

The Yogyakarta Principles soft law?

-Sexual Orientation and Gender Identity in International Human Rights Law-

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December 2009

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- *The Yogyakarta Principles*
- *Jurisprudential Annotations to the Yogyakarta Principles*

1. Introduction

International human rights law is applicable to everybody, also to people with a different sexual orientation and gender identity. Sexual orientation and gender identity rights are not explicitly addressed in international law. But visible is that certain groups with higher risks of human rights violations or potential human rights violations specifically related to their group, receive a separate document. An example of this is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Are the human rights of people with diverse sexual orientation and gender identity, also referred to as LGBTI (Lesbian, Gay, Bisexual, Transgender and Intersex), visible in international human rights law, or does this group need a separate document as well? The Yogyakarta Principles present a statement of global human rights related to sexual orientation and gender identity which are already existing in international human rights law. This thesis will focus on sexual orientation and gender identity rights in international human rights law. The Yogyakarta Principles reflect the urgency of focusing on human rights of people with diverse sexual orientation and gender identity in international human rights law. Could the Yogyakarta principles be considered soft law in international human rights law?¹

Concepts like homosexuality, transsexuality and sexual orientation are quite recently being founded in a social perspective in the Western world, but the phenomena have been a reason for repression and discrimination for a long time, in different parts of the world. Same-sex conduct is even criminalized in 77 countries and carries the death penalty in 7 states.² The fact that women received a separate document in international law (CEDAW) indicates that there was a need for this, because of human rights violations of women. Groups with a different sexual orientation or gender identity also suffer from human rights violations because of their orientation or identity. It could be argued that international human rights law should address unfair discrimination, even more when certain groups in society are unpopular or even questioned in their existence. This does not necessarily

¹ Kollman and Waites 2009, p. 5.

² Farrior 2009, p. 84.

concern creating new rights in international human rights law, but it makes sure that the fundamental human rights of certain groups in society which suffer most are guaranteed.³

Since 2006 major developments related to LGBTI campaigning resulted in the two following documents in 2006: the Declaration of Montreal and the Yogyakarta Principles. The Yogyakarta Principles state an interpretation of existing law, while the Declaration of Montreal is more a statement of proposals and demands.⁴ The Yogyakarta Principles are intended to form a coherent and comprehensive identification of the obligation of states to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity. They were developed in response to patterns of abuse against targeting people because of their actual or perceived sexual orientation or gender identity. Extrajudicial executions, torture, and other violence, access to justice, privacy, non-discrimination, rights to freedom of expression, freedom of assembly, employment, health, education, public participation, immigration and refugee issues are some of the human rights dealt with in the Yogyakarta Principles.⁵ These rights are visibly more violated in relation to people with diverse sexual orientation and gender identity and therefore more protection was considered necessary by the creators of the Yogyakarta Principles.

The central question of the thesis concerns the weight of sexual orientation and gender identity in international human rights law. The focus will be on the Yogyakarta Principles which outline these rights: Can the Yogyakarta Principles be considered soft law? In answering this question we look at their status in international human rights law and take into consideration that the Yogyakarta Principles are based on existing international human rights law with reference to sexual orientation and gender identity. We need to know why a separate document is needed in international human rights law and we need to look at how sexual orientation and gender identity are present in international human rights law. In doing this we focus on the international human rights instruments that could or are addressing sexual orientation and gender identity. To complement the question of existence of sexual orientation in international human rights law, the thesis will go deeper into the

³ Heinze 1994, p. vii.

⁴ Swiebel 2009, p.20.

⁵ Farrior 2009, p. 88.

existing case law that refer to sexual orientation and gender identity. The International Covenant on Civil and Political Rights (ICCPR) and its monitoring body the Human Rights Committee has several cases dealing with sexual orientation, which will be outlined in chapter 4. The following chapter will go deeper into the question what soft law is and whether the Yogyakarta Principles can be considered soft law. The thesis will conclude with some final remarks on the question whether sexual orientation and gender identity rights in international human rights law are ahead of state practice and therefore more in the nature of a statement de 'lege ferenda', prescribing, rather than 'lex lata', the law as it exists.

2. Human Rights related to sexual orientation and gender identity

In international human rights related to sexual orientation and gender identity a tension is visible between the right to have a different sexual orientation or gender identity and human rights violations based on sexual orientation or gender identity.⁶ This thesis focuses on the international human rights violations that occur on the basis of sexual orientation and gender identity. Worldwide people are subject to human rights violation because of their actual or perceived sexual orientation and gender identity. Although existing international human rights norms also apply to people with diverse sexual orientation and gender identity, these human rights violations take many forms. People with diverse sexual orientation or gender identity often face, next to violence, discrimination and arbitrary arrests, denial of employment related benefits and dismissal because of their sexual orientation or gender identity. Lesbian and transgender persons have a higher risk of becoming homeless, for example because of difficulties in renting accommodations. Health related human rights violations also occur on a more frequent basis to people with a different sexual orientation or gender identity. Attempts to impose heterosexual norms lead to pressure to remain silent and not file charges, also to avoid unfair trials. Aversion therapy and forced confinement have been frequently reported for homosexual people. Same-sex partners often are not recognized in the health sector, for example in taking medical decisions concerning their partners. People that seek justice in order to end violations on the basis of sexual orientation and gender identity are at risk of facing more resistance in the

