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PRESS STATEMENT

CENTRE FOR HUMAN RIGHTS REGRETS SOUTH AFRICA'S GLOBAL RENUNCIATION OF DOMESTIC PROTECTION FOR SEXUAL MINORITIES

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The Centre for Human Rights, University of Pretoria, notes with regret that the South African government did not support the recent establishment of a United Nations watchdog to monitor and report on violence and discrimination world-wide against persons based on their sexual orientation and gender identity. Taken at face value, abstaining from supporting this measure is perplexing. The substantiation given for our vote is not convincing. The onus remains on the government to fully explain to all South Africans why it has taken this approach.

The UN Human Rights Council, the UN's main human rights body, on 30 June 2016 decided by a vote of 23 against 18 (with 6 abstentions) to create this position. It is formally called the "Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity", and will serve for a period of three years.

South Africa sits on the 47-member Council. Of the 13 African states on the Human Rights Council, 9 voted against the resolution. These states joined Saudi Arabia, a state infamous for state-sponsored terror against LGBT persons. The six abstaining states are, in addition to South Africa: Botswana, Ghana, India, the Maldives, and the Philippines.

South Africa's abstention comes as a grave disappointment. The main substantive clause in the resolution, on which the creation of the expert mechanism is based, notes that the states supporting the resolution "strongly deplore acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation or gender identity". This is an entirely unassailable proposition, which any state that recognises the mere citizenship of gay, lesbian, bisexual and transgender (LGBT) persons should have little difficulty accepting. It is also perfectly aligned with our Constitution, which is one of very few Constitutions explicitly prohibiting discrimination on the basis of sexual orientation. A vote of abstention – essentially a position of indifference – contradicts the values of our Constitution.

Placing the issue in a broader African context, the resolution is also in line with South Africa's commitments under the African Charter on Human and Peoples' Rights. The African Commission, the primary human rights body of the African Union (AU) tasked with overseeing the protection of human rights in AU Member States, in 2014 adopted a resolution affirming that all state parties to the African Charter are expected to curb violence based on a person's real or perceived sexual orientation or gender identity. In its resolution (Resolution 275), the Commission called on AU Member states to

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investigate such crimes and bring the perpetrators to justice.

South Africa's abstention at the UN also contradicts the position taken in recent years in international fora. South Africa sponsored the first ever Sexual Identity and Gender Orientation protection resolution at the UN Human Rights Council in 2011 and strongly supported the second one in 2014. Earlier this year, South Africa organised and hosted the first regional African seminar on Finding Practical Solutions for Addressing Violence and Discrimination Based on Sexual Orientation, Gender Identity and Expression. The seminar made a series of recommendations that are exactly the measures that an Independent Expert could support.

While the abstention of the other African states may be explained by their unease with the potential contradictions between their commitments under the African Charter and their own domestic law, the same cannot be said for South Africa. Both Botswana and Ghana still formally criminalise consensual same-sex conduct between consenting adults, but felt that they had to balance this consideration with their obligation under the African Charter.

The South African position therefore clearly begs the question what motivated the gaping discrepancy between constitutional protection at home, and global positions on the same issue. In an attempt at answering, South Africa's ambassador to the UN in Geneva, Ms Nozipho Mxakato-Diseko, provided an explanation for the vote, aiming to reconcile the irreconcilable. On the one hand, she reiterated the constitutional protection, and the belief that "no person should be subjected to discrimination or violence on any ground, including on the basis of sexual orientation". She also acknowledged that "lives are at stake". On the other hand, her utterances elevated the principle of overriding importance, the objective of achieving "maximum unity", "building maximum consensus", "leaving no one behind", and carrying along "countries that have challenges with this issue". Our ambassador derided those introducing the resolution for their "arrogant and confrontational approach", and of "grandstanding, recklessness, brinkmanship and point scoring".

Despite our protestations, the bottom line is: South Africa did not support the establishment of the single most significant step yet taken within the UN to saving the lives of persons exposed to violence on the basis of their sexual orientation and gender identity. Threats and incidents of violence are current, recurring and real. Abstaining from the vote elevates abstract ideology above immediacy of concrete concern for human rights.

The ideological position is couched as a quest for unity, related to its concern for solidarity with African states. Although one appreciates the quest for regional acceptance, this sentiment cannot be invoked to give credence to the notion that protecting LGBT persons against violence is "un-African". A number of developments confirm that the view on this question among African states is varied and changing: the recent decriminalisation by Mozambique and the Seychelles of same-sex sexual relations between consenting adults; the fact that many countries in the region have never criminalised same-sex relations; and that a number of African States have shown openness to dialogue on this issue. The notion of a united African front on this issue has been further eroded when an African state (Angola) emerged as co-sponsor of the resolution.

South Africa should not wait for the last State in Africa – or anywhere else – to feel comfortable to give their support to this issue. We should take the lead in Africa, *together with other African States*. While solidarity with other African States is commended, in this particular instance, South Africa's solidarity should primarily be with States that promote and protect the rights of LGBT persons, and with the many LGBT persons at risk of violence, worldwide. Such an approach would also be in line with South Africa's constitutional duty to promote human rights, also in our foreign policy.

Adhering to the principle of seeing the widest possible consensus gives undue weight to the views of those States with little intention to accept the principle of non-violence on the basis of sexual orientation and gender identity – such as Saudi Arabia. Consensus-seeking comes at too high a price. As the ambassador herself noted: "Lives are at stake". Principle, not politics, should prevail.

Unfortunately, the abstention does not come as a total surprise. The South African position now is reminiscent of its position up to 2011, when South Africa's support for LGBTI persons' rights in international fora was ambiguous at best. To add to the worry, more recently, South Africa had been obstructing LGBTI NGOs from being granted UN ECOSOC consultative status at the UN Human Rights Council and failed to expressly condemn draconian legislation to jail and persecute lesbian and gay people in countries such as Nigeria, The Gambia and Uganda – all in the name of 'African solidarity'.

This incoherence and contradictions are troubling and should be clarified. We therefore encourage public debate on this issue, in the hope of achieving greater consistency.

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