



International Human Rights Law (4th edn)

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p. 305 15. Sexual Orientation and Gender Identity

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Abstract

This chapter examines the human rights protections afforded to sexual and gender minorities. It shows that the jurisprudence focuses on issues of non-discrimination and privacy, and that important human rights protections can also be derived from the range of other civil, political, economic, social, and cultural human rights of general application. The chapter examines a recent exercise in the clarification of the application of human rights law concerning issues of sexual orientation, gender identity, and sex characteristics: the Yogyakarta Principles.

Keywords: sexual minorities, international human rights, non-discrimination, privacy, Yogyakarta Principles

Summary

Worldwide, people are subject to persistent human rights violations because of their actual or perceived sexual orientation and gender identity. The range of violations demonstrates that the members of sexual and gender minorities are highly vulnerable to human rights abuse. This chapter assesses the forms of their vulnerability and identifies the applicable international human rights law. It will be seen that the jurisprudence focuses on issues of non-discrimination and privacy and that important human rights protections can also be derived from the range of other civil, political, economic, social, and cultural human rights of general application. The chapter concludes with an examination of an exercise in the clarification of the application of human rights law concerning issues of sexual orientation, gender identity, and sex characteristics: the Yogyakarta Principles.*

1 Introduction

Typically, to be different to the majority in any society is to be vulnerable to prejudice, discrimination, and even attack. The greater the difference, the greater the risk. The story of the human rights movement is replete with moments defined by the identification of such vulnerable minorities and efforts to protect them. Thus, today, treaties address the situation of ethnic, racial, indigenous, religious, and other communities. However, the protection afforded by international law is by no means confined to groups whose protection has been the explicit focus of treaties. International human rights treaty law has proved itself to be flexible in addressing the plight of groups whose vulnerability may not have been in the minds of the treaty drafters. One of the most vibrant contemporary human rights debates concerns the extent to which international law offers protection to members of what are sometimes termed ‘sexual or gender minorities’.

A wide range of terms are used to describe the diverse members of sexual and gender minorities, such as p. 306 homosexuals, bisexuals, gays, lesbians, transgender, and intersex. ↗ Other terms, such as ‘queer’, can be considered pejorative in some contexts and acceptable in others. The variety of designations and usages, as well as the manner in which some of them have changed over time, can give rise to confusion when seeking to identify applicable provisions of human rights law. With this in mind, recent discourse on the application of human rights law has tended to cluster issues around three categorizations: ‘sexual orientation’, ‘gender identity’, and ‘sex characteristics’. An authoritative document that we will consider in this chapter, the Yogyakarta Principles,¹ describes ‘sexual orientation’ as ‘each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate sexual relations with, individuals of a different gender or the same gender or more than one gender’.² ‘Gender identity’ is described as:

each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.³

The Yogyakarta Principles plus 10 (YP+10),⁴ a 2017 supplement, adds a definition of ‘sex characteristics’: ‘each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty’.⁵

Of course, these definitions are no more than intellectual constructs and, as such, can be subject to criticism. However, they have some force in that they tend to reflect the contexts in which affected people experience discrimination, exclusion, and attack in many societies. They also—and this is especially the case with regard to ‘sexual orientation’—are grounded in the jurisprudence of human rights courts and treaty-monitoring bodies. To the extent possible, this chapter will employ these terms.⁶

2 Forms of Vulnerability

Before we examine the extent of applicable human rights law, it is important to take account of the situation in which people of diverse sexual orientations, gender identities, and sex characteristics find themselves.

Even the briefest of global surveys demonstrates a remarkable degree of vulnerability and abuse.⁷ As of 2019, at least six states maintained the death penalty for consensual same-sex practices,⁸ and reports are commonplace of persons ↗ who are killed because of their sexual orientation or gender identity.

p. 307 Perpetrators often go unpunished. Persons with diverse gender identities are particularly likely to be targeted for violence. They are ‘often subjected to violence in order to “punish” them for transgressing gender barriers or for challenging predominant conceptions of gender roles’,⁹ and transgender youth have been described as ‘among the most vulnerable and marginalized young people in society’.¹⁰ Violations directed against lesbians because of their sex are often inseparable from violations directed against them because of their sexual orientation. For example, there are accounts of multiple rape of a lesbian arranged by her family in an attempt to ‘cure’ her of her homosexuality.¹¹ Same-sex sexual relations between consenting adults constitute a criminal offence in 69 states.¹² Some states apply laws against ‘public scandals’, ‘immorality’, or ‘indecent behaviour’ to punish people for looking, dressing, or behaving differently from what are considered to be the social norms.

Serious problems have also been identified regarding the enjoyment of economic, social, and cultural rights. For example, people have been denied employment or employment-related benefits or have faced dismissal because of their sexual orientation or gender identity. In the context of the right to adequate housing, lesbian and transgender women are reported to be at a high risk of homelessness; discrimination based on sexual orientation or gender identity when renting accommodation has been experienced both by individuals and same-sex couples; and children have been thrown out of the family home by their families upon learning of their sexual orientation or gender identity. Transgender persons often face obstacles in seeking access to gender-appropriate services at homeless shelters. Materials referencing issues of sexual orientation and gender identity have been banned from school curricula; student groups addressing sexual orientation and gender identity issues have been prohibited; students have faced high levels of bullying and harassment because of their actual or perceived sexual orientation or gender identity; and, in some cases, young persons who express same-sex affection have been expelled from school. In some countries, laws have prohibited the ‘promotion of homosexuality’ in schools. Numerous health-related human rights violations based on sexual orientation and gender identity have been documented. People have been forcibly confined in medical institutions, subjected to ‘aversion therapy’, including electroshock treatment, and intersex people have been subjected to involuntary surgeries in an attempt to ‘correct’ their genitals.