⁶ Gross 2008, p. 253.

form of threats and violence. Examples of deprivation of civil and political rights are denials of freedom from torture and killings, non-recognition of personal and family relationships and interference with personal dignity. Examples of discrimination in accessing economic, cultural and social rights consider health, housing, education and work.⁷

According to O’Flaherty and Fisher development towards sexual orientation and gender identity-related human rights can be categorized in the following three subdivisions:

- a. Non-discrimination
- b. Protection of privacy rights
- c. Ensuring of other general human rights protection to all, regardless of sexual orientation and gender identity⁸

Often denial of rights based on sexual orientation or gender identity are perpetrated by ‘agents of the state’ and go unpunished. The fact that human rights related to sexual orientation and gender identity are not recognized probably has to do with the fear of being too influential, trying to change cultures and transform the perception on homosexuality. Due to their sexual orientation or gender identity people are profiled as criminal, receive selective enforcement of laws, sexual, physical and verbal abuse. Transgender people are often subjected to violence in order to ‘punish’ them for transgressing gender barriers. Lesbians in different parts of the world face community restrictions, sometimes leading to human rights violations such as rape. Visible is that lesbian, gay, transgender and intersex people face different kinds of hostilities, but since the human rights violations are based on gender they are grouped together in the Yogyakarta Principles. Although there are certain basic human rights obligations for all states to follow, it is visible that certain people or countries have a policy that these human rights do not count for people with diverse sexual orientation and gender identity. More than 80 countries still maintain laws criminalizing same-sex consensual relations between adults. Also laws against ‘immorality’ or ‘indecent behaviour’ are used to penalise people that behave or are presumed to have a homosexual

⁷ O’Flaherty & Fisher 2008, p. 213.

⁸ O’Flaherty & Fisher 2008, p. 214.

orientation or a different gender identity. In countries where sanctions are not actively enforced, laws can be used to arbitrarily harass people.⁹

In a context of diverse approaches and inconsistency towards sexual orientation and gender identity the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity was conceived. A coalition of human rights NGO's, with facilitation of the International Service for Human rights and the International Commission of Jurists. Twenty-nine experts from 25 countries, including one former UN High Commissioner for Human Rights, 13 current or former UN human rights special mechanism office holder or treaty body members, two serving judges and a number of academics and activists, drafted the Principles. Twenty-nine principles comprise a statement of international human rights 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 set out the universality of human rights and their application without discrimination, as well as the right of recognition before the law. Principles 4-11 concern the rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention. Principles 12-18 set out the economic, social and cultural rights, such as employment, housing, social security, health and education. Principles 19-21 emphasise the importance of the freedom to express oneself, one's identity and one's sexuality without state interference, including the right to participate in peacefully in public assemblies. Principles 22 and 23 consider the rights of persons seeking asylum from persecution based on sexual orientation or gender identity. Principles 24-26 concern participation in family life, public affairs and cultural life. Principle 27 is about human rights defenders. Principles 28 and 29 highlight the importance of holding rights violators accountable and ensuring appropriate remedies and redress.¹⁰ In the attachment the jurisprudential annotations to the Yogyakarta Principles. They provide additional information about the international instruments and jurisprudence upon which each Principles is based.

A controversial issue in the international LGBTI rights debate, which was also visible during the negotiations of the Yogyakarta Principles is marriage. Principle 24 of the Yogyakarta

⁹ O'Flaherty & Fisher 2008, p. 211.

¹⁰ O'Flaherty & Fisher 2008, p. 234.

Declaration deals with the right to found a family, and states that families exist in diverse forms and calls for prohibition of discrimination. Other than that the Principles outlines that 1) states that recognize same-sex marriage or registered partnerships make any entitlement available to different-sex married or registered partners equally available to same-sex married or registered partners; and 2) states that ensure that any benefit available to different-sex unmarried partners be equally available to same-sex unmarried partners. States that do not recognize same-sex marriage or registered partnerships are not required to do so, or to offer same-sex couples the rights enjoyed by different-sex married couples. States only have to offer the rights enjoyed by different-sex unmarried couples. The experts tried to capture the existing state of international law in drafting the Yogyakarta Principles. Sometimes this has led to rather vague and non-prescriptive statements, reflecting the uncertain state of law or its application. The desire for consistency with existing law lead to the omission of certain elements, such as the right to a non-heterosexual marriage. Instead in Principle 24 on the right to found a family, one only speaks of a right to non-discriminatory treatment of same-sex marriage in those states which already recognise it.¹¹ Most of the rights outlined in the Yogyakarta Principles are general human rights that have been adapted to the context of sexual orientation and gender identity, but some of the Principles deal with more unique issues, such as recognition before the law and the right to family life.¹²

3. Sexual orientation and gender identity rights in International Human Rights bodies

Some parts of the UN system have recognized sexual orientation issues, while others have not. Often through invoking provisions on personal privacy and general provisions on equality lesbians and gays have been able to address these violations. Through actions of the UN treaty bodies, special procedures and working groups, and in initiatives of the UN High Commissioner for Human Rights, discrimination on the basis of sexual orientation has been addressed. But the political organs –primarily the Commission on Human Rights, now the Human Rights Council – have blocked the issues. This chapter will highlight the

¹¹ O’Flaherty & Fisher 2008, p. 236.

