



*Eurasian Coalition
on Male Health*

International standards and principles related to SOGI and HIV



Utyasheva L., Yoursky Y. International standards and principles related to SOGI and HIV / Eurasian Coalition on Male Health (ECOM). – Tallinn, 2017. – 12 p.

The information presented in this review may be useful both for non-governmental organizations and community activists and for the government, when planning advocacy processes, promoting the rights of PLWH, gay men, other MSM, and trans*people and eliminating the barriers hindering their access to services.




The publication was prepared and published within the regional program «Right to Health», implemented by the Eurasian Coalition on Male Health (ECOM) with the support of the Global Fund to Fight AIDS, Tuberculosis and Malaria.


The views described herein are the views of this institution, and do not represent the views or opinions of The Global Fund to Fight AIDS, Tuberculosis & Malaria, nor is there any approval or authorization of this material, express or implied, by The Global Fund to Fight AIDS, Tuberculosis & Malaria.

Free Distribution

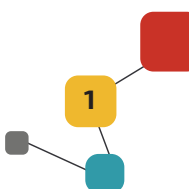
When using materials, a link to Eurasian Coalition on Male Health (ECOM) and the Global Fund to Fight AIDS, Tuberculosis & Malaria is mandatory.



All people, including lesbian, gay, bisexual and transgender persons, are entitled to enjoy the protections provided for by international human rights law, including in respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly.



¹ UN Human Rights Council 19, 2011. p. 4.



1

HIV Legislation and regulations



1.1. Entry and travel restrictions for PLHIV

All states have the legal authority to impose entry rules to control their borders, as well as stay and residence restrictions for citizens of other countries. However, international law prohibits discrimination on the basis of health status, which means that states cannot impose these restrictions arbitrarily, and without sound justification. According to UNAIDS, “HIV-specific restriction on entry, stay, and residence based on HIV status are discriminatory, do not protect public health and, if applied in a blanket manner, do not rationally identify those who may cause an undue burden on public funds.”² According to the Human Rights Council, States are encouraged to eliminate HIV-specific restrictions on entry, stay and residence and ensure that people living with HIV are no longer excluded, detained or deported on the basis of their HIV status.³ International Guidelines state that any restrictions based on HIV status on the rights to freedom of movement and to choose one’s residence, including HIV screening of international travellers, immigrants, or asylum seekers, are discriminatory, violate the right to equal protection before the law, and cannot be justified by public health concerns.⁴ In 2011, The European Court of Human Rights stressed that travel and residence restrictions on PLHIV were ineffectual, potentially harmful to public health.⁵

1.2. HIV criminalisation

The UNAIDS & OHCHR International Guidelines on HIV/AIDS and Human Rights and the UNAIDS & IPU Handbook for Legislators advise against the enactment of HIV-specific criminal statutes in this area. According to the International Guidelines, Criminal and/or public health legislation should not include specific offences against the deliberate and intentional transmission of HIV, but rather should apply general criminal offences to these exceptional cases. Such application should ensure that the elements of foreseeability, intent, causality, and consent are clearly and legally established to support a guilty verdict.⁶

UNAIDS and the UN Special Rapporteur on the Right to Health urged States to limit criminalisation of HIV transmission to intentional transmission, and to immediately repeal laws criminalising unintentional transmission of, or exposure to, HIV. These institutions also have urged states to reconsider the use of specific laws criminalising intentional transmission of HIV. Instead, UNAIDS and WHO encourage voluntary disclosure and ethical partner counseling.

1.3. Restriction on donation blood for MSM

Restriction on donation blood for MSM is controversial. Blank permanent prohibition is not supported by the science. Temporary prohibition (3 months) that many countries introduced, are also questionable, as many specialists recommend a personalized approach to each donation, without blank prohibitions.

As a matter of law, restricting a group’s access to certain occupation based on their sexual orientation or gender identity is discriminatory. In certain cases, discrimination may be justified. According to the UNAIDS Protocol for the Identification of Discrimination against PLHIV and the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, the right to non-discrimination can be justifiably restricted only in certainly narrowly defined circumstances. A discriminatory restriction can

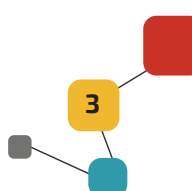
² UNAIDS, *report of the International Task Team on HIV-related Travel Restrictions: Findings and Recommendations* 5(2008).

³ UN Human Rights Council, *Resolution on the Protection of Human Rights in the Context of HIV/AIDS*, para. 4.

