

350 Fifth Avenue, 34<sup>th</sup> Floor  
New York, NY 10118-3299  
Tel: +1-212-290-4700  
Fax: +1-212-736-1300; 917-591-3452

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WATCH

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New York, August 23, 2024

Judge Napoleón R. Estévez Lavandier  
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Constitutional Court  
Santo Domingo – Dominican Republic

HRW.org

**Subject: Human Rights Watch *Amicus Curiae* in Case No. TC-01-2024-0030**

Human Rights Watch, located at 350 Fifth Avenue, New York, NY, 10118, United States, represented by Cristian González Cabrera, and Nataly Santana Sánchez, Dominican, of legal age, lawyer of the courts of the Republic, holder of the identity and electoral card No.

with address at [REDACTED]

[REDACTED] present this amicus brief to the Honorable Constitutional Court of the Dominican Republic in support of the Direct Action in Unconstitutionality (Case No. TC-01-2024-0030) challenging Article 210 in the National Police Code of Justice (Law No. 285 of June 29, 1966) and Article 260 of the Armed Forces Code of Justice (Law No. 3483 of February 13, 1953), which criminalize consensual same-sex acts carried out by officers. For that purpose, we respectfully state:

## I. PURPOSE AND SUMMARY OF THIS SUBMISSION

Human Rights Watch respectfully requests that the Constitutional Court accept this submission for its consideration of the international legal standards regarding the criminalization of same-sex conduct in public security and armed forces.

This brief is structured as follows: Section II of this brief provides background on Human Rights Watch and our interest in the case. Section III provides an overview of international human rights standards regarding the criminalization of consensual same-sex conduct, including in public security and armed forces. Section IV highlights some countries and courts that have rejected laws or policies prohibiting consensual same-sex conduct by officers, upholding the rights of LGBT service members to serve equally and without discrimination.

## II. ADMISSIBILITY OF THIS SUBMISSION

### a. *History and Mandate of Human Rights Watch*

Pursuant to Article 23 of the Jurisdictional Regulations of this Constitutional Court, interventions as *amicus curiae* shall be admitted in cases of constitutional significance or public interest, including direct actions of unconstitutionality, for those with “recognized expertise over the issue under discussion.”

Human Rights Watch is a nonprofit, nongovernmental organization that investigates and reports on violations of human rights in some 100 countries worldwide with the goal of securing the respect of those rights for all persons. By exposing and calling attention to human rights abuses committed by both state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others to end abusive practices.

Human Rights Watch is known for accurate and impartial fact-finding. To ensure its independence, the group does not accept government funding, directly or indirectly, or support from any private funder that could compromise its objectivity in reporting on human rights violations.

### b. *Human Rights Watch’s Work on LGBT Rights*

Human Rights Watch has a dedicated Lesbian, Gay, Bisexual, and Transgender (“LGBT”) Rights Program that leads the organization’s work documenting and highlighting the violence and inequality that LGBT people around the world face based on their sexual orientation or gender identity, including in Latin America and the Caribbean.

Human Rights Watch advocates for laws and policies that will protect the dignity of all people by allowing LGBT individuals to enjoy their fundamental human rights. Such advocacy includes legal interventions in relevant cases, such as before the European Court of Human Rights in the case of *Kaos GL v. Turkey* on the freedom of expression of an LGBT organization,<sup>1</sup> before the Inter-American Commission on Human Rights in the case of *Gareth Henry et al. v. Jamaica* on laws criminalizing same-sex conduct,<sup>2</sup> and before the United States Supreme Court and the Constitutional Courts of Colombia and Ecuador on same-sex marriage.<sup>3</sup>

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<sup>1</sup> *Kaos GL v. Turkey*, Judgment of 22 November 2016, European Court of Human Rights, Application no. 4982/07, <http://hudoc.echr.coe.int/eng/?i=001-168765>.

<sup>2</sup> *Gareth Henry et al. v. Jamaica*, Report No. 400/20, Case 13.637, Inter-American Commission on Human Rights, OAE/Ser.L/V/II, Doc. 418 (31 December 2020), <https://www.humandignitytrust.org/wp-content/uploads/resources/2020.02-GH-SE-v-JAM-IACHR-final-decision.pdf>.

<sup>3</sup> *Obergefell v. Hodges*, Judgment of 26 June 2015, US Supreme Court, 576 U.S. 644, [https://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf); Judgment SU214/16, Judgment of 28 April 2016, Colombia Constitutional Court, <https://www.corteconstitucional.gov.co/relatoria/2016/su214-16.htm>; *Case 0011-18-CN*, Judgment of 12 June 2019, Ecuador Constitutional Court, <http://sgc.corteconstitucional.gob.ec:8494/FichaRelatoria.aspx?numdocumento=11-18-CN/19>.