The plight in which people of diverse sexual orientations and gender identities find themselves is well summarized in a comment by an Indonesian human rights expert, Siti Musdah Mulia:

I realise that compared to other minority groups, LGBT [lesbian, gay, bisexual, and transgender] people suffer more stigmas, stereotypes and discriminatory treatment, and even ruthless exploitation. The majority community (in Indonesia) still considers homosexuality as illicit, often as unmentionable.¹³

p. 308 **3 Review of Law and Jurisprudence**

There are no specific references to issues related to sexual orientation or gender identity in the global human rights treaties. At the regional level, explicit references are confined to the prohibition of discrimination in recently adopted, thematically focused treaties.¹⁴ However, the UN human rights treaty-monitoring bodies, the European Court of Human Rights, and the Inter-American Court of Human Rights¹⁵ have developed a significant body of jurisprudence on the topics. The African Commission on Human and Peoples' Rights has also considered issues related to sexual orientation and gender identity, albeit to a more limited extent.¹⁶ The findings tend to be clustered in three groups: protection of privacy rights, combating of discrimination, and ensuring other general human rights protection to all, regardless of sexual orientation or gender identity. We will look at each of these in turn. As will become apparent, while the importance of the issue of intersex rights is increasingly recognized,¹⁷ it has so far not been at the centre of attention in international jurisprudence.¹⁸

3.1 Protection of Privacy Rights

The European Convention on Human Rights (ECHR), in Article 8, the American Convention on Human Rights (ACHR), in Article 11, and the International Covenant on Civil and Political Rights (ICCPR), in Article 17, contain provisions for the protection of an individual's privacy. These reflect a perception of the drafters that there is an autonomous zone within which a person may live a personal life and make choices without interference. While the scope and the limits of that private space are impossible to chart outside the context of specific cases, it is acknowledged that 'respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings'.¹⁹

The first successful international human rights cases on issues of sexual orientation were brought under the ECHR and invoked the privacy argument with regard to same-sex sexual activity. In *Dudgeon v UK*²⁰ and *Norris v Ireland*,²¹ the criminalization of such practices was deemed a violation of Article 8 ECHR. In *Modinos v Cyprus*, the European Court, taking account that many of the prohibitions were not actually enforced in practice, held that even a 'consistent policy' of not bringing prosecutions under the law was no substitute for full repeal.²² Privacy arguments were also successful regarding a ban on recruitment to the military of homosexuals: *Smith and Grady v UK*²³ and *Lustig-Prean and Beckett v UK*.²⁴ The European Court has also invoked privacy rights to identify a right of same-sex civil partnership in the cases of *Vallianatos and Others v Greece*²⁵ and *Oliari and Others v Italy*.²⁶ In *Orlandi and Others v Italy*, it found that the refusal to recognize in any form same-sex marriages that took place abroad violates Article 8 ECHR.²⁷ Citing these cases as well as privacy considerations, the Court of Justice of the European Union ruled in 2018 that 'spouse' in EU law includes persons of the same sex, which means they are entitled to enjoy derived residency rights in member states that have not legalized same-sex marriage.²⁸ The Inter-American Court of Human Rights, in its first finding of sexual orientation-related violations of the ACHR, identified a violation of the right to privacy in the case of the loss of parenting rights on the part of a woman, divorced from the father of her children, who was living with a same-sex partner.²⁹

The European Court of Human Rights has recognized privacy protection with regard to issues of gender identity. The approach of the Court reflects a perception that privacy protection may extend to the choices one makes regarding one's own choice of gender identity or expression. Interestingly, the cases are not about any effort of states to prohibit forms of gender identity choices. Instead, they address the positive obligation on the state to take the administrative actions, such as amending identity documents, which are necessary for the affected individuals to live in their changed gender identity. In *Goodwin v UK*³⁰ and *I v UK*,³¹ the European Court reversed a long line of previous case law and held that the UK's refusal to change the legal identities of two transgender women constituted a violation of Article 8 ECHR. In *Van Kück v Germany*, the Court considered the case of a transgender woman whose health insurance company had denied her reimbursement for costs associated with gender affirmation surgery. It found a violation of Article 8, holding that the German courts had failed to respect 'the applicant's freedom to define herself as a female person, one of the most basic essentials of self-determination'.³² In *L v Lithuania*, the Court considered that the state was required to legislate for the provision of full gender affirmation surgery whereby a person in the 'limbo' of partial reassignment could complete the process and be registered with the new gender identity.³³ According to the Court, Article 8 ECHR requires that there be a clear and predictable procedure for the legal recognition of gender identity in a fast, transparent, and accessible manner. Gender affirmation surgery, in particular, must not be a prerequisite for such procedures.³⁴ The Inter-American Court of Human Rights, relying extensively on the concept of privacy, came to similar conclusions in 2017.³⁵

The Human Rights Committee, in the communication *Toonen v Australia*, adopted the approach of the European Court of Human Rights and considered that a criminal prohibition on same-sex sexual activity, even if unenforced, constituted an unreasonable interference with Mr Toonen's privacy under Article 17 ICCPR.³⁶ It is sometimes suggested that *Toonen* turns on its facts in the particular context of a state that cherishes diversity and that the findings might have been very different in the case of, for example, an Islamic state with a dominant moral code that rejected homosexual acts.³⁷ This view ascribes to the Human Rights Committee a doctrine of margin of appreciation such as that to be found in the practice of the European Court of Human Rights.³⁸ In 2011, in its General Comment 34 on Article 19 ICCPR, the Committee repudiated such a doctrine in its practice. It also stated that morals may only be invoked to restrict rights where such morals are, *inter alia*, non-discriminatory in effect and compatible with the universality of human rights.³⁹ In *G v Australia*, the Committee found a violation of, *inter alia*, Article 17 ICCPR because a married transgender person had been denied a birth certificate that correctly identified the person's sex.⁴⁰

