EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

23 September 2015

Case Document No. 3

Transgender - Europe and ILGA - Europe v. Czech Republic
Complaint No.117/2015

OBSERVATIONS BY ADF INTERNATIONAL

Registered at the Secretariat on 28 July 2015

CZE

ADF INTERNATIONAL

European Committee of Social Rights
Council of Europe
67075 Strasbourg-Cedex, FRANCE

22 July 2015

Dear Mr Brillat, Executive Secretary of the European Committee of Social Rights,

RE: Transgender-Europe and ILGA-Europe v. Czech Republic, No. 117/2015

Pursuant to Rule 32A of the Rules of the European Committee of Social Rights, ADF International ("ADF") respectfully requests the President of the Committee to be permitted to submit the enclosed written observations in the case of *Transgender-Europe and ILGA-Europe v. Czech Republic* regarding the scope of Article 11 in the context of individuals seeking legal recognition of changes to their gender.

Headquartered in Vienna, Austria, ADF is a global alliance-building legal organization that advocates for fundamental freedoms and the right of people to freely live out their faith. As well as having ECOSOC consultative status with the United Nations, ADF has accreditation with the European Commission and Parliament, the Fundamental Rights Agency of the European Union, the Organization for Security and Co-operation in Europe, and the Organization of American States.

ADF has provided advice and memoranda to several national Governments on legal approaches to the gender identity movement and is therefore well-qualified to provide the legal analysis enclosed.

Respectfully pled,

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EUROPEAN COMMITTEE OF SOCIAL RIGHTS

COLLECTIVE COMPLAINT NO:

117/2005

TRANSGENDER-EUROPE
ILGA-EUROPE

Applicant

v.

CZECH REPUBLIC

Respondent

WRITTEN OBSERVATIONS OF:

ADF International

Filed on
23 July 2015

(a) Introduction

1. ADF International is a legal organization dedicated to protecting fundamental freedoms including the right to life, marriage and the family, and freedom of religion. In addition to holding ECOSOC consultative status with the United Nations (registered as "Alliance Defending Freedom"), ADF International has accreditation with the European Commission and Parliament, the Organization of American States, and co-operates with the Fundamental Rights Agency of the European Union and the Organization for Security and Co-operation in Europe.

2. ADF International also works with a legal alliance of more than 2,200 lawyers dedicated to the protection of fundamental human rights through which it has been involved in over 500 cases before national and international tribunals, including the Supreme Courts of the United States of America, Argentina, Honduras, India, Mexico and Peru, as well as the European Court of Human Rights and the Inter-American Court of Human Rights.

3. At a legislative level, ADF International has also provided expert testimony before several national parliaments, as well as the European Parliament and the United States Congress and recently been granted permission to intervene before the European Court of Human Rights on very similar matters to those raised in the instant case.[1]

4. The instant complaint concerns the proper legal approach to individuals identifying as the opposite sex. The complaint, in essence, argues that requiring individuals seeking an amendment to official documents to have undergone a physical sex change violates the right to health guaranteed in Article 11 of the European Social Charter.

5. These observations will firstly submit that it would undermine the legitimacy of the Charter and this Committee for the right to health to be interpreted in such a contortion as would be required to bring this complaint within the scope of the Article 11. Moreover, it will be shown that such an interpretation is inconsistent with the established case law of the Committee.

6. It will secondly be argued that the Committee should be slow to accept that the national requirements in question violate the general requirement for informed consent given the clear distortion of that concept.

7. Thirdly, it will be submitted that useful reference can be had to the well-developed jurisprudence in this area of the European Court of Human Rights ["ECtHR"]. In particular, while the Court has dealt with the question of *whether* countries should provide a mechanism for changes to gender after birth, the mechanics of so doing have always been considered a matter for the member State. It is further argued that this position should remain unchanged for two reasons. Firstly, because such practical questions are best decided at a national level; and secondly because there is a clear divergence of approaches within the Council of Europe region.

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[1] *See A.P., Garçon and Nicot v. France*, App. Nos. 79885/12, 52471/13, 52596/13.