⁴ *International Guidelines on Human Rights and HIV*, paras 127, 131.

⁵ *Kiyutin v. Russia, Judgement # 2700/10 (European Court of Human Rights, March 10, 2011)*.

⁶ *Guideline 4*.



be justifiable only if the measure: a) is in the interests of a legitimate objective, b) is prescribed by law; and c) is compatible with the objectives and purposes of the Covenant.⁷ It depends on interpretation, if restricting MSM in donating blood is such as restriction.

1.4. Access to health care:

Article 12 (1) of the ICESCR provides that States parties to the Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The Committee on Economic, Social and Cultural Rights has indicated that the Covenant proscribes any discrimination in access to health care and the underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of sexual orientation and gender identity.⁸

Because denial of HIV care to this high-prevalence population is life threatening, laws, policies, and practices that limit access to prevention, treatment, and care of MSM may also be violations of the most fundamental right of all—that to life itself.

1.5. Standards related to disclosure of HIV:

Disclosures of HIV status can damage privacy PLHIV and have other negative consequences such as stigma, discrimination, violence, and social isolation. Disclosure may also lead to serious harm, including loss of employment, insurance, or housing. On the other hand, disclosure of information about HIV may be required for public health surveillance, for the provision of appropriate medical care, and for certain non-health purposes such as law enforcement or insurance. Hence, countries need to develop laws and policies that balance the need for disclosure of HIV information with the protection of the privacy and autonomy of individuals with respect to their HIV status.

A typical approach taken by many laws is to establish a default rule that the privacy of HIV information should be protected and only disclosed under specified circumstances. Beyond these specified exceptions, disclosures of HIV information, whether intentional or negligent, will constitute a breach of privacy and may result in civil liability, criminal penalties, or other serious sanctions, such as suspension of medical license.

Laws and policies that authorize disclosure of HIV information fall within three broad categories: 1) disclosures requiring informed consent; 2) discretionary disclosures; and 3) mandatory disclosures. Requiring informed consent prior to disclosure promotes trust, cooperation, and transparency in the health care and public health systems.

Most countries that authorize partner notification prefer voluntary partner notification to other, more coercive, approaches. The UNAIDS and OHCHR International Guidelines on HIV/AIDS and Human Rights also adopt this approach. Likewise, UNAIDS and WHO encourage voluntary disclosure between partners and the provision of professional counseling for HIV-infected clients and their partners.

The UNAIDS and OHCHR International Guidelines on HIV/AIDS and Human Rights provide important guidance on when health care professionals should engage in partner notification without consent in para. 20(g). "Public health legislation should authorize, but not require, that health-care professionals decide, on the basis of each individual case and ethical considerations, whether to inform their patients' sexual partners of the HIV status of their patient."⁹

⁷ UNAIDS, *Protocol for the identification of Discrimination against PLHIV. Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (Sept. 28, 1984. E/CN.4/1984/4.

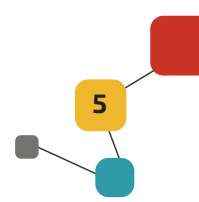
⁸ *Ibid.*

⁹ *Legal Aspects of HIV/AIDS: A Guide for Policy and Law reform*, the World Bank, 2007, p. 11.



2

Standards related to sexual orientation and gender identity



2.1. Freedom of speech and assembly

Freedom of information, speech, assembly and association are entrenched in several binding international documents to which the majority of EECA states are signatories. These are, for example, Article 19 of the ICCPR, stipulating freedom of expression; Article 21, providing for freedom of peaceful assembly, and Article 22, providing for freedom of association.¹⁰ In the Universal Declaration of Human Rights, these are: Articles 19 and 20, stipulating for freedom of expression, and peaceful assembly and association respectively.¹¹ Within in the framework of the European Convention of Human Rights, these are Articles 10 and 11, also providing for freedom of expression, and peaceful assembly respectively.¹²

According to the ICCPR and the ECHR, the exercise of such freedoms as expression and assembly may be restricted in certain cases, for example, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the reputation or the rights of others. These restrictions in order to be justified need to comply with a complicated tests, developed by the UN and the European Court of Human Rights respectively. In the UN system, the Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR provide for such guidance.¹³

Generally, in order to be justified restrictions on people's rights need to be proportionate, necessary in the democratic society and prescribed by law. It means that in balancing rights of the majority and marginalised and discriminated groups, the state must provide a very good justification for limiting their rights. In the majority of discussed in this report situations, this is not the case. For example, the ECHR has repeatedly found that the treaty's protections against discrimination bar unequal treatment based on sexual orientation. In the 2007 case of *Baczkowski and others v. Poland*, the Court found that Poland violated the treaty in banning an LGBTI parade.¹⁴

