

# Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles

Michael O'Flaherty\* and John Fisher\*\*

## Abstract

On 26 March 2007, a group of human rights experts launched the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity (the Yogyakarta Principles). The Principles are intended as 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. Since their launch the Principles have attracted considerable attention on the part of States, United Nations actors and civil society. It is likely that they will play a significant role within advocacy efforts and, whether directly or otherwise, in normative and jurisprudential development. The present article constitutes the first published critical commentary on the Principles. It seeks to situate them within the contexts of (a) the actual situation of people of diverse sexual orientations and gender identities, and (b) the applicable international human rights law as it stands today. Thus situated, the Yogyakarta drafting process and the outcome text are examined. The final section of the article comprises a preliminary review of the impact and dissemination of the Principles.

\* Professor of Applied Human Rights and Co-director of the Human Rights Law Centre, School of Law, University of Nottingham; Member of the Human Rights Committee and Rapporteur for the development of the Yogyakarta Principles (michael.oflaherty@nottingham.ac.uk).

\*\* Co-director of ARC International, a non-governmental organisation that advances recognition of sexual orientation and gender identity issues at the international level (john@arc-international.net). The authors express appreciation to Caroline Przybylla for her assistance with the referencing of this article.

## 1. Introduction

Worldwide, people are subject to persistent human rights violations because of their actual or perceived sexual orientation and gender identity. These human rights violations take many forms, from denials of the rights to life, freedom from torture, and security of the person, to discrimination in accessing economic, social and cultural rights such as health, housing, education and the right to work, from non-recognition of personal and family relationships to pervasive interferences with personal dignity, suppression of diverse sexual identities, attempts to impose heterosexual norms, and pressure to remain silent and invisible.

At least seven countries maintain the death penalty for consensual same-sex practices,<sup>1</sup> and numerous reports have documented persons killed or sentenced to death because of their sexual orientation or gender identity,<sup>2</sup> including a gay man sprayed with gasoline and set on fire in Belgium, the murder of a transgender human rights defender in Argentina, a nail bomb explosion in a gay bar in the United Kingdom, killing three people and injuring dozens of others, the murder of a gay rights activist by multiple knife wounds in Jamaica, prompting a crowd to gather outside his home, laughing and calling out 'let's get them one at a time', and the recent execution-style murder of two lesbian human rights defenders in South Africa. Often killings based on sexual orientation or gender identity are perpetrated 'by agents of the State, and their murders go unpunished. Indeed no prosecution is ever brought'.<sup>3</sup>

In a recent report,<sup>4</sup> Amnesty International documents serious patterns of police misconduct directed against individuals in the United States because of

1 Those states are Iran, Mauritania, Saudi Arabia, Sudan, United Arab Emirates, Yemen and Nigeria (the death penalty applies in 12 Northern provinces). See Ottoson, 'State-Sponsored Homophobia. A World Survey of Laws Prohibiting Same Sex Activity between Consenting Adults', International Lesbian and Gay Association (ILGA), April 2007; and International Lesbian and Gay Association, 'World Day against Death Penalty: 7 Countries Still Put People to Death for Same-Sex Acts', Press Release, 10 October 2007.

2 See Amnesty International, 'Crimes of Hate, Conspiracy of Silence. Torture and Ill-Treatment Based on Sexual Identity', AI Index ACT 40/016/2001, August 2001 at 21; Human Rights Watch, 'In a Time of Torture. The Assault on Justice in Egypt's Crackdown on Homosexual Conduct', 1 March 2004, available at: <http://hrw.org/reports/2004/egypt0304/> [last accessed 15 February 2008]; Human Rights Watch, 'Hated to Death: Homophobia, Violence and Jamaica's HIV/AIDS Epidemic', November 2004, available at: <http://hrw.org/reports/2004/jamaica1104/jamaica1104.pdf> [last accessed 15 February 2008]; and Human Rights Watch, 'More Than a Name. State-Sponsored Homophobia and its Consequences in South Africa', 1 January 2003, available at: <http://www.hrw.org/reports/pdfs/g/general/safriglhr0303.pdf> [last accessed 15 February 2008]. See also International Commission of Jurists, 'Sexual Orientation and Gender Identity in Human Rights Law. References to Jurisprudence and Doctrine of the United Nations Human Rights System', November 2007 at 87–106.

3 Statement by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Human Rights Council, 19 September 2006, available at: <http://www.extrajudicial-executions.org/reports/dialogues/hrc.second.session/texts/Alston.pdf> [last accessed 15 February 2008].

4 Amnesty International, 'Stonewalled: Police Abuse and Misconduct against Lesbian, Gay, Bisexual and Transgender People in the US', AI Index AMR 51/122/2005, September 2005.

their sexual orientation or gender identity, including profiling of such individuals as criminal, selective enforcement of laws, sexual, physical and verbal abuse, failure to respond or inadequate responses by the police to hate crimes and violence, as well as to situations of domestic violence that involve same-sex partners, inappropriate searches and mistreatment in detention and a lack of accountability for perpetrators.

Those who transgress gender norms are particularly likely to be targeted for violence. The organisation 'Transgender Day of Remembrance' estimates that one transgender person is killed every month in the US.<sup>5</sup> In Nepal, *métis* (people born as men who identify as women) have been beaten by police with batons, gun butts and sticks, burnt with cigarettes and forced to perform oral sex.<sup>6</sup>

Transgender people are 'often subjected to violence . . . in order to "punish" them for transgressing gender barriers or for challenging predominant conceptions of gender roles,'<sup>7</sup> and transgender youth have been described as 'among the most vulnerable and marginalized young people in society.'<sup>8</sup> As one Canadian report underlines:

The notion that there are two and only two genders is one of the most basic ideas in our binary Western way of thinking. Transgender people challenge our very understanding of the world. And we make them pay the cost of our confusion by their suffering.<sup>9</sup>

Violations directed against lesbians because of their sex are often inseparable from violations directed against them because of their sexual orientation.<sup>10</sup> Community restrictions on women's sexuality result in a range of human rights violations, such as the multiple rape of a lesbian in Zimbabwe, arranged by her own family in an attempt to 'cure' her of her homosexuality.<sup>11</sup>

available at: <http://www.amnestyusa.org/outfront/stonewalled/report.pdf> [last accessed 15 February 2008].

- 5 Transgender Day of Remembrance, 'About the Day of Remembrance', available at: <http://www.gender.org/remember/day/what.html> [last accessed 15 February 2008].
- 6 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 'Summary of Information, Including Individual Cases, Transmitted to Governments and Replies Received', Commission on Human Rights, 21 March 2006, E/CN.4/2006/6/Add.1 at paras 180 and 183.
- 7 Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN General Assembly, 3 July 2001, A/56/156 at para. 17.
- 8 Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Commission on Human Rights, 5 January 2004, E/CN.4/2004/9 at para. 123.
- 9 Findlay, as cited in Egale Canada Human Rights Trust, 'Outlaws & In-laws: Your Guide to LGBT Rights, Same-Sex Relationships and Canadian Law' (2003) at 46.
- 10 See generally, Rothschild, 'Written Out: How Sexuality is Used to Attack Women's Organizing', International Gay and Lesbian Human Rights Commission and the Center for Women's Global Leadership (2005); and Saiz, 'Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN', (2004) 7 *Health and Human Rights* 2 at 64–6.
- 11 Report of the Special Rapporteur on violence against women, its causes and consequences, Commission on Human Rights, 31 January 2002, E/CN.4/2002/83 at para. 102; Report of the

The Institute for Democracy in South Africa has reported that lesbians face violence twice as frequently as heterosexual women, and are at increased risk of being raped precisely because of their sexual orientation, often by someone they know.<sup>12</sup> According to the Institute, the reason most frequently cited for rape of lesbians was that the man needed to ‘show her’ she was a woman.<sup>13</sup>

The linkages between violence based on sex, sexual orientation, gender identity and gender expression are illustrated by a recent case in which a teenager in Dublin attacked a woman he mistook for a gay man because of her hairstyle. Approaching the woman and her male companion with the inquiry ‘are you two gay guys?’ he proceeded to strike the couple, knocking them to the ground, before kicking the woman in the back and stomach, and jumping on the man’s back.<sup>14</sup>

More than 80 countries still maintain laws that make same-sex consensual relations between adults a criminal offence.<sup>15</sup> Recently, such laws were used in Morocco to convict six men, after allegations that a private party they had attended was a ‘gay marriage’,<sup>16</sup> and in Cameroon 11 men were arrested in a bar believed to have a gay clientele in May 2005, and sent to prison where they spent more than a year, and a further six men were arrested on 19 July 2007, after a young man who had been arrested on theft charges was coerced by police into naming associates who were presumed to be homosexual.<sup>17</sup> In other countries, laws against ‘public scandals’, ‘immorality’ or ‘indecent behaviour’ are used to penalise people for looking, dressing or behaving differently from enforced social norms.<sup>18</sup> Even where criminal sanctions against homosexuality or ‘immorality’ are not actively enforced, such laws can be used to arbitrarily harass or detain persons of diverse sexual orientations and gender

Special Rapporteur on violence against women, its causes and consequences, Commission on Human Rights, 12 February 1997, E/CN.4/1997/47 at para. 8. See also, Report of the Special Rapporteur on violence against women, its causes and consequences, ‘Intersections between culture and violence against women’, Human Rights Council, 17 January 2007, A/HRC/4/34.

12 Graham and Kiguwa, ‘Experiences of Black LGBTI Youth in Peri-Urban Communities in South Africa’, Community Media for Development (CMFD) and the Institute for Democracy in South Africa (IDASA), 2004, at 15.

13 Ibid. at 5.

14 Tuite, ‘Teen Attacked Couple he had Mistaken for Two Gay Men’, *Irish Independent*, 10 January 2008.

15 Ottoson, supra n. 1.

16 Amnesty International, ‘Morocco/Western Sahara: Drop Charges of Homosexuality against Six Men and Ensure their Safety’, Press Release, 16 January 2008.

17 Opinions adopted by the Working Group on Arbitrary Detention, ‘Opinion No. 22/2006 (Cameroon)’, Human Rights Council, 2 February 2007, A/HRC/4/40/Add.1 at 91. Johnson, ‘Arbitrary Arrests and Detention of Men in Cameroon on Charges Related to Sexual Orientation and Gender Identity’, International Gay and Lesbian Human Rights Commission (IGLHRC), 11 September 2007.

18 See, for example, Human Rights Watch, ‘Kuwait: Repressive Dress-Code Law Encourages Police Abuse. Arrests Target Transgender People’, Press Release, 17 January 2008, available at: <http://hrw.org/english/docs/2008/01/17/kuwait17800.htm> [last accessed 15 February 2008].

identities, to impede the activities of safer sex advocates or counsellors, or as a pretext for discrimination in employment or accommodation.<sup>19</sup>

Those seeking to peaceably affirm diverse sexual orientations or gender identities have also experienced violence and discrimination. Participants in an Equality March in Poland, for example, faced harassment and intimidation by police as well as by extremist nationalists who shouted comments such as 'Let's get the fags', and 'We'll do to you what Hitler did with Jews',<sup>20</sup> and attempted suppression of Pride events has been documented in at least 10 instances in Eastern Europe.<sup>21</sup> State interference with such exercise of the freedoms of expression, assembly and association have included banning of Pride marches, conferences and events, condemnatory anti-homosexual comments by political representatives, police failure to protect participants from violence or complicity in such violence, and discriminatory or arbitrary arrests of peaceful participants.<sup>22</sup>

Discrimination in accessing economic, social and cultural rights has been widely documented. People have been denied employment, employment-related benefits or faced dismissal because of their sexual orientation or gender identity.<sup>23</sup> In the context of the right to adequate housing, lesbian and transgender women have been found to be at increased risk of homelessness, discrimination based on sexual orientation or gender identity in renting accommodations has been experienced both by individuals and same-sex couples, and persons have been forced from their homes and communities when their sexual orientation or gender identity has become known.<sup>24</sup> Transgender persons may face particular obstacles in seeking to access gender-appropriate services within

- 19 Voices against 377, 'Rights for All: Ending Discrimination against Queer Desire under Section 377', 2004, available at: <http://files.creaworld.org/files/Voices.Report.English.pdf> [last accessed 15 February 2008].
- 20 Report by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Commission on Human Rights, 27 March 2006, E/CN.4/2006/16/Add.1 at para. 72.
- 21 ILGA-Europe, 'Prides against Prejudice. A Toolkit for Pride Organising in a Hostile Environment', September 2006, at 9, available at: <http://www.ilga-europe.org/europe/publications/non-periodical/prides.against.prejudice.a.toolkit.for.pride.organising.in.a.hostile.environment.september.2006> [last accessed 15 February 2008].
- 22 Report by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, supra n. 20 at paras 72–3.
- 23 See, for example, Abramowicz, 'Situation of Bisexual and Homosexual Persons in Poland', Campaign against Homophobia and Lambda Warsaw Association, Warsaw, 2007, at 20, available at: [www.kampania.org.pl/cms/data/upimages/report.homophobia.Poland.2007.EN.pdf](http://www.kampania.org.pl/cms/data/upimages/report.homophobia.Poland.2007.EN.pdf) [last accessed 15 February 2008]; Human Rights Watch, supra n. 2 at 209–11; *Egan v Canada* [1995] 2 SCR 513 at 600–1; International Gay and Lesbian Human Rights Commission (IGLHRC), 'Abuses of Freedom of Assembly, Association and Expression against Sexual Minorities in Indonesia', 2007 (addressing denials of the right to work to transgender persons); Report of the Secretary-General on integrating the human rights of women throughout the United Nations system, 10 January 2005, E/CN.4/2005/68 at para. 14, citing the Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, supra n. 8.
- 24 Report by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination, Commission on Human

homeless shelters.<sup>25</sup> 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.<sup>26</sup> In some countries, laws have prohibited the ‘promotion of homosexuality’ in schools.<sup>27</sup>

Multiple health-related human rights violations based on sexual orientation and gender identity have also been documented. Lesbian, gay, bisexual and transgender persons have been forcibly confined in medical institutions, and subject to ‘aversion therapy’, including electroshock treatment.<sup>28</sup> Criminal sanctions against homosexuality have had the effect of suppressing HIV/AIDS education and prevention programmes designed for men who have sex with men or persons of diverse sexual orientations or gender identities.<sup>29</sup> Transgender people report having been referred to by health professionals as

Rights, 27 February 2006, E/CN.4/2006/118 at para. 30; and Human Rights Watch, supra n. 2 at 52–5.

