

The Evolving Recognition of Gender in International and European Law

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Abstract

This chapter explains the development of international and European law from a gender perspective and describes how the process from a gender-neutral to a gender-sensitive approach was developed.

Since 1945 and the adoption of the UN Charter, the idea of achieving greater gender equality was merged into many international documents, including the first catalog of women's rights—Convention on the Elimination of all Forms of Discrimination against Women. Many principal and subsidiary bodies were established, contributing to the elimination of gender discrimination and to awareness-raising on some critical issues which were an impediment to achieving gender equality. Twenty years ago, UN Security Council Resolution 1325 was adopted, due to a global effort to establish a platform as a foundation to national and international policies to ensure greater protection of women and girls, during and after, armed conflicts. International Humanitarian Law, enshrined in the Geneva Conventions, also has rules that specifically seek to protect women during armed conflicts. Also, International Criminal Law has been developed to recognize extreme forms of sexual violence as international crimes.

On the European level, under the auspices of the Council of Europe, several international conventions were adopted to achieve gender equality. One of the main instruments, the European Convention on Human Rights, provides broad protection from discrimination based on gender, established in a comprehensive jurisprudence of the European Court of Human Rights. The EU has a set of primary and secondary sources on anti-discrimination, which provides comprehensive protection from gender discrimination and serves as an inspiring model to States candidates and other European countries.

8.1 International Law and Gender Equality

8.1.1 Introduction

This chapter deals with international and European law from the perspective of gender equality. It is divided into two major parts. The first part (Sects. 8.1–8.4) covers universal sources and bodies established with the aim to promote and protect gender equality, while the second (Sects. 8.5–8.6) deals with sources developed under the auspices of the Council of Europe and EU law.

The first part is divided into four sections.

The first section briefly explains how international law developed from gender-neutral to a branch of law that considers gender equality and sketches the Convention on the Elimination of Discrimination against Women and Optional Protocol as the main UN treaties for the advancement of women's rights.

The second section covers other gender-related sources and activities at the UN level. This part covers UN main and subsidiary bodies which serve as a catalyst to the advancement of gender equality.

The third section outlines particular aspects of International Humanitarian Law. This part covers the legal provisions that protect women during armed conflict as well as the provisions in place for the prevention of sexual violence during armed conflict.

The fourth section presents the development of gender perspective into International Criminal Law and recognition of gender-based persecution in the statutes and practice of international, hybrid and national courts and tribunals.

The second part deals with the European law and consists of two sections. Thus, section five gives an overview of the gender aspects of the European Convention on Human Rights and case-law of the European Court of Human Rights as well as of other gender-relevant treaties and policies of the Council of Europe.

Finally, the sixth section focuses on primary and secondary law of the European Union, arguing that the existing rules on gender equality are functional to fair competition of the internal market and fail to promote substantial equality.

8.1.2 Traditional Gender-Neutral Approach of Public International Law and the Development of Gender Perspective (Ivana Krstić)

Three foundational approaches to the international legal order were framed in early to mid-seventeenth-century Europe by Hugo Grotius, the founder of the science of international law, with his capital work, *De jure belli ac pacis* (1625),¹ together with

¹Hershey (1912), p. 30.

Thomas Hobbes and Samuel Pufendorf.² The Peace of Westphalia (1648) is considered to be the beginning of modern international law. After the end of the Thirty Years War, two main ideas emerged: the rise of modern states and sovereignty. The notion of sovereignty was developed in writings of political theorists, such as Jean Bodin, Thomas Hobbes, John Locke and Jean-Jacques Rousseau.³ Therefore, international law was a result of certain theories and principles and international practice, which did not include women and their perspective in its development and were gender-free.

In the second half of the nineteenth century, various women's organizations were first established, with the creation of the International Council of Women in April 1888.⁴ Representatives of 53 women's organizations from 9 countries gathered together in Washington D.C. advocating for human rights of women. After World War I, the first universal organization was established as a League of Nations. Women's organizations participated at the 12th meeting of the League of Nations Committee at the Peace Conference in Paris, but their participation was limited to matters which the committee thought were directly relevant for women.⁵ However, they presented "The Women's Charter," which underlined the importance of separating the nationality of women from their spouses, prohibiting human trafficking of women and girls, and achieving equality of men and women in the area of labour.⁶ The League of Nations Covenant prescribed in Article 7 that all positions in this organizations were equally open to men and women.⁷ This opened the possibility to some of these women to continue their efforts through the work of the League of Nations, and through the work of the International Labour Organization, also established in 1919. However, foundations and human rights development originated only with the establishment of the United Nations.

In 1945, the UN Charter was adopted, reaffirming in its Preamble faith in equal rights of men and women. The UN further committed itself to promote universal respect for human rights without distinction as to, among others, sex.⁸ As the UN

²Besson and Tasioulas (2010), pp. 33, 34.

³Bederman (2002), p. 4.

⁴International Council for Women, History, available at: <http://www.icw-cif.com/01/03.php>, accessed 10 April 2021.

⁵Those issues were women's employment rights, prostitution, prison reform, child marriage and trafficking of women and children. The Inter-Allied Women's Conference as a response to Paris Peace Conference, EuroClic, 4 December 2019, available at: <https://www.euroclio.eu/2019/12/04/the-inter-allied-womens-conference-as-a-response-to-paris-peace-conference/>, accessed 9 July 2021; See also Women and Global Diplomacy: from Peace Movements to the United Nations, UN Research Guides, available at: <https://libraryresources.unog.ch/womendiplomacy/leagueofnations>, accessed 9 July 2021.

⁶More on the work of the women's organizations in the League of Nations see Miller (1994), pp. 219–245.

⁷The Covenant of the League of Nations, including amendments adopted to December 1924, available at: https://avalon.law.yale.edu/20th_century/leagcov.asp, accessed 10 April 2021.

⁸Article 55 of the UN Charter.

Charter did not contain any human rights catalogue, it was agreed to prepare a draft human rights declaration. At the end of 1945, US President Harry Truman appointed Eleanor Roosevelt, First Lady during Franklin D. Roosevelt's administration from 1933 to 1945, as a member of the US delegation, expecting her to assist in the purpose to create conditions of mutual trust and economic and social well-being of all people around the world.⁹ Eleanor Roosevelt was an active humanitarian, working on civil rights protections. In April 1946, she became chair of the UN Commission on Human Rights (HRC) and, together with Hansa Mehta, delegate from India and the only other female delegate at that time, was advocating for the adoption of the human rights declaration. They were also advocating for changing the wording of Article 1: "All men are born free and equal" to "All human beings are born free and equal."¹⁰ As Howard Zinn has written, the use of the word 'men' indicated that women were "beyond consideration as worthy of inclusion", and were politically invisible.¹¹ Therefore, with the more justifiable use of the word 'human beings', any doubt that rights equally belong to both, men and women, were dispelled.

The Universal Declaration of Human Rights (UDHR) was adopted in 1948.¹² It contains several provisions which are relevant from the perspective of gender equality, but with particular attention to Article 2 which prescribes that everyone is entitled to all rights without distinction, among others, of sex. Article 16 further proclaims equality of spouses, while Article 25(2) protects motherhood. Many other provisions are also relevant from the perspective of gender equality. Bearing in mind that the UDHR was a non-binding instrument, the work on two main human rights treaties commenced in 1951, and in 1966 they were adopted. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) contain many important provisions, as well as the provision that States Parties will respect and guarantee everyone within their jurisdiction all rights without distinction of any kind, including, sex.¹³ In 1967, the General Assembly adopted a Declaration on the Elimination of Discrimination against Women, acknowledging in its Preamble that women were greatly contributing to social, political, economic and family life and that full and complete development of a country, the welfare and peace in the world required their maximum participation.¹⁴ In 1979, this declaration was transformed into the first gender-specific convention—the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which prohibits gender discrimination in

⁹Letter, Harry Truman to Eleanor Roosevelt, 21 December 1945, available at: <https://artsandculture.google.com/exhibit/eleanor-roosevelt-and-the-united-nations/ARaxRSs->, accessed 15 April 2021.

¹⁰Scroll Staff (2019), available at: <https://scroll.in/announcements/946351/human-rights-day-2019-history-the-women-who-shaped-the-udhr-and-theme>, accessed 15 April 2021.

¹¹Zinn (2015), p. 73.

¹²General Assembly, Resolution A/RES/217 (III), 10 December 1948.

¹³Article 2(1) ICCPR; Article 2(2) ICESCR.

¹⁴General Assembly, Resolution 2263 (XXII), 7 November 1967.

all areas of life. CEDAW lists women's human rights to equality and non-discrimination and identifies the range of actions that States must take to achieve this equality. Article 7 stipulates that women's equality must be implemented in public and political life, enabling their participation in non-governmental organizations and associations and securing a more active role in international organizations and State delegations. After the adoption of CEDAW, many other international instruments relevant for gender equality were adopted. The practice of international judicial and quasi-judicial bodies was advanced, recognizing the position of women to a much greater extent.

8.1.3 The First Catalogue of Women's Rights on UN Level: General Aspects and Overview of CEDAW

8.1.3.1 CEDAW's *Raison d'être* Undermined by Reservations

The preamble of CEDAW explains the Convention's *raison d'être* by underlining that "despite [the previous] instruments extensive discrimination against women continues to exist" and points out that "a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women".

Among the nine core human rights treaties on UN level, CEDAW is one of the most widely accepted with currently 189 States Parties, important outsiders being Iran, Somalia, Sudan and the USA (the latter has at least been a signatory since 1980). Yet CEDAW is also subject to a great number of general and indeterminate reservations, such as reservations attempting to subordinate treaty obligations to domestic or religious laws and traditions. Many of these are incompatible with the Convention's object and purpose and thus impermissible under Art. 28 (2) CEDAW.¹⁵ States apparently felt politically compelled to join CEDAW, even though they do not share its main goal. Other States have objected to those far-reaching reservations.

Example

Reservation by Saudi Arabia:

"... In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention ..."

Objection by Germany:

"The Government of the Federal Republic of Germany is of the view that the reservation, with regard to compatibility of CEDAW rules with Islamic law, raises doubts as to the commitment of the Kingdom of Saudi Arabia to

¹⁵Chinkin (2010), paras 16–17. In General Recommendation no. 4 (1987), the CEDAW Committee expressed concern in this regard and suggested withdrawal of such reservations.

CEDAW. The Government of the Federal Republic of Germany considers this reservation to be incompatible with the object and purpose of the Convention. . . . This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and the Kingdom of Saudi Arabia.”¹⁶ ◀

According to the International Law Commission’s “Guide to Practice on Reservations to Treaties” of 2011, an impermissible reservation is devoid of any legal effect so that the reserving State is bound by the treaty without the benefit of the reservation, unless it expresses a contrary intention.¹⁷ The ILC’s solution may go beyond the customary international law rules on reservations.