*c. Compliance With the Filing Deadline*

In accordance with article 24 of the Jurisdictional Regulations of this Constitutional Court, in the direct action of unconstitutionality the *amicus curiae* must submit its brief within a period of fifteen (15) calendar days from the publication of the extract of the action. In the case of the present action, the extract was published on the Constitutional Court’s portal on August 14, 2024. This brief is therefore admissible as it complies with the procedure and deadline provided for in the current regulations.

**III. APPLICABLE INTERNATIONAL HUMAN RIGHTS STANDARDS**

*a. Preliminary Considerations*

The Constitution of the Dominican Republic states “[t]reaties, pacts, and conventions related to human rights, signed and ratified by the Dominican State, have constitutional status and are to be directly and immediately applied by the courts and other organs of the State.”<sup>4</sup>

The Dominican Republic has ratified various pertinent human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR),<sup>5</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>6</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>7</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture),<sup>8</sup> and the American Convention on Human Rights (“American Convention”).<sup>9</sup>

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<sup>4</sup> Constitution of the Dominican Republic, art. 74(3), <https://www.tribunalconstitucional.gob.do/transparencia/base-legal-de-la-institución/constitución-de-la-república-dominicana/>.

<sup>5</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the Dominican Republic on January 4, 1978.

<sup>6</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, ratified by the Dominican Republic on January 4, 1978.

<sup>7</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force September 3, 1981, ratified by the Dominican Republic on September 2, 1982.

<sup>8</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by the Dominican Republic on January 24, 2012.

<sup>9</sup> American Convention on Human Rights (“American Convention”), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), ratified by the Dominican Republic on April 19, 1978.

The Inter-American Court of Human Rights, the tribunal charged with interpreting the American Convention, has repeatedly held that states parties have a duty to take its case law into consideration when interpreting their legal obligations under the American Convention. Specifically, the Court has held: “[T]he Judiciary must exercise a sort of ‘conventionality control’ between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.”<sup>10</sup>

In the same vein, the Supreme Court of Justice of the Dominican Republic has stated that the contentious decisions and advisory opinions of the Inter-American Court of Human Rights form part of the block of constitutionality.<sup>11</sup>

### *b. The Right to Nondiscrimination and Equality*

The right to nondiscrimination and equality is recognized in numerous human rights treaties.<sup>12</sup> According to the ICCPR: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>13</sup> This applies to both a right to the equal protection of the law generally, and specifically a right to equal protection and nondiscrimination in the exercise of those rights specifically enumerated in the various human rights treaties.<sup>14</sup>

UN human rights bodies have repeatedly expressed concerns about discrimination based on sexual orientation and related human rights violations since the early 1990s. The Human Rights Committee, the treaty body responsible for overseeing implementation of the ICCPR, has repeatedly affirmed that the right to nondiscrimination prohibits discrimination based on a person’s sexual orientation and gender identity. Other UN human rights bodies have also found that the criminalization of private, consensual same-sex conduct between adults violates the right to nondiscrimination and equality, and have urged numerous countries to reform and repeal laws that criminalize such acts.<sup>15</sup>

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<sup>10</sup> *Almonacid-Arellano v. Chile*, Judgment of 26 September 2006, Inter-American Court of Human Rights, Series C. No. 154, ¶ 124, [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_154\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf); American Convention on Human Rights (“American Convention”), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, ratified by the Dominican Republic on January 21, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

<sup>11</sup> Supreme Court of Justice, Resolution No. 1920-03, adopted on November 13, 2003, [https://bibliotecaunapec.blob.core.windows.net/derecho/DE\\_D\\_323.4\\_R426r\\_DE\\_D210055.pdf](https://bibliotecaunapec.blob.core.windows.net/derecho/DE_D_323.4_R426r_DE_D210055.pdf)

<sup>12</sup> See e.g., ICCPR, arts. 2 and 26; ICESCR, art 2(2); American Convention, arts. 1, 24.

<sup>13</sup> ICCPR, art. 26.