25 Amnesty International, supra n. 4 at 113.

26 Forum for the Empowerment of Women, ‘Dropping Out or Forced Out?: Young Black Lesbian Women and the Right to Education in South Africa’, ongoing documentation, 2007, submitted to the Office of the High Commissioner for Human Rights as part of an NGO submission in the Universal Periodic Review of South Africa; International Gay and Lesbian Human Rights Commission (IGLHRC), ‘Cameroon: Concerns of Arbitrary Arrest and Detentions, School Expulsions and Harassment of Gays and Lesbians in the Media’, December 2007; Human Rights Watch, ‘More Than a Name’, supra n. 2 at 107; Abramowicz, supra n. 23 at 51; Committee on the Rights of the Child, Report on the 28th Session, CRC/C/111, 2001, at para. 727; Report of the Special Rapporteur on the right to education, Commission on Human Rights, 8 February 2006, E/CN.4/2006/45 at para. 113; and Report of the Special Rapporteur on the right to education, Commission on Human Rights, 11 January 2001, E/CN.4/2001/52 at para. 75.

27 See for example Connolly, ‘Poland to Ban Schools from Discussing Homosexuality’, *The Guardian*, 20 March 2007. See also former section 28 of the UK Local Government Act 1988 which prohibited the promotion of homosexuality in schools. It was repealed on 21 June 2000 in Scotland, and on 18 November 2003 in the rest of the UK.

28 See Amnesty International, supra n. 2 at 21. Human Rights Watch, ‘Hated to Death’, supra n. 2; Human Rights Watch, ‘More Than a Name’, supra n. 2; Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, supra n. 7 at paras 17–25. Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, Commission on Human Rights, 23 December 2003, E/CN.4/2004/56 at para. 64.

29 *Toonen v Australia* (488/1992), CCPR/C/50/D/488/1992 (1994); 1–3 IHRR 97 (1994) at para. 8.5; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Commission on Human Rights, 16 February 2004, E/CN.4/2004/49 at para. 38; Narrain, ‘The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva’, (2004) 7 *Health and Human Rights* 2 at 152; Human Rights Watch, ‘Uganda: State Homophobia Threatens Health and Human Rights’, Press Release, 23 August 2007, available at: <http://hrw.org/english/docs/2007/08/22/uganda16729.htm> [last accessed 15 February 2008]; and Human Rights Watch, ‘More Than a Name’, supra n. 2 at 109.



'thing', 'it', or 'not a real man/woman'.<sup>30</sup> Intersex people have been subjected to involuntary surgeries in an attempt to 'correct' their genitals.<sup>31</sup>

In the health-sector and elsewhere, same-sex relationships are frequently unrecognised and devalued, with same-sex partners denied a broad range of entitlements available to heterosexuals, such as the right to make medical decisions for an incapacitated partner, to visit a partner or partner's child in hospital, to inherit property or be involved in funeral arrangements when a partner dies, to have equal pension benefits, file joint tax returns, obtain fair property settlement if a relationship ends, or be recognised as a partner for immigration purposes.<sup>32</sup>

Those who seek to advocate for an end to such violations or affirm the human rights of persons of diverse sexual orientations or gender identities are particularly at risk:<sup>33</sup>

Defenders [of the rights of lesbian, gay, bisexual, transgender and intersex persons (LGBTI)] have been threatened, had their houses and offices raided, they have been attacked, tortured, sexually abused, tormented by regular death threats and even killed. . . . In numerous cases from all regions, police or government officials are the alleged perpetrators of violence and threats against defenders of LGBTI rights. In several of these cases, the authorities have prohibited demonstrations, conferences and meetings, denied registration of organisations working for LGBTI rights and police officers have, allegedly, beaten up or even sexually abused these defenders of LGBTI rights.

Although less tangible, perhaps even more systemic and far-reaching in consequence is the net result of such endemic human rights violations: the constant fear in which many persons of diverse sexual orientations and gender identities have to live.<sup>34</sup> As one man arrested and subsequently tortured following a police raid of a gay discotheque in Egypt noted: 'I used to think being gay

30 See, for example, Coalition for Lesbian and Gay Rights in Ontario, 'Systems Failure: A Report on the Experiences of Sexual Minorities in Ontario's Health-Care and Social-Services Systems' (1997) at 48; and Canadian HIV/AIDS Legal Network/Canadian AIDS Society, 'Gay and Lesbian Legal Issues and HIV/AIDS: Final Report' (1998) at 86.

31 See Cabral, Statement to UN Commission on Human Rights, 61st session, Item 13: Rights of the Child, 14 March to 22 April 2005, available at: <http://www.ilga.org/news.results.asp?LanguageID=1&FileCategory=61&FileID=567> [last accessed 15 February 2008]; and Fact sheets of the Intersex Society of North America, available at <http://www.isna.org/faq/> [last accessed 15 February 2008].

32 See, for example, Human Rights and Equal Opportunities Commission, 'Same-Sex: Same Entitlements, National Inquiry into Discrimination against People in Same-Sex Relationships', Australia, 2007, available at: [www.humanrights.gov.au/humanrights/same-sex/index.html](http://www.humanrights.gov.au/humanrights/same-sex/index.html) [last accessed 15 February 2008].

33 Report of the Special Representative of the Secretary-General on human rights defenders, Human Rights Council, 24 January 2007, A/HRC/4/37 at paras 93–7.

34 See, for example, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *supra* n. 29 at para. 38; and Narrain, *supra* n. 29 at 148–50.

was just part of my life and now I know it means dark cells and beatings.’<sup>35</sup> Faced with obstacles to familial and social acceptance that may seem overwhelming, many lesbians, gays, bisexuals, transgender and intersex people remain invisible and isolated. The high rates of documented suicide by such people are consequently unsurprising.<sup>36</sup>

## 2. Review of Law and Jurisprudence

There is a growing jurisprudence and other law-related practice that identifies a significant application of human rights law with regard to people of diverse sexual orientations and gender identities. This phenomenon can be observed at the international level, principally in the form of practice related to the United Nations-sponsored human rights treaties, as well as under the European Convention on Human Rights. The development of this sexual orientation and gender identity-related human rights legal doctrine can be categorised as follows: (a) non-discrimination, (b) protection of privacy rights and, (c) the ensuring of other general human rights protection to all, regardless of sexual orientation or gender identity. In addition, it is useful to examine (d) some general trends in human rights law that have important implications for the enjoyment of human rights by people of diverse sexual orientations and gender identities.

### A. Non Discrimination

The practice of the bodies that monitor implementation of the United Nations-sponsored human rights treaties relates to sexual orientation-related discrimination rather than to discrimination on the basis of gender identity.

The Committee on Economic, Social and Cultural Rights (CESCR) has dealt with the matter in its General Comments, the interpretative texts it issues to explicate the full meaning of the provisions of the Covenant on Economic, Social and Cultural Rights. In General Comments Nos 18 of 2005 (on the right

35 As cited in Human Rights Watch, ‘In a Time of Torture’, *supra* n. 2.

36 Human Rights Watch, ‘More Than a Name’, *supra* n. 2 at 172–5; Kroll and Warneke, *The Dynamics of Sexual Orientation and Adolescent Suicide: A Comprehensive Review and Developmental Perspective* (Calgary: University of Calgary, 1995); Bagley and Tremblay, ‘Suicidal Behaviours in Homosexual and Bisexual Males’, in Bagley and Ramsay (eds), *Suicidal Behaviours in Adolescent and Adults: Taxonomy, Understanding and Prevention* (Brookfield, Vermont: Avebury, 1997); Quebec Human Rights Commission, ‘De l’illégalité à l’égalité: Rapport de la consultation publique sur la violence et la discrimination envers les gays et lesbiennes’, May 1994 at 125; and Alternative Law Forum, ‘Table of Lesbian Suicides’, submitted to the Office of the High Commissioner for Human Rights as Annexure D of Universal Periodic Review submissions on India, December 2007.



to work),<sup>37</sup> 15 of 2002 (on the right to water)<sup>38</sup> and 14 of 2000 (on the right to the highest attainable standard of health),<sup>39</sup> it has indicated that the Covenant 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 CESCR has consistently based this prohibition on the terms of the Covenant’s anti-discrimination provision, Article 2.2, which lists invidious categories of discrimination as including ‘sex’ and ‘other status’. Presumably, since the CESCR distinguishes ‘sex’ and ‘sexual orientation’ in its General Comments, it locates sexual orientation within the rubric of ‘other status’. The CESCR, in the General Comments, also invokes the article addressing equal rights of men and women, Article 3, as a basis for its prohibition of sexual orientation-related discrimination. This linkage of the categories of sex and sexual orientation-related discrimination is discussed subsequently in the context of the practice of the Human Rights Committee (HRC).

The Committee on the Rights of the Child (CRC) has also dealt with the issue in a General Comment. In its General Comment No. 4 of 2003,<sup>40</sup> 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’. The CRC thus appears to adopt the same approach as the CESCR in locating sexual orientation within the category of ‘other status’.

Both the CESCR and the CRC very occasionally raise issues of sexual orientation-related discrimination in the Concluding Observations they adopt on the periodic reports submitted to them by States parties on their record of implementation of the treaties (CESCR: regarding eight of the 70 States considered between 2000 and 2006, CRC: regarding five of the 186 States considered in the same period). These Concluding Observations have a non-binding and flexible nature. As such, they are not always a useful indicator of what a Committee may consider to be a matter of obligation under the Covenant. Nevertheless, where the Committee expresses concern or makes a specific recommendation for correction of a practice, we can discern that serious

37 Committee on Economic, Social and Cultural Rights, General Comment No. 18: The right to work, E/C.12/GC/18, 24 November 2005.

38 Committee on Economic, Social and Cultural Rights, General Comment No. 15: The right to water, E/C.12/2002/11, 26 November 2002.

39 Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, E/C.12/2000/4, 11 August 2000.

40 Committee on the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC/2003/4.

issues under the treaty are at issue.<sup>41</sup> It is in this context that we may observe the CESCR's regret, in 2005, that Hong Kong's anti-discrimination legislation failed to cover sexual orientation-related discrimination<sup>42</sup> and its concern, in 2000, that Kyrgyzstan classified lesbianism as a sexual offence in its penal code.<sup>43</sup>

The Committee on the Elimination of Discrimination against Women (CEDAW), notwithstanding that it has not addressed the matter in a General Comment or otherwise specified the applicable provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, on a number of occasions has criticised States for discrimination on the basis of sexual orientation. For example, it also addressed the situation in Kyrgyzstan and recommended that, 'lesbianism be reconceptualised as a sexual orientation and that penalties for its practice be abolished'.<sup>44</sup> The Committee on the Elimination of Racial Discrimination (CERD) appears never to have engaged with issues of discrimination against persons who belong to both racial and sexual minority groups. This gap is startling when one considers the authoritative evidence of such persons facing forms of 'double discrimination', as reported, for instance, by the UN Human Rights Council's Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.<sup>45</sup>

Issues of sexual orientation have received the most extensive attention in the work of the monitoring body under the International Covenant on Civil and Political Rights, the HRC. In the individual communication, *Toonen v Australia*, in 1994, it considered that, 'the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation'.<sup>46</sup> The HRC thus decided that sexual orientation-related discrimination is a suspect category in terms of the enjoyment of Covenant rights (Article 2) and, more generally, for equality before and equal protection of the law (Article 26). The HRC has persistently observed, however, that discrimination on the basis of sexual orientation, as is the case for all the other discrimination categories listed in Articles 2 and 26, is not inherently invidious, since 'not every distinction

41 O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies', (2006) 6 *Human Rights Law Review* 27.

42 Concluding Observations of the Committee on Economic, Social and Cultural Rights regarding the People's Republic of China (including Hong Kong and Macau), 13 May 2005, E/C.12/1/Add.107 at para. 78.

43 Concluding Observations of the Committee on Economic, Social and Cultural Rights regarding Kyrgyzstan, 1 September 2000, E/C.12/1/Add.49 at para. 17.

44 Concluding Observations of the Committee on the Elimination of Discrimination Against Women regarding Kyrgyzstan, 5 February 1999, A/54/38 at para. 128.

45 Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Commission on Human Rights, 28 February 2006, E/CN.4/2006/16/Add.3 at para. 40.