3.2 Discrimination

As we have seen, people of diverse sexual orientations and gender identities are subject to multiple forms of discrimination. It is not surprising, then, that a considerable body of practice has developed in the work of the international human rights treaty bodies. The Committee on Economic, Social and Cultural Rights has addressed sexual orientation-related discrimination in its General Comments. In General Comments 18, on the right to work,⁴¹ 15, on the right to water,⁴² and 14, on the right to the highest attainable standard of health,⁴³ it has indicated that the International Covenant on Economic, Social and Cultural Rights (ICESCR) proscribes any discrimination on the basis of, *inter alia*, sex and sexual orientation, 'that has the intention or effect of nullifying or impairing the equal enjoyment or exercise of [the right at issue]'. The Committee has

consistently based this prohibition on the terms of the anti-discrimination provision—Article 2(2) ICESCR—which prohibits discrimination on a variety of specified grounds as well as one termed ‘other status’. In 2009, the Committee adopted a General Comment on non-discrimination specifying that “‘other status’ as recognised in article 2(2) includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realising Covenant rights.”⁴⁴ More recently, General Comments 22 and 25 condemned discrimination on the grounds of sexual orientation, gender identity, and sex characteristics in the context of the right to sexual and reproductive health and the right to enjoy the benefits of scientific progress and its applications.⁴⁵ The Committee, in its General Comments, also invokes the provision addressing the equal rights of men and women, Article 3 ICESCR, as a basis for its prohibition of sexual orientation-related discrimination.⁴⁶ General Comment 23 emphasizes that Article 7(c) ICESCR, which protects equal employment opportunity, bears particular relevance for lesbian, gay, bisexual, transgender, and intersex workers.⁴⁷

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Other treaty bodies have adopted similar positions in their General Comments. The Committee on the Rights of the Child, in its General Comment 4, stated that:

[s]tate parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention [on the Rights of the Child] without discrimination (art. 2), including with regard to ‘race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.’ These grounds also cover [*inter alia*] sexual orientation.⁴⁸

The Committee, on various other occasions, has drawn attention to the vulnerabilities of lesbian, gay, bisexual, transgender, and intersex children and adolescents, including in street situations,⁴⁹ in the justice system,⁵⁰ and in the digital environment.⁵¹

In 2010, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) issued two General Recommendations—one on the rights of older women and the other on the core obligations of states—in which it recognized that sexual orientation and gender identity are prohibited grounds of discrimination against women.⁵² In 2020, the Committee considered a communication concerning the failure of law enforcement authorities to properly respond to a homophobic hate crime. The Committee noted that ‘discrimination against women is inextricably linked to other factors that affect their lives, including being lesbian women’ and that ‘women experience varying and intersecting forms of discrimination, which have an aggravating negative impact’.⁵³

The treaty bodies frequently raise issues of discrimination related to sexual orientation, gender identity, and sex characteristics when considering periodic reports of states parties. The Committee on Economic, Social and Cultural Rights did so regarding 9 of the 11 states considered in 2019, and the Committee on the Rights of the Child regarding 8 of the 17 states considered in the same period. In each case, the Committees expressed concern in their ‘concluding observations’. Given the non-binding and flexible nature of these treaty body outputs, they are not always a useful indicator of formal obligations under the treaty. However, where the treaty body expresses concern about a specific practice, we can surmise that serious issues arise under the treaty.

Issues of sexual orientation-related discrimination have received extensive attention in the work of the Human Rights Committee. In *Toonen*, the Committee said that ‘the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation’. The Committee accordingly considered that sexual orientation-related discrimination is a suspect category in terms of the enjoyment of ICCPR rights (Article 2) and, more generally, for equality before and equal protection of the law (Article 26).⁵⁴ A small number of individual cases illustrate the Human Rights Committee’s approach. In *Young v Australia*⁵⁵ and *X v Colombia*,⁵⁶ the Committee was of the view that distinctions made in law between same-sex partners who were excluded from pension benefits, and unmarried heterosexual partners who were granted such benefits, constituted violations of the ICCPR. In *C v Australia*, the Committee found a violation of Article 26 in the fact that a person in a same-sex marriage which took place abroad was denied access to divorce proceedings, whereas an opposite-sex marriage which took place overseas would have been recognized for divorce purposes.⁵⁷ However, not every case has been successful. In the 2002 case of *Joslin v New Zealand*, the differential treatment under taxation regulations of same-sex unmarried couples (for whom marriage was not available in law) and heterosexual married couples was considered not to constitute a violation of Article 26 ICCPR. And yet, an individual concurring opinion of two members observed that ‘the Committee’s jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination’.⁵⁸

The Human Rights Committee frequently raises the issue of discrimination on the basis of sexual orientation, gender identity, or intersex status in its consideration of periodic reports. During 2019, it did so regarding 16 of the 17 states under review and, for example, criticized many states for the criminalization of homosexual sexual relations and the failure to incorporate sexual orientation, gender identity, and sex characteristics into anti-discrimination legal frameworks. It also expressed concern regarding irreversible medical treatment of intersex children and the lack of appropriate measures to combat homophobic and transphobic attitudes.

The European Court of Human Rights has generated a substantial body of jurisprudence concerning discrimination both on the grounds of sexual orientation and gender identity. In *Salgueiro da Silva Mouta v Portugal*, it held that a judge’s denial of child custody to a homosexual father on the ground of his sexual orientation was discriminatory.⁵⁹ The Inter-American Court adopted a similar line of reasoning in *Atala Riffo and daughters v Chile*.⁶⁰ In *Karner v Austria*, the European Court considered that the failure of Austria to permit a homosexual man to continue occupying his deceased partner’s flat was discriminatory, since this entitlement, available to family members under Austrian law, did not apply to same-sex partners. Austria claimed that excluding homosexuals aimed to protect ‘the family in the traditional sense’, but the Court considered that it had not demonstrated how the exclusion was necessary to that aim.⁶¹ In *L and V v Austria*⁶² and *SL v Austria*,⁶³ the Court considered that Austria’s differing age of consent for heterosexual and homosexual relations was discriminatory. As the Court put it, the differing age ‘embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority’, which could not ‘amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour’.