<sup>14</sup> *Id.*

<sup>15</sup> *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, UN Office of the High Commissioner for Human Rights, 2012 (HR/PUB/12/06), at 31, citing the following

In *Toonen v. Australia*, the Human Rights Committee, which can consider individual complaints regarding violations of the ICCPR, concluded that laws in Tasmania outlawing adult consensual same-sex sexual activity violated the ICCPR's guarantee to the right to non-discrimination, among others.<sup>16</sup> Today, the Committee continues to call for decriminalization of consensual same-sex sexual activity in countries like Bahrain, Gambia, and Uzbekistan.<sup>17</sup>

In *Flamer-Caldera v. Sri Lanka*, the CEDAW Committee, which can hear complaints regarding violations of CEDAW, found that Sri Lanka's legislation criminalizing adult consensual same-sex conduct between women as "gross indecency" violated, among others, the right to non-discrimination, including in matters relating to marriage and family relations, and to participate in political and public life.<sup>18</sup> It also found that decriminalization is essential to preventing and protecting against violence, discrimination, and harmful gender stereotypes.<sup>19</sup>

On similar bases, human rights bodies have specifically called for the repeal of laws that criminalize consensual same-sex conduct in public security and armed forces. For example, the Committee on Economic, Social and Cultural Rights found that the Republic of Korea's Military Criminal Act, which criminalizes same-sex acts in the

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concluding observations: Concluding observations of the Human Rights Committee on Togo (CCPR/C/TGO/CO/4), at ¶ 14; Uzbekistan (CCPR/C/UZB/CO/3), at ¶ 22; Grenada (CCPR/C/GRC/CO/1), at ¶ 21; United Republic of Tanzania (CCPR/C/TZA/CO/4), at ¶ 22; Botswana (CCPR/C/BWA/CO/1), at ¶ 22; St. Vincent and the Grenadines (CCPR/C/VCT/CO/2); Algeria (CCPR/C/DZA/CO/3), at ¶ 26; Chile (CCPR/C/CHL/CO/5), at ¶ 16; Barbados (CCPR/C/BRB/CO/3), at ¶ 13; United States of America (CCPR/C/USA/CO/3), at ¶ 9; Kenya (CCPR/C/CO/83/KEN), at ¶ 27; Egypt (CCPR/CO/76/EGY), at ¶ 19; Romania (CCPR/C/79/Add.111), at ¶ 16; Lesotho (CCPR/C/79/Add.106), at ¶ 13; Ecuador (CCPR/C/79/Add.92), at ¶ 8; Cyprus, (CCPR/C/79 Add.88), at ¶ 11; United States of America (A/50/40), at ¶ 287. Concluding observations of the Committee on Economic, Social and Cultural Rights on Kyrgyzstan (E/C.12/Add.49), at ¶¶ 17, 30; Cyprus (E/C.12/1/Add.28), at ¶ 7. Concluding observations of the Committee on the Elimination of Discrimination against Women on Uganda (CEDAW/C/UGA/CO/7), at ¶¶ 43-44; Kyrgyzstan (A/54/38), at ¶¶ 127, 128. Concluding observations of the Committee on the Rights of the Child on Chile (CRC/C/CHL/CO/3), at ¶ 29.; Report of the Office of the United Nations High Commissioner for Human Rights: Discrimination and violence against individuals based on their sexual orientation and gender identity (A/HRC/29/23), at ¶¶ 43-45.

<sup>16</sup> *Toonen v. Australia*, UN Human Rights Committee, CCPR/C/50/D/488/1992, March 31, 1994, <http://www1.umn.edu/humanrts/undocs/html/vws488.htm> (accessed August 1, 2024), ¶¶ 8.6 – 9.

<sup>17</sup> Concluding observations of the Human Rights Committee on the Initial Report of Bahrain (CCPR/C/BHR/CO/1), at ¶¶ 23-24 (Nov. 15, 2018); Concluding observations of the Human Rights Committee on the Gambia in the

Absence of its Second Periodic Report (CCPR/C/GMB/CO/2), at ¶¶ 11-12 (Aug. 30, 2018); Concluding observations on the fifth periodic report of Uzbekistan (CCPR/C/UZB/CO/5), at ¶¶ 10-11 (May 1, 2020).

<sup>18</sup> UN CEDAW Committee, *Flamer-Caldera v. Sri Lanka*, CEDAW/C/81/D/134/2018, March 23, 2022, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2F81%2FD%2F134%2F2018&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2F81%2FD%2F134%2F2018&Lang=en) (accessed August 1, 2024), at ¶¶ 9.2 – 9.6.