46 *Toonen v Australia*, supra n. 29 at para. 8.7.

amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria.<sup>47</sup>

The HRC, in individual communications subsequent to *Toonen*, while re-affirming the scope of the Article 2.1 and 26 provisions to embrace sexual-orientation-related discrimination, has avoided specifying that this is by means of a reading of the term 'sex', albeit an individual concurring opinion of two HRC members in the case of *Joslin v New Zealand*, in 2002, categorically states that, 'it is the established view of the Committee that the prohibition against discrimination on grounds of "sex" in article 26 comprises also discrimination based on sexual orientation'.<sup>48</sup> The apparent reliance on the 'sex' category has been criticised by the European Court of Justice,<sup>49</sup> on the basis that matters of sexual orientation are substantively different from binary men/women issues which the category of 'sex' is often perceived to address. However, in support of the HRC's approach it may be recalled<sup>50</sup> that much discrimination based on sexual orientation or gender identity is directed against those who violate social or cultural conceptions of gender. Also, taking account of how sexual discrimination has an elevated status in the Covenant, being addressed also in Article 3, the reliance on the 'sex' category appears to elevate the suspect nature of sexual orientation-related discrimination to a higher level than that of the other listed categories. Perhaps it is with considerations such as these in mind that Jack Donnelly described the HRC's approach as 'radical and provocative'.<sup>51</sup> The approach adopted by the HRC has the additional merit of avoiding an invocation of the category of 'other status' in the absence of clearly established criteria for when a non-specified form of discrimination can be so designated.

A small number of cases have illustrated the HRC's application of its non-discrimination doctrine. In *Young v Australia*<sup>52</sup> and *X v Colombia*<sup>53</sup> the HRC impugned a distinction made in law between same-sex partners who were excluded from pension benefits, and unmarried heterosexual partners who were granted such benefits. In *Joslin* the denial of the right to marry to same-sex couples was considered not to constitute a violation of Article 26. However, an individual concurring opinion of two members observed that the authors had not sought to identify any difference in treatment arising from their inability to marry and, 'the Committee's jurisprudence supports the

47 *Young v Australia* (941/2000), CCPR/C/78/D/941/2000 (2003) at para. 10.4.

48 *Joslin v New Zealand* (902/1999), CCPR/C/75/D/902/1999 (2003); 10 IHRR 40 (2003).

49 *Grant v South West Trains Ltd* C-249/96 [1998] ECR I-621; (1998) 1 CMLR 993.

50 See discussion in the above *Situational Analysis* section of this article on the linkages between violations based on sex, sexual orientation, gender identity and gender expression.

51 Donnelly, 'Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime' in Baehr et al. (eds), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999).

52 *Young v Australia*, supra n. 47.

53 *X v Colombia* (1361/2005), CCPR/C/89/D/1361/2005 (2007).

position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination.<sup>54</sup>

The breadth of the application of the HRC approach is best seen in its practice under the report review procedure. HRC frequently raises the issue of discrimination on the basis of sexual orientation: during the period 2000–06, it did so regarding 13 of the 84 countries under review. It criticised the criminalisation of homosexual sexual relations (multiple countries),<sup>55</sup> a failure to prohibit employment-related discrimination,<sup>56</sup> failure to include the category of sexual orientation in broad anti-discrimination legal regimes (multiple countries),<sup>57</sup> a lack of education programmes to combat discriminatory attitudes<sup>58</sup> and unequal ages of consent for sexual activity.<sup>59</sup>

At the regional level, the European Court of Human Rights (ECtHR) has been invited to consider issues of discrimination with regard to both sexual orientation and gender identity. The ECtHR, while reiterating that the non-discrimination provision of the European Convention on Human Rights (ECHR), Article 14, unlike Article 26 of the International Covenant on Civil and Political Rights, does not erect an autonomous anti-discrimination provision, but rather one that can only be applied in conjunction with a substantive provision of the ECHR (albeit it embraces those additional rights, falling within the general scope of any ECHR article, for which a State has voluntarily decided to provide),<sup>60</sup> has consistently stated that differences based on sex and sexual orientation must 'have particularly serious reasons by way of justification'.<sup>61</sup> And the ECtHR, and the former European Human Rights Commission, have not been concerned to identify whether the identification

54 *Joslin v New Zealand*, supra n. 48.

55 See, for example, Concluding Observations of the Human Rights Committee regarding Egypt, 28 November 2002, CCPR/CO/76/EGY at para. 19; and Concluding Observations of the Human Rights Committee regarding Kenya, CCPR/CO/83/KEN, 29 April 2005 at para. 27.

56 Concluding Observations of the Human Rights Committee regarding the United States of America, 18 December 2006, CCPR/C/USA/CO/3/Rev.1 at para. 25.

57 See, for example, Concluding Observations of the Human Rights Committee regarding Trinidad and Tobago, 3 November 2000, CCPR/CO/70/TTO at para. 11; Concluding Observations of the Human Rights Committee regarding El Salvador, 22 July 2003, CCPR/CO/78/SLV at para. 16; Concluding Observations of the Human Rights Committee regarding the Philippines, 1 December 2003, CCPR/CO/79/PHL at para. 18; Concluding Observations of the Human Rights Committee regarding Namibia, 30 July 2004, CCPR/CO/81/NAM at para. 22; and Concluding Observations of the Human Rights Committee regarding Poland, 2 December 2004, CCPR/CO/82/POL at para. 18.

58 Concluding Observations of the Human Rights Committee regarding the Philippines, *ibid.* at para. 18.

59 Concluding Observations of the Human Rights Committee regarding Austria, 19 November 1998, CCPR/C/79/Add.103 at para. 13.

60 See *Case relating to certain aspects of the laws on the use of languages in education in Belgium (Belgian Linguistics case) (No. 2) A 6 (1968); (1979–80) 1 EHRR 252* at para. 9; *Abdulaziz, Cabales and Balkandali v United Kingdom A 94 (1985); (1985) 7 EHRR 471* at para. 78; and *Steck and Others v United Kingdom (2005) 41 EHRR SE 18*. Compare Protocol No. 12 to the ECHR, ETS No. 117, which entered into force on 1 April 2005 and creates a free-standing right to non-discrimination.

61 *Karner v Austria 2003-IX 199; (2003) 38 EHRR 24*.

of such forms of suspect discrimination derives from the categories of 'sex', 'other status' or otherwise.<sup>62</sup>

In *Salgueiro da Silva Mouta v Portugal* the ECtHR held that a judge's denial of child custody to a homosexual father on the grounds of his sexual orientation created a discriminatory enjoyment of privacy.<sup>63</sup> In *Karner v Austria* the ECtHR was of the view that the failure of Austria to permit a homosexual man to continue occupying his deceased partner's flat was discriminatory, since this right, enjoyed by other family members under Austrian law, did not apply to same-sex partners. Although the government claimed that excluding homosexuals aimed to protect 'the family in the traditional sense', the ECtHR held Austria had not demonstrated how the exclusion was necessary to that aim.<sup>64</sup> In *L. and V. v Austria*<sup>65</sup> and *S.L. v Austria*<sup>66</sup> the ECtHR considered that Austria's differing age of consent for heterosexual and homosexual relations was discriminatory; it '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'.<sup>67</sup>

One instance in which a discrimination-based claim failed was that in *Fretté v France*. In this case a homosexual man argued that a refusal to allow him to adopt a child for reasons of his sexual orientation constituted a violation of the ECHR.<sup>68</sup> In finding against him, the ECtHR referred 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 judgment is problematic. The reasoning is inconsistent and 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 rights of the child, especially its best interests, always being paramount. Issues such as these were handled in a more consistent and comprehensible manner in the very recent decision in *E.B. v France*. The ECtHR, while assiduously 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'.<sup>69</sup>

It is unclear how far a non-discrimination approach can go in terms of the regulation of practices of non-state actors, not least since the existing

62 *Sutherland v United Kingdom* Application No. 25186/94, Report of 1 July 1997 at para. 50.

63 *Salgueiro da Silva Mouta v Portugal* 1999-IX 309; (1999) 31 EHRR 1055.

64 *Karner v Austria*, supra n. 61 at paras 39–41.

65 *L. and V. v Austria* 2003-I 29; (2003) 36 EHRR 55.

66 *S.L. v Austria* 2003-I 71; (2003) 37 EHRR 39.

67 *L. and V. v Austria*, supra n. 65; and *S.L. v Austria*, *ibid.* at para. 44.

68 *Fretté v France* 2002-I 345; (2004) 38 EHRR 21.

69 *E.B. v France* Application No. 43546/02, Judgment of 22 January 2008 at para. 96.

jurisprudence and practice only addresses instances of discrimination that fall clearly within well established jurisprudential limits. Taking account of the extensive literature on the subject of the reach of anti-discrimination law into the private sphere, the applicable principles are well-articulated by Jack Donnelly: '[T]he internationally recognized human right to non-discrimination prohibits invidious public (or publicly supported or tolerated) discrimination that deprives target groups of the legitimate enjoyment of other rights. . . . Only when. . . social contacts systematically influence access to economic or political opportunities do they become a matter of legitimate state regulation.'<sup>70</sup>

### B. Protection of Privacy Rights

The first successful international human rights cases on issues of sexual orientation were taken under the ECHR and concerned the privacy of same-sex sexual relations. In *Dudgeon v United Kingdom*<sup>71</sup> and *Norris v Ireland*,<sup>72</sup> the criminalisation of such practices was deemed a violation of the privacy protection in Article 8 of the ECHR. In *Modinos v Cyprus* the ECtHR again held that such a law violated the right to privacy, and maintained that even a 'consistent policy' of not bringing prosecutions under the law was no substitute for full repeal.<sup>73</sup> Privacy arguments were also successfully invoked in cases concerning a ban on recruitment to the military of homosexuals: *Smith and Grady v United Kingdom*<sup>74</sup> and *Lustig-Prean and Beckett v United Kingdom*.<sup>75</sup> The ECtHR has also recognised privacy protection under the ECHR for transsexual persons. In *Goodwin v United Kingdom*<sup>76</sup> and *I. v United Kingdom*<sup>77</sup> it considered the cases of two transsexual women who claimed that the United Kingdom's refusal to change their legal identities and papers to match their post-operative genders constituted discrimination. Reversing a number of its previous decisions, the ECtHR held that their right to respect for their private lives, and also their right to marry, had been violated (Articles 8 and 12 of the ECHR). In *Van Kück v Germany*<sup>78</sup> the ECtHR considered the case of a transsexual woman whose health-insurance company had denied her reimbursement for costs associated with sex-reassignment surgery and who had unsuccessfully sought redress in the domestic courts. It found violations of the right to a fair hearing (Article 6(1) of the ECHR) and of the right to private life, holding that the German civil courts had failed to respect 'the applicant's freedom to define

70 Donnelly, supra n. 51.

71 *Dudgeon v UK* A 45 (1981); (1982) 4 EHRR 149.

72 *Norris v Ireland* A 142 (1988); (1988) 13 EHRR 186.

73 *Modinos v Cyprus* A 259 (1993); (1993) 16 EHRR 485.

74 *Smith and Grady v United Kingdom* 1999-VI 45; (1999) 29 EHRR 493.

75 *Lustig-Prean and Beckett v United Kingdom* (1999) 29 EHRR 548.

76 *Goodwin v United Kingdom* (2002) 35 EHRR 18.

77 *I. v United Kingdom* (2003) 36 EHRR 53.

78 *Van Kück v Germany* 2003-VII 1; (2003) 37 EHRR 51.



herself as a female person, one of the most basic essentials of self-determination'. In a powerful statement of the entitlement to an autonomous gender identity the ECtHR spoke of 'the very essence of the ECHR being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security'.<sup>79</sup> In *L. v Lithuania*, the ECtHR considered that the State was required to legislate for the provision of full gender-reassignment surgery whereby a person in the 'limbo' of partial reassignment could complete the process and be registered with the new gender identity.<sup>80</sup>

The HRC, in *Toonen*, adopted the *Dudgeon/Norris* approach in finding a violation by Australia of Article 17 of the Covenant. It considered that a criminal prohibition on same-sex sexual activity, even if unenforced, constituted an unreasonable interference with Mr Toonen's privacy.<sup>81</sup> The HRC has not had the occasion since, in its consideration of individual cases, to address other applications of the right to privacy in the context of sexual orientation or gender identity. One possible opportunity, in *Joslin*, was missed since Ms Joslin was unsuccessful in arguing the primordial claim that Article 23 of the Covenant on marriage extended protection to same-sex relationships on the same basis as heterosexual relationships.<sup>82</sup> Nor has the HRC taken the opportunity to itself explore the range of applications of a privacy approach in the context of its review of periodic reports. Here it has addressed privacy rights exclusively in the context of the criminalisation of same-sex sexual activity (as is the case, also, in CESCR, CEDAW and CRC). Taking account of the relatively vigorous and wide-ranging engagement with privacy issues in the European context, this dearth of practice is notable. It may reflect unease with the issues on the part of the treaty bodies or a failure of civil society groups to bring situations of concern to their attention.

### *C. The Ensuring of Other General Human Rights Protection to All, Regardless of Sexual Orientation or Gender Identity*

In 2006, during the HRC's consideration of a periodic report, a representative of the State party, while replying to a question of a committee member on police violence against transsexuals,<sup>83</sup> observed that there was no mention of such people in the Covenant. The inference seemed to be that these people had a lesser entitlement to protection. Any such view is, of course, untenable. The HRC and the other treaty bodies, in the review of periodic reports, on a number of occasions, have insisted on the entitlement of people of diverse

79 Ibid. at para. 69.

80 *L. v Lithuania* Application No. 27527/03, Judgment of 11 September 2007.

81 *Toonen v Australia*, supra n. 29 at para. 8.2.

82 *Joslin v New Zealand*, supra n. 48 at paras 8.1–8.3.

