



ICTJ AMICUS BRIEF ON THE RIGHTS OF LGBT VICTIMS TO PROTECTION AND REPARATIONS

The ICTJ-Colombia has submitted an *amicus curiae* brief to the Colombian Constitutional Court on the rights to reparations and protection for victims of grave crimes, particularly lesbian, gay, bisexual and transgender (LGBT) victims. The brief focuses on the concept of victim according to international human rights law and the need to adapt national procedures to encompass the particular type of victimization suffered by members of the LGBT population. A major problem with the current system is the failure to recognize the same-sex partners of direct victims as beneficiaries of victim services and reparation programs. The brief urges the court to properly define the scope of the term “victim” by guaranteeing that LGBT individuals are recognized fully as victims and beneficiaries of services and reparations for grave human rights violations.

Summary of the Arguments Presented by the ICTJ

I. Historic pattern of persecution, discrimination and victimization of LGBT individuals

In addition to facing persecution based on their sexual orientation, LGBT individuals and their partners have traditionally been excluded from the class of victims entitled to reparations for human rights violations. This history of discrimination has resulted in systematic exclusion of LGBT individuals and has kept them from being able to exercise their rights in equal conditions as other victims and social groups.

Examples of this discrimination and persecution are numerous: the Nazi persecution of homosexuals; the McCarthy Era in the United States, where homosexuals were systematically eliminated from federal government positions; and the persecution during the Franco dictatorship in Spain, where homosexuality was associated with political opposition. Homosexuals have been made into an enemy in efforts to create homogenous national identities. Often, in addition to being morally condemned, nonheterosexual orientation has also been criminally punished. Even these most salient cases of persecution are more or less unknown to the general public. The victimization of LGBT individual continues to be denied and the persecution and exclusion continues today, including in Colombia.

International human rights bodies have responded to this by denouncing persecution based on sexual orientation and demanding that measure be adopted to combat both formal and informal discrimination. The UN Human Rights Committee and the Special Rapporteurs for extrajudicial, summary and arbitrary executions and for torture and other forms of cruel,

inhuman and degrading treatment have identified Colombia as one of several countries with persistent grave violations of the human rights of LGBT individuals.

In addition to the UN documentation, several nongovernmental organizations have called attention to the grave violations motivated by sexual-orientation discrimination in Colombia. Hate crimes resulting in offense, injury and even death have been reported. Homophobic behavior by the police towards the general public and other members of the police force has also been documented. While these incidents have been brought to the attention of the *Fiscalía General de la Nación* (Office of the Prosecutor General), they have been treated no differently than common delinquency.

The victimization of LGBT individuals includes a lack of access to the justice system and legal resources and the denial resulting from their exclusion from official versions of history and from reparations initiatives. Most transitional justice processes have ignored the patterns of discrimination and persecution based on sexual orientation. Because little has been done to expose repression of the LGBT population, the recognition of their rights as victims and beneficiaries of reparations continues in a state of denial deeply rooted in the culture.

II. The right to equality and nondiscrimination as fundamental rights under international human rights law

The right to equality encompasses a variety of principles including equality before the law, equal protection under the law, and the prohibition on discrimination. Since being asserted in Article 2 of the Universal Declaration of Human Rights, the right of nondiscrimination has been included in all the major international instruments and broadly developed in the jurisprudence of international and national tribunals.

As the Inter-American Court of Human Rights (IACtHR) has stated, the principle of nondiscrimination is imperative for equal and effective protection of the law. It demands that states refrain from taking actions that discriminate, either in purpose or effect, against one group in its ability to exercise its rights. Emphasizing the imperative nature of the right to equality, the IACtHR has declared that no judicial act can conflict with this fundamental principle.

The principle of nondiscrimination does not prohibit differential treatment in order to guarantee equality, particularly to those that find themselves in vulnerable situations or excluded from society. The Colombian Constitution Court has established that the right to equality does not always imply equal treatment where different situations, including distinct personal characteristics or circumstances, suggest different judicial consequences.

In a country like Colombia, the obligation to guarantee the right to equality goes beyond the simple formal existence of the right: it implies ensuring that formal equality progresses into substantial equality. This requires recognizing the differences and vulnerabilities of the groups and individuals that make up the society. Substantial equality requires both ensuring equality before the law and equality of opportunity created through specialized measures.