One area of discrimination in which the European Court was slow to find a violation of the Convention concerned the adoption of children. In the case of *Fretté v France*, a homosexual man complained regarding a refusal to allow him to adopt a child for reasons of his sexual orientation.⁶⁴ The Court found against him,

p. 313 referring to the fast-evolving and very diverse practice across Europe, as well as the conflicting views of experts as to what would be in the best interests of the child. The decision in *Fretté* is unsatisfactory. It posits false → dilemmas such as a supposed tension between the rights of the man and the child. There is no such tension. The tension is between the rights of homosexual and heterosexual prospective adoptive parents, with the best interests of the child as the overarching consideration. Issues such as these were handled in a better manner in *EB v France*. In that case, the Court, while maintaining the paramount principle of the best interests of the child, held that, ‘in rejecting the applicant’s application for authorisation to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention’.⁶⁵ In the later case of *X v Austria*, the Court held that a prohibition of the adoption of the child of a same-sex partner was in violation of the Convention since Austria extended such an entitlement to partners in different-sex relationships.⁶⁶ Also at the European level, the European Committee of Social Rights, the monitoring body for the European Social Charter, has interpreted the terms ‘sex’ and ‘other’ among the prohibited forms of discrimination to include discrimination on the grounds of sexual orientation.⁶⁷

Overall, the regional courts and the treaty bodies have mapped out an extensive range of areas and contexts in which sexual orientation and gender identity-related discrimination is prohibited. Furthermore, as we will see in Section 3.3, it can also be assumed that the protections apply for the non-discriminatory enjoyment of *all* human rights.

3.3 General Human Rights Protection

The international monitoring bodies are increasingly addressing issues of the entitlement of people of diverse sexual orientations and gender identities to benefit from the protection of other human rights of general application. The European Court of Human Rights, in *Alekseyev v Russia*, ruled that a municipal ban on LGBT Pride marches violated various provisions of the ECHR, including Article 11 regarding freedom of assembly.⁶⁸ The Human Rights Committee, in *Fedotova v Russian Federation*, held that the prevention of a display of posters that declared ‘Homosexuality is normal’ and ‘I am proud of my homosexuality’ near a secondary school building constituted a violation of the protester’s right to freedom of expression. The Committee observed that the protester had ‘not made any public actions aimed at involving minors in any particular sexual activity or at advocating any particular sexual orientation. Instead, she was giving expression to her sexual identity and seeking understanding for it’.⁶⁹

The Human Rights Committee, in 2014, adopted a General Comment on the right of liberty and security of the person (Article 9 ICCPR). It stated that the right benefited ‘everyone’ with that term embracing lesbian, gay, bisexual, and transgender persons.⁷⁰ The same is true, of course, of the right to life and the right of peaceful assembly, the rights addressed in the Committee’s subsequent General Comments.⁷¹ The Committee and the other treaty bodies, as we have seen earlier, have also generated significant practice in the context of the review of periodic reports of states parties. The Human Rights Committee has expressed concern to specific states regarding violent crimes perpetrated against persons of minority sexual orientation, including by law enforcement officials; the failure to → address such crime in legislation on hate crime; the frequent failure of states to investigate such acts; and the need for training of law enforcement and judicial officials in order to sensitize them to the rights of sexual minorities.⁷² The Committee on the Rights of the Child has expressed

concern that homosexual and transgender young people often do not have access to the appropriate information, support, and necessary protection to enable them to live their sexual orientation and gender identity.⁷³ On a number of occasions, the Committee Against Torture has expressed concern about the torture of homosexuals and regarding complaints of threats and attacks against sexual minorities and transgender activists.⁷⁴

The reports of the ‘special procedures’ of the Human Rights Council constitute a particularly valuable repository of examples of the application for people of diverse sexual orientations and gender identities of general human rights protections, as well as of the principle of non-discrimination. The Council’s Working Group on Arbitrary Detention has frequently invoked *Toonen* as a basis for its finding of arbitrary detention of homosexuals.⁷⁵ A former Independent Expert on the situation of human rights defenders was assiduous in condemning attacks on members of sexual and gender minorities.⁷⁶ She drew attention to such human rights violations as summary execution; torture; arbitrary detention; unreasonable impediments to freedom of expression, movement, and association; and participation in public life.

A number of the ‘special procedures’ have drawn attention to the intersectional nature of many human rights violations, where already vulnerable people face heightened risk when promoting the rights of people of diverse sexual orientations and gender identities. For example, the Independent Expert on minority issues has referred to the multiple forms of exclusion of members of minority communities, based on aspects of their identities and personal realities such as sexual orientation or gender expression that challenge social or cultural norms.⁷⁷

Some of the ‘special procedures’ that address economic, social, and cultural rights have indicated the extent to which violations of these rights are at issue for people of diverse sexual orientations and gender identities. The work of a former Special Rapporteur on the right to health is particularly notable. In 2004, he observed that:

fundamental human rights principles, as well as existing human rights norms, lead ineluctably to the recognition of sexual rights as human rights. Sexual rights include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference.⁷⁸

A former Special Rapporteur on education has identified a right to comprehensive sexual education.⁷⁹

p. 315 ↵ Most pertinently, a new ‘special procedure’ was established in 2016: the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. The mandate holders, in their reports to the Human Rights Council and the UN General Assembly, have drawn particular attention to thematic issues such as ‘socio-cultural and economic inclusion’, ‘so-called “conversion therapy” practices’, and the ‘impact of the COVID-19 pandemic on LGBT persons’.⁸⁰

A broad range of human rights are also increasingly engaged at the regional level. The Council of Europe Commissioner for Human Rights often refers to violations.⁸¹ Country reports and follow-up reports of the Inter-American Commission on Human Rights comment on such violations as ‘social-cleansing’ (killing) of

homosexuals and the treatment of lesbian prisoners.⁸² The UN and regional level examples clearly reinforce the assertion that human rights of general application may not be constrained on the basis of sexual orientation or gender identity.