8.1.3.2 Obligations of States Parties

Art. 1 CEDAW defines “discrimination against women” as, “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”. In Arts. 2–6, CEDAW sets forth the fundamental obligations of States Parties. Most importantly, they have to eradicate discrimination by public authorities and institutions, ensure effective protection of women against discrimination and “take all appropriate measures to eliminate discrimination against women by any [private] person, organization or enterprise” (Art. 2).¹⁸ Art. 4 (1) CEDAW permits “temporary special measures aimed at accelerating de facto equality between men and women . . .”

Art. 5 CEDAW obliges States Parties to modify social and cultural patterns of conduct in order to eliminate prejudices and stereotypes and redirect family education toward common responsibility of men and women in the upbringing and development of their children. Arts. 7–9 CEDAW clarifies obligations concerning equal rights and non-discrimination in political and public life. Arts. 10–16 CEDAW prescribe action to be taken against discrimination in various sectors such education, health care and family relations.

According to Art. 23 CEDAW, the Convention enshrines only minimum standards of equality, leaving the States Parties free to enact provisions “more conducive to the achievement of equality between men and women”. Art. 24 CEDAW obliges the States Parties to undertake all necessary measures at the national level aimed at achieving the full realization of CEDAW rights.¹⁹

¹⁶United Nations Treaty Collection, Status of Treaties – CEDAW, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en.

¹⁷Paras. 4.5.1.–4.5.3. (https://legal.un.org/ilc/texts/1_8.shtml).

¹⁸Chinkin (2010), para. 8.

¹⁹For more detailed information on CEDAW, see Chapter on Human Rights.

8.1.3.3 Implementation

A Committee on the Elimination of Discrimination against Women consisting of independent experts is established to monitor compliance (Art. 17–22 CEDAW).²⁰ States Parties have to submit regular reports to that Committee which can make individual or general recommendations.²¹ The Optional Protocol (OP) to CEDAW,²² with currently 114 States Parties, has introduced an individual communication procedure which can be initiated by victims of violations of CEDAW rights against a State Party (Art. 2–7 OP). The Committee can also conduct a confidential inquiry *ex officio* if it receives “reliable information indicating grave or systematic violations by a State Party” of CEDAW rights (Art. 8–10 OP). States Parties can opt out from that inquiry procedure.²³

8.2 Other Gender-Related Sources and Activities at Universal Level

8.2.1 The Role of UN Bodies in Achieving Gender Equality

Different bodies were established within the UN system to pay particular attention to women’s rights.

The Economic and Social Council (ECOSOC) is a main body of the UN with a mandate to promote social and economic progress, health issues, human rights without discrimination based on race, sex, language, or religion. One of its subsidiary bodies is the Commission on the Status of Women (CSW), established in 1946 as the principal global intergovernmental body with the aim to promote gender equality.²⁴ Each year, during a two-week long annual session, it discusses the most comprehensive global policy agenda for the empowerment of women—the 1995 Beijing Declaration and Platform for Action.²⁵ The Beijing Declaration affirms that women’s rights are inalienable, integral and an indivisible part of human rights. This platform covers 12 areas of concern: poverty, education and training, health, violence, armed conflict, economy, power and decision-making, institutional mechanisms, human rights, media, environment, and the girl child. ECOSOC also established another subsidiary body, the UN Commission on Human Rights, which

²⁰Hellum and Ikdahl (2019).

²¹Chinkin (2010), paras. 13–14.

²²6 October 1999 (UNTS, vol. 2131, p. 83). For more detailed information, see Chapter 7 on Human Rights.

²³Chinkin (2010), paras. 11, 15.

²⁴ECOSOC Resolution 11(II), 21 June 1946.

²⁵Beijing Declaration, Platform for Action, 4th World Conference on Women, 4–15 September 1995.

ceased to exist with the creation of the Human Rights Council (HRC), a subsidiary body of the General Assembly.

The HRC was established in 2006 with the aim to further advance human rights among UN Member States. There are different mechanisms that this body can use in order to focus on the protection of women around the globe. The HRC can act under the complaint procedure alleging widespread and systemic human rights violations in a certain country, as was the case with Eritrea, where it examined different human rights violations, including violence against women.²⁶ It can call special sessions to address violations of women's rights. Rape and sexual violence were at the attention of the special session on situation in Darfur,²⁷ and gender inequality and sexual violence in relation to the Democratic Republic of Congo.²⁸

Example

The Human Rights Council stated the following: "Sexual violence has been a defining feature of the armed conflicts in the DRC and conflict parties have not assumed their responsibilities reaffirmed also by Security Council resolutions 1325 (2000) and 1820 (2008) on women, peace and security. During her visit in July 2007, the Special Rapporteur on violence against women found that sexual violence against women was particularly dramatic in the Kivus, where non-state armed groups, including foreign militia, committed sexual atrocities that were of an unimaginable brutality and aimed at the complete physical and psychological destruction of women with implications for the entire society."²⁹ ◀

The role of special procedures is to examine particular thematic issues or the human rights situation in a certain country. For instance, a Special Rapporteur on violence against women, including its causes and consequences was appointed by the Human Rights Commission in 1994,³⁰ but since March 2006, the Special Rapporteur reports to the Human Rights Council.³¹ The Rapporteur has issued several thematic reports; a report on violence against women journalists addressing challenges faced by women journalists,³² and Covid-19 and the increase of domestic

²⁶HRC, Resolution 21/1, Situation in Eritrea, 9 October 2012.

²⁷Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101, A/HRC/4/80, 9 March 2007, para. 39.

²⁸A/HRC/10/59, paras. 35–42, and A/HRC/13/63, paras. 26–34.

²⁹Human Rights Council, Combined report of seven thematic special procedures on technical assistance to the Government of the DRC and urgent examination of the situation in the east of the country, A/HRC/10/59, 5 March 2009, para. 35.

³⁰Human Rights Commission, Resolution 1994/45, 4 March 1994.

³¹Human Rights Council decision 1/102, 30 June 2006. Its mandate was renewed in 2019 by Resolution 41/17, 11 July 2019.

³²Combating Violence against Women Journalists, Report of the Special Rapporteur on Violence against Women, its causes and consequences, A/HRC/44/52, 6 May 2020.

violence against women.³³ The role of special procedures mandates holders to improve knowledge on human rights, taking women into account.³⁴ The HRC can also address gender issues through its universal periodic review (UPR), which is an opportunity to regularly assess the compliance by all UN Member States with international obligations in relation to women's rights.

Example

Honduras, within the universal periodic review for Serbia welcomed the acceptance of the recommendations “related to reinforcing measures to eradicate all forms of social stigmatization, discrimination and violence on grounds of sexual orientation, gender identity and HIV status, adopting specific measures to prevent and combat discrimination against women and girls with disabilities, redoubling efforts destined to promote tolerance towards minorities, reinforcing measures to prevent and combat trafficking in persons and approving a policy addressing internal displacement in Serbia.”³⁵ ◀

In 2010, the General Assembly also created UN Women, the United Nations Entity for Gender Equality and the Empowerment of Women, as a result of years of negotiations between UN Member States, to address serious challenges in its effort to promote gender equality.³⁶ UNWOMEN supports Member States in designing laws, policies, programmes and services which are necessary to ensure that the Sustainable Development Goals³⁷ are implemented and that women participate equally in all aspects of life.

8.2.2 Women, Peace and Security: Resolution 1325, and Onwards

2020 was the 20th anniversary of the adoption of United Nations (UN) Security Council (SC) Resolution 1325 on Women, Peace and Security (WPS).³⁸ The passing of Resolution 1325 was seen as a global effort to establish a platform on which to base national and international policies with the aim of ensuring greater protection of women and girls, during and after conflict, equal participation in all efforts of women and girls in the maintenance of peace and security, mainstreaming of gender

³³ Violence against Women, its causes and consequences, Report of the Special Rapporteur on Violence against Women, its causes and consequences, A/75/144, 24 July 2020.

³⁴ Women's Rights are Human Rights, United Nations Human Rights Office of the High Commissioner, New York and Geneva, 2014, p. 21.

³⁵ Report of the Human Rights Council on its thirty-eighth session, 38/114, Outcome of the universal periodic review: Serbia, 29 June 2018, para. 816.

³⁶ General Assembly, Resolution 64/289.

³⁷ The 2030 Agenda for Sustainable Development.

³⁸ SC Resolution 1325, 31 October 2000.

perspectives in peace operations and the implementation of specialized training for all personnel deployed in affected areas. In other words, the WPS agenda is now seen to be constructed around the following five pillars: prevention, protection, participation, relief and recovery.³⁹

Example

“Noting the need to consolidate data on the impact of armed conflict on women and girls [the Security Council],

1. Urges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict;
2. Encourages the Secretary-General to implement his strategic plan of action (A/49/587) calling for an increase in the participation of women at decision-making levels in conflict resolution and peace processes;
3. Urges the Secretary-General to appoint more women as special representatives and envoys to pursue good offices on his behalf, and in this regard calls on Member States to provide candidates to the Secretary-General, for inclusion in a regularly updated centralized roster;
4. Further urges the Secretary-General to seek to expand the role and contribution of women in United Nations field-based operations, and especially among military observers, civilian police, human rights and humanitarian personnel;
5. Expresses its willingness to incorporate a gender perspective into peacekeeping operations, and urges the Secretary-General to ensure that, where appropriate, field operations include a gender component.”⁴⁰ ◀

8.2.3 After a Journey of Twenty Years

Since the adoption of SC Resolution 1325, almost half of the UN member States have launched National Action Plans⁴¹ to increase women’s participation in security processes. The seminal work of the Security Council in passing SC Resolution 1325 has since 2000 been followed by further resolutions; (a) Prevention of and response

³⁹Coomaraswamy et al. (2015), p. 329. Available from: <https://reliefweb.int/sites/reliefweb.int/files/resources/UNW-GLOBAL-STUDY-1325-2015.pdf>.

⁴⁰SC Resolution 1325, 31 October 2000.

