

**SAFEGUARDING RIGHTS OF MINORITIES  
THROUGH A PROTECTING PENAL CODE:**

**A Civil Society Position Paper on the  
Draft Penal Code.**

**A focus on the rights of Lesbians, Gays, Bi-sexual, Trans-  
Gender and Intersexual (LGBTI)**

**Submitted to Parliament by the Civil Society Coalition for the Protection of LGBTI rights**

**Abstract**

This position paper aims to provide an insightful analysis of the content of Article 217 of the Draft Penal Code which criminalises LGBTI groups, as well as initiatives for the protection and promotion of their fundamental rights.. These rights include the right to life, health care, equal treatment before the law, and protection from violence and discrimination.

This paper presents the position of the Rwandan Civil Society against the decision to criminalise LGBTI groups and-or any action for their protection, including debate.

The expected outcome of this initiative is an informed decision by the Rwanda Parliament, or Senate to remove the article from the Draft Penal Code. Additionally, we aspire to have His Excellency the President of the Republic, as the guarantor of national unity, block such a discriminative article from being passed in to law.

## **Part I.**

### **Introduction.**

The government of Rwanda is finalising the process of reviewing the penal code that has been in force since August 1978, and modified to date. The new penal code is expected to be more up-dated and reflective of a modern Rwanda, coexistent with world realities.

To date, the draft penal code has focused extensively on protecting women's rights, and its promulgation will indeed provide the judiciary with a comprehensive legal arsenal to safeguard the rights of women, even within their marriages.

Unfortunately, the draft penal code in article 217, suggests that Lesbian, Gay, Bi-sexual, Transgender and Intersexual groups be criminalised along with any initiative aimed at improving their situation. .

The Rwanda Civil Society believes however that the article is contradictory to the Rwandan Constitution, a violation of human rights, a hindrance to the implementation of the Rwanda National Strategic Plan on HIV and AIDS 2009-2011. Furthermore, article 217 is a betrayal of Rwanda's recent history and the political drive of national unity, tolerance, inclusiveness and dialogue among the Rwandan citizens and residents.

Through this position paper, it is our endeavour to layout a scientific assessment that justifies the civil society's position and suggests practical and legally-sound alternatives that will enable the Penal Code to preserve the Rwandan culture, while being conducive to promote the rights of all Rwandan Citizens without discrimination.

### **Background**

The Rwanda Civil Society Coalition on the rights of Lesbians, Gay, Bi-sexual, Transgender and Intersexual (LGBTI), is a synergy of human rights, health and faith-based non-governmental organisations operating in Rwanda. The coalition firmly believes in the fundamental rights of all Rwandans as recognised in the Rwandan Constitution, especially in its article 11, second paragraph which stipulates: *"Discrimination of whatever kind based on, inter alia, ethnic origin, tribe, clan, colour, sex, region, social origin, religion or faith, opinion, economic status, culture, language, social status, physical or mental disability or any other form of discrimination is prohibited and punishable by law"*, and its article 10, Paragraph 1. *The human person is sacred and inviolable, and Paragraph 2. **The State and all public administration organs have the absolute obligation to respect protect and defend him or her.***

The coalition was formed as a joint initiative of the Rwandan civil society to advocate for the removal of article 217 in the draft penal code. The motivation for forming the coalition was based on the unanimous belief that the content of article 217 is contrary to human rights in general as articulated in international human rights instruments, and to the Rwandan

Constitution specifically. Moreover, article 217 would sponsor discrimination, stigmatisation and violence of a group referred to as a “*group at high risk*” by the Rwandan National Strategic Plan on HIV and AIDS 2009-2011.

