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human rights



AFRIQUE ARC-EN-CIEL

EQUALITY - RESPECT - INCLUSION

ALTERNATIVE REPORT

Submitted by: Afrique Arc-En-Ciel Togo in collaboration with Synergía - Initiatives for Human Rights

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Afrique Arc-en-Ciel (AAEC) is a Togolese non-governmental organization fighting against HIV and promoting equal rights for all, including sexual minorities. It fights against HIV within vulnerable groups MSM-TG¹ and promotes the respect for the rights of lesbian, gay, bisexual, transgender (LGBT) people at local, regional and international level. With legal recognition at the local level, it is distinguished by its actions to fight HIV-AIDS and STIs in MSM-TG populations at high risk, as defined in the National Strategic Plan to fight HIV AIDS and STIs 2016-2020, advocacy and capacity building for the improvement of the socio-legal environment for the well-being of LGBTI people.

Since its creation in 2007, AAEC has carried out several activities on the human rights component:

- Legal and judicial support for victims of violations, violence and abuse
- Documentation of cases of human rights violations
- Advocacy

The mission of documenting cases of human rights violations covers all regions of the country and even a few countries in French-speaking West Africa. AAEC collaborates with other NGOs and national and international institutions and is a member of the EGIDES and AMSHER international networks.

Synergía - Initiatives for Human Rights is a non-governmental human rights organization created in 2017. While the organization is new, its team of human rights defenders based in the United States, Latin America, Europe and Africa has been a leader on the ground for more than ten years. Synergía seeks to protect and promote the human rights of all - especially those whose rights are most consistently and blatantly violated, through a series of programs that address violations based on sexual orientation, gender identity and / or sexual expression. The organization partners with LGBTI civil society organizations and human rights defenders to advocate for the rights of LGBTI people in Latin America and the Caribbean, West and Central Africa, and the Middle East, and North Africa. It combines capacity building and resources redistribution at grassroots level in three interrelated and interdependent thematic areas of work: movement building, security and protection, and rights and advocacy.

¹ Men who have sex with men - Transgender individuals.

Executive Summary

This report examines Togo's compliance with the respect for the rights protected by the ICCPR as an instrument for the protection of human rights, an instrument ratified by the Togolese State. The report concludes that the government of Togo tolerates discrimination against people on the basis of their real or perceived sexual orientation and gender identity and persecutes them. By prohibiting consensual same-sex sexual relations and tolerating a climate of impunity for those who subject those perceived to be LGBT to abuse and discrimination, the Togolese government perpetuates violence, discrimination and stigma against these citizens.

Article 392 of the Togolese Penal Code provides that: "Any indecent or unnatural act committed with an individual of the same sex constitutes contempt of morality. Any attack on public morals by words, writings, images or by any other means is also contempt of morality". Article 393 of the Togolese Penal Code provides that: "Anyone who commits an offense against good morals shall be punished with a prison sentence of one (01) to three (03) year(s) and a fine of one million (1,000,000) to three million (3,000,000) CFA francs or one of these two penalties." These articles are contrary to the international and regional human rights treaties to which Togo is a party, as well as to the Togolese Constitution with regard to non-discrimination, respect for private life, the right to liberty and to security of the person. These include a violation of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the African Charter on Human and Peoples' Rights (ACHPR).

The report provides emblematic cases of violations of the provisions of the ICCPR and offers recommendations for the Human Rights Committee to the Togolese State with the purpose of fighting against the continuing violations of human rights against individuals and groups because of their real or perceived sexual orientation or gender identity in the country. Most of the violated or unprotected rights refer to articles 19 (Right to freedom of expression); Article 9 (Right to liberty and security of person); Article 17 (Right to privacy); Articles 2 and 26 (Prohibition of discrimination, Equal protection before the law and Right to equality before the law).

The report urges the Togolese government to also consider recommendations and calls already made by other human rights institutions and organizations regarding universal respect for human rights.

Introduction

This report is presented within the framework of the 132nd session of the Human Rights Committee during which Togo will appear before the Committee. As a reminder, Togo ratified the ICCPR on May 24, 1984. This report therefore reflects the reality of the daily experiences of certain Togolese citizens on the basis of their real or perceived sexual orientation and gender identity. The State is making efforts in terms of protecting citizens' rights, but it should be noted that some citizens do not benefit from protection in the same way as others. The report therefore provides the information available on the situation of human rights violations in Togo, taking into account marginalized people, that is to say sexual minorities, precisely those who identify as LGBT.