The Yogyakarta Principles are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. They do not develop any new standards, but clarify and affirm the existing binding international legal standards with which states must comply. The Principles were developed and adopted by a group of human rights experts, from diverse regions and backgrounds, including judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, NGOs and others.¹⁵ This is what the Principles state on the subject of freedom of expression, assembly and association:

Principle 19 - the right to freedom of opinion and expression: Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

¹⁰ *International Covenant on Civil and Political Rights, 1966-12-16; GA Res 220A (XXI), 21 UN GAOR Supp. (no16) at 52, UN Doc A/6316 (1966); 999 UNTS 171; 6ILM 368 (1967).*

¹¹ *Universal Declaration of Human Rights, 10 December 1948, GA resolution 217 A(III).*

¹² *Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.*

¹³ *UN, Economic and Social Council, Siracusa Principles on the Limitation and Derogation of Provisions in the international Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).*

¹⁴ *European Court of Human Rights, Baczkowski and Others v. Poland, application no1543/06 (2007).*

¹⁵ *See more at <http://www.yogyakartaprinciples.org/>.*

Principle 20 - the right to peaceful assembly and association: Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations, regardless of sexual orientation or gender identity. Persons may form and have recognised, without discrimination, associations based on sexual orientation or gender identity, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations and gender identities.

2.2. Equality and protection from discrimination

All people are entitled to the enjoyment of all human rights - as the first articles of the Universal Declaration of Human Rights mentioned above states: "all human beings are born free and equal in dignity and rights". Everyone is entitled to the protection of life, liberty and security of person, and to be free from torture and other cruel, inhuman or degrading treatment.¹⁶

The right to privacy is enshrined in **article 12** of the Universal Declaration of Human Rights and **article 17** of the International Covenant on Civil and Political Rights, which state that **no one should be subjected to "arbitrary or unlawful interference with his privacy, family, home or correspondence"**. This concept is frequently applied in order to protect rights and interests of same-sex partners. These principles and rights are applicable to everyone, without discrimination. In order to be able to implement these concepts, it is vital to acknowledge the principles of equality and non-discrimination.

Non-discrimination and equality:

Principles of *non-discrimination* are proclaimed under various provisions of international human rights law: under article 2 of the ICCPR and ICESCR, each State party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenants, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*. Although sexual orientation and gender identity are not explicitly mentioned, the fact that the list of grounds of discrimination is left open by using the phrase "other status", means that sexual orientation and gender identity, like disability, age and health status, may be included in this category. In 1994, in the case of *Toonen v. Australia*, the Human Rights Committee held that States are obligated to protect individuals from discrimination on the basis of their sexual orientation.¹⁷ The same principle was reaffirmed in general comments of the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee against Torture and the Committee on the Elimination of Discrimination against Women.¹⁸

In the General Comment 20, the Committee on Economic, Social and Cultural Rights observed that "other status" included sexual orientation. "States parties should ensure that a person's sexual orientation is not a barrier to realising Covenant rights". Gender identity is also recognised as among the prohibited grounds of discrimination.

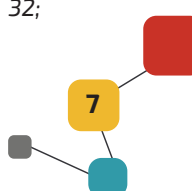
The Committee on Economic, Social and Cultural Rights has also confirmed that the ICESCR "**prohibits discrimination** in access to and maintenance of employment on grounds of ... sexual orientation" and noted concern about discrimination directed at "disadvantaged and marginalised groups and individuals."¹⁹

¹⁶ Article 3 of UDHR, Article 6 of the ICCPR.

¹⁷ *Toonen v. Australia*, communication No. 488/1992 (CCPR/C/50/D/488/1992).

¹⁸ See Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20), para. 32; Committee on the Rights of the Child, General Comment No. 13 (CRC/C/GC/13), para. 60.

¹⁹ See more: UN Human Rights Council 19, 2011.



In addition to legally binding principles enshrined in the international treaties, and authoritative interpretations of these treaties by their respective treaty bodies, the UN bodies have adopted a range of non-binding declarations, guidelines and statements on equality and non-discrimination on grounds of sexual orientation and gender identity. In December 2008, the United Nations General Assembly adopted a non-binding statement "Human Rights, Sexual Orientation, and Gender Identity", which calls for an end to discrimination in all spheres.²⁰

In 2009, UNAIDS issued a policy guidance on MSM that includes a central human rights and nondiscrimination component. The UNAIDS Action Framework: Universal Access for Men Who Have Sex with Men and Transgender People urges that a conducive legal, policy, and social environment to support programming address HIV-related issues among MSM and transgendered people and that this can be strengthened through the promotion and guarantee of human rights.

