

STUDENT NOTE

MAKING ROOM FOR SEXUAL ORIENTATION AND GENDER IDENTITY IN INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION TO THE YOGYAKARTA PRINCIPLES

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INTRODUCTION

In November of 2006 a group of international human rights law experts met in Yogyakarta, Indonesia, to draft the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles).¹ In twenty-nine principles, the document purports to “reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity.”² This is a remarkable assertion given that no major human rights treaty explicitly mentions discrimination on the basis of

1. Conference of International Legal Scholars, Yogyakarta, Indonesia, Nov. 6–9, 2006, *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (Mar. 2007), http://www.yogyakartaprinciples.org/principles_en.pdf (last visited June 8, 2010) [hereinafter *Yogyakarta Principles*].

2. *Id.* at 7.

sexual orientation or gender identity,³ and, given the wide diversity of state practice,⁴ customary law might likewise appear silent.⁵

To conclude, however, that international human rights law has nothing to say about sexual orientation and gender identity would be mistaken. State practice, soft law, regional human rights systems, United Nations bodies, and even certain elements of *jus cogens* and customary international law have increasingly taken these two issues into account.⁶ Thirty years ago, when activists began seeking the protection of international human rights law in cases of sexual orientation discrimination, courts and other bodies were universally dismissive.⁷ These same bodies hold opposite views today, due primarily to a broader understanding of international human rights law as prohibiting arbitrary

3. The authors of the *Yogyakarta Principles* derived their principles from the language and rules of law established in key human rights conventions, none of which mention gender identity or sexual orientation. See *infra* Part I.B.1. One *sui generis* treaty—the Ibero-American Convention on the Rights of Youth—does explicitly prohibit sexual orientation discrimination. This treaty has been ratified by seven countries. Child Rights Information Network, Convención Iberoamericana de Derechos de de los Jóvenes [Ibero-American Convention on the Rights of Youth], <http://www.crin.org/Law/instrument.asp?InstID=1305> (last visited June 8, 2010). See generally Organización Iberoamericana de Juventud [Ibero-American Youth Organization], Convención Iberoamericana de Derechos de de los Jóvenes [Ibero-American Convention on the Rights of Youth] art. 5, Oct. 11, 2005, available at <http://www.crin.org/docs/FileManager/cidjpdf.pdf> (last visited June 8, 2010). In addition, the European Union’s Amsterdam Treaty, while not prohibiting sexual orientation discrimination, does allow the “[European] Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, [to] take appropriate action to combat discrimination based on . . . sexual orientation.” Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 2(7), Oct. 2, 1997, 1997 O. J. (C 340) 1.

4. For example, at least 80 countries criminalize homosexuality. DANIEL OTTOSSON, INT’L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS’N, STATE-SPONSORED HOMOPHOBIA REPORT 5 (2009), available at http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2009.pdf (last visited Feb. 9, 2010). On the other hand, at least 48 countries prohibit sexual orientation discrimination. *Id.* at 50–51.

5. That such a conclusion is mistaken is a major part of this Note; for a discussion of the application of customary international law to sexual orientation and gender identity, see *infra* Part II.A.

6. For background information on the evolution of international law as applied to sexual orientation and gender identity, see generally Holning Lau, *Sexual Orientation: Testing the Universality of International Human Rights Law*, 71 U. CHI. L. REV. 1689 (2004); Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles* 8 HUM. RTS. L. REV. 207, 214–31 (2008); and Phillip Tahmindjis, *Sexuality and International Human Rights Law*, 48 J. OF HOMOSEXUALITY 9 (2005).

7. See, e.g., *Handyside v. United Kingdom*, 1 Eur. Ct. H.R. 737, 755–57 (1976) (allowing censorship of a book whose favorable treatment of sexual orientation could “deprave and corrupt” minors); *Hertzberg v. Finland*, ICCPR Communication No. 61/1979, CCPR/C/15/D/61/1979, ¶¶ 10.3–10.4 (1979) (finding censorship of television programs about homosexuality to be within Finland’s margin of discretion to protect public morals).

discrimination in all of its guises⁸—a prohibition which necessarily extends, by definition, to sexual orientation and gender identity.⁹ The Yogyakarta Principles are an attempt to reflect these changes in a codified body of law.¹⁰

Because these changes remain controversial and have not yet been put into practice in all countries or in all areas of law,¹¹ this Note argues that the Principles are not a simple restatement of settled law as they purport to be, but rather a part of this process of advancement. The Principles highlight legal developments that their drafters felt held the most promise to create tangible improvements in the lives of people who suffer from discrimination and persecution on account of sexual orientation and gender identity. In other words, as much as the Principles seek to restate existing international human rights law, they also seek to codify developing elements of the law that are helpful to victims of discrimination, but have not yet achieved binding status.¹²

8. For more information about the development of the concept of anti-discrimination principles in international human rights law, see generally PATRICIA PALACIOS ZULOAGA, *LA NO DISCRIMINACIÓN: ESTUDIO DE LA JURISPRUDENCIA DEL COMITÉ DE DERECHOS HUMANOS SOBRE LA CLÁUSULA AUTÓNOMA DE NO DISCRIMINACIÓN* [NON-DISCRIMINATION: STUDY OF THE JURISPRUDENCE OF THE HUMAN RIGHTS COMMITTEE ON THE AUTONOMOUS NON-DISCRIMINATION CLAUSE] 30–34 (2006), available at <http://www.cdh.uchile.cl/Libros/la-no-discriminacion.pdf>; Anne F. Bayefsky, *The Principle of Equality or Non-Discrimination in International Law*, 11 HUM. RTS. L. J. 1 (1990).

9. See O’Flaherty & Fisher, *supra* note 6, at 214–20 (discussing the evolution of non-discrimination in international law as applied to sexual orientation and, to a lesser extent, gender identity); Lau, *supra* note 6, at 1701–02 (discussing non-discrimination regarding sexual orientation in the jurisprudence of UN treaty bodies); See also *infra* Part II.A for a detailed discussion of this issue.

10. *Yogyakarta Principles*, *supra* note 1, at 6–7.

11. Compare Remarks of the Argentine Delegate to the United Nations, U.N. GAOR, 63d Sess., 70th plen. mtg. at 2 hrs. 25 min. (Dec. 18, 2008) (affirming that international human rights law does protect against sexual orientation and gender identity discrimination), <http://www.un.org/webcast/ga2008.html> (last visited June 8, 2010), with Remarks of the Syrian Delegate to the United Nations, *id.* at 2 hrs. 32 min. (decrying the introduction of sexual orientation and gender identity into international human rights law as an innovation some states were seeking to impose on others).

12. Indeed, the NGO whose members were the driving force behind the Yogyakarta meeting states that “contributing to the sexual orientation and gender identity rights embodied in the Yogyakarta Principles becoming soft law” is a major goal of its human rights work. International Commission of Jurists [hereinafter, ICJUR], *The International Commission of Jurists SOGI Programme, 2008–2010*, at 2 (Apr. 22, 2008) (unpublished memo, on file with author). See also Piero A. Tozzi, “Gay” Groups Lobby Treaty Body on Recognition of Yogyakarta Principles, CATHOLIC FAMILY & HUMAN RIGHTS NETWORK, Jan. 8, 2009, http://www.c-fam.org/publications/id.963/pub_detail.asp (last visited June 8, 2010) (“The effort appears to be part of a recent, coordinated push to elevate the status of the Yogyakarta Principles from a policy statement . . . to a soft-law standard that would increasingly be referenced in more formal contexts, such as by the bodies charged with reviewing countries’ compliance with international treaties.”).

Despite the tension between activism and strict legal accuracy, the Principles have already attained a high degree of influence. They have become a fixture in the proceedings of the United Nations Human Rights Council;¹³ been incorporated into the foreign¹⁴ and domestic¹⁵

13. See, e.g., U.N. Human Rights Council [UNHRC], *Universal Periodic Review, Report of the Working Group on the Universal Periodic Review: Canada, Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review*, ¶ 36, U.N. Doc. A/HRC/11/17/Add.1 (June 8, 2009); UNHRC, *Universal Periodic Review, Draft Report of the Working Group on the Universal Periodic Review: Chile*, ¶ 25, U.N. Doc. A/HRC/WG.6/5/L.9 (May 12, 2009); UNHRC, *Universal Periodic Review, Draft Report of the Working Group on the Universal Periodic Review: Malta*, ¶ 49, U.N. Doc. A/HRC/WG.6/5/L.6 (May 8, 2009); UNHRC, *Universal Periodic Review, Report of the Working Group on the Universal Periodic Review: Serbia, Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review*, ¶ 38, U.N. Doc. A/HRC/10/78/Add.1 (Mar. 18, 2009) [hereinafter *Universal Periodic Review: Serbia*]; UNHRC, *Periodic Review, Report of the Working Group on the Universal Periodic Review: Czech Republic, Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review*, ¶ 11, U.N. Doc. A/HRC/8/33/Add.1 (Aug. 25, 2008); UNHRC, *Universal Periodic Review, Report of the Working Group on the Universal Periodic Review: Ukraine*, ¶ 34, U.N. Doc. A/HRC/8/45 (June 3, 2008); UNHRC, *Universal Periodic Review: Peru*, ¶ 33, U.N. Doc. A/HRC/8/37 (May 28, 2008); UNHRC, *Universal Periodic Review, Draft Report of the Working Group on the Universal Periodic Review: Switzerland*, ¶ 24, U.N. Doc. A/HRC/8/41 (May 28, 2008); UNHRC, *Report of the Working Group on the Universal Periodic Review: Finland*, ¶ 43, 16, U.N. Doc. A/HRC/8/24 (May 23, 2008); UNHRC, *Report of the Working Group on the Universal Periodic Review: United Kingdom of Great Britain and Northern Ireland*, ¶ 30, U.N. Doc. A/HRC/8/25 (May 23, 2008); UNHRC, *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review: Ecuador*, ¶ 32, U.N. Doc. A/HRC/8/20 (May 13, 2008); United Nations Office of the High Commissioner for Human Rights [OHCHR], *Universal Periodic Review of Malaysia, Advance Questions to Malaysia* (Feb. 11, 2009), available at <http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/MY/MALAYSIA.pdf> (last visited June 8, 2010).

14. See BRITISH FOREIGN AND COMMONWEALTH OFFICE, AN FCO PROGRAMME FOR PROMOTING THE HUMAN RIGHTS OF LGBT PEOPLE 5 (2009) (“welcom[ing]” the Yogyakarta Principles), available at <http://www.fco.gov.uk/resources/en/pdf/3849543/human-rights-lgbt> (last visited June 8, 2010); Maxime Verhagen, Foreign Minister, Kingdom of the Neth., Remarks at the Seventh Session of the United Nations Human Rights Council (Mar. 3, 2008) [hereinafter Verhagen Remarks], available at <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Netherlands-E.pdf> (last visited June 8, 2010) (stating that “the Dutch government subscribes to the Yogyakarta Principles”); Boris O. Dittrich, The Yogyakarta Principles (Jun. 23, 2008) (unpublished report), available at <http://lgbt.tammybaldwin.house.gov/pdf/BorisDittrich62308.pdf> (citing support of the Dutch and Belgian parliaments as well as Brazil, Argentina, and Uruguay) (last visited June 8, 2010); *Argentina, Brasil y Uruguay auspician un acto en favor de los derechos de los homosexuales*, TERRA ACTUALIDAD, Nov. 5, 2007, <http://terranoticias.terra.es/articulo/html/av21988185.htm> (last visited June 8, 2010) (noting these three countries’ expressed support for the Yogyakarta Principles).

15. See PLAN NACIONAL DE ACCIÓN DE DERECHOS HUMANOS PARA BOLIVIA DIGNA PARA VIVIR BIEN 2009–2013, Supreme Decree No. 29850, Dec. 10, 2008, GACETA BOLIVIA EDICIÓN ESPECIAL 115, 199–201; NORTHERN IRELAND HUMAN RIGHTS COMMISSION, A BILL OF HUMAN RIGHTS FOR NORTHERN IRELAND: ADVICE TO THE SECRETARY OF STATE FOR NORTHERN IRELAND 29 (2008), available at [http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/51/A_Bill_of_Rights_for_Northern_Ireland_\(December_2008\).pdf](http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/51/A_Bill_of_Rights_for_Northern_Ireland_(December_2008).pdf) (last

policies of a number of countries; been acclaimed and debated by regional human rights bodies in Europe and South America;¹⁶ and have worked their way into the writings of a number of United Nations agencies and human rights rapporteurs.¹⁷ They have even been cited by national courts in overturning their countries' discriminatory laws.¹⁸ Nevertheless, they remain relatively unknown among grassroots human rights activists in most countries,¹⁹ and almost entirely unknown within the United States.²⁰

visited June 10, 2010); Conferência Nacional De Gays, Lésbicas, Bissexuais, Travestis e Transexuais, Brasília, Braz., May 8–11, 2008, *Direitos Humanos e Políticas Públicas: O caminho para garantir a cidadania de Gays, Lésbicas, Bissexuais, Travestis e Transexuais*. For examples contained in the Universal Periodic Review, see UNHRC, *Universal Periodic Review, Report of the Working Group on the Universal Periodic Review: Canada, Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review*, ¶ 35, U.N. Doc. A/HRC/11/17/Add.1 (June 8, 2009); UNHRC, *Periodic Review, Report of the Working Group on the Universal Periodic Review: Czech Republic, Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review*, ¶ 11, U.N. Doc. A/HRC/8/33/Add.1 (Aug. 25, 2008); UNHRC, *Report of the Working Group on the Universal Periodic Review: Finland*, ¶ 43, 16, U.N. Doc. A/HRC/8/24 (May 23, 2008).

16. Thomas Hammarberg, Comm'r for Human Rights, Council of Eur., "Time to Recognise that Human Rights Principles Apply also to Sexual Orientation and Gender Identity" (May 14, 2008), http://www.coe.int/t/commissioner/Viewpoints/080514_en.asp (last visited June 10, 2010); X Reunión de altas autoridades de derechos humanos y cancillerías del Mercosur y Estados Asociados [Tenth Meeting of Senior Officials of Human Rights and Foreign Ministers of Mercosur and Associated States], Montevideo, Uruguay, Nov. 29–30, 2007, *Conférence Report*, 10, MERCOSUR/RAADDHH/FCCP/ACTA No. 04/07, available at http://www.derhuman.jus.gov.ar/mercosur/documentos/SDH/x_reunion/acta10.pdf (last visited June 8, 2010).

17. For a thorough survey of this material through the end of 2007, see generally ICJUR, *SEXUAL ORIENTATION AND GENDER IDENTITY IN HUMAN RIGHTS LAW: REFERENCES TO JURISPRUDENCE AND DOCTRINE OF THE UNITED NATIONS HUMAN RIGHTS SYSTEM* (3d ed. 2007), available at http://www.icj.org/IMG/UN_References.pdf.

18. Naz Foundation v. Government of NCT of Delhi, WP(C) No.7455/2001, ¶¶ 43–44 (Delhi H.C. Jul 2, 2009) (citing the *Yogyakarta Principles*, *supra* note 1). See also INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMM'N [IGLHRC], *NEPAL SUPREME COURT CASE ON RELIEF FOR SEXUAL AND GENDER MINORITIES: OBSERVERS' REPORT* 4–5 (2007), available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/111-1.pdf> (last visited June 8, 2010) (describing the Court's consideration of the Yogyakarta Principles).

19. E.g. Pimann Laohapichitpong, *Are we hiding human rights in a closet?*, DAILY XPRESS (Bangkok), Apr. 3, 2009, available at http://xpress.nationmultimedia.com/2009/04/03/lifestyle/lifestyle_5854.php (last visited June 8, 2010); Observatorio de Sexualidade e Política, *Consulta Sobre a Aplicação e Utilização dos Princípios de Yogyakarta no Brasil*, Feb 2–Mar 5, 2009, available at <http://www.sxpolitics.org/pt/wp-content/uploads/2009/02/analise-pesquisa-principios-de-yogyakarta-final.pdf>.

20. For example, they have not yet been the subject of any detailed analysis in an American law journal. This Note is the first. Likewise, the Advocate, the United States' largest LGBT-oriented news magazine and website, has never mentioned them. The country's two largest LGBT advocacy organizations, the Human Rights Campaign and the Gay and Lesbian Alliance against Defamation, have referred to the Principles, respectively, once, and never. Human Rights Campaign, *International Laws Protecting Transgender Workers* (2009), http://www.hrc.org/issues/int_rights_immigration/9604.htm (last visited June 8, 2010). This is

This Note evaluates the Yogyakarta Principles' legal and inspirational capacity to drive the development of human rights law. Part I describes the most common patterns of violence and discrimination suffered around the world on account of sexual orientation and gender identity, and the process by which the Principles' drafters sought to apply principles of international law to stem these outrages by developing a restatement of international human rights law that would leave no doubt as to their illegality. Part II assesses the Principles' claim to accuracy as a restatement of existing, binding international law. It shows that the most basic of the principles—those dealing with non-discrimination and fundamental civil and political rights—draw broadly and accurately from general principles of non-discrimination, customary international law, and *jus cogens*. By comparison, principles detailing more specific rights, especially economic, social, and cultural rights, restate international law that is less-than-binding or less-than-universal, including soft law and regional law. I also highlight one principle, the “right to family,” which is not an accurate restatement of existing international law. Part III addresses the positive and negative implications of the Yogyakarta Principles' imperfections as a restatement of international law. I argue that on balance the Principles have been very successful in becoming a standard-setting document and the inspiration for a variety of efforts to combat sexual orientation and gender identity discrimination in international law, government policy, and domestic courts. I argue that these effects have come about precisely because of the Principles' overreaching nature, and that had the drafters limited themselves to strict accuracy, the document would have been insufficiently inspirational to bring about many of these changes. Where the Principles sacrifice legal accuracy, they achieve their goal of accomplishing real-life improvements in human rights without surrendering their credibility. What drawbacks their inaccuracies have created have mainly been demonstrated in the reluctance of jurists and policymakers to cite them directly, for fear of being trapped into accepting some of the Principles' more far-reaching demands, such as providing access to gender reassignment.²¹ The Principles have also met limited success among non-lawyers. For example, they remain relatively unknown among human rights activists at the municipal level.

not entirely surprising given the generally low profile of international legal developments within our legal tradition on the one hand, and on the other the increasing focus on same-sex marriage—a right not included among the Yogyakarta Principles—in the current domestic debate over LGBT rights. *See generally*, April Working Group, *Beyond Same-sex Marriage: A New Strategic Vision for all our Families & Relationships* (Apr. 2006), http://www.beyondmarriage.org/full_statement.html (last visited June 8, 2010).

21. *Yogyakarta Principles*, *supra* note 1, princ. 9.

Nevertheless, this Note concludes that the Yogyakarta Principles have, on balance, succeeded in contributing to the development of international soft law, as well as several countries' laws and policies, in the areas of sexual orientation and gender identity.

I. THE ORIGIN OF THE YOGYAKARTA PRINCIPLES

A. *Violence and Discrimination on Account of Sexual Orientation and Gender Identity*

The Yogyakarta Principles are intended to address an important problem. Around the world, human rights violations on account of sexual orientation and gender identity are committed with impunity by both governmental and private actors.²² States perpetrate a host of abuses on account of sexual orientation and gender identity.²³ Invariably, in states where such abuse is policy, private violence and discrimination against persons perceived to be homosexual also flourishes.²⁴

The arrest and prosecution of people for homosexual activity or for failing to conform to legally-mandated gender roles is widespread.²⁵ In about eighty countries, mostly former British colonies and nations applying principles of Islamic law, sexual relations between members of the same sex are illegal.²⁶ In five of these countries, the offense may be punishable by death.²⁷ In the remainder, homosexual activity is usually punished with imprisonment, imposed for a term of anywhere from a few months to a life sentence and sometimes accompanied with hard labor or corporal punishment.²⁸

In addition to such "sodomy laws," many states enforce a variety of coercive laws designed to maintain rigid gender roles and enforce sexual

22. For a timely and up-to-date series of published investigations documenting such violations, see HUMAN RIGHTS WATCH, LGBT RIGHTS, <http://www.hrw.org/en/category/topic/lgbt-rights> (linking, under the "More Reports" tab, to reports documenting human rights violations on account of sexual orientation and gender identity around the world and in nineteen selected countries over the past decade) (last visited June 8, 2010).