The contents of the report are essentially based on a comparative analysis of the commitments of the Togolese State and the situation of LGBT people in Togo. The rationale for this report is based on the fact that the State did not engage with Togolese civil society organizations that protect the rights of LGBT people and / or represent LGBT people in the process of documenting the state report and to include the concerns of the grassroots community represented by these various organizations for the protection of their rights.

The purpose of the said report is to draw the attention of the Human Rights Committee and also of the Togolese State on the situation of violations of the rights of individuals and groups on the basis of their real or perceived sexual orientation or identity. This situation requires the Committee to ask the Togolese State to take specific and targeted measures to guarantee the protection of human rights for all, without any distinction, as promoted by international legal instruments such as the ICCPR, but also, for example, the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights.

Human rights violations suffered by LGBT people in Togo are numerous; but in the responses provided to the questions which were put to it recently, the Togolese State only pretends to recognize that such situations occur on its territory; as well as to indicate what measures have been taken to guarantee the protection of the rights of all. Togolese citizens face criminalization, arbitrary arrest and detention, violence, intimidation and discrimination because of their real or perceived sexual orientation or gender identity and the State is failing on its commitments by allowing these violations to be committed with impunity by state and non-state actors.

During the Universal Periodic Review (UPR) in 2016, the Togolese government only took note of the recommendations regarding the issues of sexual minorities. It is appropriate to come back to the recommendations because the situation remains precarious.

The report is based on the following data:

- The result of documentation that traces the daily life of LGBT people in Togo. In 2018, the data on violations and abuses highlighted 42 cases. In 2019, the documentation reported 35 cases. In 2020, 33 cases were documented. In the first semester of 2021, around ten cases have already been documented. Documented cases represent a small percentage of actual cases, as the majority of LGBT people do not report discrimination and violations suffered for fear of the stigma and potential criminal consequences of art. 393.
- The follow-up activities carried out at the STD/HIV treatment centers: discrimination at treatment centers is significant. Health care providers discriminate against and stigmatize LGBT people, who no longer have the courage to go to health centers and prefer to remain underground. Hence the further importance of taking anti-discrimination measures.
- Information collected on databases made available by partners.

General Consideration

- **Status of the implementation of the ICCPR in Togo**

By ratifying the International Covenant on Civil and Political Rights, Togo has committed to guaranteeing the full and complete protection of citizens without distinction, and the enjoyment of their civil and political rights.

By virtue of its fundamental text, the Constitution, Togo has a good basis that would allow it to meet the requirements of the ICCPR. However, in reality, practice does not reflect what has been transposed into the internal legal ordering as an instrument ratified at the international level: practical experience particularly highlights the shortcomings.

What poses a problem is the absence of a protection system which results in:

- The existence of the provisions of the Penal Code that punish relations between consenting adults of the same sex.
- The absence of a text or a provision prohibiting discrimination based on sexual orientation and gender identity in the same way as other forms of discrimination.
- The absence of reinforced measures aimed at prohibiting discrimination in all its forms, including that based on sexual orientation and gender identity.

In this sense, the considerations made by the Togolese State in its answers to questions previously asked about the situation of LGBT people in relation to the implementation of the ICCPR, as well as the measures taken to fight against the stigmatization and discrimination of

this minority, need to be put in perspective². The State continues to hide under the veil of the absence of conviction of a citizen on the basis of their sexual orientation to make believe that the existence of a criminal norm is not an obstacle for any citizen to enjoy his rights. "Nullum crimen, nulla pœna sine lege"³: from the moment there is a norm that penalizes the daily life, or the nature itself, of a citizen, how can we say that this citizen should not have any concern in expressing himself, or in fully and completely enjoying his rights? In other words, the citizen is constantly exposed to prosecution on the basis of the existence of a penalizing law. Also, in terms of substance and from an institutional point of view, the LGBT issue is mainly dealt with under the public health dimension to respond to a scourge and not through the human rights dimension in general. Regarding the inclusive aspect which makes the State say that "It should be noted that this concern as a whole constitutes a taboo subject in Togolese culture and the people concerned generally do not dare to expose themselves publicly. This situation is more due to the fear of family rejection rather than a certain fear of the security services", it should be remembered that it is the existence of penalizing texts that complicates the daily life of the minority.