¹² Gross 2008, p. 250.

achievements and certain setbacks related to sexual orientation and gender identity within the international human rights instruments, bodies and Conferences.

The UN treaty bodies have called for the repeal of laws criminalizing homosexuality around the world. The concerns of the treaty bodies have extended beyond the criminalization of homosexual conduct. “Social cleansing” killings of sexual minorities, and the impunity of it, have been addressed by the Human Rights Committee, the monitoring body of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR of 1966 indicates that states also have a positive obligation to prevent human rights violations and in the Optional Protocol of the ICCPR an individual complaints procedure was set up. In October 2009, the ICCPR had 72 signatories and 165 parties. The Human Rights Committee (HRC) of the ICCPR has addressed sexual orientation several times in its case law, which will be dealt with more extensively in the next chapter. In 1994 the UN Human Rights Committee held that so-called “sodomy-laws” violated standards of privacy and equality, and that “sexual orientation” was a status protected against discrimination by the ICCPR in the decision *Toonen v. Australia*. For the first time the UN recognized rights related to sexuality and sexual orientation.¹³

Also other monitoring bodies of the UN have included sexual-orientation discrimination: The Committee on Economic, Social, and Cultural Rights (CESCR), the monitoring body of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 explored the link between the right to health, employment, housing, the right to water and non-discrimination on the basis of sexual orientation. Art. 2 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) highlights that states have to take steps, do everything with maximum of available resources in order to reach certain aims progressively. In December 2008 ICESCR had 160 parties and another six countries had signed but not ratified it. The Optional Protocol to ICESCR for individual complaints was adopted in December 2008, but has not yet entered into force. In its General Comments the ICESCR deals with non-discrimination on the basis of sexual orientation and gender identity. GC No. 18 of 2005 (on the right to work), GC no. 15 of 2002 (on the right to water), GC No. 14 of 2000 (on the right to the highest attainable standard of health) and GC No. 20 of 2009 include sex and sexual orientation. Art. 2(2) ICESCR lists categories of discrimination,

¹³ Saiz 2005, p.4.

including sex and 'other status'.¹⁴ Art. 3 of ICESCR, equal rights of men and women, is seen as the basis for prohibition of sexual orientation-related discrimination. In 8 of 70 state periodic reports considered by CESCR between 2000 and 2006, it raised issues of discrimination related to sexual orientation in the concluding observations.¹⁵ An example of this is that the Committee on Economic, Social and Cultural Rights expressed its concerns in 2005 on the anti-discrimination legislation of Hong Kong, which does not cover discrimination on the basis of sexual orientation.¹⁶

The Convention on the Elimination of Discrimination against Women (CEDAW) of 1979 does not address sexual orientation or gender identity directly or in a general comment, but the Committee on the Elimination of Discrimination against Women has criticized states for discrimination on the basis of sexual orientation in recommendations to state reports. Only six UN members have not signed CEDAW. The Convention on the Rights of the Child (CRC) of 1989 includes sexual orientation in its General Comment No. 4 on art. 2, by including it within the category of 'other status'. It stated that, 'State 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 (Article 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'. Five of 186 state periodic reports considered by CRC between 2000 and 2006 raised issues of discrimination related to sexual orientation. In November 2009, 194 UN members were party to the CRC, all UN members except the USA. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) has condemned several issues on the basis of sexual orientation. CAT has the obligation towards states to address cases falling within the scope of the treaty to investigate or prevent them. In December 2008, 146 nations were parties to CAT, and ten countries have signed but not ratified it.¹⁷

¹⁴ GC no. 20 ICESCR

¹⁵ Farrior 2009, p.87.

¹⁶ Sim. Netherlands Institute of Human Rights. CESCR Hong Kong

¹⁷ O'Flaherty & Fisher 2008, p. 216

There is still a consistent denial and defiance visible concerning rights related to sexual orientation and gender identity by governments at the more “political” UN bodies and UN World conferences. The United Nations Commission on Human Rights (UNCHR) was replaced by the UN Human Rights Council (UNHRC) in 2006 and is made up of government representatives. The Sub-Commission on Prevention of Discrimination and Protection of Minorities was the main subsidiary body of the UNCHR and was replaced by the Advisory Committee in August 2006. In the sub-commission references to sexual orientation or gender identity were made several times. In 1993 a resolution on the discrimination on the basis of HIV/AIDS included male homosexuals.¹⁸ In 2003 predominantly European countries supported a Brazilian Resolution at the UN Human Rights Commission about lesbian and gay rights being fundamental rights. The respond of Pakistan was that this draft resolution was an insult to the 1.2 billion Muslims. Pakistan later argued that the principle of non-discrimination on grounds of sexual orientation cannot be considered as universally recognized as it does not appear in any UN treaty. Sexual orientation is sometimes not considered a human right but a social and cultural one, better left to each state to address within its own sovereign legal and social systems. Sexual orientation as a universal right is seen as culturally divisive and therefore threatening to the UN consensus.¹⁹ As a respond to this Resolution, a ‘no action motion’ was put up, but was narrowly defeated. After this several states threatened to bring hundreds of amendments to the text, which resulted in ending the negotiations. New Zealand responded with a joint statement on sexual orientation in 2005. In 2006 Norway made a similar joint statement in the Human Rights Council, to put among other things sexual orientation on the agenda of the UNHRC. This joint statement was supported by 54 UN member states, including countries in Latin America and Asia, but was not supported by many Islamic countries. In March 2008 the number of supportive countries to this statement was 60 UN members.²⁰

The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has pointed out problems concerning double discrimination on the basis of race and sexual orientation. Other Special Procedures that engage with sexual

¹⁸ Sanders 2002, p. 25.