<sup>19</sup> *Id.*, ¶ 9.4.



military, is discriminatory and should be abrogated.<sup>20</sup> The Human Rights Committee has called for the repeal of Panama’s discriminatory disciplinary regulations that consider practicing “lesbianism” and “homosexuality” in the police and fire departments a “serious offense” and could lead to dismissal and imprisonment.<sup>21</sup>

The Inter-American Court of Human Rights has firmly established that discrimination based on a person’s sexual orientation and gender identity are prohibited under the American Convention on Human Rights.<sup>22</sup> In 2016, The Court found that the Ecuadorian army’s rules of military discipline, which punished sexual acts between persons of the same sex with discharge from service, violated the American Convention’s prohibition of discrimination based on sexual orientation.<sup>23</sup> The Inter-American Commission on Human Rights has urged Venezuela to repeal a discriminatory provision in the Military Code of Justice punishing consensual same-sex conduct by service personnel with up to three years in prison and dismissal.<sup>24</sup>

The Yogyakarta Principles—expert guidance on the application of international human rights law to issues related to sexual orientation, gender identity and expression, and sex characteristics—call on states to ensure all human rights without discrimination on the basis of sexual orientation or gender identity, including by repealing laws that criminalize consensual same-sex conduct.<sup>25</sup> The Yogyakarta Principles plus 10 (YP+10) further call on states to ensure the right to freedom from criminalization and any form of sanctions.<sup>26</sup>

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<sup>20</sup> Concluding observations on the fourth periodic report of the Republic of Korea (E/C.12/KOR/CO/4), at ¶¶ 24-25 (October 19, 2017).

<sup>21</sup> Concluding observations on the fourth periodic report of Panama (CCPR/C/PAN/CO/4), at ¶¶ 13-14 (April 12, 2023).

<sup>22</sup> Inter-American Court of Human Rights, Gender Identity, and Equality and Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (November 24, 2017), at ¶¶ 68, 229, [http://www.corteidh.or.cr/docs/opiniones/seriea\\_24\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf) (accessed July 7, 2024).

<sup>23</sup> Inter-American Court of Human Rights, *Flor Freire v. Ecuador*, Judgment of 31 August 2016, Inter-Am. Ct. H.R. (ser. C) No. 315 (2016), ¶ 140, [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_315\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_315_ing.pdf) (accessed July 29, 2024).

<sup>24</sup> “IACHR Calls on State of Venezuela to Guarantee Rights of LGBTI People,” Inter-American Commission on Human Rights, September 8, 2021, [https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media\\_center/preleases/2021/235.asp](https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/235.asp) (accessed August 1, 2024).

<sup>25</sup> International Commission of Jurists (ICJ), *The Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, Principles 2, 6-8 [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf) (accessed August 1, 2024).

<sup>26</sup> International Commission of Jurists (ICJ), *The Yogyakarta Principles Plus 10 – Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, November 2017, [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf) (accessed April 17, 2019).

### c. *The Right to Privacy*

The right to privacy is a fundamental human right, enshrined in the ICCPR, that is recognized in jurisdictions around the world. The ICCPR states that no person should endure “arbitrary or unlawful interference with his privacy, family, home or correspondence.”<sup>27</sup> The ICCPR also obligates states parties, including the Dominican Republic, to affirmatively protect this right, promising that everyone should enjoy “the protection of the law” against attacks on their privacy.<sup>28</sup> The Human Rights Committee has stated that arbitrary state action, even when performed under the color of law, can violate this right.<sup>29</sup> An act that interferes with privacy is considered arbitrary when it is not “reasonable in the particular circumstance.”<sup>30</sup>

The right to privacy encompasses privately conducted “adult consensual sexual activity.”<sup>31</sup> As a result, states may not arbitrarily interfere with such conduct. In *Toonen v. Australia*, for example, the Human Rights Committee decided that a law in the Australian state of Tasmania violated the right to privacy by criminalizing “various forms of sexual contacts between men,” including private, consensual same-sex conduct.<sup>32</sup> The Committee determined that the right to privacy “undisputed[ly]” covered adult sexual activity and further determined that the interference in *Toonen* was arbitrary, finding the state had presented no permissible motivations for such interference.<sup>33</sup>

Since *Toonen*, the Human Rights Committee has repeatedly found that laws criminalizing adult consensual same-sex conduct violate the ICCPR, including on the basis of the right to privacy. For example, the Committee determined that the continued existence of such laws in Chile violated the right to privacy.<sup>34</sup> For the same reason, the Committee instructed Cameroon to stop criminalizing “consensual sexual acts between adults of the same-sex,” and “bring its law into conformity with the Covenant.”<sup>35</sup>

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<sup>27</sup> ICCPR, art. 17.

<sup>28</sup> *Id.*

<sup>29</sup> See Human Rights Committee, General Comment No. 16, ¶¶ 1-4, U.N. Doc HRI/GEN/1/Rev.9 (Vol. I) (1988).

While interference may take place “on the basis of law,” that law itself must be in line with the “provisions, aims, and objectives” of the ICCPR. *Id.* at ¶ 3.

<sup>30</sup> *Id.* at ¶ 4.

