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Cardozo International & Comparative Law Review

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Recommended Citation

D'Angelo, Mika, "Sexual Orientation & Gender Identity in International Human Rights Law: Existing Between the Lines" (2021). *CICLR Online*. 34.

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Sexual Orientation & Gender Identity in International Human Rights Law: Existing Between the Lines

By: *Mika D'Angelo*



There is no international treaty that directly acknowledges the rights of LGBTIQ+ persons or the right to protection from discrimination or violence on the basis of sexual orientation or gender identity. The International Bill of Rights concerns itself with the protection of persons on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”[1] This same language is found in Article 2 of the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR).[2] This lack of recognition isn’t surprising— over 70 countries continue to criminalize queer existence or expression with anti-sodomy laws, indicating at the least a stark lack of interest in negotiating a treaty for the protection of LGBTIQ+ persons— and this tenuous framework results in LGBTIQ+ rights hanging in the balance between recognition and destruction.[3]

In the absence of the unquestionable inclusion of LGBTIQ+ protections in a ratified treaty, advocates and international adjudicating bodies turn to two places in the language quoted above to interpret existing treaties as protective of the rights of LGBTIQ+ people. First, the United Nations Human Rights Committee (HRC) has interpreted “sex” as a category in the ICCPR to include sexual orientation,

expanding its protection.[4] Similarly, the Committee on the Elimination of Discrimination Against Women released a general recommendation in 2010 advising that it interprets its convention (the Convention on the Elimination of Discrimination Against Women, “CEDAW”) to disallow both sex- and gender-based discrimination against those biologically identified as women and those bearing “socially constructed identities, attributes and roles for women.”[5] The Committee on Economic, Social and Cultural Rights (CESCR) takes another approach to this interpretive strategy. The International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 2.2 reads, “[t]he State parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”[6] CESCR takes the position that the final list item, “other status,” indicates that the list is not exhaustive, and in a general comment considers that sexual orientation and gender identity are among the implied grounds upon which individuals cannot be discriminated against.[7] Despite these interpretations, LGBTIQ+ protections are not facially obvious within these or other international treaties, and some advocacy groups have sought to change that for decades.[8]

The Yogyakarta Principles, a set of 38 principles and hundreds of state obligations in the course of the protection of individuals on the basis of sexual orientation and gender identity written in 2006 and updated in 2017, is the closest thing to an enshrining document on LGBTIQ+ international rights in the absence of a binding treaty.[9] The Yogyakarta Principles purports to enumerate rights in the current international legal paradigm and not create *new* rights or obligations.[10] That being said, it interprets rights enshrined in international law as they specifically impact LGBTIQ+ persons, providing unambiguous guidance on topics such as access to gender-affirming healthcare, sex and gender identification in state-issued documents, name change processes, restroom access, and more.[11] The Yogyakarta Principles is not universally regarded highly within the United Nations. Representatives speak on behalf of African, Caribbean, and Arab states and the Russian Federation disparaging the report as controversial and not representative of agreed-upon international norms.[12] However, it has enjoyed respect from the Council of Europe. It has been cited in numerous cases at the national level, including in the Brazilian Supreme Federal Court when it became the first supreme court to recognize same-sex civil unions as equal in rights to their heterosexual counterparts.[13]

Considering the above, it is difficult to envision a binding treaty on LGBTIQ+ rights, whether as a version of the Yogyakarta Principles or as a new document entirely. With the widespread continued criminalization of same-sex sexual activity and numerous persistent dissenters to the requirement of non-discrimination on the basis of sexual orientation and gender identity, negotiations for such a treaty would be fraught from the beginning. Even countries that do not criminalize homosexuality and recognize same-sex civil unions or marriages may lack guarantees of access to gender-affirming or reproductive healthcare for LGBTIQ+ persons or sanction of nonconforming or nonbinary gender identities.[14] This makes the Yogyakarta Principles look downright ambitious in stark contrast to the claim that it enumerates existing rights. Even under the current structure of binding law, there can be an enforcement problem when adjudicating bodies rule to protect LGBTIQ+ persons from discriminatory or violent laws only to find that countries refuse to comply with their rulings.[15]

