



The Council for Global Equality

Advancing an American Foreign Policy
Inclusive of Sexual Orientation and Gender Identity

Council for Global Equality Calls on President-Elect Obama and Secretary of State-Designate Clinton to Affirm LGBT Inclusion in US Human Rights Policy

Summary

Following a dangerous abdication of US human rights leadership at the UN General Assembly in December, this short paper urges our new foreign policy leaders to take a clear and firm stand in support of human rights for all, including all lesbian, gay, bisexual and transgender (LGBT) individuals. Human rights are not divisible, with unpopular groups being deemed less deserving. The power of human rights lies in their universal application to each and every human being.

Unfortunately, the policy of the United States with regard to the human rights of LGBT individuals has been contradictory at best, and harmful to the lives of millions of people at worst. Despite the fact that the US State Department consistently documents significant and pervasive human rights violations targeting LGBT individuals around the world in its annual Human Rights Reports, our government has not taken sufficient steps to condemn such practices. And despite the stated US commitment to champion political freedom and liberty, we have too often been silent when it comes to the rights of LGBT people to participate in their political system, or to exercise their freedoms of assembly or speech. LGBT people are still too often suppressed by governments with whom we have friendly relationships. And despite the strong US commitment against violence and terror, we have rarely spoken out against the extreme brutality waged against LGBT people, including acts of state sponsored violence, intimidation, beatings, assaults, murders and even executions.

US foreign policy should forthrightly represent the interests and voices of these individuals, many of whom are unable to advocate for themselves for fear of persecution, violence or extreme discrimination. Specifically, we ask the Obama Administration's State Department to:

- Issue a clear statement that US foreign policy includes a concern for the human rights of all LGBT people.
- Affirm existing human rights law and consistent US practice in this area.

- Convene a public policy roundtable to review US policy and best practices; designate a point person to coordinate new policy; and implement a new policy agenda in coordination with US embassies.
- Support measures at the UN and other international bodies to end human rights abuses against LGBT people.
- Use the reach of US foreign policy to speak out against these human rights abuses, as documented in the State Department Human Rights Reports for the past 18 years.
- Oppose the death penalty and criminal laws that penalize consensual homosexual conduct.
- Increase funding for the human rights of LGBT people through US human rights funding mechanisms.
- Strengthen the ability of openly LGBT people to work within the State department and the US Foreign Service.

LGBT people are citizens of the United States and positive and contributing members of each and every country. They deserve nothing less than full and equal human rights.

Background: Failure of US Leadership at UN Creates Precedent that Must Be Corrected

On December 18, 2008, 66 nations signed onto a first-ever statement in the United Nations General Assembly calling on all countries to decriminalize homosexual conduct and recognize that sexual orientation and gender identity are protected under existing human rights norms. The Statement was read by Argentina, and it was signed by countries from every UN regional block, including six African countries. Despite thousands of calls to the US State Department, a letter from Members of Congress and face-to-face meetings with the US Mission to the UN in NY, the United States was virtually the only country in the Western Group at the United Nations that refused to sign the statement. Just as alarming, the Bush Administration relied on faulty and dangerous legal arguments in defending its decision not to join this human rights initiative.

The Organization of The Islamic Conference (OIC) issued a factually unsupportable and inflammatory counter-statement in the UN General Assembly that same day, signed by fewer than 60 countries, deploring the recognition of “so-called” rights that “have no legal foundation,” and suggesting that the recognition of the basic rights of LGBT individuals could legitimize pedophilia. The United States did not sign the OIC statement, but nor did the US repudiate that offensive characterization of millions of its own citizens. Our failure to join the statement on behalf of LGBT individuals, together with the legal arguments advanced by the US Mission to the UN to explain why the United States failed to join the statement, put the United States in the diplomatically embarrassing and legally dangerous position of undermining the basic application of human rights for LGBT communities abroad.

The Council for Global Equality, representing a coalition of domestic LGBT rights organizations and international human rights organizations, urges President-Elect Obama and Secretary of

State-Designate Clinton to issue a high-level policy statement clarifying that US human rights policy specifically includes concerns for the rights of LGBT communities.

Such a position would be fully consistent with US law and practice, and with our treaty obligations under the International Covenant on Civil and Political Rights (ICCPR). It would also be consistent with the leadership demonstrated by the European Union and much of Latin America on this contemporary human rights debate within the United Nations.