83 The question had been put by the first author of the present article.

sexual orientations and gender identities to benefit from the protection of human rights of general application. The HRC has addressed various aspects: ‘violent crime perpetrated against persons of minority sexual orientation, including by law enforcement officials [and] the failure to address such crime in the legislation on hate crime’;<sup>84</sup> ‘[t]he State party should provide appropriate training to law enforcement and judicial officials in order to sensitive them to the rights of sexual minorities’;<sup>85</sup> ‘[t]he Committee expresses concern at the incidents of people being attacked, or even killed, on account of their sexual orientation (art.9), at the small number of investigations mounted into such illegal acts.’<sup>86</sup> The CRC has expressed concern that homosexual and transsexual young people ‘do not have access to the appropriate information, support and necessary protection to enable them to live their sexual orientation.’<sup>87</sup> The practice of the Committee Against Torture (CAT) is also notable. On a number of occasions it has expressed concern about the torture of homosexuals (for instance, Argentina<sup>88</sup> and Egypt<sup>89</sup>), and, in 2002, regarding, ‘complaints of threats and attacks against sexual minorities and transgender activists’ in Venezuela.<sup>90</sup>

The proceedings of the Special Procedures of the former UN Human Rights Commission and the current Human Rights Council constitute a 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 Working Group on Arbitrary Detention has frequently invoked *Toonen* as a basis for its finding of arbitrary detention of homosexuals. The Special Representative of the Secretary-General on the situation of human rights defenders has been assiduous in condemning the intimidation of and attacks on lesbian, gay, bisexual, transgender and intersex activists.<sup>91</sup> She has drawn attention to such human rights violations as arbitrary detention, torture, summary execution, arbitrary and unreasonable impediments to freedom of expression, movement, association and participation in political and public life.

84 Concluding Observations of the Human Rights Committee regarding the United States of America, *supra* n. 56.

85 Concluding Observations of the Human Rights Committee regarding Poland, *supra* n. 57 at para. 18.

86 Concluding Observations of the Human Rights Committee regarding El Salvador, *supra* n. 57 at para. 16.

87 Concluding Observations of the Committee on the Rights of the Child regarding the United Kingdom, 9 October 2002, CRC/C/15/Add.188 at para. 43.

88 Concluding Observations of the Committee against Torture regarding Argentina, 10 December 2004, CAT/C/CR/33/1 at para. 6(g).

89 Concluding Observations of the Committee against Torture regarding Egypt, 23 December 2002, CAT/C/CR/29/4 at para. 5(e).

90 Concluding Observations of the Committee against Torture regarding Venezuela, 23 December 2002, CAT/C/CR/29/2 at para. 10(d).

91 Report of the Special Representative of the Secretary-General on human rights defenders, Commission on Human Rights, 22 March 2006, E/CN.4/2006/95/Add.1 at para. 290.

The Special Representative has referred to the phenomenon of multiple victimisation, where already vulnerable people face heightened risk when promoting the rights of people of diverse sexual orientations and gender identities. In 2002, she reported about women human rights defenders as follows: 'women human rights defenders are paying a heavy toll for their work in protecting and promoting the human rights of others. ... For women human rights defenders standing up for human rights and the victims of human rights abuses – be they migrants, refugees, asylum-seekers or political activists, or simply people unwillingly relegated to the margins of society, such as ex-offenders and member of sexual minorities – can result in intimidation, harassment, unfair dismissal, death threats, torture and ill-treatment, and even death.'<sup>92</sup> A similar point was made by the Independent Expert on minority issues, who 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.'<sup>93</sup> The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, has drawn attention to problems within racial minority groups: '[b]lack homosexuals suffer from double discrimination, because of their colour and sexual orientation.'<sup>94</sup>

Among the other Special Procedures that have engaged with the issues are those on 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.

Those Special Procedures that address issues of economic, social and cultural rights have frequently drawn attention to the extent to which violations of these rights are at issue for people of diverse sexual orientations and gender identities. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has drawn wide-ranging consequences from his analysis of the state of international human rights law. For instance, 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

92 Report of the Special Representative of the Secretary-General on human rights defenders, Commission on Human Rights, 27 February 2002, E/CN.4/2002/106 at para. 83.

93 Report of the independent expert on minority issues, Commission on Human Rights, 6 January 2006, E/CN.4/2006/74 at paras 28 and 42.

94 Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, *supra* n. 45 at para. 40.

for the well-being and rights of others, without fear of persecution, denial of liberty or social interference.<sup>95</sup>

The regional level has also presented instances of attention by human rights mechanisms and procedures to sexual orientation and gender identity-related issues of the general application of human rights. For instance, country reports and follow-up reports of the Inter-American Commission on Human Rights have drawn attention to such violations as ‘social-cleansing’ (killing) of homosexuals and the treatment of lesbian prisoners.<sup>96</sup> The current Council of Europe Commissioner for Human Rights, Thomas Hammarberg, repeatedly addresses country-level sexual orientation-related concerns. His detailed and expansive treatment of such issues in a 2007 ‘memorandum’ to the Polish government is noteworthy.<sup>97</sup>

The question arises of when a generally stated human right is actually 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. The matter has been considered with regard to the right to marry. The HRC, in *Joslin*, stated that the ‘use of the term “men and women” rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2 of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other’.<sup>98</sup> It is less clear whether the Covenant recognises the rights of same-sex unmarried families. Article 23, paragraph 1 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 paragraph 2 do we find reference to the right of men and women to marry and found families. It does not follow, however, that Article 23 paragraph 2 restricts the meaning of the word ‘family’ in Article 23 paragraph 1, and in this regard it may be observed that in its General Comment No. 19, the HRC has acknowledged the existence of various forms of

95 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *supra* n. 34 at para. 54.

96 Annual report of the Inter-American Commission on Human Rights 2006, Chapter III C (1), OEA/Ser.L/V/II.127, Doc. 4 rev. 1, 3 March 2007, at para. 29; Fifth report on the situation of human rights in Guatemala, Chapter V (Right to Life), Inter-American Commission on Human Rights, OEA/Ser.L/V/II.111, Doc. 21 rev., 6 April 2001; Third report on the situation of human rights in Paraguay, Chapter VIII (Women’s rights), Inter-American Commission on Human Rights, OEA/Ser.L/V/II.110, Doc. 52, 9 March 2001, at paras 47–8; and Second report on the situation of Human Rights in Colombia, Chapter VII (Right to life), Inter-American Commission on Human Rights, OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993.

97 Memorandum to the Polish Government, Council of Europe Commissioner for Human Rights, CommDH(2007)13, 20 June 2007, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1155005&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679> [last accessed 15 February 2008].

98 *Joslin v New Zealand*, *supra* n. 48 at para. 8.2.

family.<sup>99</sup> The HRC has been willing to impugn State practices that impede same sex couples from benefiting from family-related benefits, such as transfer of pension entitlements (*Young* and *X*, referred to before). These cases, however, only addressed Article 26-based issues 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'.<sup>100</sup>

The ECtHR, in a number of cases, had held that marriage, for purposes of the ECHR is the union of two persons of the 'opposite biological sex'<sup>101</sup> but, in *Goodwin*, it indicated that the determination of sex cannot be undertaken with solely biological criteria, so that an individual who has had a sex change operation has a right to marry someone of the now opposite sex.<sup>102</sup> While not specifically addressing the issue of any distinction between families and marriages, the ECtHR has frequently indicated that homosexual stable relationships are not equivalent in rights to heterosexual relationships.<sup>103</sup> However, in the *Salgueiro da Silva Mouta* case, the ECtHR found a violation of the right to family life of a man in a homosexual relationship, albeit the family unit under consideration was that of the man and his daughter rather than that of him and his partner.<sup>104</sup> And, in *Goodwin*, the ECtHR was willing to interpret the term in Article 8 of the ECHR, 'the right of a man and a woman to marry' in a flexible manner taking account of changes in society.<sup>105</sup> It is beyond the scope of the present article to explore this issue further, other than to take account of the various other sources which lean towards flexible understanding of the term 'family',<sup>106</sup> as well as the increasing recognition by States of diversity of family forms, as reflected in the Declaration on the International Year of the Family.<sup>107</sup>

99 Human Rights Committee, General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses, HRI/GEN/1/Rev.1, 27 June 1990.

100 *X v Colombia*, supra n. 53.

101 See, for example, *Sheffield and Horsham v United Kingdom* (1999) 27 EHRR 163.

102 *Goodwin v United Kingdom*, supra n. 76 at para. 100.

103 See the citations and discussion in Walker, 'Moving Gaily Forward? Lesbian, Gay and Transgender Human Rights in Europe', (2001) 2 *Melbourne Journal of International Law* 122.

104 *Salgueiro da Silva Mouta v Portugal*, supra n. 63.

105 *Goodwin v United Kingdom*, supra n. 76 at paras 98–104.

106 See, for example, Committee on the Rights of the Child, Day of General Discussion on 'Children without Parental Care', 40th session, Geneva, 12–30 September 2005, CRC/C/153 at para. 644; *Minister of Home Affairs and another v Fourie and another*, South African Constitutional Court, Case CCT 60/04, 1 December 2005, at para. 101, available at: <http://news.findlaw.com/wp/docs/glrts/mhafourie120105.pdf> [last accessed 15 February 2008].

107 See GA Res. 44/82, International Year of the Family, 8 December 1989, A/RES/44/82, which in para. 3 refers to 'the main recommendations, objectives and principles for the observance of the Year, as contained in the comprehensive outline of a possible programme for the Year'. These principles stipulate that 'families assume diverse forms and functions among and within countries', see Report of the Secretary-General on the Observance of the International Year of the Family, UN General Assembly, 6 September 1995, A/50/370

**D. Some General Trends in Human Rights Law that Have Important Implications for the Enjoyment of Human Rights by People of Diverse Sexual Orientations and Gender Identities**

An examination of the human rights of people of diverse sexual orientations and gender identities would be incomplete without a brief reference to the evolving understanding of the duties that fall to States and the entitlements of the rights holder. Reference has already been made to those wide-ranging aspects of the human rights obligations that have been charted by the UN Special Procedures. Of more immediate normative significance are those recent General Comments of the United Nations human rights treaty bodies<sup>108</sup> that have emphasised that States are obliged to undertake effective programmes of education and public awareness about human rights and must otherwise seek to enable people to fully enjoy their entitlements. They must be assiduous in protecting rights, establishing appropriate monitoring and promotional institutions, as well as investigating and disciplining violations. Victims of human rights violations are entitled to redress and reparation and those who defend and promote human rights must be protected.

More generally, the programmatic implications of the duty that falls on States are being clarified within the context of the theory and practice of the human rights-based approaches to development (RBAD). The principal elements of the rights-based approach have been indicated in a statement of a common position of all of the UN agencies engaged in the work of human development, the Statement of Common Understanding, adopted at Stamford, Connecticut, USA (the Stamford Statement) in May 2003.<sup>109</sup> The Stamford Statement asserts that all programmes of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights (UDHR) and other international human rights instruments and that development co-operation contributes to the development of the capacity of 'duty-bearers'<sup>110</sup> to meet

at para. 14. See also: UN General Assembly, Celebration of the tenth anniversary of the International Year of the Family and beyond, 25 January 2005, A/RES/59/147 at preambulatory para. 2.

108 Human Rights Committee, General Comment No. 31: Nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004; Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States parties obligations, E/1991/23, 14 December 1990; Committee on Economic, Social and Cultural Rights, General Comment No. 9: The domestic application of the Covenant, E/C.12/1998/24, 3 December 1998; and Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27 November 2003.

109 Report of the Second Interagency Workshop on Implementing a Human Rights-Based Approach in the Context of UN Reform, Stamford, Connecticut, 5–7 May 2003, available at: [http://www.undg.org/archive.docs/4128-Human.Rights.Workshop.Stamford\\_FinalReport.doc](http://www.undg.org/archive.docs/4128-Human.Rights.Workshop.Stamford_FinalReport.doc) [last accessed 15 February 2008].

110 See O'Flaherty, 'Keynote address' to *Our Rights, Our Future: Human Rights Based Approaches in Ireland*, Amnesty International Conference, Dublin, 27 September 2005.



their obligations and/or of 'rights-holders' to claim their rights. The Statement identifies a number of elements which it considers as 'necessary, specific and unique to a RBAD:

- (i) Assessment and analysis in order to identify the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers<sup>111</sup> as well as the immediate, underlying, and structural causes of the non-realisation of rights.
- (ii) Programmes assess the capacity of rights-holders to claim their rights and of duty-bearers to fulfil their obligations. They then develop strategies to build these capacities.
- (iii) Programmes monitor and evaluate both outcomes and processes guided by human rights standards and principles.
- (iv) Programming is informed by the recommendations of international human rights bodies and mechanisms'.

Of most direct interest for the present discussion are the principles derived from human rights law which are identified as integral to a RBAD. These are described in the Stamford Statement to be: universality and inalienability; inter-dependence and inter-relatedness; non-discrimination and equality; participation and inclusion; and accountability and the rule of law.

This elaboration in General Comments as well as in RBAD theory of the nature of human rights entitlements and duties has obvious implications for the human rights of people of diverse sexual orientations and gender identities. They can, as a matter of right, demand that the promotion and protection of their rights be undertaken in a vigorous, consistent and comprehensive manner. They are entitled to have their welfare and well-being placed at the heart of the state's policy making and public programming. Moreover, they have the right to be participants in the elaboration and implementation of such policies and programmes. Indeed, one can, without hyperbole, refer as a matter of law to the human right of all persons, regardless of and in full respect for their sexual orientations and gender identities, to live honoured and dignified lives within society.