There are several instances where special protection and respect for people's rights is needed to ensure full respect, protection and fulfilment of LGBTI persons. For effective HIV prevention and treatment, and beneficial public health outcomes, the International Guidelines on HIV/AIDS and Human Rights provide good recommendations on the need to respect, protect and fulfil human rights.²¹

Anti-discrimination and protective laws should be enacted to reduce human rights violations against men having sex with men, including in the context of HIV, in order, inter alia, to reduce the vulnerability of men who have sex with men to infection by HIV and to the impact of HIV and AIDS. These measures should include providing penalties for vilification of people who engage in same-sex relationships, giving legal recognition to same-sex marriages and/or relationships and governing such relationships with consistent property, divorce and inheritance provisions. The age of consent to sex and marriage should be consistent for heterosexual and homosexual relationships. Laws and police practices relating to assaults against men who have sex with men should be reviewed to ensure that adequate legal protection is given in these situations.²²

2.3. Protection from hate crimes including hate speech:

In recent years, the Council of Europe has been active in calling for better human rights protection for LGBTI people. In 2010, the Council of Europe Committee of Ministers adopted the Recommendation "Measures to combat discrimination on grounds of sexual orientation or gender identity".²³ Particular attention is placed in the recommendation on ensuring an effective criminal-justice response in combating hate crimes. This includes increasing punishment through sentencing provisions for crimes with aggravating circumstances, and improving victim support and data recording in cases of anti-LGBTI hate crime.

Additionally, according to the Recommendation, member states should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may

²⁰ The statement reaffirms "the principle of non-discrimination which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity. It expresses deep concern by violations of human rights and fundamental freedoms based on sexual orientation or gender identity; and condemns the human rights violations based on sexual orientation or gender identity wherever they occur, in particular the use of the death penalty on this ground, extrajudicial, summary or arbitrary executions, the practice of torture and other cruel, inhuman and degrading treatment or punishment, arbitrary arrest or detention and deprivation of economic, social and cultural rights, including the right to health." UN General Assembly Statement on human Rights, Sexual orientation and Gender Identity, 18 December 2008.

²¹ UNAIDS 2009. World Bank, *The Global HIV Epidemics among Men Who Have Sex with Men*, 2011, p. 305.

²² Inter-Agency, *International Guidelines on HIV/AIDS and Human Rights*, July 2006, HR/PUB/06/9, Consolidated Version. Guideline 5, 22(h).

²³ CM/Rec(2010)5.

be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons. "Hate speech" should be prohibited and publicly disavowed whenever it occurs; member states should raise awareness among public authorities and public institutions at all levels of their responsibility to refrain from statements, in particular to the media, which may reasonably be understood as legitimising such hatred or discrimination.²⁴

UN's "Born Free and Equal" principles call on the states to protect people from homophobic and transphobic violence, establish effective systems to record and report hate-motivated crimes, and ensure effective investigation and prosecution of perpetrators and redress for victims of such violence.²⁵

2.4. Legalization of same-sex relationships:

a. Repeal of criminalisation:

Criminalisation of private consensual homosexual acts violates individual's **rights to privacy and to non-discrimination** and constitutes a breach of international human rights law. UN Special Rapporteurs have emphasised the link between criminalisation and homophobic hate crimes, police abuse, torture, and family and community violence, as well as constraints that criminalisation places on work of human rights defenders working to protect the rights of LGBTI persons. The Special Rapporteur on health noted that "sanctioned punishment by States reinforces existing prejudices, and legitimises community violence and police brutality directed at affected individuals."²⁶ The Special Rapporteur on extrajudicial executions noted that criminalisation increases social stigmatisation and makes people "more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity."²⁷ The Special Rapporteur on health observed: "Criminal laws concerning consensual same-sex conduct, sexual orientation and gender identity often infringe on various human rights."^{28, 29} The criminalisation of homosexuality may deter individuals from seeking health services for fear of revealing criminal conduct, and results in services, national health plans and policies not reflecting the specific needs of LGBTI persons.³⁰

b. Legalisation of same-sex relationships:

Although so far there is no agreement among UN and the Council of Europe member states regarding the legalisation of same-sex relationships, more and more Western states adopt laws and policies allowing same-sex marriage or partnerships. Whereas UN bodies are still silent on this matter, the European Court of Human Rights has legislated several cases on this subject, recently acknowledging the right to family life of same-sex couples.