A similar policy statement, which was issued by the United Kingdom's Foreign and Commonwealth Office (FCO) in May 2007, is attached as an addendum. It is offered as a model statement that could be adapted by the incoming Obama Administration to repudiate forcefully the dangerous ambivalence of the Bush Administration to international human rights protections for LGBT individuals. The FCO policy statement was important within the FCO, as it clarified any remaining ambiguities in UK human rights policy, and it quickly provided impetus for principled actions by UK embassies and UN representatives on LGBT concerns.

Policy Requests

- **Issue a clear statement that US foreign policy includes a concern for the human rights of all LGBT people.**

The failure of the United States to join the UN General Assembly statement in December 2008 was unexpected based on other recent diplomatic commitments by the US government. The recent UN General Assembly statement was very similar to a joint statement delivered by Norway to the UN Human Rights Council in 2006 on behalf of 54 countries. The United States joined that 2006 UN statement. And earlier in 2008, a declaration on sexual orientation, gender identity and human rights was also adopted unanimously by all 34 States in the Organization of American States. The United States supported that declaration, and actively lobbied other countries to join it. Given those two past precedents, the decision not to sign the UN General Assembly statement took many human rights experts by surprise, while sending a dangerous signal to those who actively persecute LGBT individuals.

To clarify US policy in light of these contradictory US positions, a high-level policy statement should be issued by President-Elect Obama and/or Secretary of State-Designate Clinton as soon as possible, but ideally by March 2008, around the time of the release of the annual State Department Human Rights Reports. (The reports are required by law and are presented to Congress every year in late February or early March.) In last year's reports, the State Department catalogued human rights abuses impacting LGBT individuals in more than 100 countries, including cases of extrajudicial killings, torture, imprisonments based only on an individual's declared (or perceived) sexual orientation, and discrimination in accessing education, employment, health care, and police protection. The reports also documented many limitations on the basic rights of LGBT individuals and organizations to freedom of speech and freedom of assembly, and to protection before the courts.

The policy statement should be modeled on the recent approach taken by the Foreign and Commonwealth Office in London. (See appendix.)

- **Affirm existing human rights law and consistent US practice in this area.**

Based on meetings with the US Mission to the United Nations and on press statements by Mission representatives, it appears that the decision to reject the human rights statement in the UN General Assembly was driven in large part by a limited and inaccurate analysis of US law and practice. The State Department chose to hide behind flimsy legal arguments that focused on the inconsistent application of human rights protections for LGBT Americans, rather than standing up to pledge future leadership on these basic human rights concerns.¹ The fact is that US law and practice are consistent with the legal norms expressed in the UN General Assembly statement. This legal understanding must be affirmed as a matter of priority.

Specifically, the UN General Assembly statement calls on all governments around the world to ensure that sexual orientation and gender identity are not subjected to criminal penalty, and that individuals are not executed, arrested or otherwise detained because of their sexual orientation or gender identity. It also calls on governments to ensure that human rights violations based on sexual orientation and gender identity are properly investigated and prosecuted, and that human rights advocates who expose those abuses are adequately protected.

The General Assembly statement focuses on decriminalization of homosexual conduct, which is consistent with US Constitutional provisions under the US Supreme Court's *Lawrence v. Texas* decision (2003). The statement also reaffirms non-discrimination norms in a context that is consistent with both *Lawrence* and the Supreme Court's earlier decision in *Romer v. Evans* (1996). Moreover, the United States ratified the International Covenant on Civil and Political Rights in 1992, and the Human Rights Committee, which provides an authoritative interpretation of the treaty's legal provisions, has since 1994 consistently found that criminalization of consensual homosexual conduct violates both the privacy and the non-discrimination provisions of that treaty.²

¹ The NY Times reported that "[t]he official American position was based on highly technical legal grounds. The text, by using terminology like 'without distinction of any kind,' was too broad because it might be interpreted as an attempt by the federal government to override states' rights on issues like gay marriage, American diplomats and legal experts said." The NY Times also quotes State Department officials, saying "'We are opposed to any discrimination, legally or politically, but the nature of our federal system prevents us from undertaking commitments and engagements where federal authorities don't have jurisdiction,' said Alejandro D. Wolff, the deputy permanent representative." (Neil MacFarquhar, NY Times, Dec. 19, 2008)

² While testifying before the UN Human Rights Committee on US treaty compliance on July 19, 2006, Wan Kim, the then head of the Civil Rights Division in the Justice Department, questioned whether the

It is also important to recognize that since 1990, the State Department has been requiring all US embassies to report on human rights abuses impacting LGBT communities, including acts of discrimination and abuse, for inclusion in the State Department's annual Human Rights Reports. It is almost inconceivable that one arm of the State Department could be reporting so regularly on these violations in the annual Human Rights Reports, while other offices within the State Department are now questioning whether human rights law covers basic non-discrimination protections for LGBT individuals. The existing human rights reporting instructions on non-discrimination that go out to all US embassies should be affirmed in any forthcoming policy statement, and strengthened by including more specific reporting instructions on gender identity.

