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**OPEN-ENDED INTERGOVERNMENTAL EXPERT GROUP
ON THE STANDARD MINIMUM RULES FOR THE
TREATMENT OF PRISONERS**

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**REVISING THE STANDARD MINIMUM RULES FOR THE
TREATMENT OF PRISONERS:
AMNESTY INTERNATIONAL BRIEFING ON DISCRIMINATION
AND AT RISK GROUPS IN PRISON¹**

Prepared by
Amnesty International²

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REVISING THE STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS:

AMNESTY INTERNATIONAL'S BRIEFING ON LGBTI PRISONERS' RIGHT TO NON-DISCRIMINATION AND AT RISK GROUPS IN PRISONS

“Some say sexual orientation and gender identity is a sensitive subject. I understand. I did not grow up talking about these issues. But I learned to speak out because lives are at stake – and because it is our duty... to protect the rights of everyone, everywhere.”

UN Secretary-General Ban Ki-Moon speaking to a Human Rights Council panel discussion on discrimination and violence based on sexual orientation and gender identity, March 2012.¹

“The goal of preventing discriminatory barriers is inclusion.”

Supreme Court of Canada.²

I INTRODUCTION

1. Amnesty International is submitting this briefing to the 3rd Meeting of the Open-ended Intergovernmental Expert Group on the Standard Minimum Rules for the Treatment of Prisoners (henceforth: SMR³), set to take place in Vienna in March 2014, in pursuance of United Nations (UN) General Assembly resolution 65/230 of 21 December 2010.
2. Having taken part in the two expert meetings at the University of Essex on the Standard Minimum Rules for the Treatment of Prisoners and in subsequent discussions shaping these meetings' respective outcome documents, which have also been submitted to the

¹ See UN Office of the High Commissioner for Human Rights, “Human Rights Council holds panel discussion on discrimination and violence based on sexual orientation and gender identity”, 7 March 2012, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11920&LangID=E>, accessed 10 March 2014. For the direct quote see for instance “I am because you are’ – the first ever UN panel on sexual orientation and gender identity”, Emily Gray, (Amnesty International), 24 March 2012, <http://magazin.network-99.com/index.php/component/k2/item/5487-%E2%80%98am-because-you-are%E2%80%99-%E2%80%93-the-first-ever-un-panel-on-sexual-orientation-and-gender-identity>, accessed 16 March 2014.

² *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

³ Standard Minimum Rules for the Treatment of Prisoners. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

3rd Intergovernmental Expert Group Meeting, Amnesty International has endorsed both these documents. The purpose of this added briefing is to highlight two issues concerning the proposed revision of Rule 6(1) of the SMR: the need to include ‘sexual orientation’ and ‘gender identity’ as prohibited grounds for discrimination in any widening of the list of prohibited grounds currently in this Rule; and the need to link non-discrimination with at risk, or vulnerable, groups.⁴

3. This briefing updates Amnesty International’s briefing to the 2nd International Expert Group Meeting in 2014.⁵
4. The two Essex University outcome documents largely reflect Amnesty International’s other positions as to the proposed “targeted” changes” to the SMR.

II RULE 6(1): CURRENT WORDING AND RECOMMENDED CHANGES

5. Rule 6(1) currently reads:

The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

6. Amnesty International recommends that this Rule be revised to read as follows:

The Rules shall be applied impartially and with no discrimination, on one or more grounds such as of race, colour, sex, language, religion or conviction, political or other opinion or belief, membership of a particular social group, status, activities, descent, national, ethnic, indigenous or social origin, nationality, age, economic position, property, disability, marital status, sexual orientation, gender identity, birth or other status. Particular attention should be given to aggravated forms of discrimination.

States in general and prison authorities in particular shall take all measures necessary to protect prisoners at risk on these and any other grounds, and to meet their specific needs through reasonable accommodation or adjustment.

7. This briefing focuses solely on explaining the rationale for Amnesty International’s recommendations to add “sexual orientation” and “gender identity” to the list of grounds on which it is prohibited to discriminate in the treatment of prisoners and to link non-discrimination with at risk/vulnerable groups. With the exception of these two recommendations, the changes recommended here to Rule 6(1) are fully *in tandem* with

⁴While Amnesty International is aware of the use of the term “vulnerable groups” in documents pertaining to the SMR review process, the organization is concerned that this term may implicitly attribute some kind of inherent vulnerability to such groups or members thereof. Amnesty International therefore recommends that the term “at risk,” which it considers more appropriate, be used instead. In this document, the two terms will be used side by side.

⁵ *Revising the Standard Minimum Rules for the Treatment of Prisoners: Amnesty International Briefing Recommending Inclusion of ‘Sexual Orientation’ and ‘Gender Identity’ as Prohibited Grounds for Discrimination in Prisons*, AI Index: IOR 41/030/2012 (November 2012).

those of the Essex Meetings experts, which can be found in its outcome documents to which Amnesty International is party and are explained and justified there.