23. OTTOSSON, *supra* note 4, at 5.

24. *See id.* *See also* HUMAN RIGHTS WATCH, THIS ALIEN LEGACY: THE ORIGINS OF "SODOMY" LAWS IN BRITISH COLONIALISM 52–63 (2008), available at <http://www.hrw.org/en/reports/2008/12/17/alien-legacy> (last visited June 8, 2010).

25. *See generally id.*

26. *Id.* at 4–5. *See generally* OTTOSSON, *supra* note 4.

27. OTTOSSON, *supra* note 4, at 5.

28. *E.g.*, Criminal Law (Offences) Act, Cap. 8.01, § 354 (Guy.) (authorizing homosexuality to be charged with life imprisonment); Penal Code, Act 574 (1997), Cap. XVI, § 377B (Malay.) (authorizing twenty years in prison plus whipping); Código Penal [Penal Code] art. 70(2), 71(4) (Mozam.) (authorizing internment in work house or agricultural colony for those who habitually engage in the practice of unnatural vices). For a complete list of similar measures worldwide, see Otosson, *supra* note 4, at 12–47.

stereotypes.²⁹ These laws often use vague language to allow for maximum flexibility in the imposition of sentences against people who fail to conform to the authorities' view of proper gender-specific behavior.³⁰ Recent examples include the sentencing in January 2009 of a number of Senegalese HIV-prevention workers for “indecent and unnatural acts” and “forming associations of criminals,”³¹ and the jailing of several men in Guyana in March 2009 for the crime of “wearing of female attire by man [*sic*]; wearing of male attire by women.”³² Not all of these laws are gender-specific, or even mention gender or sexuality at all.³³ North African nations have made liberal use in recent years of crimes such as “contempt for religion,”³⁴ and “outrage[s] on . . . Islamic morals”³⁵ to imprison people perceived as homosexual. In Latin America, the crime of “offenses against morals and good customs” is commonly charged against gender- and sexuality-non-conforming people.³⁶

29. See generally sources cited *supra* note 6.

30. See e.g., AMNESTY INT'L, STONEWALLED: POLICE ABUSE AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE US 21–29 (2005), available at <http://www.amnestyusa.org/outfront/stonewalled/report.pdf> (documenting the discriminatory application of “morals regulations” and other “vague” laws) (last visited June 10, 2010); HUMAN RIGHTS WATCH, NOT WORTH A PENNY: HUMAN RIGHTS ABUSES AGAINST TRANSGENDER PEOPLE IN HONDURAS 10–12 (2009), available at http://www.hrw.org/sites/default/files/reports/honduras0509webwcover_0.pdf (describing the use of laws prohibiting “immoral” conduct to jail transsexuals in Honduras and elsewhere in Latin America) (last visited June 10, 2010); Rex Wockner, *Court: Lambda Istanbul Can Continue Operating*, SAN FRANCISCO BAY TIMES, May 7, 2009, available at http://www.sfbaytimes.com/index.php?sec=article&article_id=10623 (last visited June 10, 2010) (quoting a Turkish Supreme Court opinion ruling that “encouraging or provoking gay, lesbian, bisexual, transsexual and transvestite behavior or acting with the aim of spreading such sexual orientations” could be grounds for the judicial dissolution of a non-profit organization).

31. Press Release, Human Rights Watch, Senegal: Free AIDS Activists (Jan. 9, 2009), <http://www.hrw.org/en/news/2009/01/09/senegal-free-aids-activists> (last visited June 10, 2010). After several months of pressure, the men were freed. See Adam Nossiter, *Senegal: Court Frees 9 Gay Men*, N.Y. TIMES, Apr. 21, 2009, at A8.

32. Press Release, Human Rights Watch, Guyana: Stop Dress Code Arrests (Mar. 5, 2009), <http://www.hrw.org/en/news/2009/03/05/guyana-stop-dress-code-arrests> (quoting the judge's citation to 153 (1) (xlvii) of the Summary Jurisdiction (Offences) Act Chapter 8:02) (last visited June 10, 2010).

33. E.g., Press Release, Human Rights Watch, Egypt: 117 NGOs Slam HIV-Based Arrests and Trials (Apr. 6, 2008), <http://www.hrw.org/en/news/2008/04/06/egypt-117-ngos-slam-hiv-based-arrests-and-trials> (describing Egypt's use of public health laws and a law against the “habitual practice of debauchery” against gay men).

34. OTTOSSON, *supra* note 4, at 18 (discussing Egyptian statutes affecting sexual relations between two persons of the same sex).

35. *Id.* at 28 (quoting CODE PENAL art. 306(1) (Mauritania) (unofficial translation)).

36. See, e.g., CÓD. PEN. art. 373 (Chile) (criminalizing “outrages against good customs”); CÓD. PEN. art. 418 (Honduras) (penalizing “he who . . . offends morals and good customs”). In recent years these laws have come under increasing attack in some countries of the region. See, e.g., Tribunal del Distrito Judicial de Medellín, Sala de Decisión Penal [Medellín (Colombia) Judicial District Court, Criminal Decisions Bench], Sep. 27, 2005, exp. 1221093 (ordering the municipal police department to cease detaining “transgenderists” [*sic*]

Common law countries impose misdemeanor charges such as nuisance and loitering for prostitution for the same purposes.³⁷ The application of these laws is generally accompanied by police violence—sometimes fatal and often amounting to torture—against persons detained for or suspected of having violated them.³⁸ Lesbian, gay, bisexual, and transgender (LGBT) human rights defenders are particularly vulnerable to such violence.³⁹

Human rights violations on account of sexual orientation and gender identity are not limited to arbitrary arrest, torture, violence, and loss of life. States frequently restrict the freedoms of speech, assembly, and association on account of sexual orientation and gender identity, arguing that merely permitting public discussion of such issues would be a threat to public health, order, and morals.⁴⁰ Students who fail to conform to

on the charge of “offenses against public morals and good customs”) (unofficial translation); Comisión de los Derechos Humanos del estado de Coahuila [Human Rights Commission for the State of Coahuila] (Mex.), Jul. 26, 2004, rec. 013/2004 (arguing in a case of arrested transvestites that “the indefinite formula ‘infractions against morals and good customs’ leaves the definition of the morality or immorality of an action at the discretion of the municipal authorities”) (unofficial translation). *See also* NOT WORTH A PENNY, *supra* note 30, at 11–12.

37. *See* HUMAN RIGHTS WATCH, MORE THAN A NAME: STATE-SPONSORED HOMOPHOBIA AND ITS CONSEQUENCES IN SOUTHERN AFRICA 275–80 (2003), available at <http://www.hrw.org/sites/default/files/reports/safrighrc0303.pdf> (last visited June 10, 2010); STONEWALLED, *supra* note 30, at 21–29; Christine Hauser, *Among Gay Men, Arrests Spark Concern About Being Singled Out*, N.Y. TIMES, Feb. 15, 2009, at A3.

38. *See* HUMAN RIGHTS WATCH, IN A TIME OF TORTURE: THE ASSAULT ON JUSTICE IN EGYPT’S CRACKDOWN ON HOMOSEXUAL CONDUCT 3 (2004), available at http://www.hrw.org/sites/default/files/reports/egypt0304_0.pdf (last visited June 10, 2010). *See also* Press Release, Amnesty Int’l, Amnesty International Calls on Iran to Explain Arrests of 17 Men Who Were Reportedly Beaten and Held for “Homosexual Conduct,” Saying They May Have Been Tortured in Prison (May 21, 2007), <http://www.amnestyusa.org/document.php?id=ENGUSA20070521002&lang=e> (last visited June 10, 2010); Press Release, Amnesty Int’l, Five Men Beat Transvestite Activist in Honduras While Police Watch, Charges Amnesty International (May 4, 2007), http://www.amnestyusa.org/document.php?id=ENGUSA2007_0504001&lang=e (last visited June 10, 2010); Press Release, Human Rights Watch, India: Stop Abuse of Sexual Rights Activists (Oct. 29, 2008), <http://www.hrw.org/en/news/2008/10/29/india-stop-abuse-sexual-rights-activists> (last visited June 10, 2010); Press Release, Human Rights Watch, Jamaica: Condemn Homophobic Remarks (Feb. 19, 2009), <http://www.hrw.org/en/news/2009/02/19/jamaica-condemn-homophobic-remarks> (last visited June 10, 2010); Press Release, Human Rights Watch, Uganda: Torture Threat for HIV/AIDS Activists (Jul. 30, 2008), <http://www.hrw.org/en/news/2008/07/29/uganda-torture-threat-hiv-aids-activists> (last visited June 10, 2010); Michael Schwartz, *Moscow Police Crush Gay Rights Rally*, N.Y. TIMES, May 17, 2009, at A12.

39. *E.g.* UNHRC, *Report submitted by the Special Representative of the Secretary-General on Human Rights Defenders*, ¶¶ 68, 94–96, U.N. Doc. A/HRC/4/37 (Jan. 24, 2007) (prepared by Hina Jilani); U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Addendum: Summary of Cases Transmitted to Governments and Replies Received*, ¶ 342, U.N. Doc. E/CN.4/2005/101/Add.1 (Mar. 16, 2005) (prepared by Hina Jilani).

40. *See, e.g.*, UNHRC, *Report of the Special Representative of the Secretary-General on the Situation of Human Rights Defenders*, ¶ 559, U.N. Doc. A/HRC/4/37/Add.1 (Mar. 27, 2007); NOT WORTH A PENNY, *supra* note 30, at 24; Schwartz, *supra* note 38.

gender stereotypes are sometimes denied their right to education, either due to bullying and harassment tolerated by school administrators, or because of expulsion.⁴¹ The right of access to courts is also sometimes denied on account of sexual orientation.⁴² Forced “treatment” for sexuality- and gender-non-conformity violates the right to the highest attainable standard of health and to freedom from medical abuses and unwanted treatment.⁴³ Sexual orientation and gender identity non-conformity have also been, at various times and places, grounds for denial of access to healthcare facilities and programs, and to public housing.⁴⁴

Private human rights violations on account of sexual orientation and gender identity often occur with government acquiescence. Rape of lesbians to “cure” them of their sexual orientation, at times with the acquiescence of police, has recently been documented as widespread in Southern Africa.⁴⁵ Only forty-eight countries prohibit sexual orientation discrimination in employment, and only sixteen prohibit gender identity discrimination.⁴⁶ In other countries, employers are free to fire, and

41. *E.g.* ECOSOC, Comm’n on Human Rights, *Girls’ Right to Education, Report Submitted by the Special Rapporteur on the Right to Education*, ¶¶ 64, 113, U.N. Doc. E/CN.4/2006/45 (Feb. 8, 2006) (prepared by Mr. V. Muñoz Villalobos); ECOSOC, Comm’n on Human Rights, *Annual report of the Special Rapporteur on the Right to Education, Submitted in Accordance with Commission on Human Rights Resolution 2000/9*, ¶ 75, U.N. Doc. E/CN.4/2001/52 (Jan. 11, 2001) (prepared by Katarina Tomaševski). *See generally* JOSEPH G. KOSCIW ET AL., THE 2007 NATIONAL SCHOOL CLIMATE SURVEY, THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS (2007), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1290-1.pdf (last visited June 10, 2010) (describing bullying in American schools); *Movilh denunció 13 casos de discriminación ante Consejo Asesor, LA NACIÓN* (Chile), Jul. 26, 2006; NOT WORTH A PENNY, *supra* note 30.

42. UNHRC, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, ¶¶ 21–23, U.N. Doc. A/HRC/4/25 (Jan. 18, 2007) (prepared by Leandro Despouy).

43. Claire Mahon, *Sexual Orientation, Gender Identity and the Right to Health*, in REALIZING THE RIGHT TO HEALTH 235–248 (Andrew Clapham & Mary Robinson eds., 2009); AMNESTY INT’L, CRIMES OF HATE, CONSPIRACY OF SILENCE: TORTURE AND ILL-TREATMENT BASED ON SEXUAL IDENTITY ch. 4 (2001), available at <http://www.amnesty.org/en/library/info/ACT40/016/2001> (follow “PDF” hyperlink) (last visited June 10, 2010).

44. ECOSOC, Comm’n on Human Rights, *Report by the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination*, ¶ 30, U.N. Doc. E/CN.4/2006/118 (Feb. 27, 2006) (prepared by Miloon Kothari); STONEWALLED, *supra* note 30, at 11.

45. Annie Kelly, *Raped and Killed for Being a Lesbian: South Africa Ignores ‘Corrective’ Attacks*, THE GUARDIAN, Mar. 12, 2009; MORE THAN A NAME, *supra* note 37, at 108, 165, 176, 192–96 (describing corrective rape in several Southern African nations). In a similar vein, a Honduran lesbian activist of my acquaintance was recently kidnapped by the police and made to watch heterosexual pornography in a police station, to teach her “what she was missing”; the threat of rape in this case was implied but not carried out. Interview with Lezdeny Castillo, Administrator, Asociación LGBT Arcoiris de Honduras, in Tegucigalpa, Hond. (Aug. 11, 2009).

46. OTTOSSON, *supra* note 4, at 50, 51.

professional associations free to withhold licenses, along those two grounds.⁴⁷ Denial of access to hospitals⁴⁸ and to housing⁴⁹ has also been documented.

Even where private violence or discrimination against persons based on sexual orientation and/or gender identity is illegal, victims may be unable to secure help from the authorities due to the latter's indifference or, in some cases, violent retaliation.⁵⁰ Where homosexual acts are illegal, the authorities may prosecute the victims instead of the perpetrators. For example, on Easter Sunday 2007, in Mandeville, Jamaica, the police allowed a mob to attack the funeral of a man believed to be gay, then detained some of the mourners and searched their cars in order to gather evidence of their supposed criminal acts.⁵¹ In October of 2008, police in Bangalore, India, attacked and arrested *hijra* (transgender) activists who came to a police station to inquire about the well-being of their illegally-detained co-workers.⁵² But police violence also exists even where same-sex sexual activity is not illegal. In March, 2007, police jailed a gay rights activist in Honduras and suggested that his cell-mates rape him, which they did.⁵³ Two years ago in Tennessee,

47. See, e.g., *Hodkins v. N. Carolina Real Estate Comm'n*, 504 S.E.2d 789, 790 (N.C. App. 1998) (affirming the denial of realtor's license to a man convicted of homosexual activity, as the conviction indicated the man "does not possess the requisite integrity for licensure as a real estate salesman"); HUMAN RIGHTS WATCH, FORBIDDEN: INSTITUTIONALIZING DISCRIMINATION AGAINST GAYS AND LESBIANS IN BURUNDI 7 (2009) (referring to employment discrimination in that country) available at http://www.hrw.org/sites/default/files/reports/burundi0709_brochure_web.pdf; AM. CIVIL LIBERTIES UNION, WORKING IN THE SHADOWS: ENDING EMPLOYMENT DISCRIMINATION FOR LGBT AMERICANS (2007) (documenting cases of workplace discrimination in United States jurisdictions that do not prohibit sexual orientation and gender identity discrimination in employment), available at http://www.aclu.org/pdfs/lgbt/enda_20070917.pdf (last visited Feb. 10, 2010); MORE THAN A NAME, *supra* note 37, at 156–57, 210–12 (documenting employment discrimination in Southern Africa); NOT WORTH A PENNY, *supra* note 20, at 16 (discussing employment discrimination in Honduras).

48. Tara Parker-Pope, *Kept from a Dying Partner's Bedside*, N.Y. TIMES, May 19, 2009, at D5.

49. Mauricio I Cabral, Comisión Internacional de los Derechos Humanos para Gays y Lesbianas, *Me preguntaron cómo vivía / sobreviviendo, dije, sobreviviendo . . . : Trans latinoamericanas en situación de pobreza extrema*, 9–10 (2009), available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/262-1.doc> (last visited June 10, 2010).

50. MORE THAN A NAME, *supra* note 37, at 200; STONEWALLED, *supra* note 30.

51. Press Release, Human Rights Watch, Jamaica: Shield Gays from Mob Attacks (Jan. 31, 2008), <http://www.hrw.org/en/news/2008/01/31/jamaica-shield-gays-mob-attacks> (last visited June 10, 2010).

52. IGLHRC, India: Bengaluru Police Brutally Assaulted Sexual Minorities (Nov. 7, 2008), www.iglhrc.org/cgi-bin/iowa/article/takeaction/partners/587.html (last visited June 10, 2010).

53. Press Release, Amnesty Int'l, Honduras: Fear for Safety (Mar. 26, 2007), <http://asiapacific.amnesty.org/library/Index/ENGAMR370022007?open&of=ENG-HND> (last visited June 10, 2010).

an officer wrapped handcuffs around his fist and beat a transgender woman in a police station.⁵⁴ She was subsequently murdered.⁵⁵ No charges were filed in either case, despite the beatings being filmed by the police station's security cameras.⁵⁶

B. A Description of the Yogyakarta Principles

Faced with such a wide range of human rights violations, the drafters of the Yogyakarta Principles chose to create a document that would cover nearly all of them. The Rapporteur of the Yogyakarta meeting, Michael O'Flaherty, explained that "[a]lthough initially some participants envisioned a very concise statement of legal principles, expressed in general terms, the seminar eventually reached the view that the complexity of circumstances of victims of human rights violations required a highly elaborated approach."⁵⁷ The document contains twenty-nine principles, each of which states a right protected under international law as applied to sexual orientation and gender identity. Each principle is followed by a detailed description of states' obligations necessary to guarantee and protect the right. In addition, the document contains a preamble, an introduction, recommendations to civil society, and drafters' names and brief biographies. The English version stretches to thirty-five pages of text.

1. The Principles and their Legal Sources

The twenty-nine principles are easily sorted into groups based upon their legal sources. The principles are mainly based on the major human rights conventions, notably the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).⁵⁸ The drafters chose to have the

54. Robbie Brown, *Murder of Transgender Woman Revives Scrutiny*, N.Y. TIMES, NOV. 18, 2008, at A15.

55. *Id.*

56. *Id.*

57. O'Flaherty & Fisher, *supra* note 6, at 234.

58. International Covenant of Civil and Political Rights, *opened for signature* Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant of Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. These two treaties are the backbone of the United Nations human rights treaty system; most states have ratified both. The two treaties codify in binding law the principles of the Universal Declaration of Human Rights. Together, the three documents are considered to form the "International Bill of Human Rights." Each treaty establishes a United Nations committee to ensure compliance with each treaty by periodically reviewing states' relevant laws and acts, by hearing complaints of violations, called "communications," and by issuing "general comments" about the treaty's application. The committees are called, respectively, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. OHCHR, *Fact Sheet 30, The United Nations Human*

Principles “expressed in a manner that reflected the formulations in the international human rights treaties,” which is to say that they use essentially the same language and terminology.⁵⁹

The ICCPR is the source of the largest number of principles. Fifteen principles rephrase civil and political rights that state parties to the ICCPR “undertake to ensure.”⁶⁰ In most cases, the drafters simply imported the right wholesale from the ICCPR and added wording explicitly noting that it applies regardless of sexual orientation or gender identity. For example, the first part of Article 6 of the ICCPR states, “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life In countries which have not abolished the death penalty, a sentence of death may be imposed only for the most serious crimes.”⁶¹ This article is incorporated into Yogyakarta Principle 4, which states:

Everyone has the right to life. No one shall be arbitrarily deprived of life, *including by reference to considerations of sexual orientation or gender identity*. The death penalty shall not be imposed on any person *on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity*.⁶²

The remaining principles drawn from the ICCPR work in much the same fashion. They include the rights to: recognition before the law; security of the person; privacy; freedom from arbitrary detention; a fair trial; treatment with humanity in detention; freedom from torture and cruel, degrading or inhuman treatment; protection from exploitation, sale & trafficking; freedom from non-consensual medical treatment and scientific experimentation; freedom of assembly and association; freedom of opinion and expression; freedom of thought, conscience & religion; freedom of movement; and found a family.⁶³ Each of these principles is written using the vocabulary and phrasing of the ICCPR.