Finally, the UN General Assembly statement is also consistent with the US policy of granting asylum protection to those who would face human rights violations on account of their sexual orientation or gender identity if returned to their countries of origin.

- **Convene a public policy roundtable to review US policy and best practices; designate a point person to coordinate new policy; implement new policy agenda in coordination with US embassies.**

The Council for Global Equality also calls on the Human Rights Bureau in the State Department, together with other relevant Bureaus and funding offices, to convene a public policy roundtable to review US policy and consider best practices in this policy area, including a review of both bilateral and multilateral EU policies. A participatory consultation should be followed by the

treaty's provisions could properly be understood to include protections on the basis of sexual orientation and gender identity, despite the Human Rights Committee's consistent jurisprudence on that point. One of the Members of the Human Rights Committee responded by criticizing this legal position and stating that the US position might suggest that persons of diverse sexual orientations and identities are not fully entitled to the rights to life and privacy under the International Covenant on Civil and Political Rights. This US policy argument could explain the legal hesitations behind the US decision not to sign the UN human rights statement in the General Assembly in December.

This is a dangerous legal position that must be repudiated. It undermines crucial human rights protections, is inconsistent with US law and policy and is at odds with the interpretation of international law offered by all other major Western nations. The new Obama Administration should immediately affirm that the United States accepts the Human Rights Committee's longstanding jurisprudence on the application of human rights protections for all, regardless of sexual orientation or gender identity. Note, however, that the Human rights Committee has specifically determined that the non-discrimination protections **do not** extend to marriage equality under the terms of the treaty.

adoption of a new policy agenda that charts a path forward for US global leadership on basic rights for LGBT individuals.

In addition, since there is no office or position within the State Department that has formal responsibility for monitoring and responding to LGBT human rights and equality issues, senior State Department leadership should create a formal position in Washington to work with select embassies and country teams to design and institute this new agenda.

- **Support measures at the UN and other international bodies to end human rights abuses against LGBT people.**

Human rights advocates expect that a similar UN statement on human rights, sexual orientation and gender identity will be introduced once again before the General Assembly in December 2009. The goal of a second statement would be to significantly increase the number of countries signing onto the statement, while also attempting to encourage states that signed the harmful OIC statement to reconsider their commitment to human rights for all. If a similar statement is introduced in December 2009, the Council for Global Equality will look for US leadership. That leadership should translate into an early decision on a US signature, and to active US diplomatic engagement to encourage other countries to sign the statement as well. Such efforts at the United Nations, while still very limited in scope and legal application, are immensely important to LGBT human rights defenders who represent some of the most marginalized and least protected communities worldwide.

Similar measures should be supported in other international fora, including the Organization of American States (OAS) and the Organization for Security and Cooperation in Europe (OSCE), where US diplomats have recently questioned the inclusion of sexual orientation and gender identity concerns in the OSCE's human rights mandate.

- **Use the reach of US foreign policy to speak out against human rights abuses documented in the Human Rights reports for the past 18 years.**

The State Department has reported on LGBT-related human rights abuses for more than eighteen years, but our interventions have always stopped at the reporting level. We have never formally asked our diplomats to respond to those abuses as a matter of US human rights policy, or our development specialists to explore funding opportunities to support civil society organizations working in-country to document and respond to human rights abuses targeting LGBT individuals.

The United States has by now fallen significantly behind our many allies in Europe and in Latin America in recognizing and responding to this new human rights challenge. It is time, after eighteen years of reporting, and following the high-profile abdication of principled leadership in the UN General Assembly this December, for the US government to clarify that *the rights of LGBT individuals are human rights*. It is time to move beyond a *reporting agenda* to an

affirmative *protection agenda*, to ensure that those who represent our country—in the White House, in U.S. embassies and in international fora—use the diplomatic, political and economic leverage available to them to oppose human rights abuses that are too often directed at individuals because of their sexual orientation and gender identity. This also necessarily involves support for foreign LGBT organizations as vital contributors to our country’s national interest through the development of free and vibrant civil societies abroad, just as we support women’s rights groups, disability rights groups, and minority rights groups under our global civil society support initiatives.

In over 100 countries worldwide, LGBT individuals have been subjected to arbitrary arrest, rape, legal discrimination and murder. US embassies should carry out formal diplomatic approaches (“demarches”)—at Ambassadorial or, at minimum, Deputy Chief of Mission level—in countries where security forces are complicit in LGBT human rights abuse or in failing to investigate/punish such abuse, or where governments criminalize private homosexual activity between consenting adults.