⁴¹As of 16 March 2021, 90 States have established National Actions Plans. <http://1325naps.peacewomen.org/>, accessed 16 March 2021. For visualised content analysis see: Hamilton and Shepherd (2020). Available at <https://www.wpsnaps.org/>.

to conflict-related sexual violence⁴² and (b) Women's participation and leadership in peace making and conflict prevention.⁴³ Furthermore, States started to take national initiatives that related to their own armed forces,⁴⁴ and of enacting national legislation that aims to ensure that women are fully included in discussions concerning peace and security.⁴⁵ These are some examples of the progress that has been made, although the proliferation of actors engaged in the WPS work and the broadening and deepening of the WPS agenda cause scholars to describe its reach as "extensive, contested and uncertain."⁴⁶

Women undisputedly deserve a place at the table in peace negotiations, as well as access to political power, post-conflict, when peace has been established. However, it has been suggested that seeing 'womenhood in itself' as an antidote to armed conflict, may be to regard conflict dynamics too simplistically.⁴⁷ Although not statistically verified, there are some indications in research of a correlation between gender equality in a State and avoidance of interstate conflict escalation.⁴⁸ Other research has indicated that women are inclined to promote negotiations in intrastate conflicts.⁴⁹ Furthermore, when it comes to budgetary decisions, women tend to give priority to investment in welfare⁵⁰ areas rather than military. As well as noting the strategic role women may play in peace negotiations, there are particular challenges faced by women who have taken direct part in hostilities when seeking to re-integrate into their societies after a conflict has ended.⁵¹ Research has found that these women and girls are often perceived to have broken deep rooted gender norms in their societies by engaging in what is traditionally seen as masculine behaviour. This is repeatedly found to make their re-integration even more difficult.⁵²

⁴²See SC Resolution 1820, 19 June 2008; SC Resolution 1888, 30 September 2009; SC Resolution 1960, 16 December 2010; SC Resolution 2106, 24 June 2013 and SC Resolution 2467, 23 April 2019.

⁴³SC Resolution 1889, 5 October 2009; SC Resolution 2122, 18 October 2012; SC Resolution 2242, 13 October 2015 and SC Resolution 2493, 29 October 2019.

⁴⁴See for instance the Swedish Ordinance with instructions for the Swedish Armed Forces (Swedish Code of Statutes 2007:1266) which stated that the Armed Forces are required to operate in accordance with UN Security Council Resolutions 1325 and 1820. Tengroth, in Tengroth, Lindvall (2015), p. 74. Available at: [ihl-and-gender-151110.pdf](https://www.ihl-and-gender-151110.pdf) (rodakorset.se), accessed 17 March 2021.

⁴⁵See in this regard The US Women, Peace, and Security Act of 2017 signed into law on 6 October 2017.

⁴⁶Basu et al. (2020), p. 2.

⁴⁷Sassòli (2019), p. 557.

⁴⁸Caprioli and Boyer (2001), p. 516.

⁴⁹Nagel (2020), p. 2.

⁵⁰Bolzendahl and Brooks (2007), pp. 1509–1534.

⁵¹Barth (2002).

⁵²Ibid.

8.2.4 WPS Areas Under Debate

While the importance of States' engagement with the WPS agenda cannot be overestimated, the nature of their engagement can give rise to questions. States from the global North tend to refer to WPS in their role as donors or contributors of troops. The result of this is that they display WPS in a manner Basu refers to as 'outward-oriented', that is deflecting attention away from the State in the Northern hemisphere. Correspondingly, States in the global South seemingly have to a lesser extent internalized the WPS policies in their national frameworks, with WPS references being promoted through donor policies and the aid channelled by inter-governmental organisations.⁵³ Also from the perspective of individuals, there are areas within the WPS discourse that are increasingly debated.

It has been pointed out that the explicit focus on women in the WPS discourse has rendered the vulnerabilities of men and boys invisible,⁵⁴ not least in relation to sexual violence, when the victim is male. Furthermore, in the context of armed conflict, there have been examples when widespread perception that a civilian population⁵⁵ is mainly made up of women and children has in effect, rendered civilian men and boys extremely vulnerable.⁵⁶ More recently, attention has been drawn to new themes in connection with the WPS agenda. This includes intersections between countering violent extremism and WPS, the invisibility of race and sexuality in WPS discourse and practice, and the engagement of men within and alongside the WPS agenda.⁵⁷

8.3 Protecting Women Under International Humanitarian Law

International Humanitarian Law (IHL) seeks to regulate situations where any normal and peaceful human relations have failed. The use of armed force is a pre-requisite for this legal regime to come fully into play. Despite the challenging circumstances for IHL, there are numerous historic examples dating back thousands of years, of societies that developed rules on what was, and was not, seen as permissive behaviour during armed conflict,⁵⁸ not only in general terms, but also to a certain extent with specific regard to women. It is the aim of this section to outline these provisions.

⁵³ Basu et al. (2020), p. 8.

⁵⁴ Myrtilinen, in Davies, True (2018), p. 88.

⁵⁵ Under international humanitarian law, the distinction between civilians and members of the armed forces is the lynch pin for the legal protection of this regime. See below, footnote 63, with accompanying text.

⁵⁶ See generally Carpenter (2003), pp. 661–694.

⁵⁷ Basu et al. (2020), p. 2.

⁵⁸ Crawford and Pert (2020), p. 4.

It is fundamental to note that victims on both sides of the conflict; women, men, girls and boys, need to be protected from war crimes. To achieve any respect for IHL, it is necessary for it to apply equally to all the parties involved, regardless of, and separate from issues relating to the resort to force.⁵⁹ For IHL to be applicable, the conduct must have a connection (the nexus) with either an international armed conflict (IAC), or a non-international armed conflict (NIAC).⁶⁰ Thus, in the case of IAC, applicable treaty law consists of the Geneva Conventions I-IV⁶¹ and Additional Protocol I. If the conflict falls into the category of NIAC, then Common Article 3 of the Geneva Conventions applies together with Additional Protocol II. Lastly, there are also customary law provisions that apply in IAC as well as NIAC.⁶² Separately, irrespective of the nature of the conflict, international human rights law will of course remain in force, but the State may derogate from certain human rights provisions “in time of public emergency which threatens the life of the nation”.⁶³

8.3.1 General Protection of the Civilian Population

IHL rests on distinguishing two groups of people, namely civilians and members of the armed forces. This principle of distinction is a cardinal principle, and it is paramount to the whole construction of IHL. Furthermore, the principle of distinction extends beyond human beings, and also applies to civilian objects and military objectives.⁶⁴ It is worth noting that IHL, by design, deals with the protection of *groups* of people rather than with individuals. This is clearly visible in the four Geneva Conventions as each apply to ‘categories of war victims’⁶⁵ as defined by the

⁵⁹ Sassòli (2019), p. 19.

⁶⁰ An IAC involves at least two State parties, whereas the parties to NIAC must involve a State and a sufficiently organized armed group (or groups) on the other hand. Sassòli (2019), p. 6.

⁶¹ 1949 Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field of August 12, 1949, (1950) 75 UNTS 31–83 [Geneva Convention I]; 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, (1950) 75 UNTS 85–133 [Geneva Convention II]; 1949 Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (1950) 75 UNTS 135–285 [Geneva Convention III]; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (1950) 75 UNTS 287–417 [Geneva Convention IV].

⁶² For a good overview of applicable customary law rules, please visit the Customary IHL Database, available here: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

⁶³ Article 4, 1966 International Covenant on Civil and Political Rights, *entered into force* 23 March 1976; 999 UNTS 171; the corresponding provision in the ECHR, Article 15, explicitly includes ‘war’ as a circumstance which permits derogation. 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 3 September 1953, 213 UNTS 222.

⁶⁴ Dinstein (2016), p. 72.

⁶⁵ Sassòli (2019), p. 8.

treaties.⁶⁶ Historically, it is held that women predominantly were seen as civilians, which is not, nor has ever been, a matter of a single truth. Women can be, and increasingly are, members of the armed forces, joining fighting rebel groups⁶⁷ and are deployed in United Nations peace-keeping missions.⁶⁸ When it comes to the protection of women, IHL is predominantly concerned with issues of motherhood, such as pregnancy, childbirth and new-born babies.⁶⁹ Considering the general protection outlined so far, Gardam and Jarvis have noted that of the 42 provisions in IHL treaty law that mention women, almost half concern matters such as pregnant or nursing mothers.⁷⁰ It has been noted by scholars, that concerning women, IHL has not only an old-fashioned language,⁷¹ but also gives special protection to women based on assumptions of women as a vulnerable group, rather than based on concepts of equality.

It is a customary rule of IHL that “[a]dverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited.”⁷² This is the case in IAC⁷³ as well as NIAC.⁷⁴ The notion of adverse distinction is used to signify that although discrimination is prohibited, there are circumstances when the law recognises the need for certain priorities in terms of urgent needs.⁷⁵

Many of the IHL provisions about women are concerned with particular vulnerabilities. For example, Geneva Convention IV holds that “[...] Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.[...]”⁷⁶ This provision is also echoed in Additional Protocol I, stating that “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution,

⁶⁶ Geneva Convention I protects wounded and sick members of the armed forces in the field; Geneva Convention II protects wounded, sick and shipwrecked members of armed forces at sea; Geneva Convention III regulates the treatment of prisoners of war and Geneva Convention IV protects civilian persons in the hands of a party to the conflict of which they are not nationals.

⁶⁷ Durham and O’Byrne (2010), p. 37.

⁶⁸ The increase of female UN troops remains painstakingly slow, having moved from 1% of the troops in 1993, to 4,8% some thirty years later. For updated figures see: <https://peacekeeping.un.org/en/women-peacekeeping>, accessed 11 March 2021.

⁶⁹ Additional Protocol I, Article 8(a) incorporates these women as protected persons who are ‘wounded and sick’.

⁷⁰ Gardam and Jarvis (2001), p. 93.

⁷¹ Sassòli (2019), p. 282.

⁷² Henckaerts and Doswald-Beck (2005), p. 308.

⁷³ Article 16 of Geneva Convention III, and Article 13 of Geneva Convention IV and Article 75(1) of Additional Protocol I.

⁷⁴ The relevant treaty provisions are Common Article 3 of the Geneva Conventions, and Article 4(1) of Additional Protocol II.

⁷⁵ Henckaerts and Doswald-Beck (2005), p. 309.

⁷⁶ Geneva Convention IV, Article 27(2).

and any other form of indecent assault.”⁷⁷ The disparity in these two provisions is the scope of application: the former applies in essence to civilian women who are ‘protected persons’ in the sense of Geneva Convention IV, which means that the occupying States own national’s are not covered. The provisions of Additional Protocol I cover all civilian women in IAC.⁷⁸

8.3.2 Protection of Women as Members of the Armed Forces

IHL prohibits girls and boys below the age of 15 from taking direct part in hostilities.⁷⁹ As international law holds that childhood ends at the age of 18,⁸⁰ many States have opted to extend the protection of minors from taking direct part in hostilities to the age of 18. State parties⁸¹ to the Optional Protocol to the Convention on the Rights of the Child⁸² are also committed to take any feasible measures to prevent the recruitment of girls and boys under 18 into rebel forces.⁸³

With regards to prisoners of war (POW), IHL provisions demand “respect for their person and their honour”.⁸⁴ It is commonly accepted that the notion of *honour* encapsulates protecting prisoners of war from rape.⁸⁵ Explicitly, women who become prisoners of war are to “be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.”⁸⁶ The provisions allow for beneficial treatment, based on rank and sex.⁸⁷ This is necessary in order to make substantial equality possible, rather than remain fixated on formal equality.⁸⁸

⁷⁷ Additional Protocol I, Article 76(1).