The ICESCR is the inspiration for the second-largest number of principles. Seven of the Yogyakarta Principles correspond in part or in whole with the ICESCR articles addressing the rights to work, social security, an adequate standard of living, adequate housing, education, the

Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies, 13–15, 23–39 (Jun. 2005).

59. O’Flaherty & Fisher, *supra* note 6, at 234.

60. ICCPR, *supra* note 58, art. 3; *Yogyakarta Principles*, *supra*, note 1, princs. 3–11, 18–22, 24.

61. ICCPR, *supra* note 58, art. 6.

62. *Yogyakarta Principles*, *supra* note 1, princ. 4 (emphasis added).

63. For a comparison of the *Yogyakarta Principles* and ICCPR articles, see Annex 1.

highest attainable standard of health, and participation in cultural life.⁶⁴ As with the civil and political rights, these rights are generally modified only with the addition of phrases pertinent to sexual orientation and gender identity. Thus, ICESCR Article 13—“[t]he States Parties to the present Covenant recognize the right of everyone to education”—becomes Yogyakarta Principle 16: “[e]veryone has the right to education, without discrimination on the basis of, and taking into account, their sexual orientation and gender identity.”⁶⁵ One major difference between the Yogyakarta Principles and the ICESCR is that the former nowhere reflects the “progressive realization” mandate of the latter. A state party to the ICESCR is obliged only to “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the [treaty’s] rights”⁶⁶ By contrast, the Yogyakarta Principles require not only that states refrain from discrimination in regards to those rights, but also require states to guarantee them in the present tense, without limitations like the ICESCR’s mandate of progressive realization or states’ available resources.⁶⁷

The seven Yogyakarta Principles not based on either the ICCPR or the ICESCR draw from various sources. Yogyakarta Principles 1 and 2 are broad statements of principle, which affirm the primacy of non-discrimination in international human rights law and the “universality, interrelatedness, interdependence and indivisibility of all human rights”⁶⁸ These two principles mandate that states protect “all human rights without discrimination on the basis of sexual orientation or gender identity.”⁶⁹ The source for these principles is the non-discrimination clause of most of the major human rights treaties, which contain an enumerated list of grounds of prohibited discrimination, ending in “or other status.”⁷⁰ In recent years, these three words have become increasingly understood as prohibiting any form of arbitrary discrimination, including, in many cases, sexual orientation and

64. For a comparison of *Yogyakarta Principles* and ICESCR Articles, see Annex 2.

65. ICESCR, *supra* note 58, art. 13; *Yogyakarta Principles*, *supra* note 1, princ. 16 (emphasis added).

66. ICESCR, *supra* note 58, art. 2(1).

67. See *supra* note 64. The phrasing of the *non-discrimination* obligations in the present tense is correct, as discussed *infra* Part II.B.4.

68. *Yogyakarta Principles*, *supra* note 1, princs. 1–2.

69. *Id.* at princ. 1.

70. E.g. African Charter on Human and Peoples’ Rights art. 2, Jun. 27, 1981, OAU CAB/LEG/67/3, 21 I.L.M. 58 [hereinafter African Charter]; Council of Eur., Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Apr. 11, 1950, Europ. T.S. No. 5 [hereinafter European Convention]; ICCPR, *supra* note 58, art. 26; ICESCR, *supra* note 58, art. 2(2); Organization of American States [OAS], American Convention on Human Rights art. 1(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention] (“other social condition”).

occasionally gender identity, and thus may be interpreted as the basis for these two principles. The evolution in thought and theory on this issue is discussed in Part II.A, *infra*.

The remaining five principles draw from various international human rights documents other than the international bill of rights. Principle 23, the right to seek and enjoy asylum from persecution, “including persecution related to sexual orientation or gender identity,” is based on the central right of the Convention Relating to the Status of Refugees.⁷¹ Principle 25, “The Right to Participate in Public Life,” is drawn from provisions in a number of treaties that protect the right to run for and hold public office and to participate in government, as well as decisions of the European Court of Human Rights (ECtHR) regarding military service.⁷² Principle 27, “the right to promote human rights,” is drawn from the United Nations Declaration on Human Rights Defenders.⁷³ The two closing principles are rights the drafters felt necessary to ensure that the other principles would be guaranteed in practice.⁷⁴ Principle 28, which mandates the “right to effective remedies and redress,” is based on the remedies clauses of a variety of different treaties.⁷⁵ The right to “accountability”—a guarantee of freedom from impunity for human rights violations—is based on the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity.⁷⁶

In addition to mandating a right or a particular group of rights, each principle also contains a list of detailed states obligations, beginning with the words “states shall.” The purpose of these provisions is to

71. Convention Relating to the Status of Refugees art. 1, Jul. 28, 1951, 189 U.N.T.S. 150; *Yogyakarta Principles*, *supra* note 1, princ. 23; UNIV. OF NOTTINGHAM, HUMAN RIGHTS CENTRE, JURISPRUDENTIAL ANNOTATIONS TO THE YOGYAKARTA PRINCIPLES 53 n.144 (Nov. 2007), available at <http://www.yogyakartaprinciples.org/yogyakarta-principles-jurisprudential-annotations.pdf> (last visited June 10, 2010) [hereinafter YOGYAKARTA ANNOTATIONS].

72. *Yogyakarta Principles*, *supra* note 1, princ. 25; YOGYAKARTA ANNOTATIONS, *supra* note 71, at 58 nn.162–163.

73. Compare *Yogyakarta Principles*, *supra* note 1, princ. 27 with Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms art. 1, G.A. Res 53/144, U.N. Doc. A/RES/53/144 (Mar. 8, 1999) (establishing a “right . . . to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels”).

74. YOGYAKARTA ANNOTATIONS, *supra* note 71, at 63, 64.

75. *Id.* at 63 n.178.

76. ECOSOC, Comm’n on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, princs. 31–34, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005); *Yogyakarta Principles*, *supra* note 1, princ. 29; YOGYAKARTA ANNOTATIONS, *supra* note 71, at 64 n.184 (explaining Principle 29’s reliance on the Updated Set of Principles for the Protection of Human Rights through Action to Combat Impunity).

ensure that the each principle clearly covers all of the actual situations of discrimination that people are likely to encounter that the principle was intended to remedy or prevent.⁷⁷ The states' obligations in each principle detail the specific laws and polices that are necessary to ensure the effective guarantee of each right. They are quite wide-ranging, extending well beyond merely incorporating the relevant principle into domestic law. For example, the states' obligations section of Principle 5, "the right to security of the person," which itself is only a single sentence, entails five state obligations.⁷⁸ These include: improving policing and other anti-violence and anti-harassment protections; updating criminal laws, procedures, and sentences; reforming investigation, prosecution, and compensation for violent crimes; awareness-raising campaigns; and "ensur[ing] that the sexual orientation or gender identity of the victim may not be advanced to justify, excuse or mitigate . . . violence."⁷⁹ Thus, the state's obligations emphasize that enforcing the principle requires prophylactic measures, prohibiting not just harmful conduct but conduct that threatens, permits, incites, or fails to punish harm. The emphasis on impunity and prevention reflects the reality, mentioned above, that much of the violence and discrimination based on sexual orientation and gender identity is committed by private actors with the acquiescence of the state.

2. The Principles' Introduction, Preamble, and Annexes

In addition to the text of the Principles and the accompanying states' obligations, which together form the document's core, the Yogyakarta Principles also contain a number of supplementary sections. The Introduction explains the problem that the Principles are intended to remedy, and provides some information on the Yogyakarta meeting and its participants. It closes by stating that the Principles "reflect the existing state of international human rights law" and "affirm binding international legal standards with which all States must comply."⁸⁰ The Preamble, written in the format of a parliamentary resolution, reiterates the Introduction and adds definitions of sexual orientation and gender identity. The former "refer[s] to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual

77. O'Flaherty & Fisher, *supra* note 6, at 233 (noting that the Principles "constitute a 'mapping' of the experience of human rights violations experienced by people of diverse sexual orientations and gender identities").

78. *Yogyakarta Principles*, *supra* note 1, princ. 5.

79. *Id.*

80. *Id.* at 7.

relations with, individuals of a different gender or the same gender or more than one gender.”⁸¹ The latter is defined as

each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.⁸²

Finally, the Principles close with a series of “Additional Recommendations” directed at United Nations agencies and international and non-governmental organizations, calling on them to endorse the Principles and put them into practice.⁸³

3. The Yogyakarta Principles Lack Citations to Authority

Unlike other restatements of international law, the Principles do not contain drafters’ notes and comments explaining the legal underpinnings of each principle.⁸⁴ The Principles contain no citations to any kind of authority. Details on the Principles’ drafting history are limited to the time and place of the drafting meeting and brief descriptions of the drafters and the non-governmental organizations (NGOs) involved.⁸⁵ In sum, essentially no support, beyond the drafters’ reputations as jurists and the text of the document itself, is offered to bolster the Principles’ accuracy as a “reflect[ion of] the existing state of international human rights law,” or its claim to be binding on states.⁸⁶

81. *Id.* at 8.

82. *Id.*

83. *Id.* at 32–33.

84. Compare, e.g., *Yogyakarta Principles*, *supra* note 1 (lacking citations to authority), with Int’l Law Comm’n [ILC], *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, in *Report of the International Law Commission*, 58 Sess., at 369 n.21, U.N. Doc. A/61/10 (Aug. 11, 2006), available at <http://untreaty.un.org/ilc/reports/2006/2006report.htm> (last visited June 10, 2010) (containing “explanatory notes reviewing the jurisprudence of the International Court of Justice and pertinent State practice analysed by several members of the Working Group and the Special Rapporteur and summarized in the eighth report of the Special Rapporteur”), and ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Report of the International Law Commission on the Work of its Fifty-Third Session*, 53 Sess., at 31, U.N. Doc. A/56/10 (Aug. 10, 2001), available at <http://untreaty.un.org/ilc/reports/2001/2001report.htm> (last visited June 10, 2010) (introducing 113 pages of “general commentary,” including numerous citations to authority), and RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) (issued with “comments and illustrations” and “reporters notes”).

85. *Yogyakarta Principles*, *supra* note 1, at 7, 34–5.

86. *Id.* princ. 7.

Seeking to fill this void, the Rapporteur of the Yogyakarta meeting co-authored an article that provides an overview of international human rights law and the relevance of the Yogyakarta Principles.⁸⁷ The article identifies the human rights violations commonly faced because of sexual orientation and gender identity, and the impact of international law on the victims of these crimes. The article also expounds on the development and value of the Yogyakarta Principles, as they “pass the crucial tests of being relevant to the actual situation of affected communities and being a faithful and coherent reflection of the existing international legal standards.”⁸⁸ To further fill the void, a second document, “Jurisprudential Annotations to the Yogyakarta Principles,” was published in November 2007.⁸⁹ It provides citations, mostly to UN human rights conventions and the observations of treaty bodies and special rapporteurs, supporting the existence of each principle. It does not include explanations of the citations; some citations include relevant quotations from the cited document, but the reader is left to determine the relevance of others, especially in footnotes containing lengthy string citations.⁹⁰

Despite the articles’ intended purpose, their impact remains to be seen. To date, awareness of these two explanatory documents seems to be much more limited than of the Principles themselves and only the former has been cited once in a scholarly article.⁹¹ However, references to the explanatory documents began to appear in non-scholarly contexts in the summer of 2009.⁹²

C. Description of the Drafters and the Drafting Process

1. Drafters

Restatements of the law, whether international or domestic, thrive when they “are considered persuasive and authoritative by reason of

87. O’Flaherty & Fisher, *supra* note 6.

88. *Id.* at 247.

89. YOGYAKARTA ANNOTATIONS, *supra* note 71.

90. For example, the “right to privacy” principle is accompanied by five footnotes containing fifty citations, plus a cross-reference to another footnote containing eleven others. YOGYAKARTA ANNOTATIONS, *supra* note 71, at 18–21 nn.39–44. The footnote for the states’ obligation to “undertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity” contains ten citations, only one of which mentions sexual orientation. *Id.* at 3 n.5.

91. Stephanie Farrior, Human Rights Advocacy on Gender Issues: Challenges and Opportunities, 1 J. OF HUM. RTS. PRACTICE 83, 88 (2009).

92. See, e.g., Naz Foundation v. Government of NCT of Delhi, WP(C) No.7455/2001, ¶¶ 43–44 (Delhi H.C. Jul 2, 2009); Asia Pacific Forum, *Sexual Orientation and Gender Identity* (May 2009), http://www.asiapacificforum.net/issues/sexual_orientation (last visited June 10, 2010).

their source.”⁹³ The Yogyakarta Principles benefit from being drafted by highly regarded practitioners of international human rights law.⁹⁴ The twenty-nine signatories, mostly lawyers and judges with strong human rights credentials, hail from twenty-five countries and six continents.⁹⁵ Among the most prominent are Edwin Cameron, judge of the South African Supreme Court of Appeal; Maina Kiai, Chairperson of the Kenya National Commission on Human Rights; Sanji Monageng, Chair of the African Commission on Human and People’s Rights (ACHPR) and Justice of the Supreme Court of The Gambia; and Mary Robinson, former president of Ireland and former UN High Commissioner for Human Rights.⁹⁶ The group also includes eleven human rights treaty body members and UN special rapporteurs, as well as a handful of law professors and human rights activists.⁹⁷ Additionally, the group’s geographic diversity and breadth of experience in a variety of regional and international human rights bodies helps allay concerns that the Yogyakarta Principles suffer from a “Western” cultural bias or reliance on a regional legal tradition.⁹⁸ Even the venue of the conference, Gadjah Mada University in Yogyakarta, Indonesia, for which the Principles are named, was chosen in part due to its location in a Muslim country, to help preempt accusations of regionalism.⁹⁹

2. NGOs

Two NGOs participated in the drafting conference: the International Commission of Jurists (ICJUR) and the International Service for Human Rights (ISHR).¹⁰⁰ Both organizations are well-known and long-established human rights legal organizations.¹⁰¹ The ICJUR in particular is known for its standard setting. For example, the ICJUR’s Berlin Declaration on Upholding Human Rights and the Rule of Law in

93. Joseph Lookofsky, *The Limits of Commercial Contract Freedom: Under the UNIDROIT ‘Restatement’ and Danish Law*, 46 AM. J. COMP. L. 485, 488 (1998) (when the source is, for instance, “a prestigious organization of lawyers, judges and law teachers”).

94. See *Yogyakarta Principles*, *supra* note 1, at 34–35.

95. *Id.*

96. *Id.*

97. *Id.*

98. Online video: Mauricio Cabral, Remarks at the Brazil launch of the Yogyakarta Principles, at 4:45, available at <http://www.youtube.com/watch?v=eovJ32dTCCw> (last visited June 10, 2010).

99. Sonia Corrêa, *id.* at 4:10.

100. *Yogyakarta Principles*, *supra* note 1, at 7.

101. For a brief history of the ICJUR, see ICJUR, A Brief History of the International Commission of Jurists, http://www.icj.org/default.asp?nodeID=340&langage=1&myPage=ICJ_History (last visited June 10, 2010). More on the ISHR is also provided at their website. Int’l Serv. for Human Rights [ISHR], Who We Are and What We Do—The Essentials, <http://www.ishr.ch/about-us> (last visited June 10, 2010).

Combating Terrorism, adopted in 2004, has already been incorporated into the human rights policies of various countries¹⁰² and its advocacy regarding the justiciability of Economic, Social, and Cultural Rights is credited with being an important precursor to the Draft Optional Protocol to the ICESCR.¹⁰³ These two groups recruited most of the participants and provided logistical research and support.¹⁰⁴ In fact, six of the twenty-nine drafters are current or former ICJUR Commissioners.¹⁰⁵ Subsequent to the conference, these two organizations formed the center of an informal worldwide network of NGOs working to incorporate the Yogyakarta Principles into soft law via the United Nations human rights system and through advocacy and litigation in various countries.¹⁰⁶

D. *The Strategy for the Principles' Global Diffusion*

1. Launches

Those responsible for the Yogyakarta Principles have adopted a two-tiered strategy for integrating the Principles into law and policy.¹⁰⁷ First,

102. *E.g., Resolution on the Annual Report on Human Rights in the World 2004 and the EU's Policy on the Matter* ¶ 105, EUR. PARL. DOC. INI 2151 (2004), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2005-0086+0+DOC+WORD+V0//EN&language=EN> (last visited June 10, 2010); Letter from John von Doussa, President, Austl. Human Rights Comm'n, to Lloyd Babb, Director, Criminal Law Div., N.S.W. Attorney Gen. Dep't (Feb. 11, 2005), available at http://humanrights.gov.au/legal/submissions/nsw_terrorism.htm (last visited June 10, 2010).

103. *See FONDEN FÖR MÄNSKLIGA RÄTTIGHETER, CONCISE BACKGROUND DOCUMENT ON THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS (2003)*, available at <http://www.humanrights.se/upload/files/2/ESK-r%C3%A4ttigheterna/TP-Background%20Document.pdf> (noting the connections between the ICJUR's workshop on the justiciability of economic, social and cultural rights and the UN Human Rights Commissions appointment of an Independent Expert on the question of a draft Optional Protocol to the ICESCR).

104. O'Flaherty & Fisher, *supra* note 6, at 232.

105. *Compare Yogyakarta Principles*, *supra* note 1, at 34–35 (lists individual signatories to the Yogyakarta Principles), with ICJUR, Commissioners, <http://www.icj.org/default.asp?nodeID=390&langage=1&myPage=Commissioners> (last visited June 10, 2010) (list of commissioners).

106. *See ICJUR, ANNUAL REPORT AND AUDITED FINANCIAL STATEMENT 2008*, 6–9, http://www.icj.org/IMG/Annual_Report_and_Audited_Financial_Statement_2008-2.pdf (last visited June 10, 2010) (identifying organizations promulgating the Yogyakarta principles); *see generally*, O'Flaherty & Fisher, *supra* note 6, at 239–241 (discussing subsequent NGO involvement with the OHCHR and evaluation of domestic legal principles). It should be noted that the contribution of these two NGOs did not extend to drafting. For the sake of objectivity, the text of the Yogyakarta Principles was the sole responsibility of the eminent jurists, who agreed on it by consensus. KING OEY & ARUS PELANGI, WHAT TO DO WITH THE YOGYAKARTA PRINCIPLES 1 (2009), http://www.aruspelangi.or.id/statement/what_todo_with_yogyaprinciples.pdf (last visited June 10, 2010); O'Flaherty & Fisher, *supra* note 6, at 233–34, 244 n.175.

107. Conversation with Philip Dayle, Sexual Orientation and Gender Identity Programme Officer, ICJUR, in Geneva, Switz. (May 10, 2008).

domestic and international activists have sought to increase the visibility of the Principles through a series of launch events. On the international plane, activists introduced the Principles through a pair of high-profile launches: the first in March of 2007 at a session of the Human Rights Council in Geneva, and the second eight months later at a UN General Assembly session in New York.¹⁰⁸ Both events were timed to incite discussion of the Principles among UN diplomats and the NGOs that work with them, respectively, at the Human Rights Council and at UN Headquarters.¹⁰⁹

Domestically, activists have sought to foster the integration of the Principles. International actors have provided support for incorporation of the Principles into national law and policy, both in litigation and in lobbying diplomats and elected officials.¹¹⁰ Simultaneously, local NGOs have sponsored domestic launch events focusing on the links between the universal nature of the Principles and the local situation of LGBT people.¹¹¹ By announcing the translation of the Principles into the local

108. Press Release, Douglas Sanders, Int'l Gay & Lesbian Human Rights Comm'n [IGLHRC], International: The Role of the Yogyakarta Principles (Aug. 4, 2008), <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/partners/22.html>.