8. Finally, within the Complaint, the "Yogyakarta principles" feature within the section entitled "global human rights standards." These observations will argue that the Committee should properly afford little weight to this document either in assessing the state of international law and evaluating any European consensus in this area given the origin of this unjustifiably expansive and highly contentious document, and the intent behind its drafting.

(b) National rules on gender reassignment surgery not within scope of Article 11

9. Article 11 of the ESC provides that:

> With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia:
>
> 1. to remove as far as possible the causes of ill-health;
> 2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
> 3. to prevent as far as possible epidemic, endemic and other diseases.

10. In 1969, this Committee published a "Statement of interpretation on Article 11."[2] This statement recalls that the undertakings a Contracting State make are "of a very general kind" and, in an attempt to bring clarity suggests that "a country bound by the Charter should be considered as fulfilling its obligations if it provides evidence of the existence of a medical health system comprising the following elements..." The elements listed include "proper medical care for the whole population", "a system of health education" and special effort in the organisation of preventative care.

11. These are general principles aimed at guaranteeing *access* to health services such that a population can thrive "as far as possible." The right to health is inherently concerned with questions of *access* given that it cannot simply be read as a right to be healthy – something which depends not just on medical services but also genetic and other factors.

12. That interpretation is borne out in the Committee's evaluation of subsequent complaints. In a leading decision on the merits, the Committee found that Bulgaria's failure to ensure universal access to health insurance coverage deprived a large number of Roma from access to health care[3] and a 2007 complaint focussed on access to sexual education within schools such as fell within the scope of Article 11(2) on the "promotion of health."[4]

13. Specifically in relation to transgenderism, the Committee has dealt with the question in a number of concluding observations which have, without exception,

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[2] European Committee on Social Rights, "Interpretative Statement on Article 11", 31 May 1969.
[3] *European Roma Rights Centre (ERRC) v. Bulgaria*, Complaint no. 46/2007.
[4] *Interights v. Croatia*, Complaint no. 45/2007.

sought to identify and remedy *access* to healthcare[5] and education or broader anti-discrimination provisions.[6]

14. The matter before the Committee does not relate to *access* to healthcare, nor does it relate to health education. Access to gender reassignment surgery is clearly possible in the Czech Republic and that much does not appear to be in dispute. Rather, the complaint is about the requirements imposed by law upon someone seeking a change to official documents. That falls far wide of the scope of Article 11.

15. By way of analogy, the instant complaint is closer to a right to housing being called into question if the Government refused to update a citizen's address in official records despite them not actually living there. While such a right may be engaged if the State was *preventing* the citizen from moving, a citizen who, having weighed up the advantages and disadvantages to them, decides not to move cannot fall upon that right to nonetheless claim the change in status.

16. It is respectfully submitted that this complaint therefore falls outside the scope of Article 11.

(c) A proper understanding of the principle of 'informed consent'

17. The Committee is invited by the complainant INGO to conclude that national rules preconditioning a change to official documents upon gender reassignment surgery violates the principle of informed consent. The principle is recognized in the practice of medicine and medical ethics and means that an adult who has been told of the risks and benefits of an intervention should ordinarily be entitled to refuse medical treatment even when it may be strongly advisable.

18. The principle of informed consent does not explicitly appear within the Charter but it has been found to be contained within the right to health protected by international documents including the International Covenant on Economic, Social and Cultural Rights. In its General Comment No. 14, the Committee monitoring that treaty indicates that the right to health:

> contains both freedoms and entitlements. The freedoms include ... the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.[7]

19. This is a non-exhaustive list of the types of "interference" which may run foul of the principle requiring informed consent. Non-consensual medical treatment is nestled between torture and medical experimentation. This gives context to the type of ill being targeted here which includes interventions without the patient's knowledge and interventions which are continued despite the protestations of the individual. There is a clear gravity to this with the aim being ensuring people only undergo

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[5] *See* Conclusions 2009 in respect of Malta (2009).
[6] *See* Conclusions 2012 in respect of Albania (7 December 2012); Conclusions 2012 in respect of Turkey (7 December 2012)
[7] Committee on Economic, Social and Cultural Rights, "General Comment No. 14", 11 August 2000, E/C.12/2000/4.

treatment which they both understand the essentials of and which, having so understood, are willing to undergo with all the risks and benefits entailed therein.