<sup>31</sup> *Toonen v. Australia*, Human Rights Committee, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994); Opinions adopted by the Working Group on Arbitrary Detention (A/HRC/4/40/Add.1), at 93 (Feb. 2, 2007) (“[T]he existence of laws criminalizing homosexual behavior between consenting adults in private and the application of criminal penalties against persons accused of such behavior violate the rights to privacy and freedom from discrimination. . .”).

<sup>32</sup> *Toonen*, at ¶ 2.1.

<sup>33</sup> *Toonen*, at ¶¶ 8.2, 8.6.

<sup>34</sup> Concluding observations of the Human Rights Committee on Chile (CCPR/C/79/Add.104), at ¶ 20 (Mar. 3, 1999).

<sup>35</sup> Concluding observations of the Human Rights Committee on Cameroon (CCPR/C/CMR/CO/4), at ¶ 12 (Aug. 4, 2010).

#### *d. The Right to Work*

The right to work is protected under international law. The International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right to work and provides that everyone must have the chance to “gain his living by work which he freely chooses or accepts.”<sup>36</sup>

The Committee on Economic, Social and Cultural Rights, which provides authoritative interpretations of the ICESCR, has concluded that equality in the workplace “applies to all workers without distinction based on ... sexual orientation, gender identity,” among other grounds.<sup>37</sup> The committee also affirmed that “[a]ll workers should be free from physical and mental harassment, including sexual harassment” and that labor legislation “should define harassment broadly, with explicit reference to sexual and other forms of harassment, such as on the basis of sex, disability, race, sexual orientation, gender identity and intersex status.”<sup>38</sup> The committee emphasized that states parties should “adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds,” including in the workplace.<sup>39</sup>

Yogyakarta Principle 12 specifically calls on states to ensure the right to work, including protection against unemployment, without discrimination on the basis of sexual orientation or gender identity, including in recruiting and dismissing workers.<sup>40</sup>

#### *e. The Right Against Arbitrary Detention*

Article 9 of the ICCPR establishes that all persons have “the right to liberty and security of person.”<sup>41</sup> Further, no person “shall be subjected to arbitrary arrest or detention.”<sup>42</sup>

International bodies such as the UN Working Group on Arbitrary Detention, a United Nations body that investigates arbitrary arrest and detention, consider detention due to someone’s sexual orientation to be “arbitrary.”<sup>43</sup> For example, in a case where Egyptian

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<sup>36</sup> ICESCR, art. 6.

<sup>37</sup> Committee on Economic, Social and Cultural Rights, General Comment 23, at ¶ 11, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-23-2016-right-just-and-favourable> (accessed March 2, 2023).

<sup>38</sup> *Id.* at ¶ 48.

<sup>39</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 20, ¶ 11, <https://www.refworld.org/docid/4a60961f2.html> (accessed August 1, 2024).

<sup>40</sup> International Commission of Jurists (ICJ), *The Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, Principles 12 [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf) (accessed August 1, 2024).

<sup>41</sup> ICCPR, art. 9.

<sup>42</sup> *Id.*

<sup>43</sup> *See, e.g.*, Opinions adopted by the Working Group on Arbitrary Detention (E/CN.4/2003/8/Add.1), at 68-73 (Jan. 24, 2003).



authorities arrested and detained dozens of men “who appeared to be homosexuals,”<sup>44</sup> the Working Group on Arbitrary Detention deemed the detentions arbitrary, rejecting the justification that homosexuality incites “social dissention.”<sup>45</sup>

The Working Group also reached the same conclusion in a case regarding Cameroon. In that case, authorities detained and charged eleven persons under an article of the criminal code that provides for imprisonment and fines for anyone found guilty of homosexual activity. Again, the Working Group on Arbitrary Detention found that these detentions violated rights to privacy and liberty, concluding that the detention was arbitrary.<sup>46</sup>

The Human Rights Committee has repeatedly expressed concern regarding detention related to same-sex sexual acts and has called for the repeal of the laws that enable such arbitrary detentions, including with respect to Togo, Senegal, and Morocco.<sup>47</sup>

In August 2017, a communication regarding “recent cases of arrests, interrogations, detentions and prosecutions of soldiers and military personnel perceived to be gay, under the Republic of Korea’s Military Criminal Act,” prepared by three UN independent experts with mandates from the UN Human Rights Council, was submitted to the Government of Korea.<sup>48</sup> The experts formally expressed concern over the “absence of due process in the investigation and prosecution, in particular regarding the context around the arrest and detention of those service men perceived to be gay and accused of indecent acts under Article 92-6 of the Military Criminal Act.”<sup>49</sup> The experts also noted that arbitrary arrest and detention constitutes a “clear breach of international law, in particular the right not to be deprived arbitrarily of liberty and to fair proceedings before an independent and impartial tribunal.”<sup>50</sup>

#### **IV. GOVERNMENTS AND COURTS HAVE REJECTED LAWS AND POLICIES THAT CRIMINALIZE CONSENSUAL SAME-SEX CONDUCT BY SERVICE MEMBERS**

In recent years, governments and courts around the world have rejected laws that discriminate against LGBT people, including provisions in military codes similar to Article 210 in the Dominican Republic’s National Police Code of Justice (Law No. 285

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<sup>44</sup> Id. at 69.