⁷⁸ Dinstein (2016), p. 187.

⁷⁹ Additional Protocol I, Article 77(2) and Additional Protocol II Article 4(3)(c).

⁸⁰ See Convention on the Rights of the Child, 1577 UNTS 3, *entered into force* 2 September, 1990, Article 1.

⁸¹ As of February 2021, 170 countries are State Parties to the Optional protocol to the CRC, with an additional 10 countries being signatories. See <https://indicators.ohchr.org/>, accessed 11 March 2021.

⁸² Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, 2173 UNTS 222 *entered into force* 12 February, 2002.

⁸³ *Ibid.*, Article 4.

⁸⁴ Geneva Convention III, Article 14.

⁸⁵ Pictet (1960), p. 147.

⁸⁶ *Ibid.* See also Anna Crowe analysis of the meaning of ‘regard’, in Crowe (2016), available at http://hrp.law.harvard.edu/wp-content/uploads/2016/12/Anna-Crowe_HRP-16_001.pdf, accessed 13 March 2021.

⁸⁷ Geneva Convention III, Article 16.

⁸⁸ Dörmann et al. (2020), para 1749.

Although IHL provides some particular protection to women who become POWs,⁸⁹ they are not by law granted the privilege to be searched by a woman, as is the case with civilian female internees in the hands of the adverse powers, as stipulated by Geneva Convention IV, Article 97. Prescott has also pointed out that in terms of participatory influence among prisoners of war, IHL may well be indirectly discriminating women in camps where no officers are held, because detained prisoners of war are allowed to elect their representative by secret majority ballot.⁹⁰ This may result in men voting for male representation; the law does not ensure gender representation. If officers are present, they are to be the representatives without election irrespective of their sex.⁹¹

8.3.3 Prohibition of Sexual Violence During Armed Conflict

From a gender perspective, mention needs to be made of situations when gender stereotypical behaviours or features are being encapsulated in the commission of war crimes. An example would be when detainees (prisoners of war as well as civilians) become victims of rape⁹² and other forms of sexual violence, or when women (civilian as well as members of the armed forces) become perpetrators of sexual violence as war crimes.⁹³ The issue of bringing perpetrators of sexual violence and rape, as a war crime, to justice has made significant progress through the work of international criminal tribunals, such as the tribunals for the former Yugoslavia (ICTY)⁹⁴ and Rwanda (ICTR).⁹⁵ Against an historic backdrop that lacked examples of prosecuting such conduct as war crimes,⁹⁶ these acts are now firmly incorporated and criminalized in the ICC statute, regardless of whether the victim is male or female, or the act took place in an IAC or a NIAC.⁹⁷

⁸⁹IHL proscribes separate dormitories for women and men (Geneva Convention III Article 25); separate hygiene facilities (Geneva Convention III Article 29); repatriation or relocation to neutral countries if possible, for pregnant female prisoners of war (Geneva Convention III, Annex I A (3) (f)). Similarly, female prisoners of war with infants and small children may also be relocated to neutral countries (Geneva Convention III, Annex I B (7)).

⁹⁰Prescott (2019), p. 184.

⁹¹Geneva Convention III, Article 79.

⁹²This is discussed by Bradley (2020), pp. 381–422.

⁹³IHL foresees that war crimes can be committed by women and men, be it civilians or members of the armed forces, in that it obliges States to “search for *persons*” that are alleged to have committed or ordered the commission of war crimes. See Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; and Geneva Convention IV, Article 146.

⁹⁴1993 Statute of the International Tribunal for Former Yugoslavia, UN Doc. S/25704 at 36, Annex.

⁹⁵1994 Statute of the International Tribunal for Rwanda, UN Doc. S/Res/955 Annex.

⁹⁶Durham and O’Byrne (2010), p. 35.

⁹⁷1998 Rome Statute of the International Criminal Court, *entered into force* 1 July 2002; 2187 UNTS 3, Article 8(2)(b)(xxi).

As noted in the opening of this section, IHL has origins that reach back thousands of years and that can be traced back in treaty law more than 200 years.⁹⁸ It is of no surprise that the treaties bear linguistic marks of explicit, as well as implicit attitudes and perceptions towards women and gender from past times. Furthermore, it is a longstanding truth that gender-based stereotype views tend to be exacerbated during armed conflict when the social fabrics of communities dissolve.⁹⁹ Nevertheless, the drafters of the IHL treaties set out to create rules of humanity and respect for the human being in physical as well as moral terms to be applicable in the most extreme circumstances imaginable. Whereas the protective obligations of IHL should not be undermined, a gender analysis study of IHL can be an enlightening undertaking that puts the spotlight on stereotypes and provides additional avenues of legal interpretation to strengthen the implementation of and respect for the laws of war.

8.4 International Criminal Law and Gender Perspective

International Criminal Law is a branch of International Public Law designed to prohibit heinous crimes, such as genocide, war crimes, crimes against humanity and the crime of aggression, and to hold perpetrators of those crimes accountable. While the Nuremberg and Tokyo tribunals did not pay attention to sexual crimes, the evolution of international law brought a gender dimension.¹⁰⁰ The International Criminal Court (ICC), as well as the ICTY and the ICTR have special provisions on sexual violence in their statutes. The crime of rape became a constituent element of crimes against humanity in the statute of the ICTY, while forced prostitution is recognized as a war crime by the statute of the ICTR. The ICC statute also addresses conflict-related sexual and gender-based violence and includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity as a part of crimes against humanity.¹⁰¹ In addition, the Statute defines ‘forced pregnancy’.¹⁰² Conflict related sexual and gender-based violence can also constitute grave breaches of Geneva conventions and war crimes.¹⁰³

⁹⁸ Most notably the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, which is the forerunner to modern days Geneva Conventions I-IV, and the 1868 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight.

⁹⁹ Gardam and Jarvis (2000), pp. 6–7.

¹⁰⁰ Delpia (2014), pp. 39, 179.

¹⁰¹ Article 7 (1) g) of the Rome Statute. See also Art. 7 (3) of the Rome Statute.

¹⁰² Article 7 (2) f) of the Rome Statute.

¹⁰³ Article 8 (2) b) xxii.

Example

António Guterres, the UN Secretary General, underlined the following: “Conflict-related sexual and gender-based violence (SGBV) is a widespread weapon of war—seen in conflicts in the Central African Republic, the Democratic Republic of Congo, Mali, Darfur and Syria, to name but a few. It is used to terrorize, to degrade, to punish communities and to ethnically “cleanse.” Women and girls are predominantly the victims; but men and boys are also targeted and suffer. Survivors are often marginalized and stigmatized, with little hope of seeing their attackers brought to justice.”¹⁰⁴ ◀

Despite this legal recognition, there has been only one conviction for sexual violence crimes at the ICC in a case of Bosco Ntaganda so far.¹⁰⁵ When Fatou Bensouda, the former Prosecutor of the ICC, took office in 2012, she published a policy paper on Sexual and Gender-Based Crimes, and the prosecution assumed a more proactive role.¹⁰⁶

Example

Fatou Bensouda, the former ICC Prosecutor, emphasised the role of all actors in combating sexual and gender-based crimes: “Each of us has a role to play. It is hoped that the Policy will also serve as a guide to national authorities in the exercise of their primary jurisdiction to hold perpetrators accountable for these crimes. United in our efforts, we can end the silence that has surrounded sexual and gender-based crimes for far too long and give victims the ultimate tool in combatting such crimes: a voice backed by the force of the law.”¹⁰⁷ ◀

The role of hybrid courts is also relevant in this area of law. Sexual violence was a key characteristic of the Sierra Leone conflict and Jalloh documented the battle faced by prosecutors in the Special Court for Sierra Leone in their intention to indict gender-based crimes.¹⁰⁸ It is worth mentioning the role of national transitional

¹⁰⁴ UN Secretary-General, António Guterres, Eliminating Sexual Violence in conflict through the ICC, Coalition for the ICC, 20 June 2017, available at: <https://www.coalitionfortheicc.org/news/20170620/eliminating-sexual-violence-conflict-through-icc>, accessed 9 July 2021.

¹⁰⁵ Ntaganda case: ICC Appeals Chamber confirms conviction and sentencing decisions, International Criminal Court, 30 March 2021, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1582>, accessed 9 July 2021. See also Forlani, available at: <https://www.mukwegefoundation.org/guest-blog-prosecution-sexual-violence-icc-problems/>, accessed 4 May 2021.

¹⁰⁶ ICC, Policy on Sexual and Gender-Based Crimes, June 2014, available at: https://www.icc-cpi.int/iccdocs/otp/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf, accessed 4 May 2021.

¹⁰⁷ ICC Prosecutor Fatou Bensouda, Policy Paper on Sexual and Gender-Based Crimes, 5 June 2014, available at: <https://www.icc-cpi.int/pages/item.aspx?name=pr1011>, accessed 9 July 2021.

¹⁰⁸ Jalloh (2020).

justice mechanisms in this respect. On 14 April 2021, the Colombian Special Jurisdiction for Peace (JEP), established by the final peace agreement between the Colombian Government and the Revolutionary Armed Forces of Colombia - People's Army, recognized new ground for persecution as a crime against humanity. The JEP's Chamber for the Acknowledgment of Truth held that gender-based violence also covers sexual orientation and gender identity.¹⁰⁹ It was acknowledged that the violent acts committed against the five LGBTQIA+ persons demonstrated "the indelible traces of the barbarity against diverse sexual orientations and gender identities in an armed conflict."¹¹⁰ The next step would be to assess if the alleged crimes constitute persecution of LGBTQIA+ persons as a crime against humanity.

8.5 Gender Perspective of Council of Europe Agreements and Activities

While "the maintenance and further realisation of human rights and fundamental freedoms" is among the aims of the Council of Europe (CoE), the CoE Statute¹¹¹ nowhere expressly refers to equal rights of men and women, in contrast to the UN Charter. Neither has the CoE produced any general agreement specifically protecting the human rights of women, in parallel with CEDAW or the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.¹¹² Yet, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)¹¹³ covers the human rights of women, non-binary and transgender persons. Moreover, there are several gender-relevant CoE agreements and gender-specific provisions in other CoE agreements, as well as gender-related policies by the CoE.