Substantial violations of the Covenant

a. Internal legal ordering and international law

Article 11 of the Togolese constitution recalls that: "All human beings are equal in dignity and rights... No one may be favored or disadvantaged by reason of his family, ethnic or regional origin, his economic or social situation, his political, religious, philosophical or other convictions." In compliance with the provisions of international law, the country respects the principle of the primacy of international law by enshrining the primacy of regularly ratified international standards over domestic legal standards in article 140⁴ of the constitution. Togo has signed and ratified the International Covenant on Civil and Political Rights (ICCPR) which de facto and de jure is part of the internal legal order.

Even if we welcome the advances in the right to health, in particular the inclusion of MSM in national response documents against HIV-AIDS, the representativeness of key populations at the CCM⁵, in the various technical groups such as that of Gender-Human Rights and HIV and their association with the development of HIV-AIDS policies; a paradox lies in the fact that despite these various initiatives, during the revision of the Penal Code in 2015 the country nevertheless toughened the sanctions against people having sexual relations with consenting

² Point 5, Answer 5.

³ There is no crime, no penalty without a law.

⁴ Art 140 "Treaties or agreements regularly ratified or approved have, from their publication, an authority superior to that of the laws, subject, for each agreement or treaty, to its application by the other party".

⁵ Country Coordination Mechanism.

adults of the same sex, thus constituting a violation of the provisions mentioned above and leaving an open door to abuses and violations of human rights on the basis of real or perceived sexual orientation and gender identity. There is therefore a contradiction insofar as programs are put in place to reduce the incidence of HIV and Article 392 that defines the issues of contempt of morality which are sanctioned by the following article. In addition, the safety and integrity of human rights defenders working on LGBT issues is threatened in the sense that some of their actions could be considered homosexual propaganda or promotion of homosexuality and, therefore, reprehensible under the terms of Article 394⁶ of the Penal Code. This is evidenced by the anonymous threats received by defenders, in particular the one suffered by the Director of Afrique Arc-En-Ciel in May 2019, the day after the celebration of IDAHOT⁷. Among its abuses and violations, there are physical and verbal assaults, cases of arbitrary arrests and detention, eviction from home, blackmail and extortion both by order and security forces and non-state actors. In 2019, we identified cases of physical, cruel and humiliating attacks on effeminate individuals and/or whose gender expression did not correspond to social expectations, without any reaction from the police authorities, even though they were witnessing those attacks.

This report therefore objectively exposes the lack of measures taken by the country to respond to violations and abuses of human and peoples' rights on the basis of sexual orientation and gender identity. This aims to provide the Committee with information on the state of the respect for human rights for all, sexual and reproductive rights, rights to freedom of assembly and freedom of expression, as well as recommendations aimed at improving it.

b. Violations of the provisions of the Covenant

Articles 2, 9, 17 and 26

Everyone has the right to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter without any distinction, in particular of race, ethnicity, color, sex, language, religion, political opinion or any other opinion, national or social origin, fortune, birth or any other situation. This is an essential principle in the fight against discrimination. While Article 9 advocates freedom and security and Article 26 provides for the right to equality before the law, in reference to the Togolese Penal Code of November 24, 2015 in its Article 392 and following, it

⁶**Article 394:** A punishment of a prison sentence of six (06) months to two (02) years and a fine of five hundred thousand (500,000) to two million (2,000,000) CFA francs, or one of these two penalties, will be applied to any person who:

disseminates or has a third party publicly disseminate incitements to perform practices contrary to good morals orally, in writing or by any other means of communication.

⁷ International Day against Homophobia and Transphobia, now IDAHOBIT. Indeed, the day after this celebration, the Director received an anonymous email telling him that he would receive a surprise visit to his home because he promotes homosexuality in Togo and that he better start preparing because his days were numbered.

goes without saying that the the existence of laws penalizing, or specifically against, a part of its population is in contradiction with the aforementioned articles. It should also be noted that, according to the case *Toonen v. Australia*⁸, laws that criminalize sexual acts between consenting adults of the same sex violate not only the principles of equality and the prohibition of discrimination, but also the right to privacy recognized by Article 17 of the ICCPR. In this sense, despite the answer given to the question on the harmonization of national laws (in this case the Penal Code) with its international commitments, including on issues of equality and non-discrimination against LGBT people, we would like the following recommendation to be formulated to the Togolese State:

- ***Harmonize national provisions, in particular the Penal Code in its articles 392 and following, with international and regional commitments to which the State is a party by repealing the provisions penalizing relations between people of the same sex***
- ***Adopt in its legislation a lato sensu concept of the issues of discrimination so as to prohibit discrimination based on real or perceived sexual orientation and gender identity***

If the Penal Code describes discrimination as any distinction, exclusion, restriction or preference based on sex, gender, disability, race, color, ancestry or family, ethnic or regional origin, the economic or social situation, political, religious, philosophical or other convictions, HIV seropositivity; which has the aim or effect of destroying or compromising the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social and cultural fields or in any other field of public life; then the restriction of the freedom of choice of one's sexual partner by the said Penal Code is an infringement of the rights to equality, to freedom from discrimination as enshrined in Article 7 of the Universal Declaration of Human Rights, and Article 2 and 26 of the ICCPR. In this sense, we would like the following recommendation to be formulated to the Togolese State:

- ***Prohibit discrimination based on sexual orientation and gender identity in the same way as other forms of discrimination***
- ***Guarantee fair and equitable access to and equality before the law to all Togolese citizens***
- ***Update the available texts in order to also integrate discrimination based on sexual orientation and gender identity as a prohibition***

It should also be noted that the Togolese constitution reaffirms its commitment to the human rights and freedoms contained in the declarations, conventions and other instruments adopted

⁸ Communication N. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

within the framework of its international relations and with the United Nations. Thus, we would like the Togolese State to:

- ***Repeal the laws criminalizing homosexuality, and introduce policies to end discrimination against LGBTI individuals***
- ***Strengthen the measures to prohibit discrimination, including that based on sexual orientation***

In addition, cruel, inhuman or degrading treatment is prohibited; arbitrary detention is prohibited; freedom of expression is protected as an individual right. Amongst the documented cases we can report the following cases of arbitrary arrests:

- a young gay man reported that another young man who stole his cell phone was blackmailing him because he found gay videos on the phone. While the former was trying to retrieve his phone, a fight broke out which had them brought to the police station where the case took a different turn: the sexual orientation of the victim became the subject of the news after the blackmailer revealed it, and both the victim and complainant were arrested and detained 24 hours before being released⁹.
- In March 2018, a transgender person who was dressed according to her gender identity was arrested and detained for 48 hours at the Agoe police station¹⁰ for cross-dressing, though no law prohibits cross-dressing in Togo. This situation testifies to the violation of the right to freedom of expression and the fact constituted an arbitrary detention¹¹.
- On the night of January 06, 2021, a young gay man was arrested by a police patrol while trying to escape from an ambush. He was taken to the police station and the police officers determined that he was in the street at night to steal. To justify that he was not a thief he told his story to the police officers. The agents arrested the boy's partner and finally decided to send them both to prison because they were gay. They were then released upon payment of a sum by Afrique Arc-en-Ciel¹².

The dignity of the human being and the guarantee of their security must be at the core of the law and policy making. In many documented cases, the safety and dignity of LGBT people have been called into question.

⁹ Case recorded on the database made available by the partners.

¹⁰ One of the towns surrounding the capital which has become a prefecture.

¹¹ Case recorded during field documentation.

¹² Documented case in Anfamé, Lomé district.

- In 2019, in a blackmail case that pitted a gay person against another person, the Djidjolé¹³ police station took the case, relinquished it and dismissed the complainant saying "Just as you started without us, finish without us"¹⁴.

It is therefore a question of unequal legal protection based on sexual orientation and gender identity. This situation does not only affect men but also lesbian, bisexual and transgender women who are victims of double discrimination on the one hand linked to their status as women, and on the other hand to a sexual orientation or gender identity that is not in line with social expectations.

- As an example, on November 16, 2019, a transgender person was arrested at night by the police who would not release her unless she had sex with them. The officer followed her to her home and it was the presence of the victim's mother that protected her from a sexual assault¹⁵.