<sup>45</sup> Id. at 73.

<sup>46</sup> Opinions adopted by the Working Group on Arbitrary Detention (A/HRC/4/40/Add.1), at 91-94 (Feb. 2, 2007).

<sup>47</sup> Concluding observations on the fifth periodic report of Togo (CCPR/C/TGO/CO/5), at ¶¶ 17-18 (August 24, 2021); Concluding observations on the fifth periodic report of Senegal (CCPR/C/SEN/CO/5), at ¶¶ 14-15 (December 11, 2019); Concluding observations on the sixth periodic report of Morocco (CCPR/C/MAR/CO/6), at ¶¶ 11-12 (December 1, 2016).

<sup>48</sup> UA KOR 2/2017. The experts were the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, the Vice-Chair of the Working Group on Arbitrary Detention, and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, who received mandates pursuant to Human Rights Council resolutions 32/2, 33/30 and 34/18, respectively.

<sup>49</sup> Id. at 4.

<sup>50</sup> Id. at 5.

of June 29, 1966) and Article 260 of the Armed Forces Code of Justice (Law No. 3483 of February 13, 1953). This section describes these experiences in the United States, the United Kingdom, Peru, and Ecuador.

*a. United States*

In the United States, Article 125 of the Uniform Code of Military Justice, when it was adopted in 1951, criminalized consensual sodomy. From 1993 to 2011, the United States followed the so-called “Don’t Ask, Don’t Tell” policy (“DADT”), which limited the enforcement of that provision but did not repeal it.<sup>51</sup> Under DADT, LGBT service members were not allowed to talk about their sexual orientation or to engage in sexual activity, and their commanding officers were not allowed to question service members about their sexual orientation.<sup>52</sup> DADT prohibited LGBT service members from disclosing their sexual orientation on the purported ground that their presence “would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”<sup>53</sup> DADT ensured that consensual same-sex sexual conduct, whether committed on or off a military base, could still be a ground for dismissal from military service.<sup>54</sup> By 2008, more than 13,000 service members had been discharged from the military under DADT.<sup>55</sup>

In 2010, DADT came under significant legislative and judicial scrutiny. In May 2010, the US House of Representatives voted to repeal DADT.<sup>56</sup> The Senate Armed Services Committee also voted to change the policy.<sup>57</sup> A few months later, a federal district court in a case called *Log Cabin Republicans* held that DADT was unconstitutional and suspended its enforcement.<sup>58</sup>

The court in *Log Cabin Republicans* found that DADT was unconstitutional because it denied LGBT people serving in the military the right to enjoy “intimate conduct in their personal relationships.” The court also held that DADT violated the right to freedom of speech because, among other reasons, it denied LGBT service members “the right to

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<sup>51</sup> Policy concerning homosexuality in the armed forces, Pub.L. 103-160, 10 U.S.C. § 654 (1993); *Uniform Discrimination: The “Don’t Ask, Don’t Tell” Policy of the U.S. Military*, Human Rights Watch 7 (Jan. 2003), <https://www.hrw.org/reports/2003/usa0103/>.

<sup>52</sup> Human Rights Watch, *supra* note 51, at 12.

<sup>53</sup> Policy concerning homosexuality in the armed forces, *supra* note 51, at (a)(15).

<sup>54</sup> Human Rights Watch, *supra* note 51, at 4.

<sup>55</sup> *Log Cabin Republicans v. U.S.*, 716 F. Supp. 2d 884, 915 (C.D. Cal. 2010). Many years earlier, in the landmark case of *Lawrence v. Texas*, the US Supreme Court struck down a Texas statute that prohibited sodomy because the statute violated the plaintiffs’ fundamental rights, including a constitutionally protected freedom to establish relationships of intimate conduct and intimate association. *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186\_\_ (1986), which upheld an anti-sodomy law).

<sup>56</sup> Perry Bacon Jr. and Ed O’Keefe, “House votes to end ‘don’t ask, don’t tell’ policy,” *Washington Post* (May 28, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/27/AR2010052704540.html>.