8.5.1 European Convention on Human Rights and Gender: General Aspects and Overview

The ECHR does not enshrine any gender-specific rights. It mentions women (beside men) only in Art. 12 ECHR on the right to marry. The general anti-discrimination provision in Art. 14 ECHR guarantees the enjoyment of the Convention rights and freedoms without discrimination on suspect grounds and includes "sex" in the non-exhaustive list of such grounds.

¹⁰⁹ Abouelddahab, *Ejiltalk*, 4 May 2021.

¹¹⁰ Ibid.

¹¹¹ 5 May 1949 (ETS No. 1).

¹¹² 11 July 2003 (https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf).

¹¹³ 4 November 1950, as amended (ETS No. 5).

Among the rights which the Protocols have added to the Convention catalogue, only Art. 5 of Protocol No. 7¹¹⁴ is gender-related. It sets forth that “[s]pouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution.” States are permitted to take such measures as are necessary in the interests of the children. Art. 1 of Protocol No. 12 extends the general prohibition of discrimination in Art. 14 ECHR to any right set forth by law and prohibits discrimination by any public authority, leaving the list of suspect grounds in Art. 14 ECHR (“sex”) unchanged. The preamble of Protocol No. 12 reaffirms that “the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures”, thus permitting affirmative action in favour of disadvantaged persons, including women.

The European Court of Human Rights (ECtHR) that is charged with ensuring the observance of the engagements undertaken by the States Parties (Art. 19 ECHR) has progressively developed the Convention rights and the prohibition of discrimination in order to effectively guarantee gender equality and protect gender identity as well as sexual orientation.¹¹⁵

Example

ECtHR, Grand Chamber judgment of 22 March 2012, *Konstantin Markin v. Russia*, Appl. No. 30078/06, para. 127:

“The Court further reiterates that the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention . . . In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex. For example, States are prevented from imposing traditions that derive from the man’s primordial role and the woman’s secondary role in the family . . .” ◀

The ECtHR has extended the prohibition of discrimination in Art. 14 ECHR to discrimination based on sexual orientation as well as transsexualism, recognized a right under Art. 8 ECHR for homosexual couples in a stable relationship to have access to a civil union or registered partnership (although not yet to marriage) and the duty of States to protect homosexuals from homophobic violence (Art. 3 in conjunction with Art. 14 ECHR).¹¹⁶ While the right to marry pursuant to Art. 8 and/or Art. 12 ECHR was extended to transsexuals, their position in this regard has not yet been

¹¹⁴22 November 1984 (ETS No. 117).

¹¹⁵See the regularly updated Factsheets on Gender Equality, Gender Identity and Sexual Orientation Issues by the Court’s Press Unit, available at <https://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=>.

¹¹⁶See sources cited in the preceding footnote.

fully aligned with that of cisgender persons.¹¹⁷ ECtHR has also used Art. 4 ECHR to protect women from becoming victims of human trafficking, and sexual, or other, forms of exploitation.¹¹⁸ In the context of gender identity and equality, two approaches by the ECtHR can come into conflict—the progressive interpretation extending the protective scope of Convention rights and the granting of a wide margin of appreciation to States in the absence of a European consensus.

Example

ECtHR, judgment of 26 July 2005, *Siliadin v. France*, Appl. No. 73316/01, para. 121:

“[...] Sight should not be lost of the Convention’s special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions, and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies [...]”

ECtHR, judgment of 16 July 2014, *Hämäläinen v. Finland*, Appl. No. 37359/09, paras. 74–75:

“[...] [I]t cannot be said that there exists any European consensus on allowing same-sex marriages. Nor is there any consensus in those States which do not allow same-sex marriages as to how to deal with gender recognition in the case of a pre-existing marriage. [...] 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 be afforded 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 the rules it lays down in order to achieve a balance between the competing public and private interests.” ◀

With the evolution of the legal and moral standards across Europe regarding gender equality and identity, the Court’s interpretation of the ECHR will become more progressive and the States’ margin of appreciation narrower.¹¹⁹

In 2007, a gender issue under Art. 22 ECHR was referred to the ECtHR by the Committee of Ministers (CM) for an advisory opinion pursuant to Art. 47 ECHR: the question whether the list of candidates for the post of judge at the ECtHR nominated

¹¹⁷ ECtHR, Grand Chamber judgment of 11 July 2002, *Christine Goodwin v. UK*, Appl. No. 28957/95; Grand Chamber judgment of 16 July 2014, *Hämäläinen v. Finland*, Appl. No. 37359/09.

¹¹⁸ ECtHR, judgment of 26 July 2005, *Siliadin v. France*, Appl. No. 73316/01; judgment of 7 January 2010, *Rantsev v. Cyprus and Russia*, Appl. No. 25965/04; Grand Chamber judgment of 25 June 2020, *S.M. v. Croatia*, Appl. No. 60561/14.

¹¹⁹ See, e.g., ECtHR, judgment of 19 January 2021, *X and Y v. Romania*, Appl. Nos. 2145/16 and 20607/16, para. 166.

by a State Party, which satisfied the criteria enshrined in Art. 21 ECHR, could be refused by the Parliamentary Assembly (PACE) solely because it did not include at least one woman (women being under represented in the Court). The Court answered that “although the aim of ensuring a certain mix [including gender mix] in the composition of the lists of candidates is legitimate and generally accepted, it may not be pursued without provision being made for some exceptions designed to enable each Contracting Party to choose national candidates who satisfy all the requirements of Article 21 § 1.” It was therefore not compatible with the ECHR that PACE did not allow any such exception.¹²⁰ PACE has adapted its practice on single-sex lists accordingly.¹²¹

8.5.2 Other Gender-Relevant CoE Treaties

The European Social Charter (revised),¹²² the companion to the ECHR, includes several gender-specific provisions in Part II: Art. 4 (3) on the right of men and women workers to equal pay for work of equal value; Art. 8 on the right of employed women to protection of maternity; Art. 20 on the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on grounds of sex; Art. 26 (1) on the right to be protected from sexual harassment. Moreover, in Part V, Art. E guarantees the enjoyment of the Charter rights without discrimination on suspect grounds and includes “sex” in the non-exhaustive list of such grounds (in parallel to Art. 14 ECHR). There is a gender-specific provision in Art. 14 of the Convention on Human Rights and Biomedicine¹²³ prohibiting the use of techniques of medically-assisted procreation for the purpose of choosing a future child’s sex.

The Council of Europe Convention on Action against Trafficking in Human Beings¹²⁴ is formulated in gender-neutral terms, but since most victims are women (and children), it is in substance a treaty for the protection of women.¹²⁵ When defining the purposes of the Convention, Art. 1 (1) twice refers to the need to guarantee gender equality. Art. 3 enshrines the non-discrimination principle according to which the implementation of the Convention provisions shall be secured without discrimination on suspect grounds such as sex.¹²⁶ Pursuant to Art.

¹²⁰ ECtHR, Grand Chamber Advisory Opinion No. 1 of 12 February 2008, paras. 53–54.

¹²¹ Parliamentary Assembly, Procedure for the election of judges to the European Court of Human Rights (SG-AS (2020) 03rev4), 4 December 2020, paras. 10, 18–20 (<https://assembly.coe.int/LifeRay/CDH/Pdf/ProcedureElectionJudges-EN.pdf>).

¹²² 3 May 1996 (ETS No. 163).

¹²³ 4 April 1997 (ETS No. 164).

¹²⁴ 16 May 2005 (CETS No. 197).

¹²⁵ Explanatory Report to the Convention, paras. 1, 3 (<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3812>).

¹²⁶ Such a provision has become a general standard in recent CoE agreements.

17 of the Convention, in applying measures to protect and promote the rights of victims each Party shall “aim to promote gender equality and use gender mainstreaming in the development, implementation and assessment of the measures.”

The gender-specific primary objective of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence¹²⁷ becomes apparent from its title and is confirmed by the preamble. Art. 4 (3) requires the Parties to implement the Convention without discrimination on the usual list of suspect grounds, but adding “gender” to “sex”. Art. 6 of the Convention deserves to be quoted in full: “Gender-sensitive policies: Parties shall undertake to include a gender perspective in the implementation and evaluation of the impact of the provisions of this Convention and to promote and effectively implement policies of equality between women and men and the empowerment of women.”

8.5.3 Gender-Related Policies of the CoE

Since the Second (Strasbourg) Summit of 1997 and the Third (Warsaw) Summit of 2005, real equality between men and women in all spheres of society, including equal participation in democracy and gender mainstreaming, has been high on the agenda of the CoE.¹²⁸ Both the CM¹²⁹ and PACE¹³⁰ have been involved with various gender-related declarations,¹³¹ recommendations¹³² and resolutions¹³³ on a broad range of topics. The ECtHR takes these documents into consideration when interpreting the provisions of the ECHR and Protocols.¹³⁴

Three subsidiary bodies are worth mentioning in this context:

¹²⁷ 11 May 2011 (CETS No. 210).

¹²⁸ Giegerich and Jötten (2017), paras 26.44 ff.

¹²⁹ The CM has a Rapporteur Group GR-H – Human Rights whose main fields of activity include anti-discrimination, diversity and inclusion (Steering Committee on Anti-Discrimination, Diversity and Inclusion [CDADI]) as well as gender equality (Gender Equality Commission [GEC]).

¹³⁰ PACE has a Committee on Equality and Non-Discrimination with a Sub-Committee on Gender Equality.

¹³¹ See, e.g., Declaration of the Committee of Ministers on the need to intensify the efforts to prevent and combat female genital mutilation and forced marriage in Europe of 13 September 2017.

¹³² See, e.g., Recommendation CM/Rec(2010)5 of the CM to member states on measures to combat discrimination on grounds of sexual orientation or gender identity of 31 March 2010; Recommendation CM/Rec(2010)10 of the CM to member states on the role of women and men in conflict prevention and resolution and in peace building of 30 June 2010; Recommendation CM/Rec(2019)1 of the CM to member states on preventing and combating sexism of 27 March 2019.

¹³³ See, e.g., PACE Resolution 2191 (2017) ‘Promoting the human rights of and eliminating discrimination against intersex people’ of 12 October 2017; PACE Resolution 2306 (2019) ‘obstetrical and gynaecological violence’ of 3 October 2019. For earlier examples, see Giegerich and Jötten (2017), para 26.52.

¹³⁴ Giegerich and Jötten (2017), para 26.63.