²⁴ 2010 Council of Europe Recommendation CM/Rec (2010/5), Articles 6 and 7 in the Appendix.

²⁵ UN, Office of the High Commissioner for Human Rights, *Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law*. 2012. p. 13.

²⁶ Report of the UN High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, Report to the General Assembly, 17 November 2011, A/HRC/19/41/, paras 55-56.

²⁷ A/57/138, para. 37.

²⁸ Report of the UN High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, Report to the General Assembly, 17 November 2011, A/HRC/19/41/, paras 55-56.

²⁹ Secretary-General Ban repeatedly emphasised the importance of decriminalization of lesbian, gay, bisexual, and transgendered (LGBTI) populations globally, and called all countries to remove offences that criminalize people on the basis of their sexual orientation or gender identity from the statute books and to encourage greater respect for all people, irrespective of their sexuality or gender identity. Ch. Beyrer et al, *The Global HIV Epidemics among Men Who Have Sex With Men*, the World Bank, 2011, p. 303.

³⁰ Report of the UN High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, Report to the General Assembly, 17 November 2011, A/HRC/19/41/, paras 55-56.

In *Toonen v. Australia*, the Human Rights Committee found that “adult consensual sexual activity in private is covered by the concept of “privacy” under the International Covenant on Civil and Political Rights. According to the Committee, it is irrelevant whether laws criminalizing such conduct are enforced or not; their mere existence continuously and directly interferes with an individual's privacy. Since *Toonen*, the Committee, other treaty bodies and special procedures have repeatedly urged States to reform laws criminalizing homosexuality or sexual conduct between consenting adults of the same-sex. (Human Rights Committee, 4 April 1994, CCPR/C/50/D/488/1992).

In the case of *Schalk and Kopf v. Austria* the European Court of Human Rights (ECtHR) in Strasbourg noted on November 22, 2010 ... «that since 2001.. a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples...In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy «family life» for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of «family life», just as the relationship of a different-sex couple in the same situation would.»³¹

2.5. Adoption

Fundamental children's rights include the right to life, health, development, information, protection from discrimination on any ground, including their own or their parents HIV status. In all respects, the best interest of the child must be a primary consideration.³² According to the UN Committee on the Rights of The Child, these rights should constitute the guiding theme in the consideration of HIV/AIDS at all levels of prevention, treatment, and care.³³

UNAIDS called states to adopt a holistic, child rights-based approach to HIV/AIDS and place children at the centre of the response to the epidemic. The states must ensure non-discrimination and full realization of human rights of children.

The European Convention on Human Rights protects the right to respect for family life, the right to marry, and the right not to be discriminated against on the basis of sex.³⁴ In *E.B. v France*, the Court took a step towards recognizing the full equality of LGBT groups. It explained on the applicability of Article 14 (equality), and equality standards in Protocol 12 (non-discrimination). The Court put the right to private life free from discrimination over the national interests in protecting children. It is argued that this decision could be used for providing rights of equal adoption to same-sex couples.³⁵ The Court held, that “in rejecting the applicant's application for authorization to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention.”³⁶

Principle 24 of the Yogyakarta Principles states: “Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members”. In accordance to this principle, states shall “take all necessary legislative, administrative and other measures to ensure the right to found a family,

³¹ *Schalk and Kopf v. Austria*, Application no 30141/04, Council of Europe: European Court of Human Rights, 24 June 2010.

³² *Convention on the Rights of the Child*.

³³ CRC General Comment No. 3 “On Children and HIV/AIDS”, para 5.

³⁴ *The European Convention for the protection of Human Rights and Fundamental Freedoms*, art 8, 12, 14.

³⁵ *E.B. v France*, App. No. 43546/02, slip op. at para. 96 (Eur. Cr. H.R. Jan. 22, 2008), <http://cmiskp.echr.coe.int/tkpl97/view.asp?item=l&portal=hbkm&action=html&highlight=43546/02&sessionId=41595631&skin=hudoc-en>.