But how does one distinguish rights of general application from those that are intended only to benefit a certain category of people? The answer to this question will usually be straightforward. For instance, the ICCPR limits the right to participate in political life to citizens. The question arises, though, of when a generally stated human right is limited in terms of who may benefit. For our purposes, the issue concerns when a right exclusively addresses the situation and choices of what we might term sexual majorities. This is the context for one of the most topical contemporary debates concerning the rights of sexual minorities: whether international human rights law recognizes a right of same-sex marriage or of same-sex family life.

The Human Rights Committee, in *Joslin*, was unequivocal on the matter of same-sex marriage. It contended that the right to marriage (Article 24(2) ICCPR) refers to a right of a man and a woman and that same-sex marriage is thereby excluded from the protection of the Covenant. The position of the European Court of Human Rights is more nuanced. In its 2010 judgment in *Schalk and Kopf v Austria*, it observed that, '[it] would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex'. However, in the case before it, it concluded that the diversity of practice across states parties to the European Convention was such that the matter of same-sex marriage 'is left to regulation by the national law'.⁸³ In a judgment delivered in 2012, the European Court also felt it necessary to state, obiter, that the Convention does not require states to grant access to marriage to same-sex couples.⁸⁴ The Court confirmed these views in the 2017 case of *Orlandi and Others v Italy*.⁸⁵ The Inter-American Court of Human Rights, for its part, opined in favour of a right to same-sex marriage in a 2017 advisory opinion.⁸⁶

It will be interesting to observe the extent to which a right of same-sex marriage may emerge over time from the jurisprudence and practice of the international courts and treaty bodies, taking account of considerations such as the observations of the European Court of Human Rights regarding changing circumstances within societies, an evolution in national law and jurisprudence (such as the US Supreme Court finding in the 2015

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case of *Obergefell*),⁸⁷ and the academic criticism levelled at the Human Rights Committee's findings in *Joslin*.⁸⁸

When we turn to the related but distinct issue of the identification of the family in international human rights law, we may observe that the UN and regional human rights monitoring bodies are moving, albeit haltingly, towards recognition of the existence of and rights pertaining to same-sex unmarried families. Article 23(1) ICCPR states the fundamental importance of the family and its entitlement to protection by the state, without reference to the form of family under consideration. Only in Article 23(2) do we find reference to the right of men and women to marry and found families. It is not necessarily the case that Article 23(2) restricts the meaning of the word 'family' in Article 23(1). And the Human Rights Committee, in *Young* and in *X*,⁸⁹ has criticized state practices that impede same-sex couples from benefiting from family-related benefits, such as transfer of pension entitlements. These cases, however, only addressed issues of inequality before the law (Article 26 ICCPR) and, in *X*, in a dissenting opinion of two members, it was observed that 'a couple of the same sex does not constitute a family within the meaning of the Covenant and cannot claim benefits that are based on a conception of the family as comprising individuals of different sexes'.⁹⁰

It is the regional courts that are providing the clearest guidance. Reference has already been made to the approach of the European Court of Human Rights to same-sex civil partnerships. The Court, also in *Schalk and Kopf v Austria*, reversed previous findings⁹¹ whereby, ‘a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of “family life,” just as the relationship of a different-sex couple in the same situation would’.⁹² The Inter-American Court of Human Rights adopted similar reasoning in the *Atala Rifo and daughters* case.⁹³

One final uncertainty may be observed concerning the reach of human rights law to address abuses related to sexual orientation or gender identity. It remains unclear how far a human rights approach can go in terms of the regulation of practices of non-state actors.⁹⁴ This issue is of obvious importance since so many of the forms of abusive behaviour are to be found outside the state sector, such as in the workplace, privately owned housing, religious communities, and so forth.

4 Legal Initiatives to Bridge the Gap Between Law and Practice

This chapter’s review of the law has shown the long reach of international human rights standards as regards the particular situation of people of diverse sexual orientations, gender identities, and sex characteristics. Fundamental principles, such as those of non-discrimination and of the universal application of general human rights standards, have been strongly affirmed. However, as has also been demonstrated, the courts,

p. 317 the treaty bodies, and the independent experts, limited as they are by the facts before them or their various mandates, have only indicated the actual application of these principles to a limited number of circumstances.

As a result, a certain degree of legal uncertainty persists. That uncertainty is compounded by the terminological confusion, referred to already, which is to be found throughout the case law, comments of treaty bodies, and reports of special procedures. In particular, issues of gender identity have been little understood, with, for instance, some special procedures and states referencing being trans as a ‘sexual orientation’ and others frankly acknowledging that they do not understand the term.

There has been a significant initiative to address the uncertainty regarding the reach of the law (and the terminological confusion). In 2007, a group of 29 international human rights experts produced a text known as the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.⁹⁵ A 2017 supplement, the Yogyakarta Principles plus 10, broadens the focus to include sex characteristics.⁹⁶ The documents have a tripartite function.⁹⁷ In the first place, they constitute a ‘mapping’ of the experiences of human rights violations experienced by people of diverse sexual orientations, gender identities, and sex characteristics. Second, the application of international human rights law to such experiences is articulated. Finally, the Principles spell out the nature of the obligation on states for implementation of each of the human rights.