III RATIONALE FOR ADDITIONS (1): DISCRIMINATION AGAINST LGBTI PEOPLE IN PRISONS

"I couldn't walk free in prison because the warders would point me out [as a gay man]... and prisoners were killing off gay men."

Former prisoner Harold B., speaking to Human Rights Watch in 2004.⁶

8. In prisons all around the world, lesbian, gay, bisexual, transgender and intersex (LGBTI) people are among the groups of prisoners most exposed to discrimination.

Such discrimination often assumes the harshest forms, including killing, torture and other ill-treatment by staff; and violence, including lethal violence, by other prisoners.⁷ Rape and other sexual attacks are a common form of homophobic and transphobic torture and violence.⁸ Thus according to the US Department of Justice, in 2012 the number of sexual attacks by prisoners against homosexual male prisoners was no less than tenfold that of the number of such attacks against heterosexual ones:

Among heterosexual males, an estimated 3.5% reported being sexually victimized by another inmate. In comparison, among males who were bisexual, 34% reported being sexually victimized by another inmate. Among males who were homosexual or gay, 39% reported being victimized by another inmate.⁹

9. It is not uncommon that, as described in the passage quoted at the beginning of this section, prison staff and prisoners collaborate in discriminating against LGBTI people.¹⁰
10. Amnesty International strongly recommends that since marginalisation, prejudice and dehumanisation of individuals because of their sexual orientation or gender identity lead to LGBTI prisoners being specifically targeted for harsh and often violent discrimination, states respond by specifically and explicitly clarifying that discrimination on such grounds is prohibited.

⁶ Human Rights Watch, *Hated to Death: Homophobia, Violence and Jamaica's HIV/AIDS Epidemic* (2004), p. 15.

⁷ See for instance in country-specific reports by UN human rights treaty bodies (among others): Concluding observations of the Human Rights Committee: the United States of America, UN Doc. CCPR/C/USA/CO/3, 15 September 2006, para. 25; Conclusions and recommendations of the Committee against Torture: the United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006, paras. 32, 37; Ecuador, UN Doc. CAT/C/ECU/CO/3, 8 February 2006, para. 17; Egypt, UN Doc. CAT/C/CR/29/4, 23 December 2002, para. 5(e); APT and PRI, *LGBTI persons deprived of their liberty: a framework for preventive monitoring* (2013), pp. 7-13. And see further the other sources cited in this section.

⁸ Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/56/156, 3 July 2001, paras. 17-18.

⁹ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Prison Rape Elimination Act of 2003: PREA Data Collection Activities, 2012, NCJ 238640, June 2012, <http://www.bjs.gov/content/pub/pdf/pdca12.pdf>, accessed 13 March 2014, p. 2.

¹⁰ See, for instance, *ibid.*, para. 23; report of the Special Rapporteur on violence against women, UN Doc. A/HRC/17/26/Add.2, 14 February 2011, 2 May 2011, para. 29.

IV RATIONALE FOR ADDITIONS (2): DEVELOPMENTS IN INTERNATIONAL LAW AND STANDARDS

“Simply put, people may not be discriminated against in the enjoyment of rights on the basis of sexual orientation or gender identity. As the High Commissioner has stated, ‘The principle of universality admits no exception. Human rights truly are the birthright of all human beings.’”

From a report by the Office of the UN High Commissioner on Human Rights, 2012¹¹

11. The growing realisation of the need to acknowledge the right of every person to be free from discrimination on the basis of his or her sexual orientation or gender identity¹² has been reflected in a wide array of resolutions, rulings, views and conclusions by international and regional bodies and experts, of which the following is not exhaustive.
12. Virtually all of those UN expert bodies monitoring the implementation of human rights treaties which have issued General Comments on discrimination, have stated that sexual orientation and gender identity constitute prohibited grounds for discrimination under their respective treaties.¹³
13. Significantly, the Committee against Torture, whose mandate means that it focuses to a large extent on prisoners, has stated in a General Comment the following:

States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, *gender, sexual orientation, transgender identity*, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international

¹¹ United Nations Office of the High Commissioner, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, (New York and Geneva: 2012), pp. 10-11.

<http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>, accessed 16 March 2014.

¹² For a detailed elaboration of the principles underlining LGBTI people's right to freedom from discrimination and to human rights in general see the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, adopted by an International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity following an experts' meeting held at Gadjah Mada University in Yogyakarta, Indonesia, from 6 to 9 November 2006.