20. It is a distortion of that concept to suggest it is violated where an individual chooses to undergo gender reassignment surgery having been informed of the benefits and the risks. The surgery is neither prescribed, nor required by the State and is only carried out pursuant to an individual's informed consent.

21. The fact that a State may require gender reassignment prior to amending a birth certificate or other official document does not compel the individual to undergo the surgery. To accept the alternative would mean the State would be required to recognize as female someone still biologically and genetically male and able to reproduce as such. This would introduce an excess of regulatory difficulties and amount to the backdoor introduction of same-sex marriage for the reasons recognized by the European Court of Human Rights in *Hämäläinen v. Finland*[8] – something the ECtHR explained should be avoided, not least because of the need to afford a wide margin of appreciation to contracting States particularly in areas raising sensitive moral and ethical questions where there is no consensus.

(d) Margin of appreciation

22. The margin of appreciation is, in brief, a doctrine significantly developed by the ECtHR aimed at ensuring the subsidiarity of the Convention machinery given that "national authorities are in principle better placed than an international court to evaluate local needs and conditions."[9] It is a powerful way of ensuring that human rights are properly protected whilst at the same time mitigating the risk of human rights imperialism. This sensitivity to the history, culture and law of member is a source of the legitimacy of the Court's judgments given that the Convention, like the Charter, is "built on diverse economic, cultural, and legal traditions..."[10]

23. The Committee has used the language of the margin of appreciation in recognizing a similar deference to Contracting States as to the particular method of securing a Charter objective.[11] The doctrine is therefore a powerful method of ensuring a balance of uniformity in the protection of rights whilst also supporting the diversity of social realities in different member States.

24. In relation to the instant matter, it is clear that there is an extreme divergence of approach across the Council of Europe region. Indeed, a "general question" from the Committee[12] would appear to go significantly further than any previous case

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[8] App. No. 37359/09 at para. 70: "The Court is mindful of the fact that the applicant is not advocating same-sex marriage in genereal but merely wants to preserve her own marriage. However, it considers that the applicant's claim, if accepted, would in practice lead to a situation in which two persons of the same sex could be married to each other."

[9] Explanatory Report on 'Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, art.1. http://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf.

[10] Bakircioglu, O , 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases', *German Law Journal,* vol. 8, 2007, p.717.

[11] *See Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v France,* Complaint No. 26/2004, para. 38.

[12] General Introduction to the 2013 Concluding Observations, para 15.

law, interpretive statement or comparative jurisprudence from other regional instruments, including the ECtHR, in asking States to report on "whether legal gender recognition for transgender persons requires (in law or in practice) that they undergo sterilization..."

25. This question appears to have been included (frequent reference being made thereto) as a result of a tranche of NGO reports submitted by ILGA-Europe during the national reporting round. The countries criticized included Belgium, France, Denmark, Russia, Slovenia, Poland, Latvia, Greece, Czech Republic, Cyprus, FYR Macedonia, Slovakia, Lithuania, Italy, Georgia, Finland, Bosnia and Herzegovina, Romania, Norway, Moldova, Malta, Ukraine and Turkey. This comprises 50% of the Council of Europe's membership and demonstrates conclusively the absence of any common approach to the question.

26. It is submitted that the fact this is an area in which the ECtHR has been particular active should therefore be of the highest significance to the Committee in its consideration of this complaint given the interest in developing a cohesive body of human rights jurisprudence which protects fundamental rights in a consistent way.

27. It is firstly important to distinguish two very different sorts of cases that have come before the Court in this area. The first concerns whether or not those seeking to live life as a different gender from their birth gender should have access to a procedure by which an official change can be effected. The second consists of challenges to the differing national requirements laid down by which such recognition can be obtained.

28. It is submitted that there is a significant difference between the fact of legal recognition of a transsexual[13] individual, such as, in *Goodwin v. United Kingdom,*[14] and that of the measure used to identify him or her as such upon which that identification is contingent. The latter asks questions of inherent definition. Among member States, there are a variety of different medical, social, and legal approaches to define what it means to be a transsexual - a disparity which only increased in light of the recent resolution of the Parliamentary Assembly of the Council of Europe.[15] Therefore, a State ought to be afforded a wide margin of appreciation to determine the foundational measure by which one ascertains transsexuality given the lack of a common understanding.