109. See *id.*

110. *E.g.*, Brief of ICJUR and Ctr. for Constitutional Rights as Amicus Curiae, Witt v. Dep't of the Air Force, 527 F.3d 806, 806 n.2 (9th Cir. 2008) [hereinafter Witt Amicus] (arguing that US law and international law, namely the ICCPR, protect a general right to privacy that includes the right to privacy with regard to sexual orientation); Letter from Cary Alan Johnson, Executive Director, IGLHRC Int'l Gay & Lesbian Human Rights Comm'n, & Dirk De Meirleir, Executive Director, ILGA-Europe, to Boris Tadić, President, Rep. of Serb., et al. (Mar. 9, 2009) (lobbying the government of Serbia to include gender identity and sexual orientation in the anti-discrimination law), http://www.ilga-europe.org/europe/guide/country_by_country/serbia/joint_letter_from_iglhrc_and_ilga_europe_to_the_government_of_serbia/joint_letter_in_english_and_serbian_march_9_2009 (last visited Mar. 21, 2010); Letter from Cary Alan Johnson, Executive Director, IGLHRC Int'l Gay & Lesbian Human Rights Comm'n, & Dirk De Meirleir, Executive Director, ILGA-Europe, to Ilija Filipović, Chairperson, House of Peoples, Parliamentary Assembly, et al. (June 19, 2009) (expressing concern regarding the exclusion of gender identity and sexual orientation in the anti-discrimination law), http://www.ilga-europe.org/home/guide/country_by_country/serbia/joint_letter_to_the_government_of_serbia (last visited July 6, 2010).

111. For example, at the regional level, the NGO International Lesbian and Gay Association—Europe [hereinafter ILGA—Europe] used the occasion of the European launch of the Yogyakarta Principles to announce the impending introduction of anti-discrimination legislation at the European Commission. Press Release, ILGA-Europe, Post-Conference Media Release by ILGA-Europe (Oct. 30, 2007), http://www.ilga-europe.org/europe/about_us/annual_conference/vilnius_2007/post_conference_media_release_by_ilga_europe (last visited June 10, 2010). At the local level, the Belfast NGO Lesbian Line made dissemination of the Principles a centerpiece of its advocacy efforts to incorporate protections for lesbian and bisexual women into Northern Ireland's Bill of Rights. Mairéad McCafferty, The Yogyakarta Principles (Dec. 9, 2008), <http://new.ilga.org/ilga/en/article/1205> (last visited June 10, 2010). A clear explanation of how activists make links between the universal and the local, both in theory and in practice, is provided (in Portuguese) by Beto de Jesus, at the Brazil launch of the Yogyakarta Principles, *supra* note 98, at 7:20.

language, the organizations attempt to increase the accessibility of the Principles. To date, these have occurred in Katmandu, Manila, Jakarta, Cologne, Bucharest, and four different cities in Brazil.¹¹²

However, international activists' primary role to date has focused on the second prong of this strategy: incorporation of the Yogyakarta Principles into international soft law. The ICJUR has stated that "contributing to the sexual orientation and gender identity rights embodied in the Yogyakarta Principles becoming soft law" is a central goal of its sexual orientation and gender identity program.¹¹³ The Principles themselves call for their "endorsement" by the United Nations High Commissioner for Human Rights and the Human Rights Council, and their "integration" into the work of the United Nations Human Rights Special Procedures, United Nations Human Rights Treaty Bodies, and High Commissioner for Refugees.¹¹⁴ A large number of international human rights organizations have paid special attention to getting the Principles incorporated into states' Universal Periodic Reviews at the United Nations Human Rights Council.¹¹⁵ The ICJUR has also conducted briefings on the Principles with each of the UN Human Rights Treaty Bodies.¹¹⁶ The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), an international network of NGOs, has focused on

112. See, e.g., Johan Olhagen, Director, Kathmandu Field Office, OHCHR, Statement Delivered at a Ceremony to Inaugurate "The Yogyakarta Principles" (Aug. 11, 2007), http://nepal.ohchr.org/en/resources/Documents/English/statements/HCR/Year2007/2007_08_11_BDS_E.pdf (last visited June 10, 2010) (Khatmandu); Danton Remoto, *Manila Pride March 2008*, ABS-CBN NEWS, Dec. 16, 2008, <http://www.abs-cbnnews.com/views-and-analysis/12/16/08/manila-pride-march-2008-danton-remoto> (last visited June 10, 2010) (Manila); PRINSIP-PRINSIP YOGYAKARTA (2007), available at http://www.komnasperempuan.or.id/wp-content/uploads/2009/06/yp_versi_indonesia.pdf (last visited June 10, 2010) (Jakarta); Hirschfeld-Eddy Foundation, *Deutsche Ausgabe der Yogyakarta-Prinzipien erschienen* (May 28, 2008), <http://www.hirschfeld-eddy-stiftung.de/yogyakarta-prinzipien/yogyakarta-prinzipien/> (last visited June 10, 2010) (Cologne); Press Release, IGLHRC, Romania: Romanian version of the Yogyakarta Principles launched in Bucharest (May 26, 2009), <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/908.html> (last visited June 10, 2010) (Bucharest); Sanders, *supra* note 108 (four cities in Brazil). The two NGO facilitators of the Yogyakarta process sent staff to several of these launch events.

113. ICJUR, *supra* note 12, at 2.

114. *Yogyakarta Principles*, *supra* note 1, at 32 ¶¶ A–C; E; G.

115. For example, IGLHRC, in collaboration with local NGO partners around the world, made sixteen submissions to the Universal Periodic Review and other UN human rights review mechanisms in the first two years after the launch of the Yogyakarta Principles. See, e.g., IGLHRC, SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW: THE GAMBIA (2009), <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/320-1.pdf>; IGLHRC, ROMANIA: THE STATUS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER RIGHTS (2008), <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/74-1.pdf>; IGLHRC, HUMAN RIGHTS AND TRANSGENDER PEOPLE IN PAKISTAN (2008), <http://www.iglhrc.org/binarydata/ATTACHMENT/file/000/000/73-1.pdf>.

116. ICJUR, *supra* note 12, at 8.

having the Yogyakarta Principles adopted by regional organizations, notably the Council of Europe and Mercosur.¹¹⁷

2. The Use of Global Language

To help ensure global acceptance of the Yogyakarta Principles, the drafters were careful to avoid the use of words that had the potential for cultural specificity. Thus, the words “gay,” “lesbian,” and “transgender” appear only once in the preamble, and not at all in the Principles themselves.¹¹⁸ Similarly, the Principles do not use the acronym LGBT.¹¹⁹ Rather, they refer to “sexual orientation” and “gender identity,” and offer pointed explanations of the meaning of those terms.¹²⁰ This ensures the Principles’ applicability over potential objections that diversity in sexual orientation and gender identity are imported or associated with foreignness.¹²¹ Because diversity of sexual orientation and gender

117. O’Flaherty & Fisher, *supra* note 6, at 244; Alexandre Böer & Beto de Jesus, Towards a Mercosur without Homophobia (Oct. 2, 2007) (Jorge Madeira Mendes trans.), <http://ilga.org/ilga/en/article/1105> (last visited June 10, 2010); Philipp Braun, ILGA-Europe, Greeting to Lima Conference (Sept. 19, 2007), available at http://ilga-europe.org/lac/welcome_on_ilga_lac_website/conferences/previous_conferences/lima_2007/speeches_given_during_the_iv_conference/speech_from_philipp_braun_co_secretary_general (last visited Feb. 17, 2010); Press Release, ILGA, 2nd European Transgender Council Transforms into 1st Global Conference of Transgender Activists (May 2007), available at http://trans.ilga.org/trans/welcome_to_the_ilga_trans_secretariat/news/2nd_europeantransgender_council_transforms_into_1st_global_conference_of_transgender_activists (last visited June 10, 2010).

118. *Yogyakarta Principles*, *supra* note 1, at 8.

119. *See id.*

120. The preamble to the Yogyakarta Principles states:

Understanding ‘sexual orientation’ to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender; understanding ‘gender identity’ to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms

Id.

121. *E.g. Homosexual and Hated in Zimbabwe*, BBC NEWS, Aug. 12, 1998, http://news.bbc.co.uk/2/hi/programmes/crossing_continents/143169.stm (last visited June 10, 2010) (quoting President Robert Mugabe of Zimbabwe stating that homosexuality is a “scourge planted by the white man on a pure continent”); Russell Goldman, *Ahmadinejad: No Gays, No Oppression of Women in Iran*, ABC NEWS, Sept. 24, 2007, <http://abcnews.go.com/S/story?id=3642673&page=1> (last visited Feb. 17, 2010) (quoting President Mahmoud Ahmadinejad of Iran that “[i]n Iran, we don’t have homosexuals . . .”).

identity has always existed in every culture,¹²² avoidance of the use of specific labels helps further the Principles' universality.

II. ASSESSING THE YOGYAKARTA PRINCIPLES' ACCURACY AS A RESTATEMENT OF EXISTING, BINDING INTERNATIONAL LAW

As a self-styled restatement of existing international law, the Yogyakarta Principles must be based on customary law, treaties, or general principles, including authoritative interpretations of these sources of law by domestic and international courts, treaty bodies, and respected UN human rights mandate holders, scholars, and others.¹²³ Without such a basis, it cannot be more than a declaration of ideals.¹²⁴ This reflects the concern that restatements of international law may be "cloak[ing] political claims for a change of the law in the garb of existing legal rules as they purport to see them."¹²⁵ Even the UN Office of the High Commissioner for Human Rights (OHCHR), which has generated and adopted quite a bit of expert-drafted law, cautions that "it is advisable to exercise considerable care before relying on legal articles and principles and comments adopted by private bodies outside the framework of the officially established treaty organs, since they may not in all respects correctly reflect the status of the law to be interpreted and applied."¹²⁶

Given the absence of citations to authority or justification in the text of the Yogyakarta Principles themselves, the drafters left the burden of demonstrating the legal basis of their restatement to others. The aforementioned article and list of citations by Michael O'Flaherty and John Fisher accomplishes some of this task.¹²⁷ This section seeks to further explore the law behind the Principles, as well as evaluate their claim to accuracy as a restatement.

122. See generally FRANCIS MARK MONDIMORE, *A NATURAL HISTORY OF HOMOSEXUALITY* (1996) (discussing the existence of sexual diversity across cultures and throughout history).

123. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute].

124. HENRY STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 68–78 (2nd ed. 2000).

125. H. Lauterprecht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16, 33 (1955).

126. OHCHR, *HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS* ch. 1, § 2.4.4 (2003).

127. See O'Flaherty & Fisher, *supra* note 6, at 214–31.

Since 1981, when the ECtHR decided in *Dudgeon v. U.K.* that the right to privacy in the European Convention applied to homosexuals,¹²⁸ sexual orientation and, more recently, gender identity have been taken into account comprehensively throughout the international human rights system.¹²⁹ In the years since *Dudgeon*, a variety of UN treaty and regional human rights bodies have greatly expanded the jurisprudence protecting sexual orientation and gender identity rights.¹³⁰ Supreme Courts on five continents have found these rights protected by international law.¹³¹ In addition, countless UN special mandate holders, diplomats, ombudspersons, independent experts, scholars, and others have expressed their understanding of how international law protects sexual orientation and gender identity.¹³² This jurisprudence is the wellspring from which the Yogyakarta Principles draw.

However, the Principles overstate their case when they claim that all twenty-nine are universally binding.¹³³ Some of the principles truly do restate binding law.¹³⁴ Those principles simply restating rules of *jus cogens* are binding by definition.¹³⁵ The two foundational principles

128. *Dudgeon v. United Kingdom*, 23 Eur. Ct. H.R. (ser. A) at 45 (1981).

129. See O'Flaherty & Fisher, *supra* note 6, at 214–27.

130. As of mid-2009, approximately thirty-four decisions by the ECtHR and three cases by the Court of Justice of European Communities have addressed the problem of sexual orientation and gender identity discrimination, as have three views on communications and seven general comments by UN treaty bodies, and sixteen decisions and reports of the Inter-American Commission on Human Rights. For a list complete through late 2007, see ICJUR, SEXUAL ORIENTATION AND GENDER IDENTITY IN HUMAN RIGHTS LAW: JURISPRUDENTIAL, LEGISLATIVE AND DOCTRINAL REFERENCES FROM THE COUNCIL OF EUROPE AND THE EUROPEAN UNION (2007). Subsequent cases include *E.B. v. France*, 47 Eur. Ct. H.R. 21 (2008), and *Atala v. Chile*, Case 1271–04, Inter-Am. C.H.R., Report No. 42/08 n. 1 (2008), <http://www.cidh.org/annualrep/2008eng/chile1271.04eng.htm> (last visited June 10, 2010). See also U.N. Econ. & Soc. Council [ECOSOC], *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights*, ¶ 32, U.N. Doc. E/C.12/GC/20 (July 2, 2009); ECOSOC, *General Comment No. 19: The Right to Social Security (Art. 9)*, ¶ 29, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008); Press Release, Inter-Am. C.H.R., IACHR Issues Preliminary Observations on Visit to Jamaica (Dec. 5, 2008), <http://www.cidh.oas.org/Comunicados/English/2008/59.08eng.htm> (last visited June 10, 2010).

131. See, e.g., *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD) (Nepal), available at http://www.bds.org.np/publications/pdf_supreme_eng.pdf (last visited June 10, 2010); *Foy v. Ant-Ard Chlaraitheoir & Ors*, [2007] I.E.H.C. 470 (H. Ct.) (Ir.) available at <http://www.bailii.org/ie/cases/IEHC/2007/H470.html> (last visited June 10, 2010); *Leung TC William Roy v. Secretary for Justice*, 4 H.K.L.R.D. 211 (2005); *McCoskar v. The State*, 2005 F.J.H.C. 500 (H. Ct.) (Fiji) available at <http://www.paclii.org/fj/cases/FJHC/2005/500.html> (last visited June 10, 2010); *Sentencia T-301/04 Corte Constitucional 25/3/2004* (Colombia); *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1998 (12) BCLR 1517 (CC) (S. Afr.); *Loaiza v. Ecuador*, 203 Registro Oficial (Tribunal Constitucional 1997) (Ecuador).

132. See generally ICJUR, *supra* note 17; YOGYAKARTA ANNOTATIONS, *supra* note 71.

133. See discussion *infra* Part II.B and II.C.

134. See discussion *infra* Part II.A.

135. See *id.*

regarding the universality of human rights and the general prohibition of arbitrary discrimination have strong support in existing international law, regional treaties, UN conventions, and customary law and *jus cogens*.¹³⁶ The remainder of the Yogyakarta Principles might be said to rest on those two foundational principles alone, as they are simply an extrapolation of non-discrimination and universality to a variety of other rights protected under international law.¹³⁷ However, that is a controversial assertion, and specific legal support for these remaining rights could only bolster the Yogyakarta Principles' claim to accuracy. There is such support, but most of it is either regional in scope, and thus only binding on some states, or based on interpretations of treaties by treaty bodies or other experts, neither of which are binding on states as the actual texts of the treaties themselves are.¹³⁸ There is also some contrary law, especially related to the "right to found a family," that undermines the Principles' claim to authority.¹³⁹ The following sections provide a detailed analysis of the various principles' claim to accuracy as a restatement of existing, binding international law.

A. *The Principles Based on Jus Cogens, Customary International Law, and the Principles of Universality and Non-Discrimination Are Accurate Restatements of Existing, Binding International Law*

1. Two Fundamental Principles:
Universality and Non-Discrimination

The first two Yogyakarta Principles, upon which all the others may be said to rest, are well-supported in existing international law. These are "The Right to the Universal Enjoyment of Human Rights" and the "The Right to Equality and Non-Discrimination."¹⁴⁰ The principle of the universality of human rights is as old as international human rights law itself. The foundational document of international human rights law, the Universal Declaration of Human Rights (UDHR), proclaims that "all nations . . . shall strive . . . to secure [the] universal and effective recognition and observance" of human rights.¹⁴¹ This principle suggests

136. *See id.*

137. *See id.*

138. *See* discussion *infra* Part II.B. *See generally* STEINER & ALSTON, *supra* note 124, at 68–78 (discussing the non-binding nature of these types of law).

139. *See* discussion *infra* Part II.C.

140. *Yogyakarta Principles*, *supra* note 1, princs. 1–2.

141. Universal Declaration of Human Rights, G.A. Res. 217A, at 72, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948). For more on the philosophical debate over universality, see Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315 (2004), and Shashi Tharoor, *Are Human Rights Universal?*, 26 WORLD POL'Y J. 1 (1999).

the existence of certain human rights norms that all states have embraced.

There are several sources of these universal rights. Two were identified by United Nations members themselves when they created the Human Rights Council's Universal Periodic Review (UPR); these are the UN Charter and the UDHR.¹⁴² UN member states' agreement that these two documents are a minimum standard by which all states' human rights practices will be judged evinces the universality of the human rights embodied within them.¹⁴³

Further evidence of the universality of human rights is the proliferation of regional human rights instruments. These major instruments include the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and People's Rights, and the controversial Arab Charter on Human Rights.¹⁴⁴ Each of the major regional treaties refers to the principle of universality, directly or indirectly, in its preamble.¹⁴⁵ The rights these conventions enumerate are sufficiently similar to each other to underscore the notion that concepts of human rights are not limited to certain legal or cultural traditions.¹⁴⁶ Finally, certain human rights are

142. UNHRC, *Report of the Human Rights Council*, U.N. Doc. A/62/434 (Dec. 22, 2007). The Universal Periodic Review (UPR) provides for UN member states to periodically review each others' human rights records, measured against five established standards. *Id.*; UNHRC, 9th mtg., *Institution-building of the United Nations Human Rights Council*, U.N. Doc. A/HRC/RES/5/1 (June 18, 2007). The three standards other than the UDHR and the UN Charter are not universal: two address states' voluntary commitments, and one applies only in war. *Id.*

143. The universality of these two documents was also reaffirmed at the 1993 World Human Rights Conference in Vienna, in which representatives of 171 states participated. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993).

144. League of Arab States, Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005) [hereinafter Arab Charter]; *see supra*, note 70. Asia is notably lacking in regional human rights instruments; however, a treaty for Southeast Asia is currently being drafted under the auspices of ASEAN. The Co-Chair of the Working Group for an ASEAN Human Rights Mechanism, Vitit Muntarbhorn, was also co-chair of the Experts Group of the Yogyakarta process. *See generally* Working Group for an ASEAN Human Rights Mechanism, www.aseanhrmech.org (last visited June 10, 2010).

145. *See supra* note 144. The various regional human rights bodies have also affirmed the principle of universality embodied in the Vienna Declaration. *See, e.g.*, Communication 24/2001, Purohit v. The Gambia, ¶ 48 (Afr. Comm'n on Human and Peoples' Rights [ACHPR] 2003); Juridical Condition and Rights of Undocumented Migrants, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, at 492–93 (Sept. 17, 2003); Communication 211/98, Legal Resources Foundation v. Zambia, ¶ 67 (ACHPR 2000).

146. For a brief summary on the similarities of the various international and regional human rights regimes, see OHCHR, Regional Office for South-East Asia, Regional Human Rights Systems in Other Parts of the World: Europe, the Americas, and Africa, <http://bangkok.ohchr.org/programme/other-regional-systems.aspx> (last visited June 10, 2010). *See generally* George William Mugwanya, *Realizing Universal Human Rights Norms Through*

part of *jus cogens*, which are universal by definition.¹⁴⁷ Together, all of these elements provide strong support for Principle 1's statement that all human beings, whatever their sexual orientation or gender identity, "are entitled to the full enjoyment of all human rights."¹⁴⁸

The right to equality and non-discrimination, Principle 2 of the Yogyakarta Principles, is also an accurate restatement of existing law.¹⁴⁹ It is based on the emerging consensus that all forms of arbitrary distinction are prohibited by international human rights law.¹⁵⁰ This conclusion has attained its clearest expression in the Americas, where the Inter-American Court of Human Rights (IACtHR) has ruled that, "[a]t the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*."¹⁵¹ The court observed that while the American Convention does enumerate certain specific grounds along which discrimination is prohibited, it also explicitly prohibits discrimination on the grounds of "any other social condition" not specifically enumerated, and that, furthermore, the Convention obligates states to ensure that "all persons" enjoy the exercise of the rights it protects.¹⁵² The court subsequently reiterated these observations in another case, specifying that any "distinction that lacks objective and reasonable justification is discriminatory."¹⁵³

The ECtHR has also affirmed that arbitrary discrimination is always a violation of the European Charter, regardless of whether it is on a ground explicitly enumerated in the text of the treaty.¹⁵⁴ Like the IACtHR, the ECtHR considers "a difference in treatment between persons in analogous or relevantly similar positions [to be]

Regional Mechanisms: Reinvigorating the African System, 10 IND. INT'L & COMP. L. REV. 35 (1999); Burns H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585 (1987).

147. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331; ICJ Statute, *supra* note 123, art. 38; Zdzislaw Galicki, *Hierarchy in International Law Within the Context of Its Fragmentation*, in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION 41 (Isabelle Buffard et al. eds., 2008). *See generally* INTERNATIONAL LAW COMMISSION, REPORT OF THE INTERNATIONAL LAW COMMISSION ch. XI, ¶¶ 439–93, U.N. Doc. A/60/10 (2005).

148. *Yogyakarta Principles*, *supra* note 1, princ. 1.

149. *Id.* princ. 2.

150. O'Flaherty & Fisher, *supra* note 6, at 214–220.

151. Juridical Condition and Rights of Undocumented Migrants, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003).

152. *Id.* ¶¶ 70, 109.

153. *Yatama v. Nicaragua*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127, at 375 (June 23, 2005).

154. *See, e.g., Engel v. Netherlands*, 22 Eur. Ct. H.R. (ser. A) at 72 (1976) (finding discrimination on the grounds of military rank to be arbitrary).

discriminatory if it has no objective and reasonable justification.”¹⁵⁵ It has specifically applied this view to sexual orientation in the context of a child custody case.¹⁵⁶ In *Salgueiro da Silva Mouta v. Portugal*, the ECtHR criticized a Portuguese Court of Appeals decision to award custody of a child to her mother rather than her father, on the basis of the latter’s “abnormality.” The ECtHR noted that the Portuguese court “made a distinction based on considerations regarding the applicant’s sexual orientation, . . . which is not acceptable under the Convention.”¹⁵⁷

The African Commission has also found that arbitrary discrimination in all its guises violates the African Charter. The Commission has found implicit in the Charter’s non-discrimination articles a “right to equality,” since “[e]quality or lack of it affects the capacity of one to enjoy many other rights.”¹⁵⁸ The Commission has proclaimed that the Charter’s non-discrimination provision is “essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises”¹⁵⁹ Based on these precedents, the Commission is currently in the process of developing a “draft paper on Sexual Orientation in Africa.”¹⁶⁰

United Nations treaty bodies have not yet stated that international human rights covenants prohibit all forms of arbitrary discrimination; however, they have found sexual orientation discrimination to be prohibited on several occasions. The Human Rights Committee has found sexual orientation discrimination violates the ICCPR both as part of the enumerated ground of “sex” and as part of “other status.”¹⁶¹ The Committee on Economic, Social and Cultural Rights has recently stated in no uncertain terms that “[o]ther status’ . . . includes sexual orientation,” and has issued several other general comments expressing

155. *Luczak v. Poland*, App. No. 77782/01, Eur. Ct. H.R. at 46–47 (2007).

156. *Salgueiro Da Silva Mouta v. Portugal*, 1999-IX Eur. Ct. H.R. 309, 327 (1999).

157. *Id.* ¶¶ 34–36.

158. *See, e.g.*, Communication 211/98, *Legal Resources Foundation v. Zambia* ¶ 95 (ACHPR 2000). Interestingly, the Court in both *Legal Resources* and *Yatama v. Nicaragua*, Case 12.388, Inter-Am. Ct. H.R. (ser. C) No.125, OEA/Ser.L/V/II.114, doc. 5 rev. ¶ 5 (2001), considered laws limiting the right to run for office.

159. Communication 24/2001, *Purohit and Moore v. The Gambia* ¶ 49 (ACHPR 2003).

160. ACHPR, 45th Sess., Banjul, The Gambia, May 13–27, 2009, *Final Communiqué*, ¶ 28, available at http://www.achpr.org/english/communiques/Final%20Communique_45.pdf (last visited June 8, 2010) (“The African Commission considered a draft paper on Sexual Orientation in Africa and decided to defer further consideration to its 46th Ordinary Session.”). The Commission chair, and leader of the effort to draft the resolution, Sanji Monageng, is also a Yogyakarta drafter. *Yogyakarta Principles*, *supra* note 1, at 34.

161. *Toonen v. Australia*, ECOSOC, UNHRC, Comm. No. 488/1992, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (1994); *accord* *Young v. Australia*, ECOSOC, UNHRC, Comm. No. 941/2000, ¶ 10.4, U.N. Doc. CCPR/C/78/D/941/2000 (2003) (majority opinion); *id.* (concurring opinion).

the view that sexual orientation and gender identity discrimination are prohibited under the ICESCR.¹⁶²

2. *Jus Cogens* and Customary International Law: Freedom from Arbitrary Arrest

A number of the Yogyakarta Principles are accurate restatements of existing, universally binding international law in the form of *jus cogens* and customary international law. As part of the former, slavery, torture, and extrajudicial execution are not permitted by international law under any circumstances, whether committed by the state or with the state's acquiescence.¹⁶³ Among the latter are the rights to humane treatment while in detention, freedom from arbitrary deprivation of liberty and to a fair trial, and to seek asylum.¹⁶⁴ Moreover, where these rights are codified in treaties, such as the ICCPR, they do not admit of exception for morals, public order, health, or other reasons that might otherwise be

162. ECOSOC, *supra* note 130, ¶ 28. *Accord ECOSOC, Comm. on Econ., Soc., and Cultural Rights, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 13, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); ECOSOC, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 18, E/C.12/2000/4 (Aug. 11, 2000). In a major victory for the Yogyakarta Principles, the Committee in its General Comment 20 also cited them for the principle that gender identity discrimination is prohibited—the first mention of gender identity in a treaty body general comment. ECOSOC, *supra* note 130, ¶ 32, ¶ 32 n.25.

163. *See, e.g., Doe I v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002), vacated, 395 F.3d 978 (2003) (case reheard by en banc court); ICCPR, *supra* note 58, art. 4(2).

164. The major distinction between customary international law and *jus cogens*, namely that the former arises from states' practices and the latter from widespread adoption of a norm through some other accepted mode of international lawmaking, is of little import since, in practice, both custom and *jus cogens* are universally binding in as much as states can face serious consequences from violating either. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 29, 33 (Cambridge Univ. Press, 2005). There is not exact agreement over the content of customary international law; this Note adopts the views of the OHCHR and UNHCR, which encompass humane treatment while in detention, arbitrary arrest, fair trial, and asylum. OHCHR, Comm'n on Human Rights, Working Group on Arbitrary Detention, *Civil and Political Rights, Including the Question of Torture and Detention*, ¶ 53, U.N. Doc. E/CN.4/2005/6 (Dec. 1, 2004) (humane treatment while in detention); OHCHR, *Fact Sheet No. 26, The Working Group on Arbitrary Detention*, annex IV (May 2000), <http://www.unhcr.org/refworld/docid/479477440.html> (last visited June 10, 2010) [hereinafter *Fact Sheet No. 26*] (citing various customary law sources addressing the freedom from arbitrary deprivation of liberty and right to a fair trial); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES [UNHCR], *HUMAN RIGHTS AND REFUGEE PROTECTION: SELF-STUDY MODULE 5, VOL. II*, § 1.3 (Dec. 16, 2006) (asylum). A more restrained view of customary international might not include these rights. HATHAWAY, *supra* note 164, at 36–38 (listing these rights among those “argued by senior publicists to have acquired force as matters of customary law,” but noting that neither state practice nor the jurisprudence of the ICJ supports this view).

used to justify making an exception for sexual orientation or gender identity.¹⁶⁵

These rights form the basis for part or all of seven of the principles that cover arbitrary detention, fair trial, humane conditions of detention, torture, the right to seek asylum, arbitrary execution, and “protection from . . . sale” (i.e., slavery). Because these rights are universally applicable by definition, I will not discuss them at length. However, one part of the Seventh Principle, “The Right to Freedom from Arbitrary Deprivation of Liberty,” deserves attention.¹⁶⁶ This is the assertion that “[a]rrest or detention on the basis of sexual orientation or gender identity, whether pursuant to a court order or otherwise, is arbitrary.”¹⁶⁷ As this assertion directly conflicts with the laws or practices of about eighty states,¹⁶⁸ the effect of this principle promises to be among the most far reaching, both in terms of improving human rights and altering state practice. The basis for this right is frequently misunderstood and deserves clarification. The best-known decisions prohibiting arrest on account of sexual orientation are based on the right to privacy.¹⁶⁹ However, the right to privacy is not part of customary international law

165. *E.g.*, ICCPR, *supra* note 58, art. 4(2).

166. *Yogyakarta Principles*, *supra*, note 1, princ. 7.

167. *Id.*

168. OTTOSSON, *supra* note 4. Given that so many states maintain laws criminalizing diversity in sexual orientation and gender identity, it may be argued that the prohibition on arbitrary detention is not part of customary international law. However, most states, as well as UN bodies, take the contrary view, seeing arbitrary detention, when it rises to the level of state policy, as a violation of customary international law, not as evidence of its absence. *See, e.g.*, Memorial of the United States, Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v Iran), 1980 I.C.J. Pleadings 182 (Jan. 12, 1980) (arguing that Article 9 of the ICCPR codifies customary international law); OHCHR, *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994) (“provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to . . . arbitrarily arrest and detain persons”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S., *supra* note 84, § 702 (“A state violates international law if, as a matter of policy, it practices, encourages, or condones . . . prolonged arbitrary detention”). *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004) (finding that “some policies of prolonged arbitrary detentions are so bad” that they violate customary international law). For an in-depth discussion of the customary international prohibition of arbitrary detention, *see* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 505-09 (2003). It may also be argued that detention on account of sexual orientation or gender identity does not fit within the customary international law definition of “arbitrary.” This Note, however, addresses these arguments and adopts the contrary view, *see, infra*, pp. 33-35.

169. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 558 (2003); *Toonen v. Australia*, UNHRC, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, ¶ 8.7 (1994); *Dudgeon v. United Kingdom*, 23 Eur. Ct. H.R. (ser. A) at 45 (1981).

and so is not universal; it is protected by international law only in states party to a treaty with such protections.¹⁷⁰ Moreover, even those treaties allow the right to privacy to be limited for reasons of national security, morals, and the like—a fact mentioned by both the *Dudgeon* and *Toonen* courts.¹⁷¹

The universal applicability of the right not to be arrested on account of sexual orientation lies, then, not in privacy but rather on two other foundations: customary international law prohibiting arbitrary arrest and principles of non-discrimination.¹⁷² The belief that the right rests on these latter two sources is relatively recent, as evidenced by a pair of views of the Working Group on Arbitrary Detention (WGAD).¹⁷³ The first was decided with reference to treaty rights to privacy and equality only. Considering the arrest of eleven men in a Cameroonian bar on suspicion of having committed the crime of sodomy, the WGAD held that the arrest “violate[s] the rights to privacy and freedom from discrimination set forth in [the ICCPR]. Consequently, the Working Group considers that the fact that the criminalization of homosexuality in Cameroonian law is incompatible with articles 17 [right to privacy] and 26 [right to

170. To be sure, that number is low. Only twenty-three countries are not party to the ICCPR or a regional instrument that protects the right to privacy: Antigua and Barbuda, Bhutan, China, Cuba, Fiji, the Holy See, Kiribati, Laos, Malaysia, Marshall Islands, Micronesia, Myanmar, Nauru, Oman, Pakistan, Palau, Saint Kitts and Nevis, Saint Lucia, Singapore, Solomon Islands, Tonga, Trinidad and Tobago, and Tuvalu. See sources cited *supra* notes 58, 144.

171. See *Dudgeon v. United Kingdom*, 23 Eur. Ct. H.R. (ser. A) (1981); *Toonen v. Australia*, UNHRC, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

172. *Young v. Australia*, UNHRC, Comm. No. 941/2000, ¶ 10.4, U.N. Doc. CCPR/C/78/D/941/2000 (2003) (majority opinion); UNHRC, *Civil and Political Rights, Including Questions of Disappearances and Summary Execution*, ¶ 12, U.N. Doc. A/HRC/4/20/Add.2 (Feb. 19, 2007) (prepared by Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions) [hereinafter *Mission to Guatemala*]; UNHRC, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”*, ¶¶ 93–97, U.N. Doc. A/HRC/4/37 (Jan. 24, 2007) (prepared by Hina Jilani, Special Representative of the Secretary-General on Human Rights Defenders) [hereinafter *Human Rights Council*]; ECOSOC, Comm’n on Human Rights, Working Group on Arbitrary Detention [WGAD], *Civil and Political Rights, Including the Question of Torture and Detention*, ¶¶ 25–28, U.N. Doc. E/CN.4/2003/8/Add.1 (Jan. 24, 2003); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Comm. Against Torture [CAT], *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture (Egypt)*, ¶ 6, U.N. Doc. CAT/C/CR/29/4 (Dec. 23, 2002); The Secretary-General, *Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 19, U.N. Doc. A/56/156 (July 3, 2001) [hereinafter *Question of Torture*].

173. The WGAD is a UN sub-commission established in 1991 to “investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards” OHCHR, *Fact Sheet No. 26*, *supra* note 164, § 3(a).

equality before the law] of the [ICCPR].”¹⁷⁴ In the later case, the WGAD added customary international law as a source of these rights. In that case involving fifty five arrests made by the Egyptian police on the grounds that “homosexuality, as a sexual orientation, is a source of ‘social dissensions,’” the WGAD ruled that Egypt’s criminalization of homosexuality violated not only Egypt’s treaty obligations under articles 2 (prohibiting discrimination) and 26 (ensuring equality before the law) of the ICCPR but also the UDHR’s article 2 prohibition on discrimination.¹⁷⁵ The UDHR represents customary law and, as the WGAD observed, applies independently of the ICCPR.¹⁷⁶

Subsequent to these two cases, a wide variety of UN actors have adopted the view that the freedom from being arrested on account of sexual orientation does not rest on privacy alone. For example, the Committee against Torture has concluded that the ambiguity inherent in sodomy laws is sufficient to threaten torture in violation of the Convention Against Torture (CAT).¹⁷⁷ In the matter of *Young v. Australia*, the Human Rights Committee found that sexual orientation and gender identity discrimination violates the ICCPR’s right to equality before the law.¹⁷⁸ A number of UN human rights mandate holders, including the Special Representative of the Secretary-General on the situation of human rights defenders,¹⁷⁹ and most Human Rights Special Procedures,¹⁸⁰ have also found that the freedom from arbitrary arrest on account of sexual orientation is based on more than privacy alone.

Outside of the UN, several nations’ supreme courts and the ECtHR have also found that criminalizing sexual acts on the grounds of sexual orientation violates various provisions of international law beyond

174. UNHRC, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”: Opinions adopted by the Working Group on Arbitrary Detention, No 22/2006 (Cameroon)*, at 93, ¶ 19, U.N. Doc. A/HRC/4/40/Add.1 (Feb. 2, 2007).

175. WGAD, *supra* note 172, ¶¶ 25, 28.

176. *Id.*

177. CAT, *supra* note 172, ¶ 6(k) (“The Committee recommends that the State party . . . [r]emove all ambiguity in legislation which might underpin the persecution of individuals because of their sexual orientation.”)

178. *Young v. Australia*, UNHRC, Comm. No. 941/2000, ¶ 10.4, U.N. Doc. CCPR/C/78/D/941/2000 (2003) (majority opinion).

179. UNHRC, *supra* note 172.

180. See, e.g., *Mission to Guatemala*, *supra* note 172, ¶ 12 (“the State has responsibility under international human rights law for the widespread killings of . . . gay, lesbian, transgender, and transsexual persons. . . .”); UNHRC, *supra* note 172 (“it appears that members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment . . . allegedly often exacerbated or caused by discriminatory laws and attitudes. . . .”).

privacy, including the right to be free from arbitrary discrimination,¹⁸¹ and general human rights principles.¹⁸²

3. Rejected Principles: Same-Sex Marriage and the Right to a Satisfying Sex Life

The Yogyakarta drafters also chose to omit two “rights:” the right to enter into marriage without respect of sexual orientation and gender identity, and the right to a satisfying sex life.¹⁸³ Although their inclusion could arguably have served to advance equality, there is almost no support for them under existing international law, and their omission serves to bolster the document’s credibility as an accurate restatement of international law.¹⁸⁴ Some have asserted that these rights are already protected in international law,¹⁸⁵ while other observers have dismissed them as “radical notions.”¹⁸⁶ The right to same-sex marriage is especially symbolic of the wider movement to combat discrimination on the grounds of sexual orientation and gender identity. In fact, the two are so closely associated in many people’s minds that many of the opponents of the Yogyakarta Principles frequently ascribe this right to the document, although it is not there.¹⁸⁷

Neither of these rights is well supported in international law. At the United Nations, only the Population Fund (UNFPA) has recognized the

181. See, e.g., *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD) (Nepal); *Leung TC William Roy v. Secretary for Justice*, 4 H.K.L.R.D. 211 (2005); *McCoskar v. The State*, 2005 F.J.H.C. 500 (H. Ct.) (Fiji), available at <http://www.paclii.org/fj/cases/FJHC/2005/500.html> (last visited June 10, 2010); *B.B. v. the U.K.*, Eur. Ct. H.R. ¶¶ 20, 23 (Jul. 7, 2004), *S.L. v. Austria*, Eur. Ct. H.R. ¶ 46 (2003) L. and V. v. Austria, Eur. Ct. H.R. ¶ 53 (2003).

182. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (“values we share with a wider civilization”); *Loaiza v. Ecuador*, 203 Registro Oficial (Tribunal Constitucional 1997) (Ecuador) (“general human rights principles”).

183. Conversation with Philip Dayle, ICJUR Program Officer for Sexual Orientation and Gender Identity, in Geneva, Switz. (Apr. 24, 2008).

184. *Id.*

185. E.g. *Joslin v. New Zealand*, UNHRC, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002) (“The authors claim a violation of article 26 [of the ICCPR], in that the failure of the Marriage Act to provide for homosexual marriage discriminates against them directly on the basis of sex and indirectly on the basis of sexual orientation.”); International Conference on Population and Development, Cairo, Egypt, Sep. 5–13, 1994, *Programme of Action*, ¶¶ 7.2–7.3, U.N. Doc. A/CONF.171/13 [Hereinafter Int’l Conference] (“Reproductive health . . . implies that people are able to have a satisfying and safe sex life; . . . reproductive rights embrace . . . the right to attain the highest standard of . . . reproductive health”).

186. Samantha Singson, *Controversial UN Official Paul Hunt Leaves Post Promoting Abortion*, 11 CATH. FAM. & HUM. RTS. INST. 14, ¶ 3 (Mar. 20, 2008), available at http://www.c-fam.org/publications/id.560/pub_detail.asp (last visited June 8, 2010).

187. E.g. Family Watch Int’l, *Family Policy Brief: The Yogyakarta Principles Promote Sexual Anarchy and Threaten the Family*, www.familywatchinternational.org/fwi/yogyakarta.pdf (last visited June 8, 2010).

right to a satisfying sex life as a part of the right to health.¹⁸⁸ In contrast, the World Health Organization (WHO) has distanced itself from the right;¹⁸⁹ the Committee on Economic, Social and Cultural Rights (CESCR), which is charged with reviewing states' obligation to ensure the right to health, has never considered it; and even the controversial Special Rapporteur on the right to the highest attainable standard of health did not mention it in his report on the rights to sexual and reproductive health, except to quote the UNFPA.¹⁹⁰ A recent authoritative survey of the application of the right to health to sexual orientation and gender identity likewise fails to mention the right to a safe and satisfying sex life.¹⁹¹ No human rights treaty mentions this right explicitly, nor has any international human rights body or domestic court found it to be included implicitly.

The right to same-sex marriage has been even more clearly repudiated by interpreters of international law. Both the UN Human Rights Committee¹⁹² and the ECtHR¹⁹³ have determined that the treaties they respectively oversee do not protect the right to same-sex marriage because they speak explicitly of the right of "men" and "women" to marry.¹⁹⁴ Among all the court decisions worldwide finding the right to same-sex marriage protected by a state or national constitution, only one has referred to international law as supporting the assertion of a same-sex couple's right to marry, while the rest have relied solely on municipal law.¹⁹⁵

Had these rights been included by the Yogyakarta Principles, the document's credibility would have been seriously hindered. Their

188. Int'l Conference, *supra* note 185.

189. WORLD HEALTH ORG. [WHO], *DEFINING SEXUAL HEALTH* 5 n.2 (2002) (describing the right as a "working definition . . . [that does] not represent an official position of WHO").