¹³ See Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 25 May 2009, para. 32; Committee on the Rights of the Child, General Comment No. 13, UN Do. CRC/C/GC/13, 18 April 2011, paras. 60, 72(g); Committee against Torture, General Comment no. 2, UN Doc. CAT/C/GC/2, 24 January 2008, para. 21; Committee on the Elimination of Discrimination against Women, General Recommendation No. 28, UN Doc. CEDAW/C/GC/28, 19 October 2010, para. 18. The exception is the Human Rights Committee, whose General Comment on non-discrimination dates back to 1989, and which has since stated unequivocally that “reference to ‘sex’ in articles 2, paragraph 1 and 26 [the non-discrimination provisions in the ICCPR] is to be taken as including sexual orientation.” See Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, views adopted 31 March 1994, UN Doc. CCPR/C/50/D/488/1992, para. 8.7, and similarly, for instance, *Young v Australia*, Communication No. 941/2000, views adopted 6 August 2003, UN Doc. CCPR/C/78/D/941/2000; *X v Colombia*, Communication No. 1361/2005, views adopted 14 May 2007, UN Doc. CCPR/C/89/D/1361/2005.

protection, or any other status or adverse distinction.¹⁴ [Emphasis added]

14. Other human rights bodies have increasingly stated, similarly, that discrimination against individuals on the basis of their sexual orientation or gender identity is unacceptable under international human rights law and standards. Those have included the Human Rights Council¹⁵ and, importantly for this briefing's purposes, the UN Working Group on Arbitrary Detentions. The latter Working Group has been consistently stating that it “regards deprivation of liberty as arbitrary” *inter alia*:

When the deprivation of liberty constitutes a violation of the international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; *gender; sexual orientation*; disability or other status, and which aims towards or can result in ignoring the equality of human rights.¹⁶ [Emphasis added]

15. In his contribution to the current process of revising the SMR, the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment has recommended that treatment of prisoners is carried out:

... with no discrimination, on grounds of international law, for example on grounds of age, national, ethnic or social origin, cultural beliefs and practices, birth or other status, including health status, disability, *gender or other identity and sexual orientation*... [Emphasis added]¹⁷

16. At the regional level, the Council of Europe's Convention on preventing and combating violence against women and domestic violence provides the following:

The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, *sexual orientation, gender identity*, age, state of health, disability, marital status, migrant or refugee status, or other status.¹⁸ [Emphasis added]

¹⁴ Committee against Torture, General Comment No. 2, *ibid.*, para. 21.

¹⁵ Human Rights Council, Resolution regarding human rights, sexual orientation and gender identity, UN Doc. A/HRC/17/L.9/Rev.1, 15 June 2011, available at <http://ilga.org/ilga/static/uploads/files/2011/6/17/RESOLUTION%20L9rev1.pdf>, accessed 10 March 2014. See also Statement on human rights, sexual orientation and gender identity, Annex to the letter dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations addressed to the President of the General, UN Doc. A/63/635, 22 December 2008.

¹⁶ See, for instance, Working Group on Arbitrary Detention, *Nasrin Sotoudeh v Islamic Republic of Iran*, Opinion No. 21/2011, 7 May 2011, para. 3; *Mohammad Ahmad Mahmoud Soukyeh et al v Palestinian Authority*, Opinion No. 9/2011, UN Doc. A/HRC/WGAD/2011/9, 27 February 2012, para. 3 and numerous other cases.

¹⁷ Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/68/295, 9 August 2013, para. 28.

¹⁸ Council of Europe, Convention on preventing and combating violence against women and domestic violence, CM(2011)49, 7 April 2011, Art. 4(3).

17. In a 2012 judgment, the European Court of Human Rights has found the reason for keeping a prisoner in Turkey in isolation was his homosexuality, and consequently that the prisoner had sustained discrimination on grounds of sexual orientation and there had therefore been a violation of Article 14 [prohibition of discrimination] taken together with Article 3 [prohibition of torture and other ill-treatment].¹⁹

18. In the Inter-American human rights system, the Inter-American Court of Human Rights, has ruled the following:

While it is true that certain societies can be intolerant toward a person because of their race, gender, nationality, or sexual orientation, States cannot use this as justification to perpetuate discriminatory treatments. States... must be inclined, precisely, to confront intolerant and discriminatory expressions in order to prevent exclusion or the denial of a specific status.²⁰

19. In the specific context of the treatment of prisoners, the Inter-American Commission on Human Rights, in a resolution outlining the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, has stated:

Under no circumstances shall persons deprived of liberty be discriminated against for reasons of race, ethnic origin, nationality, color, sex, age, language, religion, political or other opinion, national or social origin, economic status, birth, physical, mental, or sensory disability, *gender, sexual orientation*, or any other social condition. Therefore, any distinction, exclusion, or restriction that is either designed to or has the effect of undermining or impeding the recognition, enjoyment, or exercise of the internationally recognized rights of persons deprived of liberty, shall be prohibited. [Emphasis added]²¹

V Rationale for additions (3): linking non-discrimination with at risk (vulnerable) groups

20. The inextricable link between discrimination, marginalisation and risk of abuse, or vulnerability, described in the sections above, is not unique to lesbian, gay, bisexual, transgender and intersex people; rather, it typically characterises the experience of at risk groups, both inside prisons and in society at large. For instance, speaking of Dalit women and girls, the UN High Commissioner for Human Rights, Navi Pillay, explained that they “are exposed to multiple forms of discrimination based on gender and caste and, therefore, vulnerable to several

¹⁹ Case of *X v. Turkey* (application no. 24626/09), Judgment of 9 October 2012.