29. In 1996, the Court in *Goodwin v. United Kingdom* held that Article 8 of the Convention was violated when a State withheld legal recognition from a diagnosed transsexual who has undergone sex reassignment surgery. *Goodwin* concerned the inability to change integral documents pertaining to identity including birth certificates. The Court applied a narrower margin of appreciation recognising the

[13] The use of this term throughout this brief is guided by the inclusion of this language within the World Health Organization's International Statistical Classification of Diseases and Related Health Problems. However, the term itself is contested and has, in some circles, been entirely replaced by the term 'trans-gender'.
[14] *Goodwin v. UK*, Application no. 28957/95, 11 July 2002.
[15] PACE Resolution 2048 (2015).

> clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.[16]

30. However, in cases which raise complex scientific, legal, moral and social issues, particularly in the absence of a social consensus among the member States, the Court affords discretion to the States, yielding a wider margin of appreciation.[17] For the reasons set out above, this is an indispensable manifestation of the exercise of the Court's supervisory, rather than appellate, function.

31. This much was recognized by the ECtHR in *Goodwin v. United Kingdom*. The judgment contains an extended paragraph dealing with the scope of the margin of appreciation specifically in the context of recognition of changes in gender which concludes that:

> ...it is for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages.[18]

32. It is submitted that this affords a proper margin of appreciation to the States and there has been no significant shift within the Council of Europe region such as would justify a departure from this clear exposition of the content of the margin in this context. Indeed, the Grand Chamber of the ECtHR has confirmed this as recently as 2014 in the case of *Hämäläinen v. Finland*.[19]

33. The case involved a claim under Article 8 that Finland had violated the rights of a male-female transsexual. The applicant was married to a woman and wanted to maintain that marriage whilst also having his gender listed as female on official documents. Whilst same sex couples can enter a civil union in Finland, marriage is reserved to opposite sex couples. The applicant refused the suggestion that he convert his marriage to a civil union which would have then allowed the change in gender on his official documents.

34. In finding in favour of the State, the ECtHR re-iterated that the Convention did not impose an obligation to allow same sex marriage, nor does it require special arrangements for this kind of situation. It was also indicated there was an absence of a European consensus on gender legislation meaning a wide margin of appreciation was to be afforded to Finland:

> In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to the respondent State must still be a wide one. ...This margin must in principle extend both to the State's decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative transsexuals and, having intervened, to

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[16] *Id.* at para. 85.
[17] *X, Y, and Z v. UK*, Application no. 21830/93, 22 April 1997, *see* para. 44, 52.
[18] *Goodwin*, para. 103.
[19] Above, note 8.

> the rules it lays down in order to achieve a balance between the competing public and private interests.[20]

35. *Hämäläinen v. Finland* is a clear example of the Court affording an appropriately wider margin of appreciation where the question involved is not the recognition of a change in gender *per se*, but rather the mechanics of how such a change should be reconciled within the existing regulatory framework.

36. An earlier case is further indicative of the proper approach to questions of mechanics. In *X, Y and Z v. United Kingdom*, the applicant, a post-operative female-to-male transsexual, claimed under Article 8 that his right to respect to family life had been violated when the State refused to formally recognise him as the *father* of a child.[21] Such questions of inherent definition are both relatively novel and ethically sensitive areas and so the Grand Chamber justifiably found that the United Kingdom had acted within its wide margin of appreciation.

37. Thus, the means by which one determines gender, whether it is for example by anatomical analysis or by proof of gender dysphoria from a medical expert[22] are within the margin of appreciation.