In the case of homosexuals asserting their status as victims, although a specialized measure may not be required, there must be some differential action taken that highlights their

particular circumstances and that protects them and their rights. A clear constitutional interpretation that guarantees the inclusion of members of same-sex couples as victims with full rights and standing under domestic legislation, particularly under Law 975 of 2005 would serve this objective. The lack of inclusion of same-sex couples is resulting in inequality that limits the exercise of rights, as it blocks their access to effective judicial recourse as victims entitled to rights. That a heterosexual couple would have these prerogatives, while homosexual couples do not, violates the right to equality and the right to be free from discrimination based on sexual orientation.

III. International protection agencies' recognition of the victimization process of LGBT individuals

Developments in international jurisprudence and doctrine specifically have sought to combat patterns of discrimination and victimization and serve as examples of the recognition and protection of the rights of the LGBT individuals.

The Human Rights Committee ordered Australia to retract a dead-letter law prohibiting private homosexual conduct in the 1994 case of *Nicholas Toonen v. Australia*. The mere existence of such a law was determined to infringe the rights of the plaintiff. The HRC also discussed the level of protection that must be given to these rights, highlighting the obligation under the ICCPR to ensure that victims of discrimination have access to an effective legal remedy.

In the 2003 case of *Young v. Australia*, the HRC found that the denial of retirement benefits to homosexual partners constituted discrimination based on sexual orientation and thus violated Article 26 of the ICCPR (equality and nondiscrimination before the law). The HRC determined that as a victim of a violation of the ICCPR the petitioner must have an effective legal remedy. The HRC ordered Australia to adopt measures to ensure this type of violation does not occur in the future.

Both the HRC and the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) have made pronouncements in response to individual complaints and in general recommendations that any discrimination based on sexual orientation is prohibited. UN Member States have also condemned hate crimes based on sexual orientation, highlighting the obligation of States to provide truth, justice, and reparation to the victims in such cases, which includes an effective investigation and legal remedy.

The UN High Commissioner for Refugees has also established guidelines for international protection that demand that sexual orientation be considered a category for determining refugee status. This need arises out of the broad patterns of victimization and persecution of LGBT individuals, and its inclusion is an important advance towards protecting this group.

The efforts of experts, academicians, and activists resulted in the adoption of the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* in 2006. Although non-binding, this document reflects the current state of international law regarding States' international obligations and the protection of sexual orientation and gender identity. Of particular importance to the question considered here is Principle 28, which declares the need for effective, adequate and appropriate legal remedies for violations and highlights the importance of reparations. This document serves as an important

guide on state obligations and also includes interpretive guidelines for the exercise of judicial jurisdiction on related issues. The present case offers the Court the opportunity to guarantee the rights to equality, protection of the law, and effective legal remedy in relation to grave violations against LGBT individuals and their partners.

IV. The development and reach of the concepts of victim in international human rights law and the nonexclusion of LGBT individuals

LGBT individuals who are victims of grave violations must be recognized as such, and special consideration must be given to their social condition, which may in some cases be the motivation of the victimization. In applying the principles and rights of equality and dignity their partners must also be recognized as victims entitled to reparation, as is the case with heterosexual couples. Three sets of international legal principles support such a concept of victim. The *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* promotes a broad definition of victim, declaring that the term includes “the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” The *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* also refers to the obligation to guarantee reparations for the victim, the victim’s beneficiaries and family.

The Colombian Constitutional Court has adopted a similarly broad concept of victim. The Supreme Court and the *Consejo de Estado* (another High Court under Colombian jurisdiction) have developed a definition of victim that is even more inclusive declaring that all that is required to demand reparation is that the claimant suffers some harm. The Court has stated that the constitutionality of Law 975 of 2000 (Justice and Peace Law) is conditioned on defining “victim” as anyone that has suffered concrete and specific harm. In the case at bar, the Court has the opportunity to apply this constitutional interpretation to same-sex couple, explicitly recognize same-sex partners as victims and guarantee that they are treated with equality.

Additionally, international human rights law provides a point of departure for determining the parameters for ensuring that all victims are treated with dignity. States must take affirmative action to ensure that victims are treated with respect and that they have equal access to the justice system and to reparations. The legislation and practice should be periodically reviewed to ensure that adaptations are made according to changing circumstances.

A uniform, inclusive, broad and defined concept of victim must be pronounced so as to leave no doubt about the universal, and therefore nondiscriminatory, application of the right to reparations. The Colombian State is responsible for guaranteeing the rights to truth, justice and reparation to everyone – including LGBT individuals – that has suffered the effects of a grave violation. The interpretive guidelines presented are particularly important in light of the historic exclusion the LGBT has suffered. Given the deeply-rooted discrimination, it is necessary to go beyond simply recognizing the formal equality of all people and, in this case, eliminate all measures that *de jure* or *de facto* impede the realization of this equality.