The Principles have no binding force. They are neither a treaty nor the finding of a judicial or quasi-judicial body. Nevertheless, they carry the authority of their expert authors and have been considered by many states and experts to constitute a careful articulation of the state of existing law.⁹⁸ They have also been cited by international courts.⁹⁹ Accordingly, they bear examination in some detail. Each principle comprises a

statement of the law, its application to a given situation, and an indication of the nature of the state's duty to implement the legal obligation. Principles 1 to 3 address the principles of the universality of human rights and their application to all persons without discrimination, as well as the right of all people to recognition before the law. The experts placed these elements at the beginning of the text in order to recall the fundamental significance of the universality of human rights and the scale and extent of discrimination against people because of their actual or perceived sexual orientation or gender identity, as well as the manner in which they are often rendered invisible within society and its legal structures. Principles 4 to 11 deal with the fundamental rights to life, freedom from violence and torture, privacy, access to justice, and freedom from arbitrary detention. Principles 12 to 18 address non-discriminatory enjoyment of economic, social, and cultural rights, including accommodation, employment, social security, health, and education. Principles 19 to 21 concern the importance of the freedom to express oneself, one's identity, and one's sexuality, without state interference, based on sexual orientation or gender identity, including the rights to participate peaceably in public assemblies and events and otherwise associate in community with others. Principles 22 and 23 address the right to seek asylum from persecution based on sexual orientation or gender identity. Principles 24 to 26 deal with the rights to participate in family life, public affairs, and the cultural life of the community, without discrimination based on sexual orientation or gender identity. Principle 27 recognizes the right to defend and promote human rights without discrimination based on sexual orientation and gender identity, and the obligation of states to ensure the protection of human rights defenders. Principles 28 and 29 affirm the importance of holding rights violators accountable, and of ensuring redress for those whose rights are violated. Principles 30 to 38, added in 2017, concern the rights to: state protection, legal recognition, bodily and mental integrity, freedom from criminalization and sanction, protection from poverty, sanitation, the enjoyment of human rights in relation to information and communication technologies, and truth, as well as the right to practise, protect, preserve, and revive cultural diversity.

A notable feature of the principles is the manner in which they spell out in some detail the legal obligations of the state with regard to each of the rights that are affirmed. A general typology for the obligations can be observed. States must: (1) take all necessary legislative, administrative, and other measures to eradicate impugned practices; (2) take protection measures for those at risk; (3) ensure accountability of perpetrators and redress for victims; and (4) promote a human rights culture by means of education, training, and public awareness raising. Also, in the documents' preambles, as we have already observed, the experts proposed the definition of the terms 'sexual orientation', 'gender identity', 'gender expression', and 'sex characteristics'. These formulations, drawing on their wide usage within academic writing and advocacy communities, establish a personal scope of application for the Principles. The prefaces also include references that acknowledge the imperfections of the text and the need to keep its contents under review with a view to future reformulations that would take account of legal changes as well as developing understandings of the situation of people of diverse sexual orientations, gender identities, and sex characteristics.

5 Conclusion

This chapter has assessed the actual human rights situation of people of diverse sexual orientations, gender identities, and sex characteristics worldwide as well as the extent of the application to them of international human rights law. The gap between law and practice has been highlighted and a major initiative to address that gap, the Yogyakarta Principles, has been discussed. These Principles are presented as a form of *aide-mémoire* that indicates the contemporary state of the law and presents it in an integrated and coherent manner.

Also pertinent for this area of the law are the relevant national and international politics. It is of particular utility to study the practice in such international diplomatic fora as the UN Human Rights Council and the General Assembly. For instance, it will be of interest to examine and assess future debates surrounding the mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. It is important to remember that this initiative emerged from a context of long-standing contestation.¹⁰⁰ And while the mandate was renewed in 2019 with a greater number of votes in favour than when it was created in 2016, support was still far from unanimous.¹⁰¹ Such patterns of diplomatic practice recall the extent to which the subject area is highly controversial and in a state of political flux. We are thus precluded from drawing any firm conclusions as to the prospects for better enforcement of the law or its further development. We can no more than observe that, with regard to the plight of many members of sexual and gender minorities, the universal enjoyment of human rights remains an elusive and distant goal.

Further Reading

ASHFORD and MAINE (eds), *Research Handbook on Gender, Sexuality and the Law* (Edward Elgar, 2020).

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *A Long Way to Go for LGBTI Equality* (Publications Office of the EU, 2020).

HELLUM (ed), *Human Rights, Sexual Orientation, and Gender Identity* (Routledge, 2017).

LAU, ‘Sexual Orientation and Gender Identity Discrimination’ (2018) 2(2) *Comparative Discrimination Law* 1.

MCGOLDRICK, ‘The Development and Status of Sexual Orientation Discrimination under International Human Rights Law’ (2016) 16 *HRLR* 613.

O’FLAHERTY, ‘The Yogyakarta Principles at Ten’ (2015) 33 *NJHR* 280.

O’FLAHERTY and FISHER, ‘Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles’ (2008) 8 *HRLR* 207.

O’HALLORAN, *Sexual Orientation, Gender Identity and International Human Rights Law: Common Law Perspectives* (Routledge, 2020).

OHCHR, *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law* (2nd edn, 2019) HR/PUB/12/06/Rev.1.

Useful Websites

Independent Expert on sexual orientation and gender identity: <<https://www.ohchr.org/EN/Issues/SexualOrientationGender>>

International Commission of Jurists: <<http://www.icj.org> <<http://www.icj.org>>>

Human Rights Watch: <<http://www.hrw.org/en/category/topic/lgbt-rights> <<http://www.hrw.org/en/category/topic/lgbt-rights>>>

International Lesbian, Gay, Bisexual, Trans and Intersex Association: <<http://www.ilga.org> <<http://www.ilga.org>>>

ARC International: <<http://www.arc-international.net> <<http://www.arc-international.net>>>

Questions for Reflection

1. How convincing are the—markedly different—approaches of the Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights to the question of a right to same-sex marriage?
2. ↗ To what extent can the Yogyakarta Principles serve as a reference in the jurisprudence of international judicial bodies? What are the consequences for the legal authority of the Principles if they are cited in international jurisprudence?
3. International human rights treaties often use only male gender pronouns and sometimes female ones, yet the rights of persons of other gender identities are protected under the treaties. Does this language raise problems?
4. What should the role of businesses and other non-state actors be when it comes to eliminating discrimination against persons of diverse sexual orientations, gender identities, and sex characteristics?