38. The Court has most recently dealt with the question of transsexualism in the recent case of *Y.Y. v. Turkey*.[23] The case concerned a Turkish requirement that for access to gender-reassignment surgery, prior sterility had to be proven. Thus the context of the case was very different, as recognized by the ECtHR:

> This case provides a look at the problems faced by transsexuals which are different from those previously considered by the Court. It asks whether *preconditions to gender-reassignment* can be imposed upon transsexuals and whether this would comply with Article 8 of the Convention. The criteria and principles developed by this Court have been formulated in a substantially different context and cannot therefore be transposed as such to the present case.[24]

39. It therefore follows that the principle in that case will not readily apply to the sort of practical question at issue in the instant cases. The position remains unchanged that there exists an irreducible margin of appreciation with regards to establishing the regime through which one can be recognized as a transsexual.

40. Removing all *objective* requirements for transsexuals would afford an absolute right to self-determination, which is inconsistent with the Convention, the Charter and the States' interests. Such a 'right to self-determination' is not defined and would hold an indeterminable scope which would be by definition incompatible with the States' interests and the rights of others. To move in that unprecedented direction would raise a Pandora's box of practical problems which goes against the public interest. In *Goodwin*, it was recognised that these practical problems, such

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[20] *Id.* at para. 75.
[21] *Id.* at para. 32.
[22] For example, in the United Kingdom, the Gender Recognition Act 2004, s(3).
[23] Application no. 14793/08, 10 March 2015.
[24] *Id.* at para. 62. Unofficial translation, emphasis added.

as changing archived legal documents, do exist.[25] Since States are most properly able to resolve these practical problems, this justifies allowing the States to determine how they will balance these competing public and private interests.

41. Nevertheless, the recent PACE Resolution 2048 recommends that member States:

> develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates ... and other similar documents; make these procedures available for all people who seek it, irrespective of age, medical status, financial situation or current or previous detentions[.][26]

42. Although such resolutions *can* provide an evidential basis for an emerging European consensus, this cannot be the case for Resolution 2048 of 2015. Of the 318 members of PACE eligible to vote, 103 cast their vote, including 12 abstentions. Of those 103, 67 voted in favour of this resolution.[27] Statistically, these 67 votes cannot represent the entirety of the Council of Europe, particularly given some of the very controversial areas within the resolution and given the clear difference between aspects of the Resolution and the established case law of the ECtHR.

43. The resolution contains a "self-determination" clause[28], whereby individuals can, as they see fit, choose their gender without anything further being required, and presumably as often as they wish. However, in practice only *two* countries agree that no official psychological diagnosis is required: Denmark and Malta.[29] Finally, 37 countries out of 47 anticipate a medical intervention prior to legal recognition.[30] This highlights again not only the divide, but the wider European consensus of putting in place a system for determining one's gender.

44. As can be seen, when the resolution is subject to even basic scrutiny, the consensus regarding the requirements for the recognition of a new legal gender lies, in fact, against the positions advanced by the resolution.

(e) Open to States to pursue policy in light of social evidence

45. It is submitted that where the Committee determines that a particular issue does not command a broad consensus within the Contracting States, a wider margin of appreciation should be recognized indicating greater deference to the member

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[25] *Id* at para. 85.
[26] PACE Resolution 2048 (2015), §6.2.1. http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21736&lang=en.
[27] Voting information found at: http://assembly.coe.int/nw/xml/Votes/DB-VotesResults-EN.asp?VoteID=35498&DocID=15407; http://www.eclj.org/Releases/Read.aspx?GUID=f3733f41-9726-43f7-86d5-c2b8ad7c1655&s=eur.
[28] *Op. cit.* (no. 17).
[29] Transgender Rights Europe Index found at: http://tgeu.org/wp-content/uploads2015/05/trans-map-Side-B-may-2015_image.png.
[30] *Id.*

State.[31] There remains divergent medical and psychiatric opinion as to the nature of transexualism and whether it is wholly a psychological issue or rather is associated with differentiation in the brain.[32]

46. Legal recognition was never sought in order to promote "self-actualization" but was a recognition that some considered gender-reassignment surgery as a "treatment". Even this categorization is dubious and far from universal. The World Health Organization ("WHO"), for example, continues to classify transsexualism, transvestitism and gender identity disorder as behavioral or mental disorders.[33] Of note are two of the definitions offered by WHO.