¹⁹ Saiz 2005 p. 12

²⁰ Saiz 2005, p.8.

orientation or gender identity are extrajudicial, summary or arbitrary executions; torture and other cruel, inhuman or degrading treatment or punishment; freedom of religion; promotion and protection of the right to freedom of opinion and expression; violence against women; and sale of children, child prostitution and child pornography. The Special Rapporteur on Extrajudicial Executions also criticised countries like Pakistan for maintaining the death penalty for homosexuality. But the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression questions his mandate in whether he can consider the rights of people with diverse sexual orientation and gender identity: He believed that he required more explicit authorisation before addressing human rights violations on the basis of sexual orientation during the Interactive Dialogue, September 2006. Also Special Procedures concerning Economic, Social and Cultural Rights have drawn attention to issues related to sexual orientation and gender identity. The Special Procedure on the Right to everyone to the enjoyment of the highest attainable standard of physical and mental health is also addresses the rights of people with diverse sexual orientation and gender identities. The fact that several Special Rapporteurs and Procedures highlight the urgency of human rights focusing on sexual orientation and gender identity indicates the legitimacy of a document like the Yogyakarta Principles.²¹

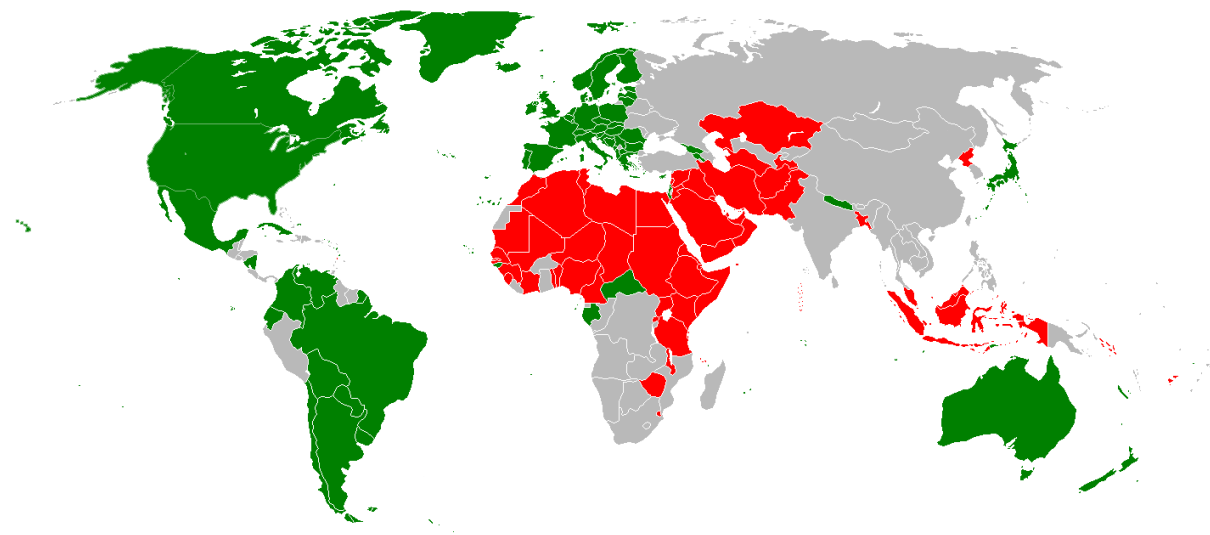
Another example of inclusion of sexual orientation and gender identity by the UN was the Resolution on the Death Penalty by the former Commission, which called upon states to 'ensure that the notion of most serious crimes does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as among other things sexual relations between consenting adults.'²²

Within the United Nations General Assembly a major breakthrough was visible when a declaration in support of the human rights of all people, regardless of sexual orientation or gender identity was signed in December 2008. This declaration has the same focus as the Yogyakarta Principles and refer to the application of international human rights law in relation to sexual orientation and gender identity. 66 countries have signed it while

²¹ O'Flaherty & Fisher 2008, p. 222, 223.

