.
87. Provide each group with one legal instrument or procedure you think is useful to challenge this law. Use international, regional or national legal instruments, such as Conventions, the UPR, the Independent Expert on SOGI, your own constitution, National Human Rights Institutes, etc. If possible and relevant, invite the participants to consider how this law affects the diversity of sexual, gender and sex minorities differently. Invite participants to consider age (and particularly the situation of young people), and gender in their analysis.
88. Allow the small groups to work on this for **(60–90 min)**. Ensure that both you and the legal expert(s) stay closely involved in discussions and offer support.
89. **Debrief:** Each small group reports back to the big group. Have a discussion on the findings. Which remedy seems to offer particular good perspectives to challenge this law? During this discussion, also look into other possible remedies that are available, and that may not have been discussed yet. →

Concluding

90. Thank participants for their attention and participation in this intense Module. We hope it led to new knowledge on the different mechanisms and procedures available.
91. Note that there is a handout with references to the specific websites used, as well as a handout with an overview of the various Conventions and how these address (of fail to address) SO/GIE/SC.
92. Note that in Module 6 in particular, we look into how to use this knowledge in participant's advocacy strategies.





RIGHT HERE
RIGHT NOW

End of module 3





MODULE 3



Sources overview

SOURCES MODULE 3: 3.1

- ¹ https://ilga.org/downloads/2017/ILGA_WorldMap_ENGLISH_Overview_2017.pdf. Information is regularly updated. At the time of writing, the last update had taken place in October 2017.
- ² <https://ilga.org/trans-legal-mapping-report>
- ³ <https://transrespect.org/en/map/criminalization-and-prosecution-of-trans-people/>
- ⁴ <https://ilga.org>
- ⁵ https://ilga.org/downloads/2017/ILGA_WorldMap_ENGLISH_Criminalization_2017.pdf
- ⁶ https://ilga.org/downloads/ILGA_Trans_Legal_Mapping_Report_2017_ENG.pdf
- ⁷ <https://transrespect.org/en/map/trans-murder-monitoring/#>
- ⁸ <https://transrespect.org/en/about/tvt-project/>
- ⁹ https://tgeu.org/wp-content/uploads/2018/05/MapB_TGEU2018_Online.pdf
- ¹⁰ PEW Research Center, "The Global Divide on Homosexuality, Greater Acceptance in More Secular and Affluent Countries" (revised version, 2014). <http://www.pewresearch.org/wp-content/uploads/sites/2/2014/05/Pew-Global-Attitudes-Homosexuality-Report-REVISED-MAY-27-2014.pdf>
- ¹¹ Source: <http://www.bbc.com/news/world-25927595>
- ¹² <https://www.theguardian.com/world/2018/apr/17/theresa-may-deeply-regrets-britain-legacy-anti-gay-laws-commonwealth-nations-urged-overhaul-legislation>

SOURCES MODULE 3: 3.2

- ¹³ <https://76crimes.com/2018/03/22/kenya-court-nixes-forced-anal-exams/>
- ¹⁴ <https://www.hrw.org/news/2017/02/02/lebanon-edges-closer-decriminalizing-same-sex-conduct>
- ¹⁵ https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf
- ¹⁶ Contact Hivos in case you think it can be helpful to support you in this and/or to mobilise our networks.
- ¹⁷ <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>.

SOURCES MODULE 3: 3.3

- ¹⁸ <https://yogyakartaprinciples.org>
- ¹⁹ Press release on the Yogyakarta Principles + 10. <http://yogyakartaprinciples.org/principles-en/press-release/>
- ²⁰ These can also be accessed at <https://yogyakartaprinciples.org>
- ²¹ Contact Hivos in case you think it can be helpful to support you in this and/or to mobilise our networks.

MODULE 3



Sources overview

SOURCES

MODULE 3: 3.4

- ²² <https://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>
- ²³ <https://www2.ohchr.org/english/bodies/docs/ReportingCycle.gif>
- ²² <https://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>
- ²³ <https://www2.ohchr.org/english/bodies/docs/ReportingCycle.gif>
- ²⁴ Prado Mosquera, Diana Carolina, "SOGIESC UPR Advocacy toolkit, a guide for defenders working on sexual orientation, gender identity and expression and sex characteristics", (ILGA, 2017). http://ilga.org/downloads/SOGIESC_UPR_Advocacy_Toolkit.pdf.
- ²⁵ <http://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx>
- ²⁶ According to information of the website of the Human Rights Council, last updated on August 1st, 2017: <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>
- ²⁷ <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>
- ²⁸ <http://www.ohchr.org/EN/HRBodies/SP/Pages/Currentmandateholders.aspx>
- ²⁹ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/32/2
- ³⁰ We speak here about "he", since the current Independent Expert on SOGI identifies as male person, but a future Independent Expert might not.
- ³¹ <https://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>
- ³² You can find the list of standing invitations here: https://spinternet.ohchr.org/_Layouts/SpecialProcedure-sInternet/StandingInvitations.aspx
- ³³ <https://www.coe.int/en/web/human-rights-convention/home>
- ³⁴ http://www.corteidh.or.cr/docs/asuntos/solicitud_31_03_17.pdf
- ³⁵ www.corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf
- ³⁶ <http://www.ijrcenter.org/2016/11/14/inter-american-court-ecuador-discriminatorily-discharged-soldier-for-sexual-orientation/>
- ³⁷ <http://www.achpr.org/sessions/55th/resolutions/275>
- ³⁸ <https://www.pambazuka.org/gender-minorities/african-commission-tackles-sexual-orientation-gender-identity>
- ³⁹ <http://aichr.org>