Notes

* The views in this chapter are solely those of the author and its content does not necessarily represent the views or positions of the European Union Fundamental Rights Agency. This chapter was updated by Nils Reimann and finalized by Michael O'Flaherty.

¹ The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007), <<http://www.yogyakartaprinciples.org>>.

² Yogyakarta Principles, preamble.

³ Yogyakarta Principles, preamble.

⁴ The Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (2017), <<http://yogyakartaprinciples.org>>.

⁵ YP+10, preamble.

⁶ For terminological observations, see Hamzic, ‘The Case of “Queer Muslims”: Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos’ (2011) 11 *HRLR* 237.

⁷ For an extensive review of the forms of vulnerability, see O’Flaherty and Fisher, ‘Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles’ (2008) 8 *HRLR* 207.

⁸ OHCHR, *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law* (2nd edn, 2019) HR/PUB/12/06/Rev.1, 46.

⁹ Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156 (3 July 2001) para 17.

¹⁰ Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, E/CN.4/2004/9 (5 January 2004) para 123.

¹¹ Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/2002/83 (31 January 2002) para 102.

¹² OHCHR, *Born Free and Equal*, 42.

¹³ Musdah Mulia, ‘Promoting LGBT Rights through Islamic Humanism’ (1–6 June 2008).

¹⁴ Charter of Fundamental Rights of the European Union (2000); Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007); Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (2011); Inter-American Convention against All Forms of Discrimination and Intolerance (2013); Inter-American Convention on Protecting the Human Rights of Older Persons (2015).

¹⁵ *Atala Riffo and daughters v Chile (Merits)*, IACtHR Series C No 239 (24 February 2012). For an overview, see Contesse, ‘Sexual Orientation and Gender Identity in Inter-American Human Rights Law’ (2019) 44 *North Carolina JIL* 353.

¹⁶ eg General Comment No 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (2017) para 59; Guidelines for the Policing of Assemblies by Law Enforcement in Africa (2017) 7.2.8.

¹⁷ See eg PACE Res 2191 (2017).

¹⁸ See, however, the 2017 ruling of Germany’s Federal Constitutional Court, requiring civil status law to offer a third option beyond male and female: BVerfGE 147, 1. See generally European network of legal experts in gender equality and non-discrimination, ‘Trans and intersex equality rights in Europe—a comparative analysis’ (Publications Office of the EU, 2018); Carpenter, ‘Intersex human rights, sexual orientation, gender identity, sex characteristics and the Yogyakarta Principles plus 10’ (2021) 23 *Culture, Health & Sexuality* 516.

¹⁹ *Niemietz v Germany* (1993) 16 EHRR 97, para 29.

²⁰ (1982) 4 EHRR 149.

²¹ (1988) 13 EHRR 186.

²² (1993) 16 EHRR 485.

²³ (1999) 29 EHRR 493.

²⁴ (1999) 29 EHRR 548.

²⁵ (2014) 59 EHRR 12.

²⁶ Application nos 18766/11 and 36030/11, Judgment of 21 July 2015.

²⁷ Application nos 26431/12, 26742/12, 44057/12, and 60088/12, Judgment of 14 December 2017.

²⁸ C-673/16, *Coman* (5 June 2018).

²⁹ *Atala Riffo and daughters*.

³⁰ (2002) 35 EHRR 447.

³¹ (2002) 35 EHRR 18.

³² (2003) 37 EHRR 51, para 73.

³³ (2008) 46 EHRR 22.

³⁴ *X and Y v Romania*, Application nos 2145/16 and 20607/16, Judgment of 19 January 2021, para 168.

³⁵ OC-24/17, IACtHR Series A No 24 (24 November 2017) paras 85–171.

³⁶ CCPR/C/50/D/488/1992 (4 April 1994).

³⁷ Cowell and Millon, ‘Decriminalization of Sexual Orientation Through the Universal Periodic Review’ (2012) 12 *HRLR* 341.

³⁸ See Chapter 5.

³⁹ HRC, General Comment 34, CCPR/C/GC/34 (12 September 2011) paras 32 and 36.

⁴⁰ CCPR/C/119/D/2172/2012 (17 March 2017) para 7.14.

⁴¹ CESCR, General Comment 18, HRI/GEN/1/Rev.9 (Vol I) 139.

⁴² CESCR, General Comment 15, HRI/GEN/1/Rev.9 (Vol I) 97.

⁴³ CESCR, General Comment 14, HRI/GEN/1/Rev.9 (Vol I) 78.

⁴⁴ CESCR, General Comment 20, E/C.12/GC/20 (10 June 2009) para 32.

⁴⁵ CESCR, General Comment 22, E/C.12/GC/22 (2 May 2016) para 23; CESCR, General Comment 25, E/C.12/GC/25 (30 April 2020) paras 25, 28.

⁴⁶ eg CESCR, General Comment 18, para 12(b)(i).

⁴⁷ CESCR, General Comment 23, E/C.12/GC/23 (27 April 2016) para 31.

⁴⁸ CRC Committee, General Comment 4, HRI/GEN/1/Rev.9 (Vol II) 410, para 6.

⁴⁹ CRC Committee, General Comment 21, CRC/C/GC/21 (21 June 2017) para 8.