- **Oppose criminal laws that penalize consensual homosexual conduct.**

In human rights fora, and through our US embassies, US diplomats must strongly oppose laws that criminalize consensual homosexual conduct. Such opposition does not constitute meddling in another nation’s internal legal affairs. It is, instead, a principled human rights position.

In particular, our diplomatic engagements must emphasize that laws criminalizing consensual homosexual activity in private, whether enforced or not, are serious human rights concerns. Even when not enforced, such laws are often used indirectly as a tool of persecution or to limit free expression. The mere existence of these laws represents a serious human rights violation, and any detention based on such a law is considered arbitrary under international legal standards. When general morality or indecency laws are used as substitutes to more explicit sodomy laws, these laws must also be challenged.

Where US legal advice is offered through US embassies in countries seeking to reform their legal systems, Department of Justice legal advisers should offer legal advice to assist with decriminalization efforts and advise host governments on legal protections for LGBT citizens.

- **Increase funding for the human rights of LGBT people through US human rights funding mechanisms.**

US assistance programs aimed at strengthening democracy and civil society abroad should be inclusive of LGBT communities. The State Department, working together with USAID’s new leadership, should designate a substantial USAID and/or State Department funding set-aside for programs aimed at enhancing LGBT equality abroad, principally in the context of funding devoted to civil society, democracy, and the rule of law.

USAID micro-credit funding—intended to strengthen the entrepreneurial and small-enterprise sectors of foreign economies—is also offered in many developing countries. In other development contexts, this aid has been targeted toward the empowerment of women, ethnic minorities, and individuals on the margins of society. Such assistance has not been directed toward LGBT communities. Our new foreign policy leadership team should ensure that USAID micro-credit funding, where part of USAID Mission Strategic Plans, is advertised broadly within LGBT communities and considered as a tool to empower economically marginalized LGBT individuals.

- **Strengthen the ability of openly LGBT people to work within the State department and the US Foreign Service.**

We need to ensure that LGBT diplomats, who serve as powerful role models in their foreign postings, remain in the Foreign Service. To ensure that they can do so, State Department personnel policies that discriminate against LGBT employees must be redressed. The foreign policy leadership team should support efforts to ensure equal benefits for federal employees' domestic partners, including by addressing inequities unique to Foreign Service. To do so, the State Department should consult with Gays and Lesbians in Foreign Affairs Agencies (GLIFAA) in the review process.

The United States could also advance LGBT workplace equality substantially by applying equality principles to those private sector contractors that receive US government funding. Require that all US government contractors and recipients of U.S. government funding similarly grant benefits to domestic partners.

Addendum

UK Policy Statement Affirming Commitment to LGBT Rights

On May 17, 2007, while marking the International Day Against Homophobia (IDAHO), UK Foreign Office Minister Ian McCartney affirmed Britain's commitment to the universal decriminalization of homosexuality. Announcing the development of a new UK strategy on international LGBT rights, he said:

“We have taken a lead in ending discrimination against lesbian, gay, bisexual and transgender (LGBT) people in the UK. But elsewhere the picture remains bleak. More than 70 countries totally prohibit consenting same-sex relations, and nine countries punish them with death, denying people their basic human rights. Every year hundreds of LGBT people are killed simply because of their sexual orientation. Some by State execution; many more while the State looks

on indifferently. Many thousands more live in fear of persecution. Human rights belong to everyone. Sexual orientation cannot be a qualifying factor.

“The Foreign and Commonwealth is developing a strategy for promoting and protecting the human rights of LGBT people overseas. This year sees the 40th Anniversary of the Sexual Offences Act in the UK, which began the decriminalisation of homosexuality. We can mark this milestone by speaking up for those millions around the world who are branded as criminals simply for being who they are. I look forward to working in partnership with NGOs and other stakeholders to develop our strategy.

“LGBT people have struggled to gain recognition of their human rights internationally. Many states refuse even to consider these issues and strive to keep them off the international agenda. Millions of our fellow human beings live in societies still blighted by stigma, prejudice and shame. Their suffering is unseen and unheard. These will be difficult issues to raise, but we must speak up for those who cannot speak up for themselves.”

In addition to efforts focused on decriminalization, there are five other areas where UK action has targeted human rights action on behalf of LGBT individuals:

- non-discrimination in the application of human rights;
- support for LGBT activists and human rights defenders;
- health and health education;
- raising LGBT issues at international / multilateral institutions;
- and bilateral engagement with key countries.

For More Information Contact

Council for Global Equality

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