## **Chapter 1: Legal Analysis**

### *Inconsistencies with the Constitution and other International human rights instruments*

The newly proposed article 217 provides that: “*Any person who practices, encourages or sensitizes people of the same sex, to sexual relation or any sexual practice, shall be liable for a term of imprisonment ranging from five (5) to ten (10) years and fine ranging from Two Hundred thousand Rwanda Francs (200.000 RFW ) to one million (1,000,000)Rwanda francs.*”

If promulgated, this article will have two strikingly negative outcomes. Firstly, it will **make any homosexual individual illegal, thereby rendering all LGBT individuals criminals, subject to punishment by an extensive jail term and substantial fine**. Secondly, article 217 will **irreversibly and effectively suppress any kind of debate, expression or protection of LGBT rights by making** such initiatives illegal and subject to similar punishment.

### **Inconsistency with the Rwandan Constitution**

The Rwandan Constitution of June 2003, as amended to date throughout, reiterates and insists on the equality of all Rwandans, touting their sacred quality, the necessity to protect them, defend them and consolidate their well being. Article 10: stipulates that: *The human person is sacred and inviolable; that The State and all public administration organs have the absolute obligation to respect protect and defend him or her*. Article 11 mentioned in the preamble prohibits any attempt to discriminate against an individual or a group on any basis. Article 15 goes further to say: Every person has the right to physical and mental integrity. Article 16 states that: *All human beings are equal before the law. They shall enjoy, without any discrimination, equal protection of the law*. Finally, Article 22 asserts that: ***The private life, family, home or correspondence of a person shall not be subjected to arbitrary interference; his or her honour and good reputation shall be respected.***

Now, Article 217, by targeting one minority group of Rwandans, is practicing *discrimination based on sex and any other form of discrimination*. By providing for a jail term; it is rejecting the state’s and *administration’s obligation to protect* its citizens from arbitrary detention and it is endorsing actions that would be *violating their private life, interfere with their honor, and disrespect their good reputation*.

**Rationale:**

Several studies, including those carried-out by the AIDS Control Commission<sup>1</sup> have established the effective existence of Rwandan LGBTI individuals, and in Rwanda. The same studies highlighted isolated incidences of violence to which these groups are victims on a daily basis. The violent acts have been committed by the rest of the community, including law enforcement officers, as the case studies below will illustrate.

The same studies also recommended that measures are put in place to protect these groups against violence and enable them to accede to treatment, including anti-retroviral.

Article 217 is ignoring a well existing and scientifically proven social fact within the Rwandan society in doing so it is contributing to the stigmatization of an already vulnerable group, and effectively sanctioning further violations perpetrated toward them. With such a provision in the penal code we may experience situations, for example, where individuals would walk into the home of a Rwandan resident and arrest him or her for allegedly being homosexual. Such a scenario would represent an *arbitrary interference* with his or her honour and good reputation, as guaranteed by Article 22 of the Rwandan Constitution.

The Article is a violation of human and civil rights;

Homosexuals have not chosen to be homosexuals, just as women have not chosen to be women, just like Tutsis did not choose to be Tutsis, or black people to be black, despite their unpopularity at some point in history, misled by beliefs and prejudices. Homosexuals were born that way; others have experienced diversified events that have determined their lifestyle. Research has shown that some homosexuals, after discovering their sexual orientation have sought mental treatment with no effect, while others have married the opposite sex and made children, but still lived unhappy and unfaithful marriages. The ultimate solution for homosexuals who were brought to hate their status and fail to change it has been suicide. With the event of Article 217, a situation like that is easy to envisage.

Also, by the criminalizing LGBT, the Penal Code would dehumanize them, exposing them to unpredictable violence, such as the regrettable acts recently perpetrated on the members of the albinos group in the region.

The Article is undermining health and HIV initiatives in Rwanda, and hence violating the right to life and health;

*The Rwandan National Strategic Plan on HIV and AIDS* has identified *Men having Sex with Men* and *Women having Sex with Women* as key target group for its HIV and AIDS prevention and anti-retroviral care services. These services include among other things the provision of condoms and femidoms to people in detention, where HIV prevalence is at 15%, as well as running voluntary counselling and testing for MSM and WSW. This strategy not only protects

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<sup>1</sup> CNLS has conducted a research on Men that have sex with Men (MSM) entitled: ***Exploring HIV risk among MSM in Kigali***, which has informed the National Strategic Plan on HIV and AIDS on the issues around LGBTI in Rwanda.