In the current international climate, a convention on LGBTIQ+ rights could highlight the persistent dissenters' position to those rights rather than provide greater protection for LGBTIQ+ persons worldwide. A treaty with a few parties might even destabilize the current strategy by painting the recognition of LGBTIQ+ rights as a minority opinion. Rather than pursue a designated convention on sexual orientation and gender identity, the HRC issued the mandate for the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (hereinafter “IE SOGI”).[16] Since the inception of the mandate, the IE SOGI has provided reports and recommendations on a variety of issues related to sexual orientation and gender identity, including but not limited to anti-LGBTIQ+ bills and laws (as recently as August 12, 2021),[17] the protection of forcibly displaced LGBTIQ+ persons,[18] the state of human rights in specific countries[19] and the intersection between the right to religious freedom and the right to be free from violence and discrimination on the basis of sexual orientation and gender identity.[20]

Overall, the state of international LGBTIQ+ rights remain inconsistent, balanced between a group of states who, as a matter of policy, disapprove of any protections on the basis of sexual orientation and gender identity and a view of international law that enshrines these

protections. The question that advocates and practitioners currently face is whether that can or should change; opportunities for the rejection of LGBTIQ+ recognition may be as dangerous as they are helpful.

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[1] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[2] *Id.*; G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (Mar. 23, 1976); G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights (Jan. 3, 1976).

[3] United Nations, *Criminalization of Same-sex Relations*, Off. High Comm'r, <https://www.unfe.org/wp-content/uploads/2018/10/Criminalization-English.pdf>.

[4] *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

[5] G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979); Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, ¶ 5 (Dec. 16, 2010).

[6] G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights (Jan. 3, 1976).

[7] Econ. And Social Council, General Comment No. 20 at ¶ 32.

[8] Arc International, *The United Nations and the Advancement of LGBT Rights*, Arc International (May 17-21, 2006), <http://arc-international.net/network-development/conference-presentations/presentation-un-mechanism/>.

[9] International Commission of Jurists, *Yogyakarta Principles Plus 10 6-7* (2017).

[10] *Id.*

[11] *Id.*

[12] U.N. GAOR, 65th Sess., 29th mtg., U.N. Doc. A/C3/65/SR.29 (Dec. 13, 2010).

[13] Eur. Consult. Ass'n, *Human Rights and Gender Identity*, Issue Paper (July 29, 2009); S.T.F.J. Arguição De Descumprimento De Preceito Fundamental No. 25832, Relator: min. Ayres Britto, 05.05.2011, Diário da Justiça Eletrônico [D.J.e], 05/05/2011 (Braz.).

[14] Movement Advancement Project, *Equality Maps: Identity Document Laws and Policies*, Movement Advancement Project (June 25, 2021), https://www.lgbtmap.org/equality-maps/identity_document_laws.

[15] *Fedotova v. Russian Federation*, Communication No. 1932/2010, U.N. Doc CCPR/C/106/D/1932/2010 (2012).

[16] G.A. Res. 32/2, Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity (July 15, 2016).

[17] United Nations, *Ghana: Anti-LGBTI Draft Bill a "Recipe for Violence"*, Off. High Comm'r (Aug. 12, 2021), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27378&LangID=E>.

[18] United Nations, *Global Roundtable Charts Joint Action for Protection of Forcibly Displaced LGBTIQ+ People*, Off. High Comm'r (June 29, 2021), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27235&LangID=E>.

[19] United Nations, *Nicaragua: UN Expert Deplores Spate of Attacks and Arrests of Human Rights Defenders*, Off. High Comm'r (June 3, 2021), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27135&LangID=E>.

[20] United Nations, *The Right to Freedom of Religion or Belief and the Right to Live Free from Violence and Discrimination Based on SOGI are both Built on a Promise of Human Freedom*, Off. High Comm'r (May 14, 2021), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27091&LangID=E>.