²² O'Flaherty & Fisher 2008, p.240.

according to Human Rights Watch, more countries are pending to sign the declaration.²³ Sponsored by France and The Netherlands, the declaration had been intended as a resolution, but became a declaration because there was not enough support for an official resolution. Although a resolution is also not binding, it has a higher status than a declaration. The declaration was presented by Argentina on December 18, 2008, and was the first declaration concerning gay rights read in the General Assembly. The declaration does have support from several Latin American and African countries, with religious backgrounds, both Christian and Islamic, like Gabon and Guinee-Bissau. Implicitly this LGBT rights declaration criticizes over 80 countries that have repressive laws against homosexuality. An alternative declaration was made by the Islamic Conference, supported by the Vatican and signed by 57 states affirming the principles of non-discrimination and equality, but claiming that universal human rights do not include ‘the attempt to focus on the rights of certain persons’. The social normalization, and possible legitimization, of many deplorable acts, including pedophilia, could not be tolerated.²⁴ The Vatican argued that they were afraid of the traditional institution of marriage opening up to homosexuals. This map shows the supporters of the UN Declaration on sexual orientation and gender identity in green. In red are supporters of the opposing declaration.²⁵



²³ Farrior 2009, p. 88 “*Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cape Verde, Central African Republic, Chile, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, United Kingdom, Uruguay, Venezuela*”.

²⁴ Farrior 2009, p. 88.

²⁵ COC Nederland VN verklaring 2008

Louise Arbour, the former UN High Commissioner for Human Rights remarked the 'shameful silence' when it concerned human rights violations based on sexual orientation or gender identity and the fact that these violations go unreported and unpunished. The High former Commissioner for Human Rights indicated that although principles of universality and non-discrimination apply to the grounds of sexual orientation and gender identity, there is a need for a more comprehensive articulation in international law concerning these rights.²⁷ The former UN High Commissioner for Refugees provided opportunities to establish refugee status for those fleeing persecution on the basis of their sexual orientation or gender identity in a Guidance note on Claims for Refugee Status in November 2008. In this document and several advisory opinions the UNHCR recognizes gays and lesbians as a group eligible for refugee status and quotes the Yogyakarta Principles several times. The conclusion of the document quotes: *'International and national developments in sexual orientation case law clearly show that LGBT persons may be recognized as a "particular social group" and, as such, are entitled to protection under the 1951 Convention. These developments, however, also indicate that ill-treatment of persons due to their sexual orientation and gender identity continues to be seen as a highly personal or hidden form of persecution. As a result, LGBT persons who seek asylum have on occasion been expected by adjudicators to avoid persecution by concealing their sexual orientation, while similar expectations are not applied to the same extent in claims concerning political opinion or religious belief.'*²⁸ This indicates the necessity of special attention to sexual orientation and gender identity in international human rights law, which is highlighted by the Yogyakarta Principles.

Human rights related to sexual orientation and gender identity are highlighted more frequently and human rights abuses are addressed by international human rights instruments and bodies. Also in Human Rights conferences issues of sexual orientation were raised, for example at the Vienna World Conference on Human Rights, in the IV World Conference on Women in Beijing and in the Beijing+5 meeting of the General Assembly in 2000. Mainly in the context of criminalisation of same-sex sexual activity, privacy rights

²⁶ Wikipedia UN Declaration on Sexual Orientation and Gender Identity

²⁷ Farrior 2009, p. 89.

²⁸ UNHCR Guidance Note on Refugee Claims relating to sexual orientation and gender identity 2008, p. 18

could be used as an argument against discrimination, is indicated by the HRC, as we will see in the next chapter. Also in CDESCR, CEDAW, CAT and CRC have taken up issues of sexual orientation and gender identity, and the Human Rights Committee (HRC) has expressed concerns about human rights violations based on sexual orientation, such as attacks, torture and lack of access to appropriate information. Other than several international human rights instruments and bodies like the Human Rights Council, also a number of member and observer states have focused on sexual orientation and gender identity. In doing this some of them have cited the Yogyakarta Principles.²⁹

4. Case law concerning sexual orientation

This chapter highlights the very few existing case law which deals with sexual orientation of the ICCPR. Case law of other bodies like CEDAW or CERD has not addressed the issue as clear as the ICCPR and therefore are considered less relevant to research. Existing international jurisprudence which deals with sexual orientation or gender identity is based on the ICCPR³⁰, and dealt with by the HRC. Most of the claims are based on art 2(1), art. 16, art. 17 (1) art 19(3), art. 23 (1, 2) and art. 26 ICCPR. Also General Comments no. 16, on art 17 ICCPR and General Comment No. 19 , on art. 23 play roles in jurisprudence of the HRC.³¹ Art. 2 (1) includes non-discrimination on the basis of among other things 'other status'.³² Art. 16 reflects equal recognition before the law.³³ Art. 17 highlights unlawful interference and privacy.³⁴ Art. 19 is about freedom of opinion and expression, subject to certain necessary restrictions by law.³⁵ Art. 23 is about the right to found a family and the right to marry,³⁶ and

²⁹ O'Flaherty & Fisher 2008, p. 238.

³⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

³¹ O'Flaherty & Fisher 2008, p. 224.

³² Article 2 (1) ICCPR: 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.

³³ Article 16 ICCPR: Everyone shall have the right to recognition everywhere as a person before the law.

³⁴ Article 17 ICCPR: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.

³⁵ Article 19 ICCPR: 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through

art. 26 concerns equality and non-discrimination before the law.³⁷ The following cases highlight the most important issues related to sexual orientation of the ICCPR.