LGBTI groups, but it simultaneously protects other members of the Rwandan community from infections. Under the regime of Article 217 such beneficial activities would be qualified as crimes.

All this said, the Penal Code is actually missing an opportunity to protect the LGBTI community, one group of the Rwandan population that is at danger. Instead, the article is halting all actions aimed at protecting, debating, advocating for LGBTIs in Rwanda.

### **Inconsistency with human rights instruments and standards:**

Rwanda is a country that is committed to democracy and the rule of law and a pioneer of peace and unity. Article 217 is a serious setback to the achievement of those ideals, as it contradicts the following provisions of International Human Rights instruments that Rwanda has ratified:

#### **The Universal Declaration of Human Rights:**

**Article 1:** All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

**Article 7:** All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

**Article 12:** no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

#### **1. The African Charter on Human and People's Rights:**

**Article 19:** All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

**Article 24:** All peoples shall have the right to a general satisfactory environment favourable to their development.

#### **2. The Geneva Conventions and their Additional Protocols**

In its Preamble the Penal Code makes reference to the Geneva Convention of 12 July 1949, and the additional Protocols I and II of July 8th 1997.

However, the Same Geneva conventions stipulate that: *“Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs...”*

*“...They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity...”*

*“...Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration”* **Article 27, Fourth Geneva Convention**

### **3. International covenant on economic, social and cultural rights**

Article 12: The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

1. The prevention, treatment and control epidemic, endemic, occupational and other diseases;
2. The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

### **4. International Covenant on Civil and Political Rights**

#### **Article 17**

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honor and reputation.<sup>2</sup>
2. Everyone has the right to the protection of the law against such interference or attacks.

#### **Article 2**

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### **Article 9**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

#### **Article 26**

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,

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<sup>2</sup> *Toonen v. Australia Case*, complaint brought before the [United Nations Human Rights Committee](#) (UNHRC) in 1994. The case resulted in the repeal of Australia's last [sodomy laws](#) when the Committee held that sexual orientation was included in the treaty's antidiscrimination provisions as a protected status.

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

### ***Analysis.***

All quoted international instruments insist on two fundamental principles:

**All human being should be treated equally; and all human beings should be protected against all forms of discrimination and violation of the person and private life.**

By seeking to criminalize LGBTI, Article 217 is contradicting the principals recognized as fundamental by the Rwandan government and the majority of the international community. Specifically, among the rights that would be violated under the article are:

- The right to Privacy and Family;
- The right to freedom of speech, assembly, and association;
- Security of the person; health;
- The right to be free from torture and from cruel inhumane or degrading treatment or punishment; and
- The freedom from arbitrary deprivation of liberty.

Before this article is suggested in the draft penal code, LGBT individuals were already frequent subjects to these kinds of human rights abuses<sup>3</sup>. Now; in the absence of a formal law protecting LGBTI. It is imperative that a legal platform which may be used to justify such rights violations is not established.

To date, there are several LGBTI associations existing in Rwanda that should be utilised as effective channel to reach out to the LGBTI group for targeted protection interventions.

### **Existence of LGBTI Rwandans and their daily life**

Much violence against LGBTI, including rape and domestic assault has gone unreported. And, as a consequence of this, many perpetrators of violent acts against LGBTI individuals go unpunished. Below are facts extracted from our findings:

- Late 2007, the police arrested individuals for allegedly being LGBTI (even though there was no provision under Rwandan law that outlaws homosexuality) and detained them anywhere from several days to three months without access to counsel or to a court.
- In 2003, a transvestite was reportedly beaten severely by police and abused by soldiers who threatened to kill her.