190. ECOSOC, Comm'n on Human Rights, *Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 8, U.N. Doc. E/CN.4/2004/49 (Feb. 16, 2004) (*prepared by* Paul Hunt, Special Rapporteur).

191. Mahon, *supra* note 43.

192. *Joslin v. New Zealand*, UNHRC, Communication No. 902/1999, ¶ 2, U.N. Doc. CCPR/C/75/D/902/1999 (2002).

193. *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) at 19 (1986).

194. ICCPR, *supra* note 58, art. 23 ("The right of men and women of marriageable age to marry and to found a family shall be recognized."); European Convention, *supra* note 70, art. 12 ("Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right"). *See also* American Convention, *supra* note 70, art. 17 ("The right of men and women of marriageable age to marry and to raise a family shall be recognized."); Arab Charter, *supra* note 144, art. 33.

195. *In re Marriage Cases*, 43 Cal.4th 757, 819 n. 41 (2008). Other cases have held that the right to same-sex marriage is not protected by international law. *Compare Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) at ¶¶ 99–105 (S. Afr.) (rejecting the view that the right to same-sex marriage is protected by international law).

omission from the Principles burnishes the document's claim to be an accurate restatement of existing international law.

B. The Principles Based on the ICCPR and the ICESCR Are Selectively Supported in Existing, Binding International Law

Most of the principles do not enjoy as strong support in existing international law as those based on customary international law or *jus cogens*. Support for the bulk of the principles, as noted above, comes from interpretations of the provisions of the ICESCR and ICCPR by treaty bodies, special rapporteurs, and other UN actors. In addition, these rights are also supported by some decisions of regional human rights mechanisms, especially the ECtHR. While these are important and authoritative sources of international law, it is inaccurate to say they are universally binding on all states. Rather, they are applicable to state parties to pertinent treaties and, since the Principles are based on interpretations of treaties and on explicit treaty text, how binding they are depends on the nature of the interpretative body within the treaty regime, and any commitments a state may have made within that regime. On one extreme, decisions made by the IACtHR and the ECtHR are binding on states.¹⁹⁶ Somewhere in the middle is the role of UN treaty bodies such as the Human Rights Committee, which is limited to making “comments,” “considering” violations, and making their “views” known—and in the latter case, sometimes only if the state party has ratified an additional optional protocol or undertaken some other similar action.¹⁹⁷ This means that a state may choose to accept such interpretations as binding¹⁹⁸ and in practice, the level of compliance with these treaty body decisions is significant, though by no means perfect.¹⁹⁹ At the other extreme, interpretations made by other authorities, such as Special Procedures, are purely advisory.²⁰⁰ Therefore, principles drawn from these sources might be said to be authoritative but not necessarily binding.

196. American Convention, *supra* note 70, art. 68; European Convention, *supra* note 70, art. 53 (“The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.”).

197. ICCPR, *supra* note 58, arts. 41–42.

198. *E.g.* American Convention, *supra* note 70, art. 62.

199. See Malgoisa Fitzmaurice, *The Practical Working of the Law of Treaties*, in *INTERNATIONAL LAW* 187, 187–216 (Malcolm Evans ed., 2006). See also, UNHRC, *Report of the Human Rights Committee*, Annex VII, 504–553, U.N. Doc. A/63/40 (Vol. II) (2008) (reviewing varying degrees of states’ compliance with the Committee’s recent views), available at <http://www2.ohchr.org/english/bodies/hrc/docs/A.63.40.Vol.II.doc>.

200. Hurst Hannum, *Implementing Human Rights in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 29 (Hurst Hannum ed., 1992).

Among this group are the principles drawn from rights from which states may derogate under the ICCPR: the rights to privacy, freedom of opinion and expression, freedom of peaceful assembly and association, and freedom of movement.²⁰¹ The treaty provisions protecting these rights are subject to limitations for reasons such as protecting public order, health, morals, and the rights of others.²⁰² Protection of morals and, to a lesser extent, public health, are the two justifications typically advanced by states seeking to discriminate in the application of these rights on account of sexual orientation and gender identity.²⁰³ The Yogyakarta Principles addressing these rights assert that such justifications violate international law when they are applied to limit their application on account of sexual orientation and gender identity.²⁰⁴ This section discusses how this assertion is a correct restatement of existing international law as regards the other rights, although only to those states that are party to the ICCPR or a regional treaty with analogous provisions.²⁰⁵

1. Freedom of Movement

Freedom from sexual orientation and gender identity discrimination in the rights to freedom of movement and assembly has a relatively lengthy pedigree. As long ago as 1994, the UN Secretary General stated that restricting the movement of sexual minorities under the pretext of preventing HIV transmission was discriminatory.²⁰⁶ A decade later, the Colombian Supreme Court reached the same conclusion, noting that the ICCPR prohibits the state from preventing homosexuals from congregating in public, whether or not such a measure could be justified as combating the spread of disease.²⁰⁷ Most recently, the ECtHR, considering the right to freedom of movement in conjunction with the

201. In addition to the ICCPR, these rights are protected by all of the major regional instruments, except for privacy, which is omitted from the African Charter. Therefore they are applicable to most states. *See supra* notes 58 and 144.

202. In addition, the Arab Charter requires that the rights to opinion and expression “be exercised in conformity with the fundamental values of society.” *See supra* note 144, art. 32(2).

203. Tahmindjis, *supra* note 6, at 16.

204. *Yogyakarta Principles*, *supra* note 1, princs. 6, 19, 20 and 22.

205. As mentioned, this is all but a handful of states. *See supra* note 170. To avoid repetition, I omit a discussion of the right to privacy. The two most prominent interpretations of the right to privacy as applied to sexual orientation and gender identity, *Dudgeon* and *Toonen*, were already discussed in Section II.A, *supra*. The issue of privacy and sexual orientation has been addressed in great detail elsewhere. *See generally supra* note 6.

206. ECOSOC, Comm’n on Human Rights, *Report of the Secretary-General on International and Domestic Measures Taken to Protect Human Rights and Prevent Discrimination in the Context of HIV/AIDS*, ¶ 103, E/CN.4/1995/45 (Dec. 22, 1994).

207. Corte Constitucional, Mar. 25, 2004, sent. T-301/04.

highly-related right to freedom of assembly, ruled that attempting to ban a gay pride march for reasons of protecting the public morals violated the European Convention's grant of freedom of assembly.²⁰⁸ Subsequently, the EU's Congress of Local and Regional Authorities issued a resolution affirming the rights to assembly and movement of gays, lesbians, bisexuals, and transgendered persons.²⁰⁹

2. Freedom of Opinion and Expression

The view that the freedom of opinion and expression may not be limited on account of sexual orientation and gender identity has a longer history still. Jurisprudence from the 1970s granted a margin of discretion to states to censor mentions of sexual diversity and gender identity in various media.²¹⁰ Notable cases from the time include *Handyside v. United Kingdom*, which allowed censorship of a book whose favorable treatment of homosexuality could "deprave and corrupt minors,"²¹¹ and *Hertzberg v. Finland*, which found censorship of television programs about homosexuality to be within a state's margin of discretion to protect public morals.²¹²

The law is the opposite today. For example, the ECtHR now cites *Handyside* as standing for the proposition that the European Convention prohibits restricting expression on the grounds that some may find it shocking or immoral.²¹³ The AIDS epidemic has been particularly significant in bringing about this change, as discussing sexuality is crucial to combating AIDS.²¹⁴ The Council of Europe's Parliamentary Assembly now urges its member states to actively impart information about HIV/AIDS, sexual orientation and homophobia.²¹⁵ The member and associate nations of Mercosur recently adopted the same conclusion

208. Baczkowski v. Poland, App. No. 1543/06, 2007-VI Eur. Ct. H.R. (2007).

209. Eur. Consult. Ass., *Freedom of Assembly and Expression for Lesbians, Gays, Bisexuals and Transgendered Persons*, Res. 230 (Mar. 28, 2007), available at [https://wcd.coe.int/ViewDoc.jsp?Ref=RES\(2007\)230](https://wcd.coe.int/ViewDoc.jsp?Ref=RES(2007)230) (last visited June 8, 2010).

210. *Hertzberg v. Finland*, ICCPR Communication No. 61/1979, CCPR/C/15/D/61/1979, ¶¶ 10.3–10.4 (1979); *Handyside v. United Kingdom*, 1 E.H.R.R. 737 (1976).

211. *Handyside v. United Kingdom*, 1 E.H.R.R. 737 (1976).

212. *Hertzberg v. Finland*, ICCPR Communication No. 61/1979, CCPR/C/15/D/61/1979, ¶¶ 10.3–10.4 (1979).

213. *Lindon v. France*, 46 Eur. Ct. H.R. 35 (2008) (partly dissenting opinion) (citing *Handyside* for the proposition that "freedom of expression is one of the foundations of a democratic society, of which the hallmarks are pluralism, tolerance and broadmindedness").

214. See generally, WHO, *supra* note 189, at 8–9.

215. Eur. Consult. Ass., *HIV/AIDS in Europe*, 8th Sess., Res. 1536, ¶ 13 (2007); Council of Eur., *Situation of Lesbians and Gays in Council of Europe Member States*, 27th Sess., Recommendation 1474, ¶ 11 (2000).

at a summit meeting of their foreign ministers and human rights authorities.²¹⁶

At the UN, the Special Rapporteur on the right to freedom of opinion and expression, considering states' obligations under the ICCPR, has said, "in accordance with the nature and the spirit of his mandate, [he] considers that all citizens, regardless of, inter alia, their sexual orientation, have the right to express themselves"²¹⁷ He has also specifically noted that neither morals nor public health may be used as justifications to limit the application of the rights to opinion and expression on account of sexual orientation and gender identity.²¹⁸

3. Employment Discrimination

Another right noteworthy for being the subject of a recent and wholesale reversal in international law is the prohibition on discrimination in employment due to sexual orientation and gender identity. Yogyakarta Principle 12 asserts that states are obliged to "eliminate and prohibit discrimination on the basis of sexual orientation and gender identity in public and private employment."²¹⁹ Just a decade ago, this would not have been an accurate reflection of international law. For example, in 1998, the European Court of Justice in *Grant v. South-West Trains* ruled that a company could deny the unmarried same-sex partners of employees the benefits that it provided to unmarried opposite-sex partners.²²⁰ The court ruled that this practice did not amount to employment discrimination on account of the prohibited ground of sex, and furthermore that "in the present state of the law within the [European] Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex."²²¹

However, contemporary views of the European Convention have reached the opposite conclusion, and these views have been reflected

216. MERCOSUR, IX Reunión de Altas Autoridades Competentes en Derechos Humanos y Cancillerías del MERCOSUR y Estados Asociados, Montevideo, Uruguay, Aug. 9–10, 2008, Declaración final del seminario regional realizado, available at http://www.mec.gub.uy/ddhh/diversidad_sexual.html.

217. ECOSOC, Comm'n on Human Rights, *Report of the Special Rapporteur on the Right to Freedom of Opinion and Expression, Mission to Colombia*, ¶ 75, U.N. Doc. E/CN.4/2005/64/Add.3 (Nov. 26, 2004) (prepared by Ambeyi Ligabo).

218. *Id.* ¶¶ 76–77 (public health); ECOSOC, Comm'n on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 176, U.N. Doc. E/CN.4/2001/64 (Feb. 13, 2001) (prepared by Abid Hussain) (morals).

219. *Yogyakarta Principles*, *supra* note 1, princ. 12.

220. Case C-249/96, *Lisa Jacqueline Grant v. South-West Trains Ltd.*, 1998 E.C.R. I-621, ¶ 50.

221. *Id.* ¶¶ 3, 50.

globally by the changing views of the ICCPR. Just four years after *Grant*, the ECtHR in effect overruled it with its decision in *Perkins v. the U.K.*²²² In *Perkins*, the British military had explicitly relied on *Grant* to support its view that discharging homosexuals from the military was not prohibited employment discrimination under European law.²²³ The ECtHR took only four paragraphs to explain that such discrimination did in fact violate Articles 8 and 14 of the European Charter on Human Rights, which protects the rights to privacy and to freedom from discrimination.²²⁴

The next year, the Human Rights Committee, in an employment benefits case with facts virtually identical to *Grant*, reached an opinion analogous to the earlier *Perkins* court, but applying a global instrument, the ICCPR.²²⁵ In *Young v. Australia*, the Committee ruled that denying benefits to same-sex unmarried partners while granting them to opposite-sex unmarried partners was in fact discrimination “because of . . . sex or sexual orientation,” in violation of article 26.²²⁶ In addition, a number of supreme courts, including Brazil²²⁷, Colombia²²⁸, Nepal,²²⁹ and South Africa,²³⁰ as well as a trial court in Argentina,²³¹ have also held that such discrimination is prohibited variously by the ICCPR, the UDHR, and the American Convention.

222. *Perkins v. U.K.*, App. No. 43208/98, Eur. Ct. H.R. (2002).

223. *Id.* ¶¶ 22, 30.

224. *Id.* ¶¶ 38–41.

225. *Young v. Australia*, UNHRC, Comm. No. 941/2000, ¶ 10.4, U.N. Doc. CCPR/C/78/D/941/2000 (2003) at 164.

226. *Id.* ¶ 10.4. The Australian government, in contrast to its position in the *Toonen* case, initially refused to accept the Committee’s findings and recommendations in *Young*. UNHRC, *supra* note 199, at 505. After the Labour Party victory in the November, 2007 elections, the government’s position changed and employment non-discrimination bills are currently under debate in the Senate. Commonwealth, *Senate Notice Paper No. 80* (Aug. 17, 2009) 7, 8, 105 (Austral.), available at http://www.aph.gov.au/SENATE/work/notice/2009/snpf_080.pdf (last visited June 8, 2010).

227. S.T.J.–6, Resp. No. 395.904, Relator: Min. Hélio Quaglia Barbosa, 12.12.2005, § 2.2 138 (Brazil).

228. Corte Constitucional, Apr. 16, 2008, sent. C-336/08 (paras. 5.6–5.8); Corte Constitucional, Oct. 3, 2007, sent. C-811/07 (part 5); Corte Constitucional, Feb. 7, 2007, sent. C-075/07 (Dr. Rodrigo Escobar Gil, dissenting opinion, part 6); Corte Constitucional, May 15, 2005, sent. C-373/02 (fn. 33).

229. *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD) (Nepal).

230. *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) at 11, ¶ 23 (S. Afr.).

231. Juzgado de Primera Instancia No. 1 en lo Contencioso Administrativo del Departamento Judicial de La Plata [1a Inst.], 9/3/2005 “Y., E. A. C/ Caja Pervisión y Seguro Médico de la Provincia de Buenos Aires S/ Amparo,” available at <http://www.scba.gov.ar/falloscompl/Infojuba/ContenciosoEsp2/412.doc>.

4. Economic, Social and Cultural Rights

A number of the Yogyakarta Principles dealing with economic, social, and cultural rights are also supported by the jurisprudence of relevant interpretative bodies, especially the general comments of the CESCR. Perhaps because such rights are norms of progressive achievement, and thus violations are not generally considered sanctionable,²³² they have merited less attention from states, and so the CESCR has not met significant opposition to its quiet adoption of sexual orientation as one of the types of “other status” by which discrimination is prohibited under the treaty. Since 2000, the Committee has included such a prohibition in its general comments on the rights to work,²³³ water,²³⁴ and the highest attainable standard of health.²³⁵ Last year, the Committee came to the blanket conclusion that sexual orientation and gender identity discrimination in the granting of *any* right in the ICESCR is a violation of the treaty.²³⁶

In addition to the treaty body, the Special Rapporteur on the Highest Attainable Standard of Health has stated bluntly that “discrimination on the grounds of sexual orientation is impermissible under international human rights law,” and continued that he “has no doubt that . . . sexual rights [are] human rights [and] include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference.”²³⁷

The CESCR general comments and the Special Rapporteur, unfortunately, are the sum total of interpretations of international law on the issue. And the Special Rapporteur’s assertion, unlike the CESCRs’, has met opposition by states that hold that “homosexuality is a mental disease” and therefore not protected under international human rights law.²³⁸ Given the lack of adjudication and enforcement mechanisms for economic, social, and cultural rights in international law,²³⁹ voluntary

232. ICJUR, COURTS AND THE LEGAL ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 9–12, 23–53 (2008).

233. ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 18: The Right to Work*, ¶ 12(b)(1), U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006).

234. See ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 15: The Right to Water*, *supra* note 162.

235. See ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, *supra* note 162, ¶ 18.

236. See ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights*, *supra* note 130, ¶ 32.

237. *Report of the Special Rapporteur*, *supra* note 190, ¶¶ 38, 54.

238. Essex Human Rights Review, Interview, *The Right to Health: An Interview with Professor Paul Hunt*, 2 ESSEX HUM. RTS. REV. 57, 61 (2004).

239. Because only two countries—Ecuador and Mongolia—of the requisite ten have ratified the Optional Protocol to the ICESCR, the CESCR has no authority to hear

assumption of international law obligations by states assumes greater importance than with civil and political rights. Given that no state has expressed the view that it intends to comply with the opinion of either the CESCR or Special Rapporteur on the right to health in regard to sexual orientation and gender identity rights, the existing support for the Yogyakarta Principles related to economic, cultural, and social rights is notably less substantial than for civil and political rights.

5. Rights Never Before Addressed Under International Law

A number of the remaining rights asserted by the Yogyakarta Principles have never been addressed by authoritative interpreters of international law. These include the right to security of the person, the right to an adequate standard of living, the right to participate in cultural life, the right to participate in public life, and the right to promote human rights.²⁴⁰ Support for the existence of these rights may be drawn from the principles of non-discrimination and equality before the law.²⁴¹ However, no human rights tribunal, court, or other interpretative body has actually made such an argument in favor of these rights with respect to sexual orientation and gender identity. Given the increasing willingness of international law to embrace the principle of non-discrimination in respect of nearly all rights, it is not unreasonable to expect that courts and other interpreters of international law would not make an exception for these particular rights.²⁴² However, this remains an expectation; these principles are better described as reasonable aspirations than as existing law.

C. Errors of Law in the Yogyakarta Principles: The Absence of Progressive Realization and the Right to Found a Family

The Yogyakarta Principles contain two major errors of law. One has already been mentioned: the Principles omit the concept of progressive realization from their discussion of economic, social, and cultural

communications under the Optional Protocol. United Nations Treaty Collection, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (July 23, 2010), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en (last visited July 24, 2010). *See also* Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10, 2008). The regional human rights treaties, with the exception of the African Charter, do not protect economic, social and cultural rights. *See* African Charter, *supra* note 70, arts. 15–18.

240. *Yogyakarta Principles*, *supra* note 1, princs. 5, 25–27.

241. *See supra* Part II.A.

242. *See supra* Part II.A.1.

rights.²⁴³ Although the guarantee of non-discrimination in the granting of economic, social, and cultural rights is supported in law, the Principles are wrong in baldly asserting that, for example, everyone presently has a right to housing or medical care.²⁴⁴ The Yogyakarta Principles cannot claim to have any authority to bind states to grant a present right that the ICESCR itself requires only that states take progressive steps to realize. This leads to an unusual situation in which the portions of these rights that demand non-discrimination²⁴⁵ have some legal basis in the principle of non-discrimination, but the underlying right²⁴⁶ actually exceeds states' obligations under existing treaty law.²⁴⁷

The Yogyakarta Principles' second error is that Principle 24, "The Right to Found a Family,"²⁴⁸ is contradicted by existing international law. This right is drawn from Article 23 of the ICCPR, which states "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized."²⁴⁹ According to the Yogyakarta Principles, states' obligations in this area include, *inter alia*, granting "the right to found a family, including through access to adoption . . . without discrimination on the basis of sexual orientation or gender identity," and ensuring "that laws and policies recognise the diversity of family forms."²⁵⁰

At the time the Yogyakarta Principles were drafted, there were essentially no existing interpretations of the ICCPR's Article 23, nor any comparable regional treaty provision, that suggested that the "right to found a family" encompassed either access to adoption without discrimination on the basis of sexual orientation or gender identity, or the recognition of the diversity of family forms.²⁵¹ The only support in existing law for this principle could be found in a certain interpretation of the Convention on the Rights of the Child (CRC), holding that a blanket ban on adoption by same-sex couples threatens to prevent

243. See *supra* Part II.C.

244. ICJUR, *supra* note 232, at 54–57.

245. E.g., *Yogyakarta Principles*, *supra* note 1, princ. 15 ("[S]tates shall . . . [e]nsure equal rights to land and home ownership and inheritance without discrimination on the basis of sexual orientation or gender identity.").