<sup>57</sup> *Id.*

<sup>58</sup> *Log Cabin*, 716 F. Supp. 2d at 929.

speak about their loved ones while serving their country.” The court also rejected various justifications offered by the US government, including the claim that DADT was necessary to advance military readiness or for military unit cohesion.<sup>59</sup>

On November 30, 2010, the Department of Defense released a report which found that repealing the DADT policy would pose little risk to military effectiveness.<sup>60</sup> The report, which looked at studies on militaries of Australia, Canada, Germany, Israel, Italy, the Netherlands and the United Kingdom—all of which had years of experience with LGBT personnel serving in their forces without any restrictions—concluded that a shared commitment to the unit’s mission, rather than interpersonal liking, is necessary to effective unit cohesion. None of the militaries studied reported that having LGBT service members had affected unit performance.<sup>61</sup> The General Accounting Office, a legislative agency attached to the US Congress, had similar findings after surveying Canada, Israel and Sweden, and concluded that inclusion of LGBT people in their militaries had not adversely affected unit readiness, effectiveness, morale or cohesion.<sup>62</sup> The formal repeal of DADT became effective on September 20, 2011.<sup>63</sup>

#### *b. United Kingdom*

Before 2000, the UK Ministry of Defence prohibited LGBT service members from serving openly in the armed forces, regardless of the individual’s conduct or service record. The United Kingdom changed its policies in 2000 in response to the decisions in *Lustig-Prean v. the United Kingdom* (“Lustig-Prean”) and *Smith and Grady v. the United Kingdom* (collectively with Lustig-Prean, “Smith”). These decisions were rendered by the European Court of Human Rights (“ECtHR”), which is authorized to hear human rights complaints from individuals for violations of the European Convention of Human Rights (“the Convention”).

In *Smith*, the ECtHR considered whether the UK military policy that authorized the dismissal of military personnel following investigations into their sexuality violated the right to privacy protected under Article 8 of the Convention. Interference with that right is permitted only to the extent “necessary in a democratic society in the interests of national security . . . for the prevention of disorder . . . [and] for the protection of health or morals.”<sup>64</sup> The ECtHR found that these investigations into the applicants’ sexual

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<sup>59</sup> Id. at 884, 923, 929 and 957.

<sup>60</sup> Bernard D. Rostker, Susan D. Hosek and Mary E. Vaiana, Gays in the Military, Rand Corp. (Spring 2011), <https://www.rand.org/pubs/periodicals/rand-review/issues/2011/spring/gays.html>.

<sup>61</sup> Id.

<sup>62</sup> Human Rights Watch, *supra* note 51, at 46.

<sup>63</sup> Repeal of “Don’t Ask, Don’t Tell” (DADT): Quick Reference Guide, U.S. Dep’t of Def. (Oct. 28, 2011), [http://archive.defense.gov/home/features/2010/0610\\_dadt/Quick\\_Reference\\_Guide\\_Repeal\\_of\\_DADT\\_AP\\_PROVE\\_D.pdf](http://archive.defense.gov/home/features/2010/0610_dadt/Quick_Reference_Guide_Repeal_of_DADT_AP_PROVE_D.pdf).

<sup>64</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively, Art. 8.

orientation and sexual activity were a “direct interference with the applicants’ right to respect for their private lives.”<sup>65</sup>

The ECtHR concluded that the UK government did not offer convincing and weighty evidence that the inclusion of LGBT people in the forces would damage morale and, thus, operational effectiveness, and did not justify the interference with the applicants’ right to privacy.<sup>66</sup> On the contrary, the ECtHR held that the UK government’s position was based solely upon negative attitudes ranging from “stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues.” The Court found that there was no sound evidence that consensual same-sex sexual conduct threatens unit cohesion or poses security risk.<sup>67</sup>

In response to the *Smith* decisions on September 27, 1999, the UK government repealed its ban on January 12, 2000.<sup>68</sup>

### c. Peru

Article 269 of the Military Justice Code of the Republic of Peru, which had prohibited same-sex sexual activity within the military, has been held by that country’s highest court to be unconstitutional.<sup>69</sup> The first paragraph of Article 269 provided that a soldier who carried out “indecent acts or acts against nature with a person of the same-sex, within or outside the military premises, will be punished with expulsion from the Army if he is an officer, or with prison if he is a troop soldier.”<sup>70</sup>

Peru’s Constitutional Tribunal held in June 2004 that the provision was unconstitutional on several grounds. These include that Peru’s Constitution explicitly limits the scope of military justice, and that laws regulating a person’s freedom to their own sexuality exceed that scope.<sup>71</sup> Also, the Court found that Article 269 violated the right to equality by punishing “indecent” acts only when committed between those of the same-sex, without

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<sup>65</sup> *Smith v. United Kingdom*, 29 European Court of Human Rights 493, 523 (2000); *Lustig-Prean v. United Kingdom*, 29 European Court of Human Rights 548, 573 (2000).