²⁰ Inter-American Court of Human Rights, *Case of Atala Riffo and Daughters v Chile*, Judgment of February 24, 2012 (Merits, Reparations and Costs), para. 119. See more generally the resolution of the General Assembly of the Organization of American States “Human Rights, Sexual Orientation, and Gender Identity”, on 3 June 2008, AG/RES. 2435 (XXXVIII-O/08).

²¹ The Inter-American Commission on Human Rights, Resolution 1/08: Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, 31 March 2008, principle II (equality and non-discrimination). Available at: http://www.cidh.oas.org/pdf%20files/RESOLUTION%201_08%20-%20PRINCIPLES%20PPL%20FINAL.pdf, accessed 16 November 2012.

layers of marginalisation and violence.”²²

21. In its authoritative General Recommendation 19, the UN Committee determined that “Gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”²³

22. The Committee on Economic, Social and Cultural Rights has similarly explained that:

Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice... States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. ²⁴

23. Amnesty International strongly supports the determination of the Intergovernmental Expert Group, as consistently expressed since its first meeting, to include “Protection and special needs of vulnerable groups deprived of their liberty” among the areas to be considered for review. The organization believes that the revised SMR should clearly reflect states’ commitment to provide such protection and address such needs.

24. During the review process, some states have proposed listing the vulnerable groups which must be protected and whose needs must be met.²⁵ Amnesty International supports this proposal in principle, believing that explicit mention would contribute to inclusion and challenge these groups’ marginalisation, which is a key component of both the discrimination and the risk/vulnerability they face within prisons. At the same time, current Rule 6(1) already contains a list of prohibited grounds for discrimination, which Amnesty International hopes will be expanded as recommended above. The organization believes it may be confusing for prison authorities to have two, overlapping lists. We therefore propose that this be resolved by reflecting the link between discrimination and risk, or vulnerability in the revised Rule 6(1).

²² Side-event at the 23rd session of the UN Human Rights Council Dalit Women, Opening remarks by Ms. Navi Pillay, United Nations High Commissioner for Human Rights, 4 June 2013, http://idsn.org/fileadmin/user_folder/pdf/New_files/UN/HRC/Side-Event_Dalit_Women_HC_statement_June_4_2013.pdf, accessed 18 March 2014.

²³ Committee on the Elimination of Discrimination Against Women, General Recommendation 19, Violence against Women (11th session, 1992), UN Doc. HRI/GEN/1/Rev.1, para. 1.

²⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), UN Doc. E/C.12/GC/20 (2009), para. 8(b).

²⁵ See for instance Open-ended Intergovernmental Expert Group on the Standard Minimum Rules for the Treatment of Prisoners Vienna, Austria, 25-28 March 2014, Working paper prepared by the Secretariat, UN Doc. UNODC/CCPCJ/EG.6/2014/CRP.1, 29 November 2013, pp. 8-10.

25. This explains Amnesty International's recommendation that the following sentence be added to current Rule 6(1), in the wake of the (expanded) list of prohibited grounds for discrimination:

States in general and prison authorities in particular shall take all measures necessary to protect prisoners at risk on these or any other grounds, and to meet their specific needs through reasonable accommodation or adjustment.

26. The first part of this sentence is self-explanatory. The second uses the term "reasonable accommodation" which, while so far used mostly in the context of persons with disabilities,²⁶ is in Amnesty International's understanding useful for addressing specific needs of other individuals and groups as well, not least among prison populations. Because in the context of prisons, the term "accommodation" may be misunderstood as being confined to housing, we have added "or adjustment" by way of clarification, but without attempting to thereby change the meaning of this concept as provided in the CRPD.²⁷

²⁶ See UN Convention on the Rights of Persons with Disabilities (CRPD), adopted by the General Assembly resolution 61/106 on 13 December 2006, entered into force 3 May 2008, Art. 3, which explains the concept thus:

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

²⁷ See similarly Second Report of Essex Expert Group on the Review of the Standard Minimum Rules for the Treatment of Prisoners, UN Doc. UNODC/CCPCJ/EG.6/2014/NGO.7, March 2014, para. 34.