246. E.g., *id.* ("Everyone has the right to adequate housing . . .").

247. See ICJUR, *supra* note 230, at 27 ("The right to adequate housing includes positive duties to make housing accessible to people in need, which could require progressive implementation over a period of time.").

248. *Yogyakarta Principles*, *supra* note 1, princ. 24.

249. ICCPR, *supra* note 58, art. 23(2); O'Flaherty & Fisher, *supra* note 6, at 224.

250. *Yogyakarta Principles*, *supra* note 1, princ. 24.

251. An extensive search reveals no jurisprudence interpreting the ICCPR or any regional instrument to allow adoption or the recognition of diverse family forms without regard to sexual orientation or gender identity existing at the time of the Yogyakarta Principles' drafting.

adoptions by otherwise-qualified potential parents, thus violating the treaty's article 21, which states that any "system of adoption shall ensure that the best interests of the child shall be the paramount consideration."²⁵² The Supreme Court of South Africa reached this conclusion in *Du Toit v. Minister of Welfare*,²⁵³ which considered the CRC, as well as the African Charter on the Rights and Welfare of the Child. It concluded that laws preventing adoptions by same-sex couples

exclude from their ambit potential joint adoptive parents who . . . would otherwise meet the criteria. . . . Their exclusion surely defeats the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important to a child's development, which can be offered by suitably qualified persons.²⁵⁴

However, until 2008, the *du Toit* opinion stood by itself, in contrast to quite a lot of opposing authority. In 2002, the ECtHR ruled in *Fretté v. France* that sexual orientation was a legitimate reason for disallowing the adoption of children by homosexuals, reasoning in part that "the scientific community . . . is divided over the possible consequences of a child being adopted by one or more homosexual parents."²⁵⁵ In the same year, the Human Rights Committee determined that limiting marriage to heterosexual couples did not violate the ICCPR, observing that the "right to marry and found a family" clause of the ICCPR "is the only substantive provision in the Covenant which defines a right by using the term 'men and women', rather than 'every human being', 'everyone' and 'all persons'."²⁵⁶ Although this decision pertained to marriage only, it certainly suggests that "the right to found a family," which is similarly granted by the treaty to "men and women," would not apply to two persons of the same sex.²⁵⁷ The same is true of the American Convention,

252. G.A. Res. 44/25, art. 21, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989).

253. *Du Toit & Another v Minister of Welfare & Others* 2002 (10) BCLR 1006 (CC) (S. Afr.).

254. *Id.* ¶ 21.

255. *Fretté v. France*, 2002-I Eur. Ct. H.R. 345, ¶ 42. The European Court seems to have disfavored *Fretté* two years ago, ruling in the confused opinion *E.B. v. France* that a French government agency had improperly denied a lesbian the permission to adopt a child on account of her sexual orientation. *E.B. v. France*, 47 Eur. Ct. H.R. 21 (2008). However, *E.B.* is carefully worded so as to apply only to countries in which adoption by single persons is allowed and where the state cannot produce objective evidence that adoption by homosexuals is harmful for children; it does not strictly speaking guarantee the right to found a family regardless of sexual orientation or gender identity. *Id.* ¶¶ 91, 94.

256. *Joslin v. New Zealand*, UNHRC, Communication No. 902/1999, U.N. Doc. A/57/40 ¶ 8.2 (2002).

257. *Id.*

which speaks even more explicitly of “right of men and women of marriageable age to marry and to raise a family.”²⁵⁸ In addition, domestic jurisprudence from a variety of countries also denies that limiting the right to found a family to same-sex couples is discriminatory under international law.²⁵⁹

Similarly, there was, and remains, almost no support for the view that national laws must “recognise the diversity of family forms.”²⁶⁰ In a case considering the circumstances under which foreign spouses of South Africans who contracted marriage in a variety of different fashions may be permitted to reside in South Africa, the Court considered the obligation imposed by the UDHR, ICCPR, ICESCR, and the ACHPR “to protect the family,” and noted that “[i]n recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.”²⁶¹ However, the South African Constitutional Court’s interpretation again stands alone. No other interpreter of an international treaty has reached the same conclusion. The closest any has come is the opinion of the Human Rights Committee that “when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23 [of the ICCPR].”²⁶² In other words, a state may not discriminate among various types of officially recognized families. This logic was applied to find the Australian government in violation of Article 26 of the ICCPR when it awarded survivors’ pensions to heterosexual domestic partnerships but not to homosexual ones.²⁶³ Nevertheless, this decision leaves the door open for any country not to recognize any unmarried couple, with or without dependents, as a family, and retain marriage as a right strictly for heterosexuals. The ECtHR has a more restrictive view of family than even the Human Rights Committee. The court has consistently found that a provision of the European Charter protecting the right of “men and women of marriageable age . . . to marry and found a family,” as well as “the right to respect for . . . family life,” requires a state to recognize only

258. American Convention, *supra* note 70, art. 17 § 2.

259. *Lars Arnell och Lars Gårdfeldt v. Skatteverket* (Regeringsrätten) (May 9., 2008) (Swed.); Sent. C-075/07, *supra* note 228 (Colum.); Corte Constitucional, sent.1634-02, exp.02-001547-651-VD (Nov. 29, 2002) (Costa Rica).

260. *Yogyakarta Principles*, *supra* note 1, princ. 24.

261. *Dawood & Others v Minister of Home Affairs & Others* 2000 (8) BCLR 837 (CC) ¶¶ 29–31 (S. Afr.).

262. OHCHR, *General Comment No. 19*, *supra* note 130, ¶ 2.

263. *Young v. Australia*, UNHRC, Communication No. 941/2000, ¶ 10.4, U.N. Doc. CCRP/C/78/D/941/2000 (2003).

“families” related by blood, adoption, or legal marriage.²⁶⁴ The Arab Charter goes further still by saying that “the family is . . . based on marriage between a man and a woman.”²⁶⁵

In the face of this, it is unclear upon what existing international law the drafters of the Yogyakarta Principles sought to base the “right to family” principle. While it remains true that, as with every human right, no international human rights instrument explicitly permits sexual orientation and gender identity discrimination as regards the right to family, between the wording of the ICCPR and the nearly-universal view among courts and tribunals that “family” in international law refers to a heterosexual couple and its children, there is more support here than for any other area of law that the subjects of this particular right are uniquely heterosexual. Even one of the Principles’ drafters conceded that this principle is “controversial.”²⁶⁶ At best, the “right to family” principle must be seen as aspirational, supported by a minority view of currently existing international law on the topic, and contradicted by other interpretations of that same law.

III. THE YOGYAKARTA PRINCIPLES HAVE BENEFITED FROM THEIR INACCURACIES

As has been shown, with the exception of the “right to family,” the Yogyakarta Principles contain principles with differing weight of support in existing international law. There are the two broad introductory principles, plus several more based on *jus cogens* and customary international law, which are accurate restatements of existing international law.²⁶⁷ The remainder is more correctly described as restatements of international law favorable to victims of sexual orientation and gender identity discrimination, but which do not bind all states at all times.²⁶⁸ In this section, I will argue that this dual nature has proven to be of great benefit to the Principles, although it is not without some drawbacks.

The Principles’ inaccuracies are limited enough that, when offset by the reputations of its drafters and facilitating NGOs, and the grounding

264. *E.g.*, *Kroon v. the Netherlands*, 19 Eur. Ct. H.R. 263, 273–74 (1994); *Marcx v. Belgium*, 2 Eur. Ct. H.R. 330, 356 (1979).

265. Arab Charter, *supra* note 144, art. 33(a).

266. *Launching Yogyakarta Principles in New York*, SEXUALITY POLICY WATCH, Dec. 7, 2007, <http://www.sxpolitics.org/?p=1755> (last visited June 10, 2010) (“Sonia Correa agreed it is a controversial principle, but responded that the right to constitute a family is articulated in international law and applies to all.”).

267. *See supra* Part II.A.

268. *See supra* Part II.B.

of the Principles in existing—if not always completely binding—interpretations of international law, they have not prevented the Principles from becoming an important legal standard, both internationally and within a number of states, in a very short period of time. The inclusion of a large number of principles that address very concrete and widely-suffered injustices renders the Principles useful tools to advance human rights. Had the Principles been limited to those that are indisputably accurate restatements of existing international law, the result would have been a short, uninspiring document. It would have contained only a few principles, primarily dealing with rights at a high level of generality, such as equality and non-discrimination. It would have done little to advance its drafters' goal of making substantive changes in the lives of people who suffer discrimination on account of sexual orientation and gender identity.²⁶⁹

On the other hand, the Principles' overreaching is great enough that it has placed some limits on their influence. Principally, makers of law and policy have been reluctant to cite the Principles directly; explicit references to the Principles have been removed a number of times from draft laws, declarations, and court decisions. They have also probably limited the Principles' impact in countries that are the most hostile to LGBT rights. While some of these countries are willing to make certain legal changes, such as repealing sodomy laws, the Principles ask for so many more improvements that they are proving dead on arrival. Additionally, the Principles have attained fairly little influence outside of the rarefied world of international legal diplomacy. In other words, the Principles have yet to reach the grassroots.

A. The Achievements of the Yogyakarta Principles

1. Success as a Standard-Setting Document

The Yogyakarta drafters have stated that incorporating the Yogyakarta Principles into soft law is a major goal.²⁷⁰ If incorporated into

269. See *supra* Part II.A (discussing those Yogyakarta Principles that are accurate restatements of existing, universally binding international law).

270. See, *supra* note 12. Soft law is non-binding international law. Dinah Shelton, *Introduction to Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* 1, 6 (Dinah Shelton ed., Oxford Univ. Press 2000). This seeming oxymoron has led some legal positivists to see soft law as irrelevant, lying on the far side of the border between "Laws proper, or properly so called," and "laws improper or improperly so called." JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 1 (Prometheus Books 2000) (1832). However, this simplistic view does not play out in practice. Just as it would be wrong to say that states comply with their hard-law obligations all of the time, so it is wrong to say that states never follow soft law out of a sense of obligation. As with hard law, the coercive power of soft law exists along a continuum. Shelton, *supra* note

soft law, the Principles could be used for a variety of purposes. For instance, the Principles could be used for interpretative purposes by international courts in the way that the IACtHR has used various soft law instruments to determine who is a “child” for the purposes of an article in the American Convention referring to the rights of “children.”²⁷¹ They could be referred to as a benchmark in declarations or treaties as, for example, the Paris Principles are referred to in the Convention on the Rights of Persons with Disabilities.²⁷² They could be used by treaty bodies to flesh out states’ obligations under treaties.²⁷³ These various types of use-by-reference are often considered together under the rubric of “standard setting.”²⁷⁴ However, as soft law, the Principles could also be

270, at 4. While non-binding by definition, soft law is more than just an expression of policy preference. Even at its least influential, soft law gives extra weight to political and moral arguments in favor of certain interpretations of states’ legal duties. Dinah Shelton, *International Law and ‘Relative Normativity’*, in *INTERNATIONAL LAW* 159, 162 (Malcolm Evans, ed., 2d ed., 2006). More powerfully, states can declare their voluntary intentions to be held to it. See Peter M. Haas, *Choosing to Comply: Theorizing from International Relations and Comparative Politics*, in *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM*, *supra*, at 43, 45. In the absence of stare decisis, the decision of an international tribunal is not supposed to bind states not party to a dispute; nevertheless, such decisions, as soft law, may exert significant effects on state practice generally. See Douglas Cassel, *Inter-American Human Rights Law, Soft and Hard*, in *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM*, *supra*, 393, 394–95 (discussing increasing compliance by Latin American states with the decisions of the Inter-American Court of Human Rights). For all these reasons, some scholars prefer terms such as “norms of imperfect obligation” to soft law. Eibe Reidel, *Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?*, 2 *EUR. J. INT’L L.* 58, 66 (1991).

271. Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, 2002 Inter-Am. C.H.R. (ser. A) No. 17, ¶¶ 38–42 (Aug. 28, 2002) (citing the Beijing Rules, the Tokyo Rules, and the Riyadh Guidelines on juvenile crime).

272. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/611, art. 33, U.N. Doc. A/61/611 (Dec. 13, 2006) (referring to “principles relating to the status and functioning of national institutions for protection and promotion of human rights”).

273. See, e.g., ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 13: The Right to Education*, ¶ 5, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) (noting that standards such as the Plan of Action for the United Nations Decade for Human Rights Education and the World Declaration on Education for All are evidence of “elements which are not expressly provided for in [the ICESCR], such as specific references to gender equality and respect for the environment These . . . elements are implicit in, and reflect a contemporary interpretation of” the ICESCR); UNHCR, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01 ¶ 20 (May 7, 2002) (reproducing paragraph 13 of the Michigan Guidelines on International Refugee Law on Nexus to a Convention Ground nearly in its entirety); *The Michigan Guidelines on International Refugee Law on Nexus to a Convention Ground* ¶ 13, in James C. Hathaway, *The Causal Nexus in International Refugee Law*, 23 *MICH. J. OF INT’L L.* 207, 217 (2002).

274. See, e.g., INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *HUMAN RIGHTS STANDARDS: LEARNING FROM EXPERIENCE* 11–19 (2006), available at http://www.ichrp.org/files/reports/31/120b_report_en.pdf (last visited June 8, 2010).

voluntarily adopted for use by states as policy, or even law, via legislation or through the courts.²⁷⁵

The Principles have already had significant success as a standard-setting document. The Council of Europe's Human Rights Commissioner's Office is now using them for "country and thematic monitoring related to discrimination and human rights violations based on sexual orientation and gender identity."²⁷⁶ The High Human Rights Authorities of Mercosur "now consider [the Yogyakarta Principles] a reference document for Mercosur."²⁷⁷ The Asia Pacific Forum of National Human Rights Institutions has requested its members to report on their activities in relation to human rights and sexual orientation and gender identity, with reference to the Yogyakarta Principles.²⁷⁸ In the UNHCR Handbook for the Protection of Women and Girls, published the discussion of "risk factors faced by women and girls" notes that "[w]ith regard to sexual orientation, the 2007 Yogyakarta Principles . . . affirm the binding international legal standards on this issue as derived from key fundamental human rights instruments."²⁷⁹ The UN Office on Drugs and Crime has recently published a handbook on prisoners with special needs, which contains a chapter on LGBT prisoners that draws heavily on the Yogyakarta Principles, citing them variously to call for the decriminalization of same-sex sexual relations and to reiterate that the right to human treatment while in detention—Principle 9—requires states to address LGBT prisoners' risk for rape, HIV infection, violence, and isolation.²⁸⁰ The Committee on Economic, Social and Cultural rights has adopted the Yogyakarta Principles' definitions of sexual orientation and gender identity in its general comments on discrimination.²⁸¹ The Human Rights Committee uses them as terms of reference in

275. For example, the Standard Minimum Rules for the Treatment of Prisoners are widely used by states as legal guarantees of minimum prison conditions, although they have yet to be adopted as "hard" international law. *See, e.g.*, *Lareau v. Manson*, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980) (referring to the Rules as "instructive in certain cases").

276. O'Flaherty & Fisher, *supra* note 6, at 244.

277. Mercosur, *supra* note 16.

278. Asia Pacific Forum, *supra* note 92. The Asia Pacific Forum (APF) is a network of 15 national human rights institutions established in accordance with the Paris Principles. *See* About the Asia Pacific Forum, www.asiapacificforum.net/about (last visited June 8, 2010).

279. UNHCR, HANDBOOK FOR THE PROTECTION OF WOMEN AND GIRLS 72 (2008), available at <http://www.unhcr.org/protect/PROTECTION/47cfae612.html> (last visited June 8, 2010).

280. UNITED NATIONS OFFICE ON DRUGS AND CRIME [UNODC], HANDBOOK ON PRISONERS WITH SPECIAL NEEDS ch. 5 (2009).

281. *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights*, *supra* note 130, at 10 n.25.

consideration of states' reports under Article 40 of the ICCPR.²⁸² They have become a fixture in the Human Rights Council with several nations, notably Slovenia and the Netherlands, inquiring as to states' compliance with them, and a number of states, including Brazil, Canada, Chile, the Czech Republic, Ecuador and Finland, committing themselves to using them as guidelines or standards in policymaking.²⁸³

2. Successes in Regional Human Rights Bodies

The Principles have also provided the inspiration for, or even been explicitly referenced in, a number of non-binding declarations by international organizations. A Working Group of the European Parliament "endorse[d]" the Principles, just a few weeks before the ECtHR overturned France's de facto ban on adoption by gay parents in *E.B.*²⁸⁴ The General Assembly of the Organization of American States (OAS) approved a resolution drawn from the Yogyakarta Principles condemning "violence and related human rights violations committed against individuals because of their sexual orientation and gender identity."²⁸⁵ The foreign ministers of South America are considering the Yogyakarta Principles for adoption in a declaration.²⁸⁶ The Principles may also become incorporated into a regional human rights convention in the near future: the draft Inter-American Convention against Racism and other Forms of Intolerance, currently nearing finalization in its eleventh draft, draws from the Principles to include sexual orientation and gender identity within its definition of prohibited discrimination.²⁸⁷ If

282. *E.g.* UNHRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Third Periodic Report of Ireland*, 5, 7, U.N. Doc. CCPR/C/SR.2552 (Aug. 8, 2008).

283. *See, supra* note 13 (listing states' references to the Yogyakarta Principles in the Human Rights Council).

284. Human Rights Watch, Summary of Panel Discussion on the Yogyakarta Principles: The Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity (Nov. 7, 2007), <http://hrw.org/english/docs/2007/11/21/global17399.htm> (last visited June 8, 2010).

285. OAS, *Human Rights, Sexual Orientation, and Gender Identity*, G.A. Res. 2435 (XXXVIII), ¶ 2, U.N. Doc. AG/RES. 2435 (June 3, 2008).

286. *Cf.* Mercosur, *supra* note 16 (in which the Uruguayan foreign minister recommends that the Mercosur High Human Rights Authorities "take [the Yogyakarta Principles] into consideration"); Mercosur, XIV Reunión de Altas Autoridades en Derechos Humanos y Cancillerías del Mercosur y Estados Asociados, www.derhuman.jus.gov.ar/mercosur; Mercosur, Acta Final del XV Reunión de Altas Autoridades de Derechos Humanos y Cancillerías del Mercosur y Estados Asociados (2009), available at http://www.redlamyc.info/Niniosur/XV%20RAADDHH/20090503%20RAADDHH_2009_ACTA01_ES%20VERSION%20final.doc (in which Argentina "proposes endorsing the Yogyakarta Principles given the favorable change in the position of several countries").