1982: Herzberg v Finland

This case concerned the Finnish penal law prohibiting the public encouragement of indecent behaviour between persons of the same sex. This provision led to regulations and policies against television and radio programmes that dealt with homosexuality. Two had been censored and one had been unsuccessfully prosecuted. This case dealt with art. 19 (2, 3) of the ICCPR concerning the right of freedom of expression and the question whether the freedom of expression could be restricted with the argument of public morals as the Finish Government made. The state party argued that it is not possible to apply the criteria of article 19 (3) to self-imposed restrictions. The Committee wanted to leave a certain margin of discretion to the responsible authorities in considering public morals and judged that there had been no violation.³⁸

1994: Toonen v. Australia

This case was a major breakthrough for the recognition of LGBT rights. The Tasmanian Criminal Code criminalized various forms of sexual contacts between men. The criminal prohibition of same-sex sexual activity, even if unenforced, was considered by the Committee as an unreasonable interference with Mr. Toonen's privacy.³⁹ The Committee found a violation of art 17 (1) jo 2 (1) ICCPR; Mr. Toonen was the victim of an unlawful or arbitrary interference with his privacy. Violation of Art. 17 (1) jo Art. 2(1) required the repeal of the offending law and therefore the Committee did not consider it necessary whether

any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

³⁶ Article 23 ICCPR: 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

³⁷ Article 26 ICCPR: 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, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

³⁸ Sanders 2002, p. 14.

³⁹ O'Flaherty & Fisher 2008, p.221.

there has also been a violation of article 26 of the covenant, which entailed the question whether Mr. Toonen had been discriminated against in his right to equal protection of the law. The Committee argued that discrimination on the basis of sexual orientation is considered a form of discrimination on the basis of sex in art. 2 (1) and 26.⁴⁰

2002: *Joselin v New Zealand*

This case did not reflect non-discrimination in the context of criminalisation of same-sex sexual activity, which was according to previous case law not allowed. It concerned privacy rights focusing on marriage. According to the HRC, refusal of the right to marry in New Zealand was not a violation of articles 16, 17, 23 (1, 2) or 26 of the ICCPR. A law that does not permit same-sex marriage, was not determined to violate the ICCPR. (art. 26 jo art 23 ICCPR). Among the reasons given were that the terms used in art. 23 concerning marriage is “union between men and women” (art. 23 (2))⁴¹ The HRC argues that prohibition against discrimination on grounds of sex includes sexual orientation. But there is no total prohibition on difference in treatment on the basis of sexual orientation, as long as it is based on reasonable and objective criteria.⁴²

2003: *Young v Australia*

Young v Australia continues where *Toonen v Australia* has left off. Prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation was argued in *Toonen v Australia*. The HRC in *Young v Australia* found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples had the choice to marry. Not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The distinction between same-sex partners, who were excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, was not considered reasonable and objective. So in this case the HRC found a violation of art. 26 of the ICCPR based on sexual orientation.⁴³

⁴⁰ CCCPR Case 488/1992

⁴¹ Farrior 2009, p. 88.

⁴² CCCPR Case 902/1999

⁴³ CCCPR Case 941/2000

2007: X contra Colombia

This case concerned discrimination on the basis of sexual orientation related to the transfer of pension. After a relationship of 22 years and 7 years living together the author's life partner died. The Social Welfare Fund rejected transfer of pension, because the law did not permit transfer to a person of the same sex. The author alleged a violation of art. 3 ICCPR, equality of the sexes, since a partner of the same sex is being denied the rights granted to different sex couples, without justification. The Committee did not find this claim admissible, because of the fact that this article concerned differences between men and women, and this claim did not compare the discrimination with female homosexuals. The claim dealt with heterosexual couples, which comparison did not fall within the scope of this article.

The Committee did not find it necessary to consider the claims under art. 2 (1) jo 17 ICCPR. It argued that differences in benefit entitlements between married couples and heterosexual unmarried couples were reasonable and objective. It was not open to the author to enter into marriage with his same-sex permanent partner. The Act did not make a distinction between married and unmarried couples but between homosexual and heterosexual couples. Based on earlier jurisprudence, the Committee found a violation of Art. 26 prohibition against discrimination, which also includes discrimination based on sexual orientation, because there was a distinction between (unmarried) homosexual and (unmarried) heterosexual couples.⁴⁴

Art. 17 on privacy was used to address rights of sexual orientation. In the General Comment 16 (32) on art. 17 of the ICCPR about privacy rights the Committee recalls that the "introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances". The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case. Criminal prohibition of same-sex sexual activity, even if unenforced, constituted an unreasonable interference with privacy as indicated in *Toonen v Australia*. Other than privacy, the successes of the above cases consider discrimination of sexual

⁴⁴ CCCPR Case 1361/2005

orientation based on art. 2 (1) and art. 26 ICCPR. Discrimination, or difference in treatment is allowed when there is a reasonable justification, so not every distinction amounts in unreasonable discrimination. In *Young v Australia* the Committee argues that the State Party must offer “reasonable and objective criteria” for making a distinction on grounds of sex or sexual orientation. Also in *Toonen v. Australia*, Australia did not provide arguments on how this distinction between same-sex partners was reasonable and objective and there was no evidence which would point to the existence of factors justifying such a distinction. Therefore it was not a contested case. In this case the HRC made a distinction between same-sex partners who were excluded from pension benefits, and unmarried heterosexual partners who were granted these benefits, which was indicated reasonable and objective. The distinction between unmarried heterosexual couples and unmarried homosexual couples was not reasonable and objective and therefore constituted a violation of their equal rights. The HRC determined a violation of the ICCPR when a law excludes same-sex partners from pension benefits, while unmarried heterosexual partners are granted them.⁴⁵