The Gender Equality Commission (GEC) was established by the CM in order to “steer the CoE’s intergovernmental work in the field of gender equality and advise the CM on appropriate action to be taken in its field of competence, taking due account of relevant transversal perspectives.”¹³⁵ The GEC is charged with promoting “gender equality as a visible priority for the Organisation (internally and externally)”.¹³⁶ It supports the implementation of the newest CoE Gender Equality Strategy 2018–2023.¹³⁷ That Strategy is based on the following definition: “*Gender equality entails equal rights for women and men, girls and boys, as well as the same visibility, empowerment, responsibility and participation, in all spheres of public and private life. It also implies equal access to and distribution of resources between women and men.*”¹³⁸

Example

The Gender Equality Strategy 2018–2023 pursues six strategic objectives, addressing intersectionality as a transversal issue:¹³⁹

- “1) Prevent and combat gender stereotypes and sexism.
- 2) Prevent and combat violence against women and domestic violence.
- 3) Ensure the equal access of women to justice.
- 4) Achieve a balanced participation of women and men in political and public decision-making.
- 5) Protect the rights of migrant, refugee and asylum-seeking women and girls.
- 6) Achieve gender mainstreaming in all policies and measures.”¹⁴⁰ ◀

The second subsidiary body is the European Commission against Racism and Intolerance (ECRI).¹⁴¹ It was set up by the First (Vienna) Summit of 1993 as an independent human rights monitoring body. While mainly focussing on racism, it has also addressed homo- and transphobic intolerance and discrimination since 2013.¹⁴²

The third subsidiary body is the Commissioner for Human Rights that was instituted by the CM as “a non-judicial institution to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the CoE.”¹⁴³ Part of the thematic work of the Commissioner is devoted to women’s

¹³⁵ GEC current terms of reference (<https://rm.coe.int/tor-gec-2020-2021/1680997efd>). For GEC’s predecessors, see Giegerich and Jötten (2017), para 26.49 ff.

¹³⁶ Id.

¹³⁷ Adopted by the CM on 7 March 2018 (<https://rm.coe.int/strategy-en-2018-2023/16807b58eb>).

¹³⁸ Para. 2 (italics in the original).

¹³⁹ Id., para. 21.

¹⁴⁰ Id., para. 35.

¹⁴¹ <https://rm.coe.int/leaflet-ecri-2019/168094b101>.

¹⁴² See ECRI Factsheet on LGBTI issues of 1 March 2021 (<https://rm.coe.int/ecri-factsheet-lgbti-issues/1680a1960a>).

¹⁴³ Art. 1 (1) of Resolution (99) 50 of 7 May 1999.

rights and gender equality,¹⁴⁴ including women's sexual and reproductive health rights,¹⁴⁵ and the human rights of LGBTQIA+ people.¹⁴⁶

8.6 EU Law and Gender Equality (Marco Evola)

8.6.1 Gender Equality in the EU Legal System

The principle of equality is one of the general principles of the EU legal system.¹⁴⁷ In applying this principle the Court of Justice (hereinafter CJEU) has stated that it possesses the nature of a fundamental right.¹⁴⁸ Gender equality embodies one of the expressions of the principle of equality and shares the same legal features. The CJEU made this point clear in *Defrenne III* ruling that "There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights."¹⁴⁹

The Court's assessment of gender equality sheds light on the legal framework the founding Treaties and the Charter of Fundamental Rights of the European Union (hereinafter CFREU) shape. The Lisbon Treaty stipulates that equality between men and women is one the founding values of the Union (art. 2 TEU). Pursuant to this provision, EU law has to tackle gender issues in order to promote substantial equality¹⁵⁰ beyond the mere formal approach embedded in the principle of non-discrimination. From this perspective, outlawing gender discrimination contributes to the development of the EU social policy, a result stemming from art. 3 TFEU, which combines the promotion of social protection with that of equality between women and men. In the same vein art. 23 CFREU provides that equality between women and men must be ensured in all areas, including employment, work and pay. This set of rules recognises the existence of stereotypes shaping the division of labour and requiring women and men to perform different roles in society. In

¹⁴⁴ See, e.g., the human rights comment "Remove obstacles to the work of women's rights defenders", 2015 (<https://www.coe.int/en/web/commissioner/-/remove-obstacles-to-the-work-of-women-s-rights-defenders>).

¹⁴⁵ See the issue paper "Women's sexual and reproductive health and rights in Europe", 2017 (<https://rm.coe.int/women-s-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dead>).

¹⁴⁶ See, e.g., the issue paper "Human rights and intersex people", 2017 (<https://rm.coe.int/human-rights-and-intersex-people-issue-paper-published-by-the-council/16806da5d4>).

¹⁴⁷ Joined cases 117-76 and 16-77, *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen*; *Diamalt AG v Hauptzollamt Itzehoe* (ECJ 19 October 1977), para. 7; Case C-115/08, *Land Oberösterreich v ČEZ* (ECJ 27 October 2009), para. 91. On EU non-discrimination law see Fredman (2011); Bell (2011), pp. 611–639.

¹⁴⁸ Case C-144/04, *Werner Mangold v Rüdiger Helm* (ECJ 22 November 2005), paras. 94–96; Koukoulis-Spiliotopoulos (2005), p. 330; Muir (2013), pp. 1231–1254.

¹⁴⁹ Case 149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* (ECJ 15 June 1978), paras. 26–27.

¹⁵⁰ Scholars also proposed the notion of transformative equality. See Fredman (2003), pp. 111–118.

order to dismantle this structuring of gender relationships the TFEU lays down gender mainstreaming committing the EU institutions to eliminate inequalities and promote equality between men and women in its actions (art. 8 TFEU) and to combat discrimination based, among other grounds, on sex and sexual orientation in defining and implementing its policies and actions (art. 10 TFEU). This duty is general in nature since it does not cover only the traditional field of employment, thus making it clear that gender equality is not a special issue.¹⁵¹

Furthermore, pursuant to art. 21 TEU, gender equality is one of the principles and objectives of the EU external action.¹⁵²

Three legal items rise from EU law as well as the rulings of the CJEU. The first issue concerns the scope of equality. The express reference to women and men in art. 2, art. 3 TEU and art. 23 CFREU might entail a binary conception of gender. However, it could be argued that EU law on gender has to be applied to any discrimination based on sexual orientation guaranteeing LGBTQIA+ individuals' rights.

The second issue relates to the objective of EU gender law. In this perspective it is doubtful whether EU law is shaped to attain substantial equality through the guarantee of diversity or to remove differential treatment through the eradication of discriminatory rules and practices.

The third item refers to the role of gender equality law in the wider framework of the EU policies since the rules on gender might be functional to the working of the common market rather than contribute to the setting up of a social policy at the EU level.¹⁵³

The EU has limited or no power on issues which are of utmost importance in the perspective of women's emancipation: gender-based violence, reproductive rights, family law, women's participation to political life and their representation in public institutions, contract law, and children's custody. In the same vein it is to be added that the EU has no competence on those thorny legal items which are a crucial pivot point in outlawing discrimination on the ground of sexual orientation: marriage of homosexual couples, recognition of civil union, adoption and legal status of same-sex partnerships.

Notwithstanding the Treaty's boundaries on its action, the EU has been playing a crucial role in equality. A first reason for that role is to be found in the influence of EU anti-discrimination law on the domestic legal system of Member States on sex equality¹⁵⁴. This is due not only to the direct effect and supremacy of EU law,¹⁵⁵ but

¹⁵¹ Beveridge et al. (2000); Pollack and Hafner-Burton (2000) pp. 432–456.

¹⁵² Thies (2019), pp. 429–454-, pp. 433 *et seq.*

¹⁵³ Case 439/75, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (ECJ 8 April 1976), paras. 9–10.

¹⁵⁴ Tridimas (2006), p. 102.

¹⁵⁵ Cichowski (2004), pp. 147–196.

also to the continuous dialogue between the CJEU and national judges.¹⁵⁶ A second reason is entrenched in the case law of the CJEU. The arrangement of the EU competences has not prevented the Court from exercising its control over Member States laws regulating fields not falling within the competences of the Union, for they could affect the effectiveness of EU gender equality law.¹⁵⁷ From this point of view, gender equality is part of wider trends in EU law.¹⁵⁸

The problematic legal items stemming from the laws on non-discrimination are the eventual result of a long process which is the necessary starting point in the assessment of EU gender equality.

8.6.2 The Development of EU Law on Gender Equality

EU anti-discrimination law on the ground of gender has been shaped neither to pursue a consistent and systematic design of gender relationships, nor to give an answer to the demand for equality with a view to mould a defined arrangement of equality in the gender perspective. As a consequence, the rules outlawing gender discriminations are piece-meal.

The Treaty of Rome laid down the duty of Member States to ensure that men and women receive the same pay for work of equal value (art. 119) in order to establish fair competition in the internal market by putting an end to wage disparities between the Member States. The CJEU highlighted that the principle of equal pay is an expression of a principle of non-discrimination which was wider in scope since it extended to employment.¹⁵⁹

Furthermore, the Community adopted laws aiming at outlawing discrimination in the following fields: (a) employment;¹⁶⁰ (b) social security;¹⁶¹ (c) self-employed

¹⁵⁶ On the relationship between EU Law and the German and Dutch law see Mulder (2017), pp. 66 *et seq.*

¹⁵⁷ Case C-117/01, K.B. v National Health Service Pensions Agency and Secretary of State for Health (ECJ 7 January 2004).

¹⁵⁸ Lefevre (2004), pp. 501–516; Micklitz and De Witte (2012).

¹⁵⁹ Barnard (1999), pp. 215–279; Rönmar (2020), pp. 612–642.

¹⁶⁰ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women OJ L 45, 19.2.1975, pp. 19–20. The Directive is no longer in force. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976, pp. 40–42. The Directive is no longer in force.

¹⁶¹ Council Directive 79/7 of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10.1.1979, pp. 24–25. Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ L 225, (1986), pp. 40–42. The Directive is no longer in force.

capacity;¹⁶² (d) pregnancy and motherhood;¹⁶³ (e) parental leave;¹⁶⁴ and (f) judicial protection of women's rights.¹⁶⁵ The reforms of the Treaties have bolstered the action of the EU.

The EU citizenship endowed also non-economic migrants with the right not to be discriminated against on grounds of nationality in the access to the social assistance of the hosting country (see *infra* Sect. 8.6.6).

The Amsterdam Treaty made the principle of equal pay part of the social policy of the EU (art. 155 TFEU para. 1 (i)), laid down the principles of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. (art. 157 para. 3 TFEU), enabled Member States to maintain or adopt positive measures, established gender mainstreaming (art. 8 and 10 TFEU)¹⁶⁶ and conferred on the EU the competence to combat discrimination based on various grounds, such as sex or sexual orientation.¹⁶⁷

The CFREU devotes two provisions to gender discrimination, a choice highlighting its importance in EU law and its extensive policy development.¹⁶⁸ The first limb of art. 21 prohibits any discrimination on various grounds such as sex and sexual orientation, enabling the EU to face multiple discrimination cases because of the extensive and non-exhaustive array of forbidden status.¹⁶⁹

Art. 23 CFREU recognizes the existence of inequalities to the detriment of women and provides two different rules. The first paragraph of art. 23 obliges the EU and the Member States to ensure equality in all areas, including employment, work and pay. Art. 23 para. 2 regulates positive actions laying down a provision that is a step back compared to art. 157 par. 4 TFEU since the former considers positive

¹⁶² Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ L 359, (1986), pp. 56–58. The Directive is no longer in force.