47. WHO defines transexualism as:

> A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex.[34]

48. Gender identity disorder is classified as:

> A disorder, usually first manifest during early childhood (and always well before puberty), characterized by a persistent and intense distress about assigned sex, together with a desire to be (or insistence that one is) of the other sex. There is a persistent preoccupation with the dress and activities of the opposite sex and repudiation of the individual's own sex. The diagnosis requires a profound disturbance of the normal gender identity; mere tomboyishness in girls or girlish behaviour in boys is not sufficient.[35]

49. It should also be noted that gender reassignment surgery is not viewed universally as an appropriate treatment for transgenderism. For example, Johns Hopkins University in Baltimore, which is ranked by U.S. News and World Report as the third leading American hospital in the field of psychiatry,[36] was one of the first U.S. hospitals to introduce sex-reassignment surgery. However, in 1979, John Hopkins' closed its gender identity clinic and thereafter ceased performing the surgery based on a published report it produced in 1977 identifying transgenderism as a mental disorder.[37] The former Head of Psychiatry and current Distinguished Professor of Psychiatry at John Hopkins, Prof. Dr. Paul McHugh, strongly

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[31] See for example, *VGT v. Switzerland* no. 24699/94 June 28, 2001 and *Murphy v. Ireland* no. 44179/98 July 10, 2003. But contrast *Animal Defenders v. UK*, no. 48876/08, April 22, 2013.

[32] ECHR, *Case of Christine Goodwin v. the United Kingdom* [GC], application no. 28957/95, judgment of 11 July 2002, § 81.

[33] World Health Organization, *International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD-10)-2015-WHO Version for ;2015*, Chapter 5: Mental and Behavioral Disorders. F64.

[34] *Id.*, F64.0.

[35] *Id.*, F64.2.

[36] http://health.usnews.com/best-hospitals/rankings/psychiatry.

[37] Wise TN, Dupkin C, Meyer JK (1981). Partners of distressed transvestites. American Journal of Psychiatry . 1981 Sep;138(9):1221-4. http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=pubmed&dopt=Abstract&list_uids=7270729.

reiterated his position regarding transgenderism as a mental disorder in a Wall Street Journal Op-Ed published very recently.[38]

50. With such divisive medical and psychological debates taking place over the nature of the treatment and diagnosis of transgenderism, and the restrained approach of the ECtHR, it would be wholly inappropriate for the Committee to make a decisive pronouncement which would strip member States of their role in determining the most proportionate and appropriate means of promoting public order, public health and morals under Article 8 of the Convention.

(f) Legal Status of the Yogyakarta principles

51. In November 2006, a self-described "distinguished group of human rights experts" from only 25 countries met and drafted the Yogyakarta Principles ("Principles"); named after Yogyakarta, Indonesia where the document was drafted. The document represents a non-binding and non-democratically created list of alleged human rights related to "lesbian, gay, bisexual, and transsexual" ("LGBT") individuals.[39] The drafters claim both that the Principles "reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity" and that the Principles "affirm binding international legal standards with which all States must comply."[40]

52. It is submitted that this Committee, if it relies on the Principles, would be doing something never before done by an international tribunal; that being the legitimizing of a non-binding, non-legislatively drafted document without any governmental or inter-governmental input as a binding human rights document.

53. The slippery slope upon which the document asserts its binding nature falters already in the preamble, "[a]cknowledging that this articulation must rely on the current state of international human rights law and will require revision on a regular basis in order to take account of development in that law."[41] The drafters, then, implicitly admit that they are not only articulating unchangeable human rights, but also a bevy of malleable policy assertions.[42] The reality is that the Principles assert a number of novel and dangerous privileges proffered as "human rights," policy assertions, and governmental mandates that neither reflect the existing state of international human rights law nor correspond with the traditional beliefs and values held by the majority of the global populace. Giving authority to a non-binding policy wish-list which goes against the consensus law in the majority of Council of Europe States would considerably undermine the legitimacy of this Committee.