### **3. Impact of the Law and Jurisprudence for the Protection of the Human Rights of People of Diverse Sexual Orientations and Gender Identities**

Notwithstanding the extent to which applicable legal standards have been clarified and articulated, the response of States and intergovernmental organisations to human rights violations based on sexual orientation or gender

111 Ibid.

identity has been equivocal and inconsistent. The Special Representative of the Secretary General on human rights defenders has expressed concern at the ‘almost complete lack of seriousness’ with which human rights violations based on sexual orientation or gender identity are treated by the concerned authorities.<sup>112</sup> The High Commissioner for Human Rights has noted the ‘shameful silence’ surrounding such violations and the fact that ‘violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished.’<sup>113</sup> A number of States do not acknowledge that human rights violations based on sexual orientation or gender identity constitute legitimate areas of human rights concern. For example, a letter distributed to all State Missions in Geneva by Pakistan on behalf of the Organization of the Islamic Conference asserted that ‘sexual orientation is not a human rights issue.’<sup>114</sup> When criticised by the Special Rapporteur on extrajudicial executions for maintaining the death penalty for homosexuality,<sup>115</sup> Nigeria responded that ‘the death penalty by stoning under Shari’a law for unnatural sexual acts . . . should not be equated with extrajudicial killings, and indeed should not have featured in the report.’<sup>116</sup> Similarly, the United Republic of Tanzania opposed granting UN accreditation to non-governmental organisations (NGOs) working to address human rights violations based on sexual orientation, on the grounds that such matters were ‘not relevant to our work.’<sup>117</sup>

NGOs working on issues of sexual orientation and gender identity have faced challenges to their participation in UN activities. At the UN General Assembly Special Session on HIV/AIDS in June 2001, a representative of the International Gay and Lesbian Human Rights Commission had been chosen, along with other representatives from governments, NGOs and UN agencies, to participate in an official roundtable discussion on HIV/AIDS and human rights. Following objections from a number of States, she was excluded and

112 Report of the Special Representative of the Secretary-General on human rights defenders, *supra* n. 33 at para. 95.

113 Presentation of the United Nations High Commissioner for Human Rights Ms Louise Arbour to the International Conference on Lesbian, Gay, Bisexual and Transgender Rights, Montreal, 26 July 2006, available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/B91AE52651D33F0DC12571BE002F172C?opendocument> [last accessed 15 February 2008].

114 Letter from the Ambassador and Permanent Representative of the Permanent Mission of Pakistan, Geneva, 26 February 2004.

115 ARC International, ‘Recognizing Human Rights Violations Based on Sexual Orientation and Gender Identity at the Human Rights Council, Session 2’, 18 September – 6 October 2006, available at: <http://www.arc-international.net/HRC2report.html> [last accessed 15 February 2008].

116 *Ibid.*

117 See notes of meeting, ECOSOC, July 2006, on file with the second author of the present article. See also: United Nations Information Service. ‘Economic and Social Council Takes Action on Texts Concerning Consultative Status of Non-Governmental Organizations’, Press Release, ECOSOC/6231, 25 July 2006, available at: <http://www.unis.unvienna.org/unis/pressrels/2006/ecosoc6231.html> [last accessed 15 February 2008].

only allowed to take the floor after debate and vote in the General Assembly.<sup>118</sup> The same year, the International Lesbian and Gay Association, along with hundreds of other NGOs, sought accreditation to the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Following an objection by Malaysia on behalf of the Organization of the Islamic Conference, its accreditation was put to a vote, resulting in a 43–43 tie and the denial of accreditation.<sup>119</sup> The NGO Committee of the UN Economic and Social Council (ECOSOC) has persistently denied UN consultative status to NGOs working on issues of sexual orientation and gender identity, a decision seemingly inconsistent with an ECOSOC resolution requiring that the ‘full diversity of non-governmental organisations’ be taken into account when determining matters of accreditation.<sup>120</sup> Such status governs whether NGOs can participate in UN activities, including by accessing UN premises, attending international meetings, submitting written statements, making oral interventions and hosting parallel panel discussions. The plenary ECOSOC has reviewed and overturned these rejections,<sup>121</sup> although in subsequent meetings the NGO Committee has continued to defer or deny applications submitted by NGOs working on these issues, with the result that NGOs seeking to address matters of sexual orientation or gender identity must continue to fight for the recognition routinely granted to NGOs working on other issues.

States that have sought to promote the human rights of people of diverse sexual orientations and gender identities in international fora have also faced difficulties. When Brazil presented a resolution at the former UN Commission on Human Rights in 2003 condemning human rights violations based on sexual orientation, States opposed to consideration of the resolution brought a ‘no action’ motion in an attempt to prevent the Commission from considering the issue. When the motion was narrowly defeated, these States threatened to bring hundreds of amendments to the text, resulting in a decision by the Commission to defer the resolution until

118 Rothschild, *supra* n. 10 at 111–2; and Sanders, ‘Human Rights and Sexual Orientation in International Law’, 23 November 2004 at 23–5, available at: <http://www.ai-lgbt.org/resources.other.htm> [last accessed 15 February 2008].

119 Sanders, *ibid.* at 25.

120 ECOSOC Res. 1996/31, 25 July 1996 at preambulatory para. 4. See also GA Res. 60/251, 3 April 2006, establishing the Human Rights Council, which affirms the importance of NGO involvement in the work of the Council.

121 In 2006, the ECOSOC agreed to reject the application of the International Lesbian and Gay Association (ILGA), but overturned the denial of status to three other NGOs: Danish National Association for Gays and Lesbians, the Lesbian and Gay Federation in Germany and ILGA-Europe. In 2007, the ECOSOC overturned the denial of status, granting accreditation to the two applicant NGOs, Coalition gaie et lesbienne du Québec and the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights. See United Nations Information Service, ‘NGO Committee Recommends Three Organizations for Special Consultative Status with Economic and Social Council’, Press Release, ECOSOC/6254 NGO/615, 31 January 2007, available at: <http://www.un.org/News/Press/docs/2007/ecosoc6254.-doc.htm> [last accessed 15 February 2008].

its 2004 session.<sup>122</sup> At the 2004 session, Brazil was pressured to further defer consideration of the resolution, indicating in a press release that it had ‘not yet been able to arrive at a necessary consensus’.<sup>123</sup> A statement of the Chair was adopted, carrying the resolution over until 2005. In 2005, Brazil did not proceed with the resolution, which therefore lapsed on the Commission agenda.

Although ultimately not pursued, the Brazilian resolution on sexual orientation and human rights did raise States’ awareness of the issues, and mobilised NGOs from all regions to engage in UN processes.<sup>124</sup> When it became apparent that the resolution would not be discussed in 2005, New Zealand delivered a joint statement on sexual orientation and human rights on behalf of a cross-regional grouping of 32 States,<sup>125</sup> asserting that States ‘cannot ignore’ the evidence of human rights violations based on sexual orientation, and calling for the Commission to respond. By the December 2006 session of the Human Rights Council, support for a similar joint statement delivered by Norway had grown to 54 States, from four of the five UN regions.<sup>126</sup> This statement acknowledged that the Council had received extensive evidence of human rights violations based on sexual orientation and gender identity, commended the work of NGOs, Special Procedures and treaty bodies in this area, called upon all Special Procedures and treaty bodies to integrate consideration of human rights violations based on sexual orientation and gender identity within their relevant mandates, and urged the President of the Council to allocate time for a discussion of these issues at an appropriate future session. The Norwegian joint statement also represented the first time that ‘gender identity’ had been included in a UN statement.

Some recognition of these concerns had already been articulated in UN resolutions, although this has thus far been limited to resolutions addressing matters of extrajudicial executions and the death penalty, rather than the full range of human rights violations identified by the Special Procedures. The

122 Report on the 59th session, Commission on Human Rights, 17 March – 24 April 2003, E/CN.4/2003/135 at paras 575–85.

123 Press Release, Permanent Mission of Brazil to the United Nations, Geneva, 29 March 2004.

124 See, for instance, ILGA, ‘ICFTU, The International Confederation of Free Trade Unions Supports the Brazilian Resolution’, Press Release, 2 June 2004; African rapport, ‘Campaign in Support of the Brazilian Resolution 2005’, 6 February 2005. ILGA, in collaboration with other NGOs started a campaign in 2003 and 2004 to support the Brazilian resolution. For a summary of the activities, see ‘ILGA - Supporting the Brazilian resolution’, 4 June 2004, available at: <http://www.ilga.org/news.results.asp?LanguageID=1&FileCategory=44&ZoneID=7&FileID=151> [last accessed 15 February 2008].

125 Statement made by New Zealand on behalf of 32 States under agenda Item 17: Promotion and protection of human rights, Commission on Human Rights, 61st session, 14 March – 22 April 2005, available at: <http://www.mfat.govt.nz/Media-and-publications/Media/MEAT-speeches/2005/0-15-April-2005a.php> [last accessed 15 February 2008].

126 Norwegian joint statement on human rights violations based on sexual orientation and gender identity, Human Rights Council, 3rd session, Geneva, 1 December 2006, available at: <http://uklgig.org.uk/docs/Norwegian.Joint.Statement-UNHRC.06.doc> [last accessed 15 February 2008].

former Commission on Human Rights adopted a resolution on extrajudicial executions in each of 2000, 2002, 2003, 2004 and 2005, expressly affirming the obligation of States to 'protect the inherent right to life of all persons under their jurisdiction' and calling upon States to investigate promptly and thoroughly 'all cases of killings including those . . . committed for any discriminatory reason, including sexual orientation'.<sup>127</sup> 'Gender identity' was also included in a draft of this resolution in 2005, and received widespread support, representing the first time that language to explicitly protect the rights of transgender people has been presented in a UN forum, although the reference was removed from the text by sponsoring States before the resolution came to a vote in order to ensure adoption of the resolution. The resolution on the death penalty, adopted each year by the former Commission, recalled that the death penalty may not be imposed for any but the 'most serious crimes', and 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 . . . sexual relations between consenting adults'.<sup>128</sup>

Although, as already noted, a number of Special Procedures have consistently addressed relevant sexual orientation and gender identity issues falling within their mandate,<sup>129</sup> practice, overall, is inconsistent. During the Interactive Dialogue at the September 2006 session of the Human Rights Council, for example, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression indicated that the question of sexual orientation 'was not debated' when his mandate was created, and he appeared to believe he required more explicit authorisation before addressing human rights violations on this ground.<sup>130</sup> Similarly, although a number of the treaty bodies regularly address issues of sexual orientation and gender identity, and engage States in discussion of these issues during consideration of country reports, there is a great deal of room for them to integrate these issues more systematically within consideration of State reports, Concluding Observations and General Comments.

127 CHR Resolution, 20 April 2005, E/CN.4/RES/2005/34 at para. 5; CHR Resolution, 19 April 2004, E/CN.4/RES/2004/37 at para. 6; CHR Resolution, 24 April 2003, E/CN.4/RES/2003/53 at para. 5; CHR Resolution, 22 April 2002, E/CN.4/RES/2002/36 at para. 6; and CHR Resolution, 20 April 2000, E/CN.4/RES/2000/31 at para. 6.

128 CHR Resolution, 20 April 2005, E/CN.4/RES/2005/59 at para. 7(f); CHR Resolution, 21 April 2004, E/CN.4/RES/2004/67 at para. 4(f); CHR Resolution, 25 April 2003, E/CN.4/RES/2003/67 at para. 4(d); and CHR Resolution, 25 April 2002, E/CN.4/RES/2002/77 at para. 4(c).

129 See International Commission of Jurists, *supra* n. 2 at 48–156.

130 Statement of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Interactive Dialogue, Human Rights Council, 2nd session, 8 September – 6 October 2006.

#### 4. The Yogyakarta Process

The High Commissioner for Human Rights, Louise Arbour, has expressed concern about the inconsistency of approach in law and practice. In an address to a lesbian, gay, bisexual and transgender forum, she suggested that although the 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 of these rights in international law, '(i)t is precisely in this meeting between the normative work of States and the interpretive functions of international expert bodies that a common ground can begin to emerge'.<sup>131</sup> Furthermore, commentators have suggested that international practice could also benefit from the application of more consistent terminology to address issues of sexual orientation and gender identity.<sup>132</sup> While some Special Procedures, treaty bodies and States have preferred speaking of 'sexual orientation' or 'gender identity', others speak of 'lesbians', 'gays', 'transgender' or 'transsexual' people, and still others speak of 'sexual preference' or use the language of 'sexual minorities'. In addition, issues of gender identity have been little understood, with some mechanisms and States referencing transsexuality as a 'sexual orientation', and others frankly acknowledging that they do not understand the term.<sup>133</sup>

It is in this context of such diverse approaches, inconsistency, gaps and opportunities that the *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* (the Yogyakarta Principles)<sup>134</sup> were conceived. The proposal to develop the Yogyakarta Principles originated, in 2005, with a coalition of human rights NGOs that was subsequently facilitated by the International Service for Human Rights and the International Commission of Jurists. It was proposed that the Principles have a tri-partite function.<sup>135</sup> In the first place they should

131 Presentation of the United Nations High Commissioner for Human Rights Ms Louise Arbour to the International Conference on Lesbian, Gay, Bisexual, and Transgender Rights, Montreal, 26 July 2006, available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/B91AE52651D33F0DC12571BE002F172?opendocument> [last accessed 15 February 2008].