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<sup>3</sup> Quote evidence



- Recently, a man seeking to report a case of torture to the police was instead abused and raped. Due to the extreme stigmatization and harassment of the individual, he has reportedly fled the country.<sup>21</sup>
- In 2003, newspapers reported the case of a transvestite who encountered discrimination and abusive treatment by state officials. Officials delayed the individual's passport application for two years and scorned her as "queer." Soldiers threatened to kill her, and she was hauled from a hotel bar by police, who "beat her to a pulp."<sup>19</sup>

Violations such as these are rarely reported due to the likelihood of stigmatization and intolerance, and yet the few instances when violations *are* officially reported they are exhibited as cause for serious concern.<sup>5</sup>

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## **Chapter II Medical Analysis**

### **II. a. Psycho-social analysis**

A high emotional and psychological toll resulting from widespread societal rejection is a reality for members of the LGBTI community. A lack of sensitivity towards the LGBTI community cultivates distain and stigmatization at all levels of society, even transcending to the level of individual families. As a result, LGBT individuals are frequently targeted in vicious acts of physical and verbal abuse<sup>6</sup>.

Social conspiracy to cover violations for each other vehiculates the culture of impunity. If violence committed on LGBTs are committed under the auspices of the law, they will not be reported, hence tolerated. On a long run, they may exacerbate into systematic killings of LGBTI. While the law itself is not necessarily a precipitating cause for violence against LGBTs, it is sufficient to expect it to antagonize divisive societal attitudes, and protect perpetrators of hate crimes. Therefore, it is not unreasonable to expect article 217 to catalyze a debasement of civil cohesion, at large.

The consequences of Rwandan society's negative attitudes toward LGBT individuals are deeply distressing. A disproportionate number of individuals within the LGBT community turn to drug and alcohol abuse as mechanisms for escaping their adverse realities. Tragically, suicide is an alarmingly frequent phenomenon within the LGBT community. It is clear that ultimately the

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<sup>21</sup> Naome Ruzindana Follow-up Email, Horizon Community Association, March 3, 2009.

<sup>19</sup> Declan Walsh, *The tough life of being a transvestite in gay-hating Rwanda*, The Mercury, at <http://www.themercury.co.za/index.php?fSectionId=284&fArticleId=236281> (Sept. 16, 2003).

<sup>5</sup> **The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in RWANDA, A Shadow Report ssubmitted to the Human Rights Committee by a** Coalition of African Lesbians Global Rights Horizon Community Association; The International Gay and Lesbian Human Rights Commission (IGLHRC); International Human Rights Clinic, Human Rights Program, Harvard Law School

strain of dealing with the stigma and shame of a homophobic society may prove so great as to even collapse the will to live.

Given the crippling hardships of life as a member of the LGBT community in Rwanda, it is only logical to conclude that being LGBT is not a choice. To subject oneself to a life of rejection and discrimination is beyond reason. The members of the LGBT community do not willingly decide to lead such turbulent lives; one can no more choose their sexual orientation than the colour of their skin. The acceptance of homosexuality as natural and occurring from birth is the only logical way to understand the issue.

Occasionally upon discovering their sexual orientation, homosexual and bi-sexual individuals seek mental health counselling to correct what is often wrongly perceived as mental illness. The ineffectiveness of mental health treatment lends itself to the fact that lesbian, gay, and bi-sexuality are not mental afflictions. This is further demonstrated in numerous studies and testimonies like this one from the American Psychological Association:

Lesbian, gay, and bisexual orientations are not disorders. Research has found no inherent association between any of these sexual orientations and psychopathology. Both heterosexual behavior and homosexual behavior are normal aspects of human sexuality. Both have been documented in many different cultures and historical eras.<sup>7</sup>

In order to cope with the pressure to conform to traditional societal norms some LGBTI individuals form marriages against their sexual orientations. A marriage that is inconsistent with one's sexual orientation can be in no way fulfilling to either of the individuals involved. Furthermore, it is a serious injustice to raise children in the context of an unhappy, fraudulent marriage. In order for LGBTI individuals to flourish as fully functional members of society they have to be able to achieve the same quality of life as afforded to society at large. The first step is to bar article 217 from the draft penal code.