³⁶ *E.B. v France*, at 96.

including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity". In addition, the new European Convention on the Adoption of Children recognizes a much broader notion of family.³⁷

2.6. Standards relating to transgender persons

In principle, international human rights instruments protect everybody without discrimination. Despite the fact that gender identity as a discrimination ground, along with sexual orientation, is often not explicitly mentioned in international human rights treaties, these treaties do apply to all persons through their open-ended discrimination clauses. [See above]

Apart from facing the same human rights issues as other LGBTI people, transgender persons are exposed to a range of unique challenges. These include the fact that some international and national medical classifications still impose the diagnosis of mental disorder on transgender persons. Such diagnosis may become an obstacle to the full enjoyment of human rights by transgender people especially when it is applied in a way to restrict the legal capacity or choice for medical treatment.³⁸ Another significant set of issues is presented by the fact that in order to fully realise their human rights, many transgender persons need to have access to medical gender reassignment procedures, as well as procedures for legal change of their name, and general recognition of the preferred gender.

In the following sections, international legal standards related to change of gender and name are described.

Access to gender reassignment procedures:

European Convention on Human Rights obliges all State parties to provide for the possibility, in principle within their jurisdiction, to undergo surgery leading to full gender reassignment. The European Court of Human Rights has applied the European Convention on Human Rights in judgments ruling that states should provide transgender persons the possibility to undergo surgery leading to full gender reassignment and that this surgery should be covered by insurance plans as «medically necessary» treatment.³⁹ The Court has also ruled that states should recognise the change of sex in identity documents.⁴⁰

Often, states impose multiple requirements on transgender persons in order to qualify for a gender reassignments procedure. This may include the obligation to get divorced if married, the requirement to undergo a sterilisation procedure, and other not medically necessary and frequently abusive and degrading processes. Recommendation CM/Rec (2010) 5 of the Committee of Ministers states in this respect that 'prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements'.⁴¹ The 2009 the Council of Europe Commissioner for Human Rights's Issue Paper recommends the expeditious and transparent procedures for changing name and sex, and the abolishment of sterilisation and other compulsory medical treatment as a legal requirement to recognise a person's gender identity.⁴²

³⁷ Council of Europe, *European Convention on the Adoption of Children*, Article 7.

³⁸ Council of Europe. *European Union Agency for Fundamental Rights (FRA), Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity. Comparative legal analysis, 2010 Update.*

³⁹ ECtHR, *van Kück v. Germany*, judgment of 12 June 2003.

⁴⁰ ECtHR, *B. v. France*, judgment of 25 March 1992 and *Christine Goodwin v. U.K.*, judgment of 11 July 2002.

⁴¹ Council of Europe, *recommendation CM/Rec (2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, 31 March 2010.

⁴² Council of Europe, *Human Rights and gender Identity, Issue Paper by Thomas hammarberg, Council of Europe Commissioner for Human Rights. Strasbourg, 29 July 2009. CommDH/IssuePaper(2009)2.*

Legal recognition of the preferred gender and change of sex and name in ID and other documents:

On the basis of Article 8 of the European Convention, that states that “everyone has the right to respect for his private and family life, his home and his correspondence”, the European Court of Human Rights has ruled that failure of a state to alter the birth certificate of a person to the preferred gender constitutes a violation of Article 8 of the Convention.⁴³ Member states are thus required to legally recognise the gender change of transsexual persons.

Access to procedures to change one’s sex and one’s first name in identity documents is vital for a transgender person to live in accordance with preferred gender identity. Indeed, the ability to live in the preferred gender and be legally recognised as such is preconditioned by identity papers that are used to conduct everyday life, for example when using a health insurance card, a driving licence or an educational certificate during a job application process. It could also lead to restrictions on participation in education or employment wherever birth certificates are necessary or sex is indicated on national identity cards. It can mean that transgender people without the correct documentation are effectively hindered from meaningful participation in the labour market, leading to unemployment.

2.7. Human Rights obligations of Businesses

The 2017 UN Standards of Conduct for Business and Human Rights declare that all businesses have a responsibility to respect human rights of LGBT-groups in their operations and business relations. Businesses are expected to develop policies, exercise due diligence, and establish mechanisms to monitor and communicate about their compliance with human rights standards. They should eliminate discrimination and human rights violations against LGBT-groups in the workplace, in the marketplace, and in the public sphere.⁴⁴

⁴³ ECtHR, *B. v. France*, judgment of 25 March 1992 and *Christine Goodwin v. U.K.*, judgment of 11 July 2002.

⁴⁴ UN Human Rights, Office of the High Commissioner, *Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People, Standards of Conduct for Business*, Sept 2017.



*Eurasian Coalition
on Male Health*

www.ecom.ngo
www.fb.com/ecom.ngo
www.twitter.com/ECOMngo
contact@ecom.ngo