<sup>66</sup> The U.K. government supported its argument by a report produced by the Homosexuality Policy Assessment Team (HPAT), which was established by the Ministry of Defence to conduct an internal assessment of the armed forces’ policy on homosexuality. The HPAT was composed of a very small sample proportion of the Ministry of

Defence civil servants and representatives of the three services. *Smith*, 29 European Court of Human Rights at 514; *Lustig-Prean*, 29 European Court of Human Rights at 564.

<sup>67</sup> *Smith*, 29 European Court of Human Rights at 501, 524, 533-36; *Lustig-Prean*, 29 European Court of Human Rights at 554, 574, 583-86.

<sup>68</sup> “Historic ruling ends ban on gay people serving in the armed forces,” Council of Europe, <https://www.coe.int/en/web/impact-convention-human-rights/-/historic-ruling-ends-ban-on-gay-people-serving-in-the-armed-forces>.

<sup>69</sup> *Sentencia 0023-2003-AI/TC*, Constitutional Tribunal of Peru, June 9, 2004, ¶ 87 <https://www.tc.gob.pe/jurisprudencia/2004/00023-2003-AI.pdf>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

any reasonable basis.<sup>72</sup> And the Court held that Article 269 violated the equality principle by prohibiting only same-sex sexual acts, while other kinds of sexual acts on military premises were not prohibited.<sup>73</sup>

*d. Ecuador*

In 1998, the Republic of Ecuador enacted Article 117 of the Rules of Military Discipline,<sup>74</sup> which provided that an officer who engages in “acts of homosexuality” must be discharged, on grounds of either “misconduct or professional incompetence.”<sup>75</sup>

On August 30, 2002, the Inter-American Commission on Human Rights (“IACHR”) received a complaint about the military discharge of Homero Flor Freire, an Ecuadorian service member for an alleged disciplinary infraction, specifically, alleged same-sex sexual conduct in the dormitories of a military base.<sup>76</sup> On November 4, 2013, the IACHR concluded that the state of Ecuador violated rights enshrined by the American Convention of Human Rights.<sup>77</sup> Ecuador, in turn, was recommended to (1) make full reparations to Flor Freire, (2) publicly recognize that Flor Freire was discharged in a discriminatory manner, (3) adopt measures so that officers in the army are not subject to discrimination based on sexual orientation, (4) ensure that those in the army and in the courts of law in the military jurisdiction are aware of Inter-American standards and Ecuadorian domestic law regarding non-discrimination based on sexual orientation and (5) adopt measures to guarantee due process rights to those who are tried by courts in military disciplinary proceedings.<sup>78</sup>

Following Ecuador’s failure to comply with the IACHR’s recommendations, the IACHR submitted Flor Freire’s case to the IACtHR. In November 2016, the court also found the enforcement of Ecuador’s military law to have violated the American Convention on Human rights. The IACtHR found that Ecuador’s military law treated “homosexual acts” differently without an objective and reasonable justification, and therefore discriminated based on sexual orientation, a protected characteristic under Articles 1.1 and 2 of the American Convention.<sup>79</sup> Furthermore, according to the court, the law did not respect Flor Freire’s honor and dignity, which is protected under Article 11 of the American Convention, as the disciplinary sanctions imposed on him were discriminatory in nature and distorted the public’s perception of him.<sup>80</sup>

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<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Inter-American Court of Human Rights, *Flor Freire v. Ecuador*, Judgment of 31 August 2016, Inter-Am. Ct. H.R. (ser. C) No. 315 (2016), ¶ 60, [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_315\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_315_esp.pdf) (accessed July 29, 2024).

<sup>75</sup> Id., at ¶ 60.

<sup>76</sup> Inter-American Commission on Human Rights, *Report No. 81/13* (Nov. 4, 2013), ¶ 1, <http://www.oas.org/en/iachr/decisions/court/12743FondoEn.pdf>.

<sup>77</sup> Id., at ¶ 167.

<sup>78</sup> Id., at ¶ 168.

<sup>79</sup> *Flor Freire v. Ecuador*, *supra* note 74, at ¶ 140.

<sup>80</sup> Id., at ¶ 158.

## V. CONCLUSIONS

For the abovementioned reasons, we ask this Honorable Court to:

1. Accept Human Rights Watch as a Friend of the Court in this case; and
2. Take into account the Dominican Republic's international legal obligations on the criminalization of consensual same-sex conduct, as well as comparative examples from other countries that have eliminated such discriminatory provisions, during its deliberations.