### **Case Study**

- A member of *Horison Community Association*, an LGBTI Association, Mbarute Jasonde, was arrested by Kigali police and detained for three months on inexistent charges, for alleged homosexuality. His name, address, and picture were broadcast on TV, in newspapers and over the radio. Jasonde continues to face harassment and threats from people within his community.<sup>28</sup>
- Two women en route to a leadership institute organized by the Coalition of African Lesbians were detained at the Kigali International Airport and then held in cells for two and a half weeks without any charges. Their passports are still being held by migration officers.<sup>29</sup>

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<sup>7</sup> <http://www.apa.org/topics/orientation.html>

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

<sup>29</sup> *Id.*

## **II. b. Physical Health analysis**

The information for analysis in this section is mostly drawn from the exploratory study on HIV recently conducted by the National HIV and AIDS response Commission (CNLS) in collaboration with UNAIDS and MEASURE Evaluation as well as the Rwanda National Strategic Plan on HIV and AIDS to assess health risks among MSM in Kigali.

CNLS researchers gather data to index 'risk behavior' among MSM in Rwanda. This data is intended to influence further research, and serve as an advocacy tool for raising awareness of MSM in Rwanda. The advocacy enabled by CNLS research would be used to promote and respect LGBT human rights... Results of the research are intended to inform the development of comprehensive HIV/AIDS prevention programs targeting the LGBTI group.

Most MSM are not open about their sexuality and lack a supportive community structure which complicates research endeavors. This calls for a novel approach to recruitment and data collection that prioritizes safety, while raising community awareness of the existence of MSM.

Also, the National AIDS response strategy recognizes the need to strengthen access to justice, with special attention given to the monitoring and protection of human rights. This is particularly true of the rights of women, children, and people living with HIV and AIDS and other vulnerable groups.

Through this research, Rwandan experts in the fight against HIV and AIDS clearly demonstrate that recognising the existence of MSM within the Rwandan community, protecting them and raising public awareness and fighting stigma against them is a key pillar in the fight against HIV and AIDS in Rwanda.

The following are comprehensive prevention programmes planned in the National Policy on HIV and AIDS, targeting LGBTI as a vulnerable and most at risk group through:

- Peer education programs, involving training about prevention among MSM, provision of information on HIV and STIs, referral for HIV testing, condom promotion and STI diagnosis;
- Extension of testing, HIV and sexual health services to MSM;
- A specific activity to ensure access to condoms and water-based lubricant for men who have sex with men;
- Outreach for men who have sex with men through peer education programs including provision of information on HIV and STIs, referral for HIV testing and STI diagnosis;
- Addressing sex between men in general, and within prisons, is a new area of work; and

- Operational research and an emphasis on ensuring MSM are active in the design and implementation of prevention programs, to ensure that they are carried out in the most appropriate way

### ***Analysis***

Infections among MSM and WSW are likely to contribute disproportionately to total incidences based on their population size, HIV prevalence, and sexual interactions with the general, heterosexual population. In other words, HIV prevalence among the LGBTI group is not only a threat to themselves, but a threat hetero-sexual Rwandans as 30% of LGBTI groups engage in sexual intercourse with hetero-sexual individuals. According to the NSP, MSM will contribute approximately 15%, even under conservative assumptions of population size and risk behaviors. Due to a lack of national data and limitations of the model in dividing a population into mutually exclusive categories, the confidence intervals around point estimates are very large.