Still dissatisfied with the responses provided by the government, we would like to propose the following recommendations:

- ***Put in place domestic policies and programs to sensitize law enforcement and security forces as well as actors within the judicial system on the issues of sexual rights, gender identity, sexual orientation, as well as the vulnerability of LGBT groups.***
- ***To establish a legal framework for the repression of hate crimes, including abuses and violations based on sexual orientation, gender identity and sex characteristics***

In the context of HIV, for example, the awareness messages disseminated to MSM will not be the same as those of other target populations. Beyond LGBT people, the associations and structures working with this target group on various aspects are also endangered under the aforementioned Article 394. Even if in criminal matters the rule is to be interpreted strictly, the fact remains that if we consider the act of "contempt of morality" which is punished by the Penal Code, the concepts implied which define it as "indigent or unnatural act committed with an individual of his sex" are not defined *stricto sensu*. In the Togolese context, no law specifically protects human rights defenders. We therefore ask for the following recommendation to the Togolese State:

- ***Adopt provisions aimed at protecting actors working with LGBT people***
- ***Adopt provisions that protect human rights defenders, including LGBT human rights defenders***

¹³ Lomé district.

¹⁴ Case recorded during field documentation.

¹⁵ Case registered directly with the victim.

- ***To ensure a safe and favorable working environment for defenders, in particular women and LGBT rights defenders, by removing obstacles to their activities and amending relevant legislation***

Article 6

Hostility is present even among state actors such as the security officers who arrest LGBT people. And in these situations, even when LGBT people seek protection from the police, they do not find it. The legal framework prevents LGBT people from receiving support from the state. Because a criminal law exists, people do not have the courage to seek justice, even though they are victims of aggression, cruel, inhuman or degrading treatment, committed on them by state and non-state actors, which encourages impunity. The State responsible for this omission violates Article 6.

Insults and verbal attacks are commonplace for people expressing an attitude said to be at odds with their gender. Those who dare to react to them, end up being beaten up. The documentation of the situation shows that there are many family rejections, refusals of housing, and many other restrictions linked to sexual orientation and gender identity, such as the refusal of care by some health care providers.

Even if formally there are no cases of conviction based on sexual orientation or gender identity and expression, the fact remains that the existence of the law is in contradiction with the international commitments of the State as well as the values of non-discrimination and equality that the latter advocates. Also, it encourages abuses and violations against part of the population, as evidenced by the cases of abuse and violence documented by LGBT associations at the local level, i.e. 37 in 2017, 42 in 2018, 35 in 2019, 33 in 2020 and a dozen already from January to June 2021. We highlight that there are on average thirty cases per year, a significant figure.

- In December 2020, a young transgender person was the victim of physical violence and inhuman treatment: beaten by her family, she had crushed pepper introduced in her eyes, ears and genitals. She was about to be strangled by her uncle when the neighbors rescued her¹⁶.

It is therefore important to take action to discourage and punish abuses and violations of human rights based on real or perceived sexual orientation or gender identity, as recommended by Resolution 275 on the Protection from Violence and Other Human Rights Violations of Individuals on the Basis of Real or Imputed Sexual Orientation or Gender Identity¹⁷, adopted by the African Commission on Human and Peoples' Rights in 2014. Nothing has been done in this

¹⁶ Case documented and monitored in Anfamé, Lomé district.

¹⁷ ACHPR/Res.275(LV)2014; https://www.achpr.org/fr_pressrelease/detail?id=584.

direction since the adoption of the resolution. Thus, we would like the Togolese State to be recommended to:

- ***Popularize Resolution 275 among human rights actors***
- ***Take appropriate measures to implement Resolution 275 in the domestic legal order***

Conclusions

Togo has ratified many legal instruments and strives every day to improve its human rights situation. However, challenges persist. If the principles of the universality of human rights, their interdependence, non-discrimination, equality and inherence have been integrated and have had the approval of the Togolese State, it is possible to think that efforts still need to be made so that these principles are truly a reality that is reflected in the country's legal texts and the situation of all Togolese, including those who identify as LGBT or their human rights defenders in order to ensure their protections given that human rights defenders who work for the protection of LGBT people are frequently victims of anonymous threats.

So far, the State has not taken any measures to implement Resolution 275/2014. This indicates that the State is still prone to reject all the recommendations aimed at improving the living conditions of LGBT people in its territory, although these recommendations have been made to it on numerous occasions in recent years. We therefore invite the Committee to ask the State to kindly make respect for human rights a reality for all its citizens without distinction.

Questions to the State Party

1. *Does the State intend to repeal Article 392 and following of the Penal Code?*
2. *To what extent does the government plan to protect human rights defenders, including those working on LGBT issues?*
3. *What measures does the State intend to take to sensitize law enforcement and security forces as well as other state actors, on issues relating to sexual orientation and gender identity in order to protect sexual minorities?*
4. *What measures have been put in place to ensure the implementation of Resolution 275 at the level of internal legal ordering?*