287. OAS, Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance, Feb. 18, 2009, CAJP/GT/RDI-57/07 rev. 11, art 1.

approved, this would become the first mention of either term in a major human rights treaty.²⁸⁸ The African Commission on Human and Peoples' Rights is also studying the possibility of making some form of public recognition of the Principles. This would be a rare and important step in a continent known for having a poor human rights record on issues of sexual orientation and gender identity.²⁸⁹

3. Successes in Influencing Policy

The Yogyakarta Principles have become part of the foreign policies of several countries. In the Government of the Netherlands' human rights strategy, it "regards the Yogyakarta Principles as a guideline for its policy."²⁹⁰ The Foreign Minister has explained that this will include prioritizing its foreign aid in countries that respect the rights embodied in the Yogyakarta Principles.²⁹¹ The British Foreign and Commonwealth Office has developed a "toolkit" for "promoting the human rights of LGBT people" that welcomes the Yogyakarta Principles and draws heavily from them.²⁹² A number of other countries have adopted part or all of the Yogyakarta Principles as domestic policy. Foremost among these is Brazil, which made translating the Principles into Portuguese and distributing thousands of free copies into a centerpiece of its ongoing "Brazil without Homophobia" campaign.²⁹³

4. Successes in Municipal Courts

The Yogyakarta Principles have also had several successes in national courts, especially in Asia. When the Supreme Court of Nepal was considering an LGBT rights case, it turned to the ICJUR's Nepal

288. The Ibero-American Convention on the Rights of Youth, which requires state parties to protect the rights of people ages 15–24 without distinction of sexual orientation, is the only human rights treaty that mentions sexual orientation. See Ibero-American Convention, *supra* note 3, art. 5. Unfortunately, the treaty has no enforcement mechanism, and the international organization that promotes it, the Ibero-American Youth Organization, is a sui generis organization, not part of the UN or any other more established body, limiting its ability to pressure or persuade states into compliance.

289. ACHPR, *supra* note 160, at 4 (noting that the ACPHR considered a presentation on LGBT issues from one of the Principles' drafters).

290. MINISTRY OF FOREIGN AFFAIRS OF THE NETHERLANDS, HUMAN DIGNITY FOR ALL 54 (2007), available at <http://www.minbuza.nl/dsresource?objectid=buzabeheer:53627&type=org> (last visited June 8, 2010).

291. Verhagen Remarks, *supra* note 14, at 2–3.

292. BRITISH FOREIGN AND COMMONWEALTH OFFICE, *supra* note 14, at 1, 5.

293. ECOSOC, *Consideration of Reports Submitted by States Parties in Accordance with Article 16 of the International Covenant on Economic, Social and Cultural Rights: Brazil*, ¶ 64(d), U.N. Doc. E/C.12/BRA/Q/2/Add.1 (Mar. 16, 2009); Secretaria Especial dos Direitos Humanos, *Outras ações relacionadas ao Brasil sem Homofobia* (Dec. 2009), https://www2.gestao.presidencia.serpro.gov.br/sedh/brasilem/Id_bsh_acoes.

staff to request an amicus brief about the Yogyakarta Principles and the status of sexual orientation and gender rights in international law. The ICJUR was able to respond and the decision came out in favor of granting Nepal's LGBT citizens rights broadly consistent with the Principles.²⁹⁴ In fact, this sweeping decision granted essentially all of the rights in the Principles, as it not only overturned Nepal's sodomy law but also instituted broad anti-discrimination provisions on the basis of sexual orientation and gender identity, including even the creation of a "third sex" for identity documents. It also resulted in a follow-up decision eleven months later ordering the creation of a committee to study legalizing same-sex marriage.²⁹⁵ The Delhi High Court, the court of appeals for India's capital region, also relied on the Yogyakarta Principles to rule as to the unconstitutionality of India's sodomy law.²⁹⁶ The 9th Circuit Court of Appeals in the United States considered an ICJUR amicus brief relying heavily on the Yogyakarta Principles in a decision ruling that the US military's policy of firing homosexuals may violate due process of law.²⁹⁷ Most recently, the Supreme Court of Pakistan, following in the path of Nepal, ordered that social security programs be extended to *hijra* (transgender) Pakistanis, and that the census take a registry of them for this purpose.²⁹⁸

5. Incorporating Gender Identity into International Law

The Pakistani and Nepalese decisions also highlight what may well be the greatest success of the Yogyakarta Principles: incorporating the term "gender identity" into international law and the language of human rights.²⁹⁹ Before the Yogyakarta Principles' launch, there was not a single

294. Pant v. Nepal, Writ No. 917 of the Year 2064 BS (2007 AD) (Nepal).

295. *Id.* (first decision); Blue Diamond Society, Supreme Court Decision—Summary Note (Dec. 27, 2007) (second decision) available at <http://www.bds.org.np/decision.html> (last visited June 10, 2010); Nepal SC approves same-sex marriage, HINDUSTAN TIMES, Nov. 19, 2008 (second decision), available at <http://www.hindustantimes.com/News-Feed/nepal/Nepal-SC-approves-same-sex-marriage/Article1-352722.aspx> (last visited June 8, 2010).

296. Naz Foundation v. Government of NCT of Delhi, WP(C) No.7455/2001, ¶¶ 43–44 (Del. H.C. Jul 2, 2009).

297. Witt Amicus, *supra* note 110, at 806 n.2.

298. Nasir Iqbal, *Supreme Court Asks Govt to Care for Transvestites*, DAWN, Aug. 18, 2009, available at <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/12-supreme+court+asks+govt+to+care+for+transvestites--bi-11>; Bronwyn Curran, *Pakistan to Recognise Eunuchs*, THE NATIONAL, Jun. 30, 2009, available at <http://www.thenational.ae/article/20090701/FOREIGN/706309828/1103/ART> (last visited June 8, 2010). The opinion remains unpublished at the time of writing, so it is not possible to know whether it relies on the Yogyakarta Principles. Given its similarity to the "third sex" provisions ordered by the Nepali court, this opinion may represent a second-order influence of the Yogyakarta Principles on the courts.

299. The distinction between this and sexual orientation is that the former addresses how an individual conceives of and publicly represents his or her own gender. In many cultural

mention of the term in any soft law instrument or treaty body opinion.³⁰⁰ Interpretation of regional instruments was limited to Europe.³⁰¹ Since the launch of the Yogyakarta Principles, international lawmakers have reference gender identity with greater frequency. For example, every UN agency handbook containing a reference to gender identity cites the Principles.³⁰² The term gender identity was added to the Draft OAS Convention against Racism and all Forms of Discrimination and Intolerance at the behest of Brazil, after it adopted the Principles as part of its Brazil Without Homophobia campaign.³⁰³ The Principles may have been an impetus for the recent OAS Declaration on Human Rights, Sexual Orientation, and Gender Identity, as well as a statement read at the UN General Assembly in December by the Argentine ambassador on behalf of sixty-six nations, both of which contain references to gender identity.³⁰⁴ Since the launch of the Yogyakarta Principles, gender identity has also appeared for the first time in a national constitution,³⁰⁵ a supreme court decision,³⁰⁶ and national human rights policies.³⁰⁷ The addition of gender identity into the international human rights lexicon may prove, with time, to have been the Yogyakarta Principles' greatest accomplishment.

contexts, this is more important than sexual orientation, which is defined by the gender of the person for whom one feels sexual attraction. *See generally*, Thomas Hammarberg, *Human Rights and Gender Identity*, CommDH/IssuePaper (2009), available at <https://wcd.coe.int/ViewDoc.jsp?id=1476365>; *Yogyakarta Principles*, *supra* note 1, at 8.

300. ICJUR, *supra* note 130.

301. *See, e.g.*, Van Kuck v. Germany, 7 Eur. Ct. H.R. 1 (2003); Goodwin v. United Kingdom, App. No. 28957/95, Eur. Ct. H.R. (2002); Case of I. v. United Kingdom, App. No. 25680/94, Eur. Ct. H.R. (2002).

302. *See, e.g.*, UNHCR, *supra* note 279; UNODC, *supra* note 280.

303. OAS, Committee on Juridical and Political Affairs, *Working Group to Prepare a Draft Inter-American Convention against Racism And All Forms Of Discrimination And Intolerance*, CAJP/GT/RDI-57/07 corr. 1 (Dec. 14, 2007).

304. *See* OAS, Declaration on Human Rights, Sexual Orientation, and Gender Identity (draft version), June 2, 2008, AG/doc.4867/08 (citing the Principles); Piero A. Tozzi, *French UN "Sexual Orientation" Push Linked to Radical Yogyakarta Principles*, C-FAM FRIDAY FAX (Jan. 2, 2009) (noting that a draft version of the statement contained a reference to the Principles).

305. BOLIVIA CONST. art. 14, § 2.

306. Pant v. Nepal, Writ No. 917 of the Year 2064 BS (2007 AD) (Nepal).

307. In Brazil, for example, gender identity (under the name "sexual identity") was literally only a footnote to the original *Brazil without Homophobia* campaign. MINISTERIO DE SAUDE, BRASIL SEM HOMOFÓBIA: PROGRAMA DE COMBATE À VIOLÊNCIA E À DISCRIMINAÇÃO CONTRA GLTB E DE PROMOÇÃO DA CIDADANIA HOMOSSEXUAL 29 (2004). After the Principles' launch, the policy made gender identity a central concern, citing the Yogyakarta Principles. Secretaria Especial dos Direitos Humanos, *supra* note 15. *Accord*, Verhagen Remarks, *supra* note 14 (describing the Netherland's national human rights policy); Gaceta Bolivia, *supra* note 15 (Bolivia's national human rights policy).

B. Shortcomings of the Yogyakarta Principles

The fate of the references to the Yogyakarta Principles in the OAS Declaration and Argentina's recent statement at the United Nations also highlights a weakness of the Principles: states are reluctant to embrace the Principles completely because of the extent of the obligations they ask states to assume. Much of the Yogyakarta Principles' incorporation into soft law and into national policy has been as a point of reference or as an inspiration; there is much more hesitation to accept the Principles' assertion that they are in fact binding. This stems from the Principles' reach beyond what is commonly accepted as binding law, especially in relation to the "right to found a family" principle and to economic, social, and cultural rights.³⁰⁸ Thus, many of the states that have accepted the Yogyakarta Principles as a point of reference in the Universal Periodic Review or elsewhere have done so with reservations, such as that of Britain, which has welcomed the Principles, but simultaneously acknowledged that "some of the Principles exceed current UK positions on human rights."³⁰⁹ Other governments, such as Serbia and Paraguay, have publicly announced their discomfort with the Principles, making statements that they require further study before they can be accepted as authoritative.³¹⁰ Still other countries, principally members of the Organization of the Islamic Conference (OIC) and the African Group at the UN, have stressed that LGBT rights do not exist.³¹¹ A document that asked states to assume fewer obligations might have had more success in such states. Of course, this is just speculation. Pakistan, as the leader of the OIC, has repeatedly attempted to use the UN's human rights mechanisms generally as a forum in which to weaken the universality of

308. One of the Principles' own drafters said as much. *Launching Yogyakarta Principles in New York*, *supra* note 264 (remarks of Sonia Corrêa).

309. BRITISH FOREIGN AND COMMONWEALTH OFFICE, *supra* note 14, at 5. *See also* Gaceta Bolivia, *supra* note 15; Tony Grew, *Nations pledge to support gay rights at UN meeting*, PINK NEWS, Sep. 26, 2008 <http://www.pinknews.co.uk/news/articles/2005-9118.html> (noting Switzerland's reluctance to embrace the Principles in their entirety).

310. Mercosur, *supra* note 216; *Universal Periodic Review: Serbia*, *supra* note 13 (agreeing to "consider" but not "adopt" the Principles).

311. *E.g.*, Statement of the Syrian Delegate, *supra* note 11, at 2 hrs. 41 minutes (observing that they have "no legal foundation in any human rights instrument" and "not[ing] with concern the attempt to create new rights or new standards by misinterpreting the UDHR and international treaties to include such notions that were never articulated nor agreed by the general membership."); *See also* Grew, *supra* note 309 (describing resistance to the idea by Ukraine and other countries); *South African named as new UN human rights chief*, PINK NEWS, July 28, 2008 (describing resistance to the idea from countries with Islamic legal systems), www.pinknews.co.uk/news/articles/2005-8504.html (last visited June 8, 2010); *Gay groups gain observer status at UN*, PINK NEWS, June 9, 2008 (detailing resistance from Egypt), <http://www.pinknews.co.uk/news/articles/2005-7876.html>.

human rights.³¹² Such steadfast opposition to LGBT rights may have been part of Pakistan's general opposition to human rights, and may have occurred with or without the Yogyakarta Principles.³¹³

However, several states not members of either bloc have also rejected the Principles outright.³¹⁴ It is conceivable that, had the Yogyakarta drafters omitted just a few of the most controversial elements, such as the right to adoption by same-sex couples and the right to artificial insemination by lesbians, these more middle-of-the-road states might have been willing to accept them. Since even countries that have accepted the Principles have done so with reservations in these areas, it is probably the case that, had the drafters been willing to shorten the document just slightly, they would have sacrificed little in the way of concrete achievement, in exchange for a measurably larger number of adherents.

The Principles' other major shortcoming to date has been its inability to filter down to the grassroots. The Principles are relatively unknown among local human rights organizations, their volunteers, and members.³¹⁵ A recent poll among Brazilian human rights and gender rights activists found that over three quarters had never heard of the Yogyakarta Principles or were unfamiliar with them.³¹⁶ A Thai activist recently noted that the Principles were launched "two years ago but even today when I mention the principles to my family, friends and co-workers, they have no idea what I'm talking about."³¹⁷ An attempt by a

312. For example, during debate over the adoption of the first two reports of the Universal Periodic Review, the Pakistani delegation attempted to redefine them as "just a factual reflection of the proceedings of the working group"—in other words, as minutes—rather than as conclusions adopted by the Human Rights Council. During this statement, the delegate also referred obliquely to the discussion of LGBT rights and the Yogyakarta Principles in Ecuador's report as "counterproductive to the spirit of the UPR." Marghoob Saleem Butt, HRC, First Universal Periodic Review, Fifth Plenary Meeting (Apr. 9, 2008), <http://www.un.org/webcast/unhrc/archive.asp?go=080409> (follow "Pakistan, Mr. Marghoob Saleem Butt, [English] 1 minute") (last visited June 8, 2010).

313. The situation in Pakistan has also changed significantly in recent months with the restoration of civilian rule. Pakistan created a Ministry of Human Rights and a National Human Rights Commission in late 2008. *France lauds Pak efforts to protect human rights*, THE NEWS (Karachi), Dec. 16, 2008. This new openness to human rights allowed the Chief Justice of the Supreme Court (himself recently restored to power from house arrest) to issue the *hijra* order; perhaps Pakistan's position toward LGBT rights on the international stage will change as well.

314. Grew, *supra* note 309 (Ukraine); United Belize Advocacy Movement, *Report on Belize—5th Round of the Universal Periodic Review* (May 2009), available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/BZ/UNIBAM_SRI_BLZ_UPR_S5_2009_UnitedBelizeAdvocacyMovement_theSexualRightsInitiative_JOINT.pdf (last visited June 8, 2010).

315. See e.g., Observatorio de Sexualidade e Política, *supra* note 19.

316. *Id.*

317. Laohapichitpong, *supra* note 19.

Peruvian NGO to produce a Spanish-language “Activists’ Guide to the Yogyakarta Principles” failed.³¹⁸ There are several possible reasons for this. The Principles’ breadth may make them sufficiently unsuitable as a basis for legislation so that activist groups have been unwilling to use them in political advocacy efforts. Additionally, their language may make them difficult for non-lawyers to understand. Most importantly, the efforts of the Yogyakarta’s drafters and those backing them have been primarily focused on other lawyers.³¹⁹ A Honduran human rights activist recently said of the Principles that they had simply never been published in his country, and the copies he had seen elsewhere, being lengthy, required explanation for him to be able to understand.³²⁰ In the future, if the Yogyakarta Principles are to become more successful as a basis for domestic human rights advocacy, their drafters will have to reorient their current focus on international soft law and place more emphasis on building the capacity and knowledge of local leaders, developing strategies for the Principles’ use in their own legal and political contexts. This will also require a re-direction of resources, both human and financial. In the world of LGBT rights, these are both quite scarce,³²¹ which provides further explanation for why the Yogyakarta Principles are not widely known.

318. Alejandra Sarda, Llamado a activistas trans, lesbianas, gays, bisexuales e intersexuales para enviar aportes a la Guía para Activistas sobre los Principios de Yogyakarta (Jan. 22, 2008), http://www.promsex.org/index.php?option=com_content&view=article&id=846:llamado-a-activistas-trans-lesbianas-gays-bisexuales-e-intersexuales-para-enviar-aportes-a-la-guia-para-activistas-sobre-los-principios-de-yogyakarta&catid=35:notas-de-prensa&Itemid=72 (last visited June 8, 2010) (calling for the production of an “activists’ guide to the Yogyakarta Principles,” although no such guide has been created in the intervening two years).

319. For example, the activities of Sonia Córrea, Sanji Monageng, and Vitit Muntarbhorn have all been oriented at training, respectively, South American, African, and Asian national- and regional-level human rights authorities. *See supra* notes 144 (describing Vitit Muntarbhorn’s leadership in ASEAN’s working group on a regional human rights instrument); 160 (mentioning Sanji Monageng’s role in bringing up sexual orientation in the ACHPR); 266 (describing Sonia Córrea’s advocacy in Brazil).

320. Conversation with Donny Reyes, Director, Asociación LGBT Arcoiris de Honduras (Aug. 13, 2009).

321. For example, the combined annual expenditures of the two largest (by far) international LGBT rights organizations—ILGA-Europe and IGLHRC—are about three-and-a-half million dollars. IGLHRC, ANNUAL REPORT 2007–08 (2008), available at <http://www.iglhrc.org/cgi-bin/iowa/article/publications/annualreports/827.html> (last visited June 8, 2010); ILGA-EUROPE, ANNUAL REPORT FOR 2007–2008 (2008), available at http://www.ilga-europe.org/europe/about_us/organisational_documents/activity_reports/annual_report_2007_2008 (last visited June 8, 2010).

CONCLUSION

Over the past three-and-a-half years, the Yogyakarta Principles have had a sizable impact on the development of international human rights law. Their presence at the Human Rights Council's Universal Periodic Review appears to be self-sustaining, as they are now referenced as a matter of course by the delegates themselves, with no need for prompting from NGOs. They have set the standard for the terms "sexual orientation" and "gender identity" for regional human rights mechanisms, treaty bodies, UN agencies, and even some governments. They have become the impetus for unprecedented attempts to condemn sexual orientation and gender identity discrimination—the latter in particular—including in a historic statement read out by sixty-six countries at the United Nations,³²² and in the drafting of a new Inter-American human rights convention.³²³ They have guided courts, notably in South Asia, in the overturning of discriminatory legislation.³²⁴ This all comes despite, or perhaps more accurately, because of, the drafters' decision to push the limits of what could most accurately be labeled as binding law. While it remains to be seen whether the Principles will be able to bring about municipal legislative changes, particularly in the countries most in need of them, there can be no doubt as to the Principles' impact in the international and judicial arenas.

322. ILGA, *UN Gen. Assembly Statement Affirms Rights for all* (Dec. 12, 2008), <http://ilga.org/ilga/en/article/1211> (last visited June 8, 2010).

323. OAS, *supra* note 287.

324. *See Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD) (Nepal), available at http://www.bds.org.np/publications/pdf_supreme_eng.pdf (last visited June 8, 2010); *Naz Foundation v. Government of NCT of Delhi*, WP(C) No.7455/2001, ¶¶ 43–44 (Del. H.C. Jul 2, 2009).

ANNEX 1

Yogyakarta Principle	ICCPR Article
3: Right to Recognition before the Law	16
4: Right to Life	6(1)–6(2)
5: Right to Security of the Person	9(1)
6: Right to Privacy	17
7: Right to Freedom from Arbitrary Deprivation of Liberty	9(1)–9(3)
8: Right to a Fair Trial	9(3)
9: Right to Treatment with Humanity while in Detention	10(1)
10: Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment	7
11: Right to Protection from all Forms of Exploitation, Sale and Trafficking of Human Beings	8(1)–8(2)
18: Protection from Medical Abuse	7
19: Right to Freedom of Opinion and Expression	19(1)–19(2)
20: Right to Freedom of Peaceful Assembly and Association	21, 22(1)
21: Right to Freedom of Thought, Conscience and Religion	18(1)
22: Right to Freedom of Movement	12(1)–12(2)
24: Right to Found a Family	23(1)–(2)

ANNEX 2

Yogyakarta Principle	ICESCR Article
12: Right to Work	6(1), 7
13: Right to Social Security	9
14: Right to the Highest Attainable Standard of Living	11(1)
15: Right to Adequate Housing	11(1)
16: Right to Education	13(1)
17: Right to Highest Attainable Standard of Health	12(1)
26: Right to Participate in Cultural Life	15(1)(a)