The promulgation of article 217 as it is now would criminalize any attempt to identify LGBTIs, direct any access to justice and HIV protection actions to them, and it would halt the implementation of the prevention programmes as planned by the NSP. For instance, distributing condoms and femidom in prisons - usually a regular HIV prevention activity would be characterized as a crime under the regime of Article 217.

The oppression of LGBTI individuals has serious implications for their physical well being as well as their emotional and psychological health. LGBT individuals often confront insurmountable barriers in accessing LGBTI sensitive healthcare and information on healthy living practices. These difficulties are particularly salient in dealing with issues of Sexually Transmitted Infections such as HIV/AIDS, which affects LGBTI individuals differently than the population at large. Rwanda has made significant advances in dealing with HIV/AIDS but criminalizing homosexuality will only contribute to reversing these accomplishments by deterring LGBT individuals from open discussion with healthcare providers.

### ***Case Study***

- In one case, a homosexual, a member of Horizon Community Association (HOCA), a gay and lesbian community organization, visited a hospital in Kigali for medical treatment. She encountered multiple rounds of questioning and disparate treatment based on his sexual orientation. Her doctors requested that she undress, “after which they said they just wanted to confirm my gender, that there had always been a debate whether Rwanda has such people.”<sup>15</sup> Although he eventually received treatment, he was humiliated and it was delayed.
- In the research conducted by CNLS, one in five respondents reported being mistreated due to their sexuality or sexual behaviour, with 12 men reporting physical abuse, and 15 men reporting verbal abuse (N=98).<sup>8</sup>

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<sup>15</sup> Statement by Naome Ruzindana, Horizon Community Association, February 23, 2009.

<sup>8</sup> The age range among those reporting mistreatment due to their sexuality was 18 to 29 years.

- Environments where abuse was reported include: work (n=4), school (n=3), bars (n=2), prison (n=2), and public places such as the street (n=8). Seven men reported mistreatment among family and/or friends. Seventeen men reported a history of forced sex (N=98)<sup>9</sup>; eight of these men reported being forced to have sex in the last 12 months.

## **CONCLUSION**

Rwanda has suffered tremendously in recent history as the result of the discrimination of one group against another. In the aftermath of the 1994 genocide, Rwanda has pledged a renewed commitment to tolerance and non-discrimination as a mechanism to guard against such atrocities ever occurring again. Article 217 stands in direct contradiction with this vision for Rwanda's future. The tone of the article is explicitly intolerant and discriminatory. Such a law can in no way contribute to the promotion of forbearance and social cohesion within Rwanda. It is in the interest of a unity and tolerance seeking for Rwanda not to allow article 217 to pass into law.

A law should be inclusive, uniting, and considerate of social facts considerate minorities' rights and the National Constitution. The legislator is missing an opportunity to promote safety and public order, his main goal. If Article 217 is promulgated in its current form, it will establish a societal framework in which the life of one group of Rwandan citizens and residents, the LGBTIs will be unbearable.

Furthermore, individuals from the LGBTI group interact with and affect the health and livelihood of heterosexual individuals and vice-versa. By passing such a law all health initiatives, especially HIV prevention programmes will be seriously affected.

The LGBTI group does not pose a threat to anyone. They are adults, responsible and discrete individuals who respect the law and ethics. Their status and their relationships thereafter, do not pose a threat to rest of Rwandans. Unfortunately these individuals are singled out for abuse, stigma in their communities and discrimination in their workplaces.

To allow article 217 to become law is to destroy the spaces for discussion surrounding LGBT issues. Article 217 will, in effect, obstruct all avenues of progress for the LGBT rights movement within Rwanda. We would ask that you carefully consider these issues before denying any prospect of change to the Rwandan LGBTIs. The Rwandan LGBTI community is made up of decent, hard-working, patriotic Rwandan's who are deeply committed to the nation's future. Please do not refuse them their own.

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<sup>9</sup> Seven men reporting physical mistreatment due to their sexuality also reported a history of rape; ten men reporting a history of rape did not report previous physical mistreatment due to their sexuality.