54. The Principles themselves, in an attempt to feign legitimacy, strategically conceal their more radical assertions within a bundle of obvious and redundant human

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[38] http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120.
[39] *The Yogyakarta Principles* (2007), p. 7, http://www.yogyakartaprinciples.org/principles_en.pdf
[40] *Id.*
[41] *Id.* at 9..
[42] *Id.*

rights that are already universally legally binding and therefore not in need of being restated.[43] The strategy can be effective; a radical and controversial redefinition of family, like the one contained in Principle 24, would almost certainly shock and de-legitimize the Principles in the eyes of most.[44] However, this effect is numbed and the radical nature of Principle 24 may even be overlooked when read alongside a group of legitimate and foundational human rights. It is for this reason that the Principles unnecessarily contain redundant human rights, most already being identified in the European Convention of Human Rights and other foundational human rights treaties, and belonging the human family as a whole.

55. Even though, as former United Nations High Commissioner for Human Rights Louise Arbour explained, "Human rights principles, by definition, apply to all of us, simply by virtue of having been born human,"[45] the drafters specifically tailored these fundamental rights to people who identify themselves under the LGBT umbrella. This can be very dangerous because focusing a right on a specific, and small, segment of individuals necessarily implies that all those who do not identify themselves as homosexuals do not enjoy that same right equally.[46] The Principles further corrupt the fundamental human rights that they restate by melding many of them to expensive, impractical, and unnecessary governmental spending mandates.

56. Beyond those norms already enumerated in international law, many of which lose their legitimacy within the Principles because they are drafted with a caveat taking away their universality and promoting a disproportionate benefit to those who engage in homosexual behavior, the more radical Principles themselves have absolutely no grounding in legal or scientific fact. The Principles, for example, define sexual orientation as "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender,"[47] and gender identity as:

> Each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech and mannerisms."[48]

57. This definition of "sexual orientation" is dubious because it equalizes all sexual relationships, divorcing sexuality from its biological purpose (procreation) and

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[43] *Id.*
[44] *Id.* at 27-28.
[45] Douglas Sanders, *The Role of the Yogyakarta Principles* (2008), p. 7, http://sxpolitics.org/wp-content/uploads/2009/03/yogyakarta-principles-2-douglas-sanders.pdf
[46] *See The Yogyakarta Principles* (2007), http://www.yogyakartaprinciples.org/principles_en.pdf (generally).
[47] *Id.*
[48] *Id.*

social responsibility,[49] while this definition of "gender identity" is legally flawed because it is completely subjective, ignoring the basic objective biological reality that people are born of a certain sex.

58. All human beings have equal amounts of dignity simply because they are human.[50] Dignity should in no way be linked to sexual orientation or gender identity. Plus, that everyone has equal dignity does not mean that every sexual orientation warrants equal respect.[51] The Principles as a whole set a very dangerous precedent by lacking in legal certainty, providing a discriminatory balance of human rights protection for a minority segment of the population by proffering preferential treatment, and by feigning to be document prescribed by law rather than merely a policy document.

(g) Conclusion

59. The instant complaint raises relatively novel questions in terms of whether Article 11 can speak to national procedures which allow for recognition of changes in gender. The jurisprudence of this Committee and the clear direction of the case law of the ECtHR would suggest it cannot. This Committee has properly defended the rights of minorities to equal access to healthcare but the instant complaint falls significantly wide of that. Moreover, the judgments of the ECtHR have been consistent in holding that the mechanics for recognition are a matter for the State.

60. Furthermore, these are fundamental definitional questions, with ramifications in ethics, psychology, and medical science which must be afforded a wide margin of appreciation. States approach the question of transsexuality in various ways in accordance with their particular national environment. In this sense, they are laying down rules to achieve a balance between their competing public and private interests. This position is further supported by the extreme divergence in the legal position as between member States on this question.

61. Finally, it is respectfully submitted that in analyzing the instant cases, no regard should be had to the Yogyakarta Principles which do not represent established international law and go radically beyond what has previously been accepted by any international tribunal.

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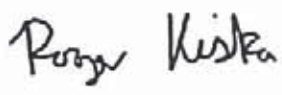
[49] *See* Jakob Cornides, *A Brief Commentary on the Yogyakarta Principles*, p. 2, http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=jakob_cornides.
[50] *See Universal Declaration of Human Rights*, (Dec. 12, 1948).
[51] *See* Jakob Cornides, *A Brief Commentary on the Yogyakarta Principles*, p. 10, http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=jakob_cornides.

For the Intervener:



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