132 ARC International, 'A Place at the Table: Global Advocacy on Sexual Orientation and Gender Identity - And the International Response', November 2006.

133 See ARC International, 'Out at the UN: Advancing Human Rights Based on Sexual Orientation and Gender Identity at the 61st Session of the UN Commission on Human Rights', March – April 2005, available at: <http://www.rightsaustralia.org.au/data/ARC%20CHR%20Report%202005.pdf> [last accessed 15 February 2008].

134 Available at: [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm) [last accessed 15 February 2008]. See also International Commission of Jurists, *supra* n. 2; International Commission of Jurists, 'Sexual Orientation and Gender Identity in Human Rights Law. References to Jurisprudence and Doctrine of the Inter-American System', July 2007, available at: <http://www.icj.org/IMG/Inter-American.References.pdf> [last accessed 15 February 2008]; International Commission of Jurists, 'Sexual Orientation and Gender Identity in Human Rights Law, Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union', October 2007, available at: <http://www.icj.org/IMG/European.Compilation-web.pdf> [last accessed 15 February 2008].

135 Address of the Rapporteur at the launch event of the Principles, Geneva, March 2007.



constitute a 'mapping' of the experiences of human rights violations experienced by people of diverse sexual orientations and gender identities. This exercise should be as inclusive and wide ranging as possible, taking account of the distinct ways in which human rights violations may be experienced in different regions of the world. Second, the application of international human rights law to such experiences should be articulated in as clear and precise a manner as possible. Finally, the Principles should spell out in some detail the nature of the obligation on States for effective implementation of each of the human rights obligations.

Twenty-nine experts were invited to undertake the drafting of the Principles. They came from 25 countries representative of all geographic regions. They included one former UN High Commissioner for Human Rights (Mary Robinson, also a former head of state), 13 current or former UN human rights special mechanism office holders or treaty body members, two serving judges of domestic courts and a number of academics and activists. Seventeen of the experts were women.<sup>136</sup> The first of the present authors was one

136 The experts who adopted the Yogyakarta Principles are: *Philip Alston* (Australia), UN Special Rapporteur on extrajudicial, summary and arbitrary executions and Professor of Law, School of Law, New York University, United States of America; *Maxim Anmeghichean* (Moldova), European Region of the International Lesbian and Gay Association; *Mauro Cabral* (Argentina), Universidad Nacional de Cordoba, International Gay and Lesbian Human Rights Commission; *Edwin Cameron* (South Africa), Justice, Supreme Court of Appeal, Bloemfontein, South Africa; *Sonia Onufer Corrêa* (Brazil), Research Associate at the Brazilian Interdisciplinary AIDS Association (ABIA) and Co-chair of the International Working Group on Sexuality and Social Policy (Co-chair of the experts' meeting); *Yakin Ertürk* (Turkey), UN Special Rapporteur on violence against women, Professor, Department of Sociology, Middle East Technical University, Ankara, Turkey; *Elizabeth Evatt* (Australia), former Member and Chair of the UN Committee on the Elimination of Discrimination Against Women, former Member of the UN Human Rights Committee and Commissioner of the International Commission of Jurists; *Paul Hunt* (New Zealand), UN Special Rapporteur on the right to the highest attainable standard of health and Professor of Law, Department of Law, University of Essex, United Kingdom; *Asma Jahangir* (Pakistan), Chairperson, Human Rights Commission of Pakistan; *Maina Kiai* (Kenya), Chairperson, Kenya National Commission on Human Rights; *Miloon Kothari* (India), UN Special Rapporteur on the right to adequate housing; *Judith Mesquita* (United Kingdom), Senior Research Officer, Human Rights Centre, University of Essex, United Kingdom; *Alice M. Miller* (United States of America), Assistant Professor, School of Public Health, Co-director of the Human Rights Program, Columbia University; *Sanji Mmasenono Monageng* (Botswana), Judge of the High Court (The Republic of the Gambia), Commissioner of the African Commission on Human and Peoples' Rights, Chairperson of the Follow Up Committee on the implementation of the Robben Island Guidelines on prohibition and prevention of torture and other cruel, inhuman or degrading treatment (African Commission on Human and Peoples' Rights); *Vitit Muntarbhorn* (Thailand), UN Special Rapporteur on the human rights situation in the Democratic People's Republic of Korea and Professor of Law, Chulalongkorn University, Thailand (Co-chair of the experts' meeting); *Lawrence Mute* (Kenya), Commissioner of the Kenya National Commission on Human Rights; *Manfred Nowak* (Austria), Professor and Co-director of the Ludwig Boltzmann Institute of Human Rights, Austria, and UN Human Rights Council Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment; *Ana Elena Obando Mendoza* (Costa Rica), feminist attorney, women's human rights activist, and international consultant; *Michael O'Flaherty* (Ireland), Member of the UN Human Rights Committee, Professor of Applied Human Rights and Co-director of the Human Rights Law Centre, School of Law, University of Nottingham, and Rapporteur for the development of the

of the experts. He also served as rapporteur of the process, responsible for proposing various formulations and capturing various expert views in a single agreed text. The drafting process took place over a period of some 12 months during 2006–07. While much of the drafting was done by means of electronic communications, many of the experts met at an international seminar that took place in Yogyakarta, Indonesia at Gadjah Mada University from 6 to 9 November 2006 to review and finalise the text. All of the text was agreed by consensus.

Although initially some participants envisioned a very concise statement of legal principles, expressed in general terms, the seminar eventually reached the view that the complexity of circumstances of victims of human rights violations required a highly elaborated approach. They also considered that the text should be expressed in a manner that reflected the formulations in the international human rights treaties, whereby its authority as a statement of the legal standards would be reinforced.

There are 29 principles. Each of these comprises 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. There is some order to the Principles. Principles 1 to 3 set out 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 primordial significance of the universality of human rights and the scale and extent of discrimination targeted against people of diverse sexual orientations and gender identities, as well as the manner in which they are commonly rendered invisible within a society and its legal structures. Principles 4 to 11 address fundamental rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention. Principles 12 to 18 set out the importance of non-discrimination in the enjoyment of economic, social and cultural rights, including employment,

Yogyakarta Principles; *Sunil Pant* (Nepal), President of the Blue Diamond Society, Nepal; *Dimitrina Petrova* (Bulgaria), Executive Director, The Equal Rights Trust; *Rudi Muhammad Rizki* (Indonesia), UN Special Rapporteur on international solidarity, and Senior Lecturer and the Vice Dean for Academic Affairs, Faculty of Law, University of Padjadjaran, Indonesia; *Mary Robinson* (Ireland), Founder of Realizing Rights: The Ethical Globalization Initiative, former President of Ireland, and former United Nations High Commissioner for Human Rights; *Nevena Vuckovic Sahovic* (Serbia and Montenegro), Member of the UN Committee on the Rights of the Child, and President of the Child Rights Centre, Belgrade, Serbia Montenegro; *Martin Scheinin* (Finland), UN Special Rapporteur on counterterrorism, Professor of Constitutional and International Law, and Director of the Institute for Human Rights, Finland; *Wan Yanhai* (China), founder of the AIZHI Action Project and Director of Beijing AIZHIXING Institute of Health Education, China; *Stephen Whittle* (United Kingdom), Professor in Equalities Law, Manchester Metropolitan University, United Kingdom; *Roman Wieruszewski* (Poland), Member of the UN Human Rights Committee, and Head of Poznan Centre for Human Rights, Poland; and *Robert Wintemute* (United Kingdom), Professor of Human Rights Law, School of Law, King's College London, United Kingdom.

accommodation, social security, education and health. Principles 19 to 21 emphasise 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 highlight the rights of persons to seek asylum from persecution based on sexual orientation or gender identity. Principles 24 to 26 address the rights of persons to participate in family life, public affairs and the cultural life of their community, without discrimination based on sexual orientation or gender identity. Principle 27 recognises 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 working in these areas. Principles 28 and 29 affirm the importance of holding rights violators accountable, and ensuring appropriate redress for those who face rights violations.

Most of the principles are titled in a manner that directly reflects the provisions of human rights treaties: right to education, highest attainable standard of health, etc. Those that differ are so phrased either to more specifically address a problematic situation (Principle 18, Protection from Medical Abuse), or to better reflect an accepted legal standard that does not derive from any one specific treaty provision (the principles on promotion of human rights—27, effective remedies—28 and accountability—29).

The content of each Principle reflects the particular human rights challenges that the experts identified as well as the precise application of the law for that situation. As such, they vary widely in style and category of contents. However, a general typology for the legal obligations of States can be observed: (i) all necessary legislative, administrative and other measures to eradicate impugned practices; (ii) protection measures for those at risk; (iii) accountability of perpetrators and redress for victims; and, (iv) promotion of a human rights culture by means of education, training and public awareness-raising. It may thus be observed that the Principles take account of the manner in which UN human rights treaty bodies in their General Comments, as well as the theory of rights-based approaches, as discussed earlier, are informing contemporary understanding of the State's implementation obligation.<sup>137</sup>

As has already been noted, the experts sought to capture the existing state of international law. The present authors, based on a review of the consistency of the Principles with their understanding of the law (as presented in the present article), suggest that this goal was achieved. It may be argued, however, that in some cases, the Principles could have gone further in identifying the application of the law for certain situations. For instance, Principle 19, on the right to freedom of opinion and expression, where identifying the duty of

137 See *supra* n. 108.

the State to regulate the media to avoid discrimination, only refers to media that is ‘State-regulated’. While it is surely correct that such media should be prohibited from discriminatory practices and outputs it is not evident that the duty should not also be extended to non-state regulated media. In cases such as this we may observe the experts taking account of legal uncertainties regarding the reach of non-discrimination law into the private sphere, as discussed earlier. In a small number of other instances, the Principles are somewhat vague and non-prescriptive, perhaps again reflecting the uncertain state of law or its application. This may explain the provision at Principle 21(b) that ‘expression, practice and promotion of different opinions, convictions and beliefs with regard to sexual orientation or gender identity is not undertaken in a manner incompatible with human rights’. Thus expressed it is unclear, for instance, whether a faith community could exclude someone from membership on grounds of sexual orientation, albeit the Principle, at a minimum, would require reflection as to the legitimacy in law of such an exclusion. Another criticism that may be directed to the Principles is that, notwithstanding a concerted effort to address specific fact circumstances, they are not comprehensive in this regard. For instance, it has been suggested that they could usefully have referred to issues of access to medicines in least-developed countries<sup>138</sup> and to the phenomenon of domestic violence in same-sex households.<sup>139</sup> Undoubtedly, as the Principles generate further commentary, additional omissions will be identified.

The desire for consistency with the existing law resulted in the deliberate omission from the final text of a number of elements that had been considered during the drafting phase. For instance, there is no expression of a right to non-heterosexual marriage. Instead, Principle 24 on the right to found a family, at paragraph (e) only speaks of a right to non-discriminatory treatment of same-sex marriage in those States which already recognise it.

It is noteworthy that the Principles are expressed in exclusively gender-neutral terms. The approach was deliberately adopted in order to ensure the application of all aspects of the Principles with regard to the life experience of people regardless of and with full respect for whatever gender identity they may have, while also avoiding binary constructions of gender. This achievement came at the price of the invisibility in the text of any reference to the particular situation and issues of women. It may be considered that this omission detracts from the capacity of the document to forcefully address the problems confronting lesbians in numerous countries.

The experts added a short 9-paragraph preamble to the Principles, but only after some debate, focussing on such matters as the avoidance of additional

138 Comment made to the present authors by an activist in Sub-Saharan Africa.

139 Comment made to the present authors by an activist who addresses issues of domestic violence.

text that might detract from the Principles themselves. The preamble provides a context for the document, referring to the experiences of suffering and discrimination faced by people because of their actual or perceived sexual orientation or gender identity, the extent to which international human rights law already addresses these situations and the 'significant value in articulating [this law] in a systematic manner'. Notably, the preamble contains definitions of 'sexual orientation' and 'gender identity'. These formulations, drawing on those definitions widely in use within advocacy communities, establish a personal scope of application for the Principles. The preface also includes 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 and gender identities.

While the Principles are addressed to States, as the duty-bearers in international human rights law, the experts considered that they should also make recommendations to other actors with relevance for the promotion and protection of human rights of people of diverse sexual orientations and gender identities. There are 16 such recommendations directed to international inter-governmental and non-governmental bodies, international judicial and other human rights treaty bodies, national human rights institutions, commercial organisations, and others.

## **5. Assessment of Dissemination and Impact of the Principles**

The Yogyakarta Principles were launched on 26 March 2007, at a public event timed to coincide with the main session of the United Nations Human Rights Council in Geneva. Attended by Ambassadors, other State delegates, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, participating experts and NGO representatives, the launch served as a focal point to move the Yogyakarta Principles onto the international agenda. Immediate discussion of the Principles at the Human Rights Council was encouraged by means of the convening of a Council side-event panel discussion. There have been numerous other launch-related events since, including a presentation of the Principles at an event in UN Headquarters in New York on 7 November 2007, co-hosted by the Governments of Brazil, Argentina and Uruguay, in conjunction with the Third Committee of the General Assembly, and attended by diplomatic representatives of some 20 States.<sup>140</sup> The Principles are available

140 See International Service for Human Rights, Human Rights Watch and International Gay and Lesbian Human Rights Commission, 'Launching the Yogyakarta Principles in New York.

on-line,<sup>141</sup> and have been published in the six official languages of the United Nations: English, French, Spanish, Russian, Chinese and Arabic. In addition to the official translations, NGOs have prepared translations of the Principles in Nepali, Indonesian, German and Portuguese, an annotated version of the Principles has recently been completed to identify the jurisprudential basis for each of the Principles, an international Youth Coalition is preparing a 'youth-friendly' version of the Principles, and work has begun on an Activists' Guide to strengthen the use of the Principles as a tool for advocacy.