¹⁶³ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 348, (1992), pp. 1–8.

¹⁶⁴ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145, (1996), pp. 4–9. The Directive is no longer in force.

¹⁶⁵ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14, (1998), pp. 6–8. The Directive is no longer in force.

¹⁶⁶ Lewis (2006), p. 427. Shaw (2002), pp. 213–226, p. 221, highlights that mainstreaming could be reduced to the ticking of boxes.

¹⁶⁷ On the different grounds of discrimination EU law forbids see Ellis and Watson (2012), pp. 22–42.

¹⁶⁸ Kilpatrick (2014), p. 582.

¹⁶⁹ *Idem*, p. 591. On multiple discrimination see Schiek and Lawson (2011).

actions as permissible derogations while the latter acknowledges that positive measures are a means to promote substantial gender equality.¹⁷⁰

The EU has adopted a series of directives to rationalize the existing laws and to widen the scope of the action in gender sensitive issues (see Sect. 8.6.4).

8.6.3 EU Primary Law and Gender Equality

EU primary laws have different functions within the multi-layered legal framework on gender equality.¹⁷¹

A first group of primary laws is composed of rules the CJEU utilises as a benchmark against which the action of the EU institutions or the rules of the Member States can be checked.

This group of rules comprises the general principle of non-discrimination on the ground of sex the CJEU considers a fundamental right of the EU.¹⁷² However, the reasoning of the rulings in *Mangold*¹⁷³ and *Küçükdeveci*¹⁷⁴ on the relationships between a general principle of non-discrimination and directives intended to apply that principle, could open new avenues of protection in the field of equality law, since the principle of sex discrimination could become a source of rights which are to be protected in horizontal disputes.¹⁷⁵

Art. 21 CFREU is the second primary law belonging to this first group.¹⁷⁶ However, as regards art. 21 of the Charter the most recent developments of the Court's case law might entail a broader application of the provision at stake.

In *Egenberger* the CJEU dealt with the application of the principle of non-discrimination on grounds of religion in horizontal litigations and stated that art. 21 para. 1 CFREU has direct effect so that "the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law."¹⁷⁷ The reasoning could lead the Court to apply art. 21 CFREU in disputes between individuals arising from discrimination on grounds of sex or sexual orientation. Such an outcome would contribute to enhance the system since the CJEU has always

¹⁷⁰ Millns (2017), p. 258.

¹⁷¹ On this distinction see Muir (2018), pp. 61 *et seq.*

¹⁷² Case 149/77, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, (ECJ 15 June 1978), paras. 26–27.

¹⁷³ Case C-144/04, Werner Mangold v Rüdiger Helm (2005).

¹⁷⁴ Case C-555/07, Seda Küçükdeveci v Swedex GmbH & Co. KG (2010).

¹⁷⁵ Ellis and Watson (2012), p. 138.

¹⁷⁶ The CJEU, case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* (2011), paras. 30–34 referred to art 21 and art. 23 of the Charter in assessing the validity of art. 5 para. 2 of Directive 2004/113.

¹⁷⁷ Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V* (2018), para. 79.

pointed out that directives have not direct effect in horizontal disputes. Hence, in *Cresco Investigation*, a case on discrimination based on religion, the CJEU stated that “where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category.”¹⁷⁸

A second group of primary laws is composed of those provisions playing a dual role. Firstly, primary law is a benchmark. Secondly, the provisions “define the scope and content of EU regulatory intervention in domestic policies”.¹⁷⁹ Art. 157 TFEU is one of the provisions of this group.

Example

Ms. Defrenne was hired by SABENA as an air hostess. Pursuant to the provision of a collective agreement Ms. Defrenne’s contract ended when she reached the age of 40. Ms. Defrenne brought a legal action arguing that she was victim of sex discrimination compared to her male colleagues. The CJEU in *Defrenne II* ruled that art. 157 TFEU is sufficiently clear and precise and unconditional to produce direct effect in the legal order of Member States.¹⁸⁰ ◀

A third group of primary laws cover those rules which confer upon the EU the power to adopt laws aiming at giving effect to the prohibition of discrimination. Two provisions on sex discrimination are at stake: art. 19 and art. 157 para. 3 TFEU.

The fourth group of primary rules is composed of Art. 2 and 3 TEU which are not binding but play a role in construing EU laws.

The last set of primary laws group Art. 8 and art. 10 TFEU and art. 23 CFREU and impose upon EU institutions and Member States the obligation to integrate gender equality in all policies.

8.6.4 Gender Equality and EU Secondary Law

The directives on gender equality set up identical tools to combat gender discrimination: direct discrimination, indirect discrimination, harassment and sexual harassment, positive actions, the burden of proof.¹⁸¹ It is necessary to highlight that the principle of non-discrimination on the ground of sex is supplemented by a series of

¹⁷⁸ Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi* (2019), para. 79.

¹⁷⁹ Muir (2018), p. 68.

¹⁸⁰ Case 43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* (ECJ 8 April 1976), para 39.

¹⁸¹ Prechal (2004) p. 533; Muir and De Witte (2017) p. 137.

directives regulating part-time work, fixed-term employees and temporary agency work which are examined in the chapter on labour law.

8.6.4.1 Equal Treatment of Men and Women in Employment and Occupation

Directive 2006/54¹⁸² on equal treatment in employment and occupation is framed in four titles. The Directive's purpose is the implementation of the principle of equal opportunities and equal treatment (art. 1) in the following areas: (a) access to employment, including promotion, and to vocational training; (b) working conditions, including pay; and (c) occupational social security schemes.

The laws aim at making implementation more effective through a series of instruments; remedies and penalties, the softening of the burden of proof, victimisation, equality bodies, social dialogue and dialogue with NGOs. Moreover, the title devotes rules to the prevention of discrimination, gender mainstreaming and the dissemination of information.

8.6.4.2 Equal Treatment of Men and Women in Social Security Schemes

Equal treatment in the field of statutory social security is provided for by Directive 79/7 prohibiting direct and indirect sex discrimination (art. 4 para. 1) as regards the following risks: sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment. The Directive also covers social assistance, as it is intended to supplement or replace the schemes on the risks already mentioned. The Directive applies to the working population including: self-employed persons; workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment; persons seeking employment, and retired or invalided workers and self-employed persons (art. 2).

Directive 2006/54 repealed Directive 86/378 that extended the principle of equal treatment to occupational social security schemes. The two directives supported the process of market integration for social policy is subordinated to economic policy and purports the promotion of economic targets, mainly as regards the labour market.¹⁸³ EU law does not cover social assistance benefits resulting in no protection against the risk of poverty which affects women more than man.¹⁸⁴

8.6.4.3 The Directive on Pregnant Workers

Directive 92/85 was adopted to improve the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (art. 1).

The Directive prohibits the dismissal of workers during the period from the beginning of their pregnancy to the end of the maternity leave (art. 10 par. 1), but

¹⁸²Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, (2006), pp. 23–36.

¹⁸³Hodson and Maer (2001), pp. 719–746; Carmel (2003).

¹⁸⁴Hervey (2005), p. 310.

Member States are not obliged to guarantee the reinstatement in post. Consequently, the system provides a weak protection in this instance.

8.6.4.4 The Directive on Parental Leave

Parental leave should foster the emancipation of women from a model of family life in which they are charged with the task of providing care, an arrangement which is one of the reasons why women face difficulties in accessing the labour market. Directive 2010/18 on parental leave¹⁸⁵ sets minimum standards to reconcile work with family and confers upon men and women workers the right to a parental leave, which in principle, should be provided on a non-transferable basis.

Member States enjoy a wide margin of discretion in determining the conditions of access, whether the leave should be compensated, whether it should cover full or part-time work, and on the remedies in case of less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave. However, it is unlikely that men would accept the leave because of the leeway on the mandatory nature of compensation, therefore the law failed to enhance a redistribution of roles within family and to set aside the stereotype of men as breadwinners,¹⁸⁶ legitimating women's social role of childbearers and childrearsers.¹⁸⁷

Most of the highlighted limits mark Directive 2019/1158, which is to repeal Directive 2010/18¹⁸⁸ from 2 August 2022, notwithstanding various important reforms it introduces. Directive 2019/1158 establishes the paternity right (art. 4) and obliges Member States to take appropriate measures to prohibit the dismissal of those who benefitted from paternity or parental leave (art. 12). However, the new directive ensures Member States the leeway they enjoyed pursuant to the rules of Directive 2010/18.

8.6.4.5 Equal Treatment Between Men and Women in an Activity in a Self-Employed Capacity

Directive 2010/41¹⁸⁹ refined the existing rules in order to put into effect the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity, as regards those aspects not covered by Directives 2006/54/EC and 79/7/EEC (art. 1). The Directive stipulates that there shall be no discrimination whatsoever on grounds of

¹⁸⁵ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance), OJ L 68, (2010), pp. 13–20.

¹⁸⁶ Lewis (2006), p. 429 raises this criticism on the rules of Directive 96/34.

¹⁸⁷ Fourbet (2002), pp. 219–246.

¹⁸⁸ Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L188, (2019), pp. 79–93. See Waddington and Bell (2021); Weldon-Johns (2021).

¹⁸⁹ Directive 2010/41/EU of the European Parliament and the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, (2010), pp. 1–6.

sex in the public or private sectors, either directly or indirectly, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity (art. 3 para. 1). The focus on the principle of non-discrimination prevents the directive from fostering women's self-employed capacity which stems, among other factors, from the distribution of roles within family and the difficulties in accessing education.

8.6.4.6 Equality Between Men and Women in the Access to and Supply of Goods and Services

Sexual discrimination affects women's ability to be fully and successfully integrated into economic and social life. Moving from this assumption Directive 2004/113 purports to guarantee the principle of equal treatment between men and women in the access to and supply of goods and services.¹⁹⁰

Pursuant to art. 3, the Directive "shall apply to all persons who provide goods and services available to the public irrespective of the person concerned as regards to both the public and private sectors, including public bodies and which are offered outside the area of private and family life and the transactions carried out in this context."

The Directive envisages wide-ranging exceptions (art. 4 para. 5) and lays down specific provisions on actuarial factors in insurance contracts which legitimize different offers to men and women (art. 5). This arrangement severely curtails the potential for reshaping private contractual relationships¹⁹¹ since in the fields of goods and services, mainly insurance services, the treatment of women is handled differently to the treatment men are granted.¹⁹²

8.6.4.7 Sexual Orientation and Equal Treatment in Employment and Occupation

Directive 2000/78 encompasses various prohibited types of discrimination including sexual orientation.¹⁹³ Art. 3 stipulates that the Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: (a) conditions for access to employment, to self-employment or to occupation; (b) access to all types and to all levels of vocational guidance, and vocational training; (c) employment and working conditions, including dismissals and pay;

¹⁹⁰Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, (2004), pp. 37–43.