⁵⁰ CRC Committee, General Comment 24, CRC/C/GC/24 (18 September 2019) para 40.

⁵¹ CRC Committee, General Comment 25, CRC/C/GC/25 (2 March 2021) para 11.

⁵² CEDAW Committee, General Recommendation 27, CEDAW/C/2010/47/GC (16 December 2010); CEDAW Committee, General Recommendation 28, CEDAW/C/2010/47/GC.2 (16 December 2010).

⁵³ *ON and DP v Russian Federation*, CEDAW/C/75/D/119/2017 (24 February 2020) para 7.4. For commentary, see Simm, 'Queering CEDAW? Sexual orientation, gender identity and expression and sex characteristics (SOGIESC) in international human rights law' (2020) 29 *Griffith Law Review* 374.

⁵⁴ On equality and non-discrimination, see Chapter 8.

⁵⁵ CCPR/C/78/D/941/2000 (6 August 2003).

⁵⁶ CCPR/C/89/D/1361/2005 (14 May 2007).

⁵⁷ CCPR/C/119/D/2216/2012 (1 November 2017) para 8.6.

⁵⁸ CCPR/C/75/D/902/1999 (30 July 2002).

⁵⁹ (1999) 31 EHRR 1055.

⁶⁰ IACtHR Series C No 239 (24 February 2012).

⁶¹ (2003) 38 EHRR 24.

⁶² (2003) 36 EHRR 55.

⁶³ (2003) 37 EHRR 39.

⁶⁴ (2003) 38 EHRR 21.

⁶⁵ (2008) 47 EHRR 21, para 96.

⁶⁶ (2013) 57 EHRR 14.

⁶⁷ European Committee of Social Rights, Conclusions concerning Albania: Article 1(2) (30 June 2006), *Conclusions 2006 – Vol 1* (2006) 28.

⁶⁸ Application nos 4916/07, 25924/08, and 14599/09, Judgment of 21 October 2010.

⁶⁹ CCPR/C/106/D/1932/2010 (30 November 2012) para 10.7.

⁷⁰ HRC, General Comment 35, CCPR/C/GC/35 (16 December 2014) para 3.

⁷¹ HRC, General Comment 36, CCPR/C/GC/36 (3 September 2019) paras 23, 61; HRC, General Comment 37, CCPR/C/GC/37 (17 September 2020) paras 25, 46.

⁷² eg HRC, Concluding Observations: United States of America, CCPR/C/USA/CO/3/Rev.1 (18 December 2006) para 25.

⁷³ eg CRC Committee, Concluding Observations: Russian Federation, CRC/C/RUS/CO/4-5 (31 January 2014) paras 24–5, 55–6.

⁷⁴ eg *JK v Canada*, CAT/C/56/D/562/2013 (10 February 2016).

⁷⁵ McGoldrick, 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law' (2016) 16 *HRLR* 613, 628 n 108.

⁷⁶ Report of the Special Representative of the Secretary-General on human rights defenders, E/CN.4/2006/95/Add.1 (22 March 2006).

⁷⁷ Report of the Independent Expert on minority issues, E/CN.4/2006/74 (6 January 2006).

⁷⁸ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2004/49 (16 February 2004) para 54.

⁷⁹ Report of the Special Rapporteur on the Right to Education, A/65/162 (23 July 2010).

⁸⁰ <<https://www.ohchr.org/EN/Issues/SexualOrientationGender>>.

⁸¹ Discrimination on grounds of sexual orientation and gender identity in Europe, Report of the Council of Europe Commissioner for Human Rights (June 2011).

⁸² Annual Report of the Inter-American Commission on Human Rights 2006, ch IIIC(1).

⁸³ (2011) 53 EHRR 20, para 61.

⁸⁴ *Gas and Dubois v France*, Application no 25951/07, Judgment of 15 March 2012, para 66.

⁸⁵ Application nos 26431/12, 26742/12, 44057/12, and 60088/12, Judgment of 14 December 2017, para 207.

⁸⁶ OC-24/17, paras 200–28.

⁸⁷ *Obergefell v Hodges* 576 US 644 (2015).

⁸⁸ Gerber, Tay, and Sifris, ‘Marriage: A Human Right for All?’ (2014) 36 *Sydney LR* 643.

⁸⁹ CCPR/C/78/D/941/2000 (6 August 2003) and CCPR/C/89/D/1361/2005 (14 May 2007).

⁹⁰ CCPR/C/89/D/1361/2005 (14 May 2007), separate opinion of Mr Abdelfattah Amor and Mr Ahmed Tawfik Khalil.

⁹¹ (2011) 53 EHRR 20.

⁹² (2011) 53 EHRR 20, para 94. See also, *PB and JS v Austria* (2012) 55 EHRR 31.

⁹³ IACtHR Series C No 239 (24 February 2012).

⁹⁴ See Chapter 28.

⁹⁵ Yogyakarta Principles.

⁹⁶ YP+10.

⁹⁷ Address of the Rapporteur, launch event of the Principles (March 2007).

⁹⁸ O’Flaherty and Fisher (2008).

⁹⁹ eg OC-24/17, paras 32, 104, 112, 129, 138, 148, 155, 196; ECtHR, *Hämäläinen v Finland* [GC], Application no 37359/09, Judgment of 16 July 2014, Joint Dissenting Opinion of Judges Sajó, Keller, and Lemmens, para 16.

¹⁰⁰ Blitt, ‘The Organization of Islamic Cooperation’s (OIC) Response to Sexual Orientation and Gender Identity Rights: A Challenge to Equality and Nondiscrimination Under International Law’ (2018) 28 *Transnational Law & Contemporary Problems* 89.

¹⁰¹ Human Rights Council, Res 32/2 (30 June 2016) A/HRC/RES/32/2; Human Rights Council, Res 41/18 (12 July 2019) A/HRC/RES/41/18.

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