In art. 26 of the ICCPR the HRC indicated that reference to “sex” included “sexual orientation”: In other words “discrimination on the basis of sexual orientation is a form of discrimination on the basis of sex.”⁴⁶ As indicated in *Joselin v New Zealand* denial of the right to marry for same sex couples was not considered a violation of art. 26.⁴⁷ Concluding one could argue that there is no total prohibition on discrimination or interference with one’s privacy rights on the basis of sexual orientation, as long as it is based on reasonable and objective criteria.⁴⁸

5. Can the Yogyakarta Principles be considered soft law

In international law particular non-binding instruments, documents or non-binding provisions in treaties which form a special category are sometimes called ‘soft law’. Soft law refers to quasi-legal instruments which do not have legally binding force, or with a weaker

⁴⁵ O’Flaherty & Fisher 2008, p. 217.

⁴⁶ Sanders 2002, p. 14.

⁴⁷ Farrior 2009, p. 87.

⁴⁸ O’Flaherty & Fisher 2008, p. 216.

binding force than traditional law. There is a wide diversity in the instruments which are called soft-law. Soft law instruments range from non-binding resolutions or codes of conduct, to statements which purport to lay down international principles but can be set up by individuals in a non-governmental capacity.⁴⁹ Soft law can be considered a self-contained regime which depends on the parties' intentions. Soft law can indicate that the instrument or provision in question is not on itself 'law', but a document does not need to constitute a binding treaty before it can exercise an influence in international politics. A document can show its importance in the general framework of international legal development. The use of such documents may ultimately be converted into legally binding rules, as they are important but do not in themselves constitute legal norms.⁵⁰ Soft law can be distinguished from hard law. Examples of hard law are treaties, conventions, covenants, customary law (which needs state practice and *opinion juris*) and *ius cogens*. Examples of soft Law are declarations, resolutions, principles and recommendations. But not the title of the document decides whether it is soft or hard law, the intention of the parties involved does.⁵¹

If domestic and international practice will use soft law rules to guide their actions, a process of hardening into law can take place. General comments and recommendations of the monitoring bodies acquire an ever-growing weight and sometimes are seen as soft law.⁵² The declaration on sexual orientation and gender identity, focusing on human rights of people with diverse sexual orientation and gender identity of 2008, could not become a resolution because there was not enough overall support and therefore became a declaration. A declaration has not the same legal status as a resolution, resolutions are often referred to as being soft law. The declaration on sexual orientation and gender identity has similar intentions as the Yogyakarta Principles, a separate document to prohibit human rights violations on the basis of sexual orientation and gender identity, based on existing and recognized human rights norms in international law. The fact that it did not have overall support in the UN was visible by the alternative declaration. Therefore it can be questioned whether this document, the declaration in support of the human rights of all people, regardless of sexual orientation or gender identity, is soft law. If this depends on the

⁴⁹ Chinkin 1989, p. 851.

⁵⁰ Hillgenberg 1999, p. 499.

⁵¹ Shaw 2003, p. 111.

⁵² Tomuschat 2008, p. 39.

intention of all parties involved in the UN, it is not. Looking at the intentions of the parties involved it can only count for the countries that signed the declaration. International law depends on states which are sovereign to decide whether they want to be bound by specific international agreements.

The Yogyakarta Principles also cannot be considered soft law in international law as a document on itself, because of the fact that not all countries agree with the intention to address human rights violations on the basis of sexual orientation and gender identity. But the Yogyakarta Principles also reflect existing international human rights norms and reflects on the importance of these rights for people with diverse sexual orientation or gender identity. As has been indicated in the previous chapter on case law, the general comments and recommendations of treaty bodies have frequently paid attention to the human rights violations related to sexual orientation or gender identity. For example the Human Rights Committee raised the issue of discrimination on the basis of sexual orientation in 13 of 184 country reviews during 2000 and 2006. It criticised among other things the criminalisation of homosexual sexual relations, a failure to include the category in anti-discrimination legal regimes and the failure to prohibit employment-related discrimination. Sexual orientation is mentioned in the concluding observations of state reports of the CESCR and the CRC. Although concluding observations of state reports have a non-binding and flexible nature, it can express the concerns of the Committees with its specific recommendations.⁵³ Apart from that the Yogyakarta Principles have been used by states, in international organizations and in international law as guidelines how to deal with human rights violations related to sexual orientation and gender identity. A number of member and observer states have cited the Yogyakarta Principles in Human Rights Council proceedings. Within days of the launch of the Yogyakarta Principles in Geneva seven states referred to them and more than 30 states made positive interventions on sexual orientation and gender identity issues. The Dutch Minister of Foreign Affairs for example developed a new human rights strategy to be debated in parliament in which the Yogyakarta Principles are seen as a guideline. Also the Canadian, Uruguayan, Brazilian and Argentinean government made references to the Yogyakarta Principles. Czech Republic referred to the Yogyakarta Principles in a Council dialogue with the Special Rapporteur on Freedom of Expression. The Special Rapporteur on