¹⁹¹Schiek (2005), p. 434.

¹⁹²Hervey (2005), p. 310. The Court Case C-236-09, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* (1 March 2011), paras. 30–32 struck down art. 5 para. 2 of the Directive because it enabled the Member States to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits working against the objective of the Directive itself and breaching art. 21 and 23 CFREU.

¹⁹³Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, (2000), pp. 16–22.

and (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

A difference in treatment does not constitute discrimination where it is based on a characteristic which constitutes a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, provided that the objective is legitimate and the requirement is proportionate (art. 4 para. 1).

8.6.5 Citizenship of the Union and Gender Equality

The setting up of the EU citizenship did not purport to the tackling of gender discrimination. However, the right of residence and the right not to be discriminated against on grounds of nationality have been construed by the Luxembourg Judge in a manner which contributed to the protection and enforcement of women's rights; the Court has linked stay and access to social assistance in the hosting country to caretaking.

In *Martínez Sala*¹⁹⁴ the Court stated that an EU citizen lawfully residing in another country has the right to equal treatment as regards to access to a child-raising allowance in the host Member State.

Furthermore, in *Baumbast*¹⁹⁵ the CJEU ruled that the parent who is the primary carer of children, having the right to reside in a Member State, is entitled to reside with them in order to enable them to exercise the right of residence. In the same vein the exercise of the rights EU citizenship guarantees led the Court to endow the third-country nationals who are carers with the right of residence in *Chen*¹⁹⁶ and *Ruiz Zambrano*.¹⁹⁷

Example

The preliminary ruling the CJEU delivered in the *Ruiz Zambrano* case concerned the refusal of the Belgian authorities to regularize the stay of Mr. and Ms. Ruiz-Zambrano, a couple of third-country nationals whose children held Belgian nationality. The Court stated that “article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (. . .). A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals

¹⁹⁴ Case C-85/96, *María Martínez Sala v Freistaat Bayern* (ECJ 1998), paras. 61–65.

¹⁹⁵ Case C-413/99, *Baumbast and R v Secretary of State for the Home Department* (ECJ 2002), para. 75.

¹⁹⁶ Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* (ECJ 2004), paras. 44–47.

¹⁹⁷ Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* (ECJ 2011).

and reside, and also a refusal to grant such a person a work permit, has such an effect.”¹⁹⁸ ◀

The connection between caring and the right of residence limits States’ power to expel unlawful stayers. In *Carpenter* the CJEU pointed out that the order of deportation of Ms. Carpenter would prevent Mr. Carpenter from providing services since the former took care of the latter’s children when he was abroad to run his business.¹⁹⁹

Scholars argued that these rulings give EU citizenship a social content going beyond the economic dimension of the rights embedded in EU laws, since the CJEU valued the care work women and mothers do, highlighting that this work is not usually considered as a source of rights.²⁰⁰

However, in the more recent *Dano* case the CJEU adopted a narrower interpretation of the rules on citizenship and stated that the claim of a Romanian woman to have access to social assistance benefits for herself and her son was unfounded.²⁰¹

Furthermore, it could be argued that the case law of the CJEU stereotypes women as caregivers rather than promoting gender equality.

8.6.6 Gender Equality Beyond Equality Between Women and Men

The reference to equality between women and men that art. 2 TEU and art. 23 CFREU establish relates to “socio-economic role expectations around division of labour”.²⁰² In this perspective the rationale behind the two rules is to dismantle those factors which distribute roles in family, employment, and society, giving rise to inequality.

A cautious approach marks the way in which the CJEU has managed the thorny issues related to the legal status of transsexuals and homosexuals.²⁰³

As regards transsexuals, the Court ruled that the principle of non-discrimination on grounds of sex “cannot be confined simply to discrimination based on the fact that a person is of one or other sex” but its scope is also “such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.”²⁰⁴

¹⁹⁸ *Ibidem*, paras. 42–43.

¹⁹⁹ Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department* (ECJ 2002), paras. 45–46.

²⁰⁰ Millns (2017), p. 258. Cheltenham, p. 263. See Baer (2004), p. 112 who considers citizenship in the light of the CFREU and argues that the latter reacts to social exclusion by establishing rights of solidarity.

²⁰¹ Case C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* (ECJ 2014), paras. 82–84.

²⁰² Schiek (2014), p. 645.

²⁰³ Gallo et al. (2015).

²⁰⁴ Case C-13/94, *P v S and Cornwall County Council* (ECJ 1996), paras. 17–20.

The Court has adopted a different stance towards homosexuality. In the first stage of its case law the CJEU excluded that same-sex partnerships and married couples are comparable.²⁰⁵

In *Maruko*²⁰⁶ and *Römer*²⁰⁷ the Court illustrated that a comparison can be made between same-sex partnerships and married couples.

Example

Römer, who was in a stable same-sex partnership, claimed the same treatment of married couples as regards his pension scale. The Court held that “first, it is required not that the situations be identical, but only that they be comparable and, second, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned. (...) the Court (...) on the basis of the analysis of German law carried out by the court which made the reference for a preliminary ruling, according to which there was a gradual harmonisation in German law of the regime put in place for registered life partnerships with that applicable to marriage, (...) made it clear that registered life partnership is to be treated as equivalent to marriage as regards the widow’s or widower’s pension.”²⁰⁸ ◀

In the following *Hay* case the comparability was affirmed in a horizontal dispute. The Court stated that “as regards the very existence of discrimination, it is apparent from the Court’s case-law that a Member State’s rules which restrict benefits in terms of conditions of pay or working conditions to married employees, whereas marriage is legally possible in that Member State only between persons of different sexes, give rise to direct discrimination based on sexual orientation against homosexual permanent employees in a PACS arrangement who are in a comparable situation.”²⁰⁹

In these rulings the Court based its reasoning on a broader interpretation of Directive 2000/78.²¹⁰ In so doing the Court showed its reluctance to extend the *Mangold* jurisprudence to discrimination based on sexual orientation.²¹¹ The protection of homosexuals within the EU legal system falls short of the protection which is guaranteed within the ECHR (see Sect. 8.5.1 in this chapter).

²⁰⁵ Case C-294/96, *Lisa Jacqueline Grant v South-West Trains Ltd* (ECJ 1998), para. 35.

²⁰⁶ C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* (ECJ 1 April 2008), paras. 67–73.

²⁰⁷ C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg* (ECJ 10 May 2011).

²⁰⁸ *Ibidem* para. 42.

²⁰⁹ Case C-267/12, *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* (ECJ 2013), para 41.

²¹⁰ Zaccaroni (2017), p. 183 argues that the broad interpretation of Directive 2000/78 may be justified only in light of the particular importance of the principle of non-discrimination.

²¹¹ Amalfitano (2018), p. 133.

8.7 Conclusion

International law is a result of particular theories and international practice that were gender-free and did not include women and their perspectives in its development. In the second half of the nineteenth century, various women's organizations were first established. They participated at the Peace Conference in Paris, advocating for separating the nationality of women from their spouses, prohibiting human trafficking of women and girls, and achieving equality of men and women in the area of labour. Some of the members of those organizations were very active and took part in the League of Nations and the International Labour Organization. In 1945, the UN Charter was adopted, reaffirming in its Preamble a faith in equal rights of men and women. Since then, many international documents were adopted, and bodies were established to achieve greater gender equality. In 1979, the first gender-specific convention, the Convention on the Elimination of All Forms of Discrimination against Women was adopted, prohibiting gender discrimination in all areas of life.

Resolution 1325 was passed in the Security Council more than twenty years ago. It has since been followed by several more resolutions, covering the two areas of (a) Prevention of and response to conflict-related sexual violence and (b) Women's participation and leadership in peace making and conflict prevention. Global work on the WPS agenda remains challenging, as it engages a vast number of actors and stretches over several agendas. Nevertheless, some progress is also noted; almost half of the UN member States have developed their National Action Plans, as envisaged by the resolution. These States regularly engage in the revision process with regards to their plans. Work continues to engage the remaining States in this process.

International humanitarian law is an inherently male-normative branch under international law, since armed conflict is a context traditionally associated with masculinity. This is evident in the language of the Geneva Conventions and their Additional Protocols, whose history goes back to a time when women did not take part in public life, even less so in deliberations of international public law. The treaties bear their mark of time: they speak about women as objects whose honour needs protection. Even if we today may perceive the language as outdated, this does not render the provisions void of legal protection. Interpreting the norms in light of their object and purpose remains the most constructive approach today.

While the ECHR does not contain gender-specific rights, its prohibition on gender-based discrimination is strictly enforced by the ECtHR. The primary objective of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence is gender-specific. That Convention is the crowning achievement of the CoE's longstanding gender-related policies.

The EU has shaped gender law focusing mainly on labour law. The laws the EU enacted ensure fair competition in the common market and do not dismantle the social and economic structures and cultural stereotypes segregating women in the labour market. A similar reasoning applies to the laws on self-employed activities and the rules on access to and supply of goods and services. The limits on women's access to social assistance and the restrictions on the enactment of positive actions

clearly convey that EU gender law is anchored in the principle of non-discrimination, failing to promote substantial equality.²¹²

In the same vein, it is to be observed that the fragmentation of the rules outlawing discrimination contained in a set of directives regulating specific prohibited statuses, jeopardizes the efficacy of the system in tackling multiple discriminations, a phenomenon which is of growing importance.²¹³

Eventually, the Court's care in handling transsexual and homosexual persons rights lowers the standard of protection EU law envisages in comparison with the jurisprudence of the ECtHR.

Questions

1. What are the principal and subsidiary organs within the UN system which deal with gender equality?
2. What is the main UN body for gender equality?
3. Explain the main features of CEDAW.
4. Which provisions of the ECHR and Protocols are particularly important from a gender perspective?
5. Describe the ECtHR's approach to gender-related discrimination.
6. Describe the role EU primary law plays in the case law of the Court of Justice on gender equality.
7. Define direct and indirect discrimination.
8. Describe the case law of the Court of Justice on sexual orientation discrimination.
9. More than twenty years have now passed since the Security Council passed resolution 1325. Many actors have engaged with the agenda over the years. What are the key gains of the resolution? What are the contemporary challenges with its implementation? Discuss.
10. Does it matter under IHL whether the rape victim is a civilian, a combatant, a fighter, a militant sympathizer, or a terrorist? Why?

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²¹³Solanke (2021), p. 93.

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