A preliminary assessment of the impact of the Yogyakarta Principles can be undertaken by means of an evaluation of the impact they have had since their launch. In this regard, it is of interest to identify the extent to which their addressees, primarily States, but also such actors as international organisations, Special Procedures, treaty bodies and civil society, have reacted. Given the ongoing process of dissemination and the extent to which many initiatives are not reported internationally, it is not possible for such a review to be exhaustive. Instead, the present authors closely examine reactions within the context of the various UN fora and take note of the more significant of the other reported reactions.

#### *A. Reaction by States and other Actors within United Nations Fora*

This is not a propitious time at which to launch major human rights initiatives at the UN. That organisation is in a phase of reform and, in the context of the Human Rights Council, pre-occupied with institutional development, sometimes detracting from its ability to focus on substantive human rights.<sup>142</sup> Taking account of this, as well as of the relatively short period of time since the launch of the Principles and the generally slow pace of change within international mechanisms, one may conclude that the dissemination of the Principles has met with a surprising degree of success. A number of member and observer States have already cited them in Council proceedings. Within days of the Geneva launch, more than 30 States made positive interventions on sexual orientation and gender identity issues, with seven States specifically referring to the Yogyakarta Principles,<sup>143</sup> describing them as 'groundbreaking'.

Summary of the Panel Discussion on the Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity', New York, 7 November 2007, available at: <http://www.sxpolitics.org/mambo452/index.php?option=com.content&task=view&id=126> [last accessed 15 February 2008].

141 *Supra* n. 134.

142 See Hicks and Gillioz, 'The Challenges Facing Non-Governmental Organisations' in Müller (ed.), *The First 365 Days of the United Nations Human Rights Council* (Bern: Federal Department of Foreign Affairs of Switzerland, 2007) 199 at 202.

143 The Czech Republic, Switzerland and the Nordic Countries Denmark, Finland, Iceland, Sweden and Norway, cited in ARC International, 'Recognising Human Rights Violations Based on Sexual Orientation and Gender Identity at the Human Rights Council, Session 4', April 2007; and ARC International, 'Report on Launch of Yogyakarta Principles', June 2007.



as articulating 'legally-binding international standards that all States must respect' and commending them to the attention of the UN Human Rights Council, the High Commissioner for Human Rights, Special Procedures and treaty bodies. The Principles recommend that the Human Rights Council 'endorse' them and 'give substantive consideration to human rights violations based on sexual orientation or gender identity, with a view to promoting State compliance with these Principles'.<sup>144</sup> Although endorsement by the Council as a body may be seen as ambitious, at least in the short term, it may be recalled that the Norwegian joint statement on sexual orientation, gender identity and human rights called for the President of the Council to allocate time at an appropriate future session of the Council 'for a discussion of sexual orientation and gender identity issues'.<sup>145</sup> The 'substantive consideration' envisaged by the Principles may therefore be expected to take place during 2008–09, in which case the Principles themselves are likely to be referenced by many States in order to frame the debate.

In addition to joint and separate interventions by States, there are a number of other mechanisms available to the Council through which the Principles may be engaged with, with some of these mechanisms subject of specific recommendations in the Principles themselves. The Principles recommend, for example, that the Special Procedures 'pay due attention to human rights violations based on sexual orientation or gender identity, and integrate these Principles into the implementation of their respective mandates'. The Principles were presented by NGOs to the system of Special Procedures at their 2007 annual meeting. The Czech Republic made favourable reference to the Principles during a Council dialogue with the Special Rapporteur on freedom of expression.<sup>146</sup> Egypt raised them in dialogue with the Special Rapporteur on the right to health,<sup>147</sup> citing the definition of 'sexual orientation' and challenging the Special Rapporteur for signing the Principles 'in his capacity as UN Representative'. In his reply, the Special Rapporteur noted 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 a number of Special Procedures, eight of whom had endorsed the Yogyakarta Principles in their official capacity. Highlighting the role that the Principles may come to play in standard-setting, the Special Rapporteur further pointed out to Egypt during an informal briefing that 10 years ago

144 Yogyakarta Principles, *supra* n. 134 at Additional Recommendation B.

145 Norwegian joint statement, *supra* n. 126.

146 Statement of the Czech Republic, Interactive Dialogue on the report of the Special Rapporteur on right to freedom of opinion and expression, Human Rights Council, 4th session, Geneva, 12–30 March 2007.

147 Statement of Egypt on the Review, rationalisation and improvement the mandate of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Human Rights Council, 6th session (resumed), Geneva, 10–14 December 2007.

female genital mutilation was considered by many States to be a matter of ‘cultural sensitivity’, but is now widely regarded as incompatible with the right to health, and that in future there may well be similar changes with regard to perceptions of homosexuality. In challenging the Special Rapporteur, it is noteworthy that Egypt took no exception to the content of the Principles themselves, or to their endorsement by a number of Special Procedures, only to the fact that the Special Rapporteur had signed them in an official capacity. It further noted that ‘we understand that these values are acceptable in many societies, and we have no objection to this. What we have objection to is the persistent attempts to streamline those values at the UN while they are objectionable by the majority of the countries.’<sup>148</sup>

Interesting possibilities for engagement around the Principles are offered by the Universal Periodic Review, a new mechanism of the Council designed to address criticisms of politicisation and selectivity levelled at the former Commission on Human Rights,<sup>149</sup> by ensuring that the human rights records of all 192 United Nations Member States will be reviewed on a periodic four-year cycle.<sup>150</sup> The review is intended to be a co-operative mechanism, to assist States in fulfilling their international commitments and improving their human rights situation. During the first cycle of review, NGOs addressing sexual orientation, gender identity and broader sexual rights issues have made submissions on 13 of the 16 countries under review.<sup>151</sup> Many of these submissions explicitly referenced the Yogyakarta Principles, both to articulate the nature and scope of State obligations under international human rights law, and to identify detailed recommendations for measures that States can take to fulfil these obligations at the national level. The Universal Periodic Review is described as a process, providing multiple opportunities for engagement.<sup>152</sup> Future evaluation of the impact of the Principles may therefore additionally take into account the extent to which they are referenced in the Office of the High Commissioner for Human Rights (OHCHR) compilations of

148 *Ibid.*

149 See Ambassador de Alba, ‘Reviewing the Process: Challenges in the Creation of the Human Rights Council’, in Müller, *supra* n. 142, 48 at 49; and Tistounet, ‘Facts and Figures: Human Rights Council in Brief’, in Müller, *supra* n. 142, 57.

150 See HRC Res. 5/1, ‘Institution-building of the United Nations Human Rights Council’, Human Rights Council, 5th session, A/HRC/RES/5/1, Geneva, 18 June 2007; Follow-up to Human Rights Council Resolution 5/1: General Guidelines for the preparation of information under the Universal Periodic Review, Human Rights Council, 6th session, A/HRC/DEC/6/102, 27 September 2007.

151 Bahrain, Ecuador, Tunisia, Morocco, Indonesia, Finland, India, Brazil, Algeria, Poland, South Africa, the Czech Republic and Argentina: ARC International, ‘Summary of NGO Submissions addressing Sexual Orientation and Gender Identity in First Cycle of UPR’, 2008. A complete copy of the submissions is on file with the second author of the present article.

152 OHCHR, ‘Information Note for NGOs Regarding the Universal Periodic Review Mechanism’, Geneva, 8 January 2008, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/upr/noteNGO.041007.htm> [last accessed 15 February 2008]; and OHCHR summaries, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> [last accessed 15 February 2008].

relevant materials, during national consultations by the State under review, in the State report itself, during the Interactive Dialogue conducted in a Working Group between Human Rights Council members and the State under review, in the outcome report and recommendations arising from the Working Group dialogue, during adoption of the report by the Human Rights Council, and in follow-up activities to implement the ensuing recommendations at the national level.<sup>153</sup>

The Principles recommend that the UN High Commissioner for Human Rights endorse them, 'promote their implementation worldwide' and integrate them into the work of OHCHR, 'including at the field level'.<sup>154</sup> In a written statement to the New York launch event, the High Commissioner described the 60th anniversary of the UDHR as an 'ideal opportunity to recall the core human rights principles of equality, universality and non-discrimination'. Describing it as 'unthinkable' to exclude persons from these protections because of their race, religion or social status, she asserted that we must similarly 'reject any attempt to do so on the basis of sexual orientation or gender identity', and described the Yogyakarta Principles as a 'timely reminder' of these basic tenets.<sup>155</sup> While falling short of the recommendation that she 'endorse' the Principles, her statement does affirm their value and it may be observed that she chose their launch event at which to express the 'firm commitment' of her Office to promote and protect the human rights of all persons, regardless of sexual orientation or gender identity.

Whatever restraint may be observed in the High Commissioner's personal statements, at the field level her Office may have some flexibility in integrating the Principles into their work. At annual meetings between the heads of the OHCHR field offices and Geneva-based NGOs, the Yogyakarta Principles were introduced. The field office heads, acknowledging that attention to these concerns has often been sporadic and inconsistent, welcomed the Principles as a useful tool for bringing greater coherence to their efforts.<sup>156</sup> Such previous efforts had included interventions on behalf of victims of sexual orientation and gender identity-related attacks in Nepal and NGOs under threat in Uganda.<sup>157</sup> The first specific citation of the Principles by a field office was in Nepal, in August 2007, where a senior officer delivered a statement at a ceremony 'to inaugurate the Yogyakarta Principles translated into Nepali'.<sup>158</sup>

153 See HRC Res. 5/1, *supra* n. 150; OHCHR, *ibid.*; and ARC International, 'A Guide to the UPR for Sexual Orientation and Gender Identity Advocates', December 2007.

154 Yogyakarta Principles, *supra* n. 134 at Additional Recommendation A.

155 Statement of Louise Arbour, UN High Commissioner for Human Rights, Launch of the Yogyakarta Principles, New York, 7 November 2007.

156 ARC International, 'Report of Annual Meeting with OHCHR Field Presences', 7 November 2007.

157 *Ibid.*

158 Statement by Johan Olhagen, Head of Katmandu Field Office, Office of the High Commissioner for Human Rights in Nepal, delivered at a 'Ceremony to Inaugurate the Yogyakarta Principles translated into Nepali', Blue Diamond Society, Katmandu, 11 August 2007.

He described the Principles as an ‘important document to focus international attention on the need for a more systematic approach to protection’. He went on to situate the Principles within the context of the Nepali peace process and Interim Constitution, acknowledging that the voices of *métis* are amongst the most marginalised in society, and concluded that ‘the Yogyakarta Principles provide an essential tool for creating awareness, for debate, advocacy and action to develop a proper protective legal framework, and to end abuses against individuals on account of their sexual orientation and gender identity in Nepal’. Similar sentiments were expressed by another senior official in South Africa in December 2007.<sup>159</sup> While such developments are of interest, it must be observed that they occurred in response to civil society invitations rather than on the basis of any policy-level positioning on the part of OHCHR.

Other UN mechanisms to which the Yogyakarta Principles address recommendations include the treaty bodies, the UN ECOSOC and UN agencies. Initial awareness-raising work has begun, with the distribution of the Principles to all treaty-body members, a presentation of the Principles to the annual meeting of Chairpersons of Treaty Bodies, and a briefing to members of the UN HRC.<sup>160</sup> While this preliminary engagement may assist in advancing the recommendation in the Principles that the treaty bodies integrate the Principles into the implementation of their mandates, including their case law and examination of State reports,<sup>161</sup> the recommendation that they adopt relevant ‘General Comments or other interpretive texts’<sup>162</sup> is likely to be a significantly longer-term objective.

Recommendation D of the Principles calls upon the UN ECOSOC to accredit NGOs working to promote and protect the human rights of persons of diverse sexual orientations and gender identities. Despite initial rejections, a number of such NGOs have now received ECOSOC accreditation, and the Yogyakarta Principles were cited in advocacy materials when the matter arose for consideration,<sup>163</sup> although it is difficult to measure the extent to which the Principles themselves may have influenced the outcome. The ECOSOC NGO Committee receives accreditation applications from an increasingly diverse range of NGOs, and the issue is likely to remain a lively one for many years. Regarding Recommendations F and G, there has been modest engagement

159 International Dialogue on Gender, Sexuality, and HIV/AIDS, ‘Strengthening Human Rights Responses in Africa and Around the Globe’, Johannesburg, 6–10 December 2007.

160 Joint briefing for members of the Human Rights Committee, International Service for Human Rights and ARC International, Geneva, 23 October 2007.