⁵³ O'Flaherty & Fisher 2008, p. 215, 218.

the Right to Health argued in signing the Yogyakarta Principles in an official capacity that his position on the 'illegality of discrimination on the grounds of sexual orientation' was consistent with that taken by the High Commissioner for Human Rights and several Special Procedures. Eight of these Special Procedures had already endorsed the Principles officially.⁵⁴ Although the reference to and the use of the Yogyakarta Principles is still in the beginning phase and not broadly taken up by every state, because of the increasing use it can be argued that the Yogyakarta Principles are becoming soft law.

The rights in the Yogyakarta Principles are international human rights that have been adapted to the context of sexual orientation or gender identity. Also more specific and unique issues are raised, such as recognition before the law and the right to family life. However these are defined rather general and vague because of the fact that international law does not provide for these rights for non-heterosexual people, and will be mostly left to countries' margin of discretion. The *Toonen v Australia* decision in the Human Rights Committee has caused many states questioning their legislation on sexual orientation and gender identity. At the UN the monitoring bodies overall recognize the human rights related to people with diverse sexual orientation and gender identity, but the more political charter bodies, such as the Commission on Human Rights, show little progress considering discrimination on the basis of sexual orientation or gender identity.⁵⁵ Most countries are signatories to several human rights treaties or covenants, such as the ICCPR and the ICESCR. Basic human rights principles count for diverse sexual orientation and gender identities. What the Yogyakarta Principles have aimed for is not making new international law, but paying attention to a vulnerable group in society and point out that they have the same basic human rights.⁵⁶

Looking at the Yogyakarta Principles as a document that needs overall consensus, one could argue that the Yogyakarta Principles are not soft law. From another perspective they can be seen as soft law, since they are referred to by many countries and UN bodies. Also if we look at the Yogyakarta Principles in the light of prohibition of basic human rights violations, which

⁵⁴ O'Flaherty & Fisher 2008, p. 243

⁵⁵ Sanders 2002, p.14.

⁵⁶ Gross 2008, p.250.

are recognized in international treaties and covenants by most UN countries, we can consider the Principles soft law . Most countries have signed human rights agreements so have underlined the prohibition of human rights violations, also on the basis of sexual orientation and gender identity. Looking at the General Comments and recommendations of monitoring bodies we see the importance of addressing human rights violations on the basis of sexual orientation and gender identity. The importance of a separate document for this group have been highlighted by different actors in international law. The Yogyakarta Principles apply existing human rights law to a specific group and do not create new rights. From that perspective one could argue that the document is soft law.

6. Conclusion:

One could argue that the Yogyakarta Principles are soft law, for its already existing norms in international law, and because violations on the basis of sexual orientation and gender identity are addressed in cases of the ICCPR, by international human rights monitoring bodies and by states. Other than that the document itself is also used in the international human rights debate, for example by states and by Special Procedures to use as a guidance in their human rights policy. But the document is rather new and therefore not broadly known, and its focus on sexual orientation and gender identity is not overall recognized; for that reason one could question to what extent the Yogyakarta Principles are soft law.

In international human rights related to sexual orientation and gender identity a tension is visible between the right to have a different sexual orientation or gender identity and human rights violations based on sexual orientation or gender identity. Rights related to sexual orientation are not general state practice and from that perspective could not be considered soft law. But the Yogyakarta Principles could also not be seen in the nature of a statement de “*lege ferenda*”, prescribing or the way law should develop, since they reflect existing international human rights norms. Since it is based on existing law, it can rather be called “*lex lata*”, the law as it exists. The Yogyakarta Principles document itself cannot be considered soft law in international human rights law because it has no overall support by all UN member states. But human rights violations, also on the basis of sexual orientation and gender identity, are prohibited in international law. The focus on human rights violations on

the basis of sexual orientation and gender identity is recognized and used by several UN human rights instruments, and by several countries. Therefore the Yogyakarta Principles are gaining legitimacy and because more attention is given to the document it is becoming more influential.

International law only exists when there is a consensus reached between countries, but not necessarily all countries. When it concerns the rights of diverse sexual orientation or gender identity this is not agreed upon by all countries. But there is a consensus concerning basic human rights. No one is excluded from these basic international human rights norms, reflected in several international treaties, conventions and declarations. During the last decades the rights of LGBTI (Lesbian, Gay, Bisexual, Transgender and Intersex) people have developed. The Yogyakarta Principles have focused on this group by using existing international human rights norms. Although the document of the Yogyakarta Principles in itself may not be overall accepted and recognized, the international human rights that are highlighted in the document are. The Yogyakarta Principles in itself do not provide new international legal rules but focus on a vulnerable group in society and the fact that the same human rights norms count for this group. By invoking the existing international human rights norms states cannot be against these Principles since they are parties to several other international human rights documents. Since the term soft law is not strictly defined it cannot be put with certainty that the Yogyakarta Principles are soft law, but they do indicate the ever growing attention for human rights violations on the basis of sexual orientation and gender identity.

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