161 Yogyakarta Principles, *supra* n. 134 at Additional Recommendations E.

162 *Ibid.*

163 ARC International, Fact Sheet: ECOSOC Accreditation of NGOs addressing Issues of Sexual Orientation & Gender Identity: The Importance of Non-Discriminatory Access and Participation, July 2007.

around the Principles with UN agencies. Copies of the Principles have sent to the Office of the UN High Commissioner for Refugees, which is considering developing clearer guidelines on refugee issues relating to sexual orientation and gender identity. Also, a senior UNAIDS official addressed the New York launch event,<sup>164</sup> observing that the criminalisation of homosexual activities is not an effective method of addressing HIV/AIDS, referencing the non-binding UN International Guidelines on HIV/AIDS,<sup>165</sup> and expressing the support of UNAIDS for the Principles. In addition, the UN Office on Drugs and Crime, in developing a draft Handbook on 'Prisoners with Special Needs', including sexual minorities, drew extensively on the Yogyakarta Principles, including Principle 9 dealing with the Right to Treatment with Humanity while in Detention.<sup>166</sup>

### ***B. Other Responses by States to the Principles***

A number of States have expressed a willingness to draw upon the Principles as a guide to policy-making. The Dutch Minister of Foreign Affairs has developed a new human rights strategy to be debated in Parliament, which affirms that 'the Yogyakarta Principles are seen by the government as a guideline for its policy',<sup>167</sup> and outlines a number of specific initiatives, including capacity-building for international and local NGOs working on these issues. The Canadian government has described the Principles as 'useful blueprints' to measure progress on human rights related to sexual orientation and gender identity around the world,<sup>168</sup> and the Uruguayan government referred to the Principles as an 'important document to assist (it)' in overcoming discrimination based on sexual orientation and gender identity.<sup>169</sup> The Brazilian government intends to publish the Principles in a Portuguese translation and to feature them at an event in 2008 to promote its 'Brazil without homophobia' programme.<sup>170</sup> The Argentinean government has stated that many of the issues addressed by the Yogyakarta Principles are also the focus of a National Action Plan for non-discrimination adopted by the government in 2004.<sup>171</sup> Some States are citing the Principles in bilateral relations. Part of the Dutch

164 See International Service for Human Rights, Human Rights Watch and International Gay and Lesbian Human Rights Commission, *supra* n. 140.

165 CHR Res. 1997/33, The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS), 11 April 1997, E/CN.4/1997/33.

166 UN Office on Drugs and Crime (Criminal Justice Reform Unit), *Prisoners with Special Needs (draft)*, 2007.

167 Dutch Ministry of Foreign Affairs, 'A life of human dignity for all, A human rights strategy for foreign policy', 6 November 2007, at para. 2.7 (pp. 47 and 48) (unauthorised translation).

168 Government of Canada, Response to Petition, Petition No. 391-1634, 6 June 2007.

169 International Service for Human Rights, Human Rights Watch and International Gay and Lesbian Human Rights Commission, *supra* n. 140.

170 *Ibid.*

171 *Ibid.*

strategy involves raising the issue of decriminalisation of homosexual conduct with relevant States.

At the regional level, the European Parliament's Intergroup on Gay and Lesbian Rights has endorsed the Principles and a recently appointed Advisor to the Council of Europe's Human Rights Commissioner has indicated that the Yogyakarta Principles will serve as an important tool in advancing one of the Office's core priorities, namely country and thematic monitoring related to discrimination and human rights violations based on sexual orientation and gender identity.<sup>172</sup> Within Latin America, where issues of sexual orientation and gender identity have increasingly been discussed as part of the agenda at Mercosur meetings,<sup>173</sup> the support for the Principles expressed by founding members Brazil, Argentina and Uruguay may be expected to result in increased support from other full and associate members.

Interestingly, while many States have yet to embrace the responsibilities set out in the Yogyakarta Principles, there are early indications that municipal authorities and national human rights institutions may be more ready to engage. For instance, in South Africa, where government representatives declined to attend a conference on Gender, Sexuality, HIV/AIDS and Human Rights, the Speaker of the Johannesburg Municipal Council chose that event to express criticism of a 'collective amnesia' in public life concerning the constitutional prohibition of discrimination on the ground of sexual orientation and to commend the Yogyakarta Principles. He called on conference participants to ensure that 'both the Constitution and the Yogyakarta Principles become accepted by all members of our increasingly diverse communities in Johannesburg and internationally'.<sup>174</sup>

### C. Civil Society Responses

Notwithstanding Recommendation J, the non (or at least limited)-participatory approach inherent in an expert-led process of drafting the Principles raised a risk that the process or text might be rejected as elitist by the very communities whose situation it was intended to address and the support of whom is of crucial significance.<sup>175</sup> Notwithstanding such concerns,

172 Dittrich, 'Yogyakarta Principles in New Dutch Human Rights Strategy', 21 November 2007 (unofficial translation); and e-mail communications with Advisor, Office of the Commissioner for Human Rights Council of Europe, January 2008, on file with authors.

173 At the 9th High Level MERCOSUR meeting that was held in Montevideo in August 2007, the first regional seminar on sexual diversity, identity and gender was held with the participation of government representatives and representatives of civil society from the whole region.

174 Speaker of Council, Councillor Nkele Ntingane, City of Johannesburg Metropolitan Municipal Council, Opening Ceremony for International Dialogue on Gender, Sexuality and HIV/AIDS, Johannesburg, 6 December 2007.

175 In this regard, the Yogyakarta process may be distinguished from the highly participatory manner in which other more aspirational texts have been developed. For instance, there was wide community participation in the drafting of the Declaration of Montreal on Lesbian,



preliminary indications of civil society response are encouraging. The Principles have been presented and discussed at regional conferences in Africa,<sup>176</sup> Latin America,<sup>177</sup> Eastern Europe<sup>178</sup> and Asia,<sup>179</sup> and requests for copies for distribution have been received from NGOs in a diverse range of countries around the world.<sup>180</sup> The Principles were referenced by civil society in statements addressed to the 2007 Africa-European Union summit.<sup>181</sup> NGOs are also drawing upon the Principles in negotiations with governments. In Northern Ireland, for example, civil society representatives have introduced the Principles for debate at the Bill of Rights Forum of Northern Ireland, constituted to advise on elements for a Bill of Rights.<sup>182</sup> In Kyrgyzstan, a group is using the Principles in meetings with the government to establish procedures for recognising the right of transgender people to official documentation that reflects their gender identity,<sup>183</sup> and activists in Nicaragua invoked the Principles in meetings with the government to advocate successfully for the decriminalisation of homosexuality.<sup>184</sup> In one particularly well publicised instance, a campaigning group in South Africa launched an anti-hate crimes campaign in response to the murders of lesbian women in Soweto<sup>185</sup> citing Principle 5 of the Principles, on the right to security of the person, and calling upon the government to implement the associated recommendations.

Gay, Bisexual and Transgender Human Rights, adopted on 29 July 2006 by the International Conference on LGBT Human Rights as part of the first World Outgames. See <http://www.declarationofmontreal.org/> [last accessed 15 February 2008].

- 176 ILGA Conference, Johannesburg, May 2007; International Dialogue on Gender, Sexuality, HIV/AIDS and Human Rights, ARC International and Coalition of African Lesbians, Johannesburg, December 2007.
- 177 International Association for the Study of the Sexuality, Culture and Society (IASSCS) Conference, Peru, June 2007; 4 encuentro de ILGA en América Latina y el Caribe, Peru, September 2007.
- 178 ILGA Europe Conference, Lithuania, 25–28 October 2007.
- 179 ILGA Asia-Regional Conference, Thailand, 24–27 January 2008.
- 180 Requests for copies and supportive comments have been received from NGOs in countries including Andorra, Argentina, Australia, Belarus, Belize, Brazil, Cameroon, Canada, Chile, China, Denmark, Ecuador, France, Germany, Guyana, Hong Kong, India, Indonesia, Ireland, Japan, Kenya, Kyrgyzstan, Latvia, Lithuania, Mexico, Nicaragua, Nigeria, Peru, the Philippines, Romania, Russia, Senegal, South Korea, Thailand, Tonga, Uganda, United Kingdom, Uruguay, the United States of America and Zimbabwe.
- 181 ILGA, ILGA-Europe, Pan-Africa ILGA, 'African and European LGBT Organisations Call on all States to Fight Homophobia and to Adopt the Yogyakarta Principles', joint media release, Portugal, 7 December 2007.
- 182 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, 10 April, 1998, Strand Three (Rights, Safeguards and Equality of Opportunity) at para. 4, available at: <http://www.niassembly.gov.uk/io/agreement.htm> [last accessed 15 February 2008].
- 183 E-mail communications on file with authors, cited in ARC International, *supra* n. 143.
- 184 E-mail communications on file with authors, cited in *supra* n. 143.
- 185 The Alliance for Campaign 07 – 07 – 07, 'Call to Action', Johannesburg, 10 December 2007, at para. 1.3, available at: <http://www.out.org.za/articles.asp?artid=43> [last accessed 15 February 2008].

Other instances of use of the Principles include NGO actions in South Korea, Belize and the UK.<sup>186</sup> The first known citation in domestic law of the Principles is contained in a brief submitted to the Nepal Supreme Court by the International Commission of Jurists. The brief invokes the Principles' definition of 'gender identity'.<sup>187</sup> The Principles are being used as teaching tools in university-level and other courses in China, Argentina, UK, USA, Brazil and the Philippines. Civil society has also engaged the media. For instance, a Kenyan group is reportedly using the Principles 'to involve the media in our mission through sexual health and rights policy visibility'.<sup>188</sup>

Although it is difficult to speculate as to the reasons for such vigorous civil society activism, informal discussions of the present authors with NGO leaders, suggest a variety of factors.<sup>189</sup> One such is the extent to which the expert drafters of the Principles were representative of so wide a range of competencies and skills relevant both to international law and issues of sexual orientation and gender identity. This representation ensured a balance of expertise contributing to a text that, to be effective, needed to be both jurisprudential and reflective of the 'lives and experiences of persons of diverse sexual orientations and gender identities'.<sup>190</sup> The Preamble to the Principles, for example, explicitly recognises the 'violence, harassment, discrimination, exclusion, stigmatisation and prejudice' directed against persons because of their sexual orientation or gender identity, as well as the resulting concealment of identity, fear and invisibility,<sup>191</sup> factors which resonate with the communities affected. As one online commentator noted at the time of the launch of the Principles, 'I am now, under International Human Rights Law, officially human. And yesterday, I wasn't'.<sup>192</sup> It has also been suggested to the present authors that the use of

186 Immigration Law Practitioners' Association (ILPA) and the UK Lesbian and Gay Immigration Group (UKLGIG), 'Sexual and Gender Identity Guidelines for the Determination of Asylum Claims in the UK', July 2007 at para. 3.2.3.

187 International Commission of Jurists, 'Submissions to the Supreme Court of The State of Nepal, Providing the Basis in International Human Rights Law for the Prohibition of Discrimination Based on Sexual Orientation and Gender Identity, and Other Connected Matters', 2007, available at <http://www.icj.org/IMG/nepalsupremecrt.pdf> [last accessed 15 February 2008]. The Court ruled on 21 December 2007, that all persons are entitled to the equal protection and benefit of the law, irrespective of their sexual orientation or gender identity (although the Yogyakarta Principles were not specifically referenced in the judicial decision).

188 As cited in: O'Flaherty, 'New Principles on Sexual Orientation, Gender Equality and Human Rights', *Rights News*, Irish Council for Civil Liberties, Summer 2007, at 4.

189 The speculative elements in this paragraph are supported by notes of such discussions on file with the present authors.

190 Yogyakarta Principles, *supra* n. 134 at Preamble, paras 8 and 9.

191 *Ibid.* at Preamble at para. 2.

192 'Victory in Yogyakarta', 26 March 2007, available at: <http://aebrain.blogspot.com/2007.03.25.archive.html> [last accessed 15 February 2008].

the widely encompassing grounds of 'sexual orientation' and 'gender identity', rather than attempting to define an exhaustive catalogue of specific identities avoids some of the hazards of identity politics, and ensures a more inclusive approach. There have been favourable comments regarding the manner in which the Principles place gender identity on an equal footing with sexual orientation rather than treating it as an addendum issue. Finally, commentators have referred to the utility for advocacy purposes of the combination of statements of principle with detailed recommendations for State action.

Not all the responses to the Principles have been positive: a faith-based group, the Catholic Family and Human Rights Institute, corresponded with all Permanent Missions to the UN in New York regarding the 'dangerous document' and provided them with briefing materials entitled 'Six Problems with the Yogyakarta Principles', which express concerns that the Principles 'undermine parental and familial authority', 'undermine freedom of speech', 'undermine religious freedom', 'undermine national sovereignty/national democratic institutions', 'encourage (physically, psychologically and morally) unhealthy choices' and 'fail to provide objective standards for evaluating sexual behaviour'.<sup>193</sup> A group called 'The State of America' has also condemned the Principles as 'an affront to all human and especially natural rights' and a 'farce of justice'.<sup>194</sup> Even these critiques, however, reflect the extent to which the Principles have attracted international attention, and are perceived by opponents and supporters alike as a significant step forward in the recognition of human rights for people of diverse sexual orientations and gender identities.

## **6. Conclusion**

The Yogyakarta Principles appear to pass the crucial tests of being relevant to the actual situation of affected communities and being a faithful and coherent reflection of the existing international legal standards. It is not then surprising to consider the impact the Principles have already had, albeit dissemination is only beginning and will require the sustained attention from a global collaboration of lawyers, academics and activists. Equally, and as the Principles themselves attest, they are an imperfect work—set in a moment of time and reliant on the limited available information and understanding. As such, the

193 Catholic Family and Human Rights Institute, 'Six Problems with the Yogyakarta Principles', 13 April 2007.

194 Downs, State of America, e-mail communication on file with second author of the present article, 9 November 2007.

Principles should be understood as a work-in-progress that must countenance an ongoing and frank consideration of how they might be improved and adjusted. In this way, the Yogyakarta Principles are most likely to contribute to the realisation of their own promise of ‘a different future where all people born free and equal in dignity and rights can fulfil that precious birthright’.<sup>195</sup>

195 *Supra* n. 134 at ‘About the Principles’.