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Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles

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# Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles

David Brown*

## Introduction ...................................................................................... 822

<table>
<thead>
<tr>
<th>I. The Origin of the Yogyakarta Principles.......................... 828</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Violence and Discrimination on Account of Sexual Orientation and Gender Identity .................. 828</td>
</tr>
<tr>
<td>B. A Description of the Yogyakarta Principles ......................... 833</td>
</tr>
<tr>
<td>1. The Principles and their Legal Sources .......................... 833</td>
</tr>
<tr>
<td>2. The Principles’ Introduction, Preamble, and Annexes .............. 837</td>
</tr>
<tr>
<td>3. The Yogyakarta Principles Lack Citations to Authority .......... 838</td>
</tr>
<tr>
<td>C. Description of the Drafters and the Drafting Process ................ 839</td>
</tr>
<tr>
<td>1. Drafters ................................................................. 839</td>
</tr>
<tr>
<td>2. NGOs ................................................................. 840</td>
</tr>
<tr>
<td>D. The Strategy for the Principles’ Global Diffusion .................. 841</td>
</tr>
<tr>
<td>1. Launches .................................................................. 841</td>
</tr>
<tr>
<td>2. The Use of Global Language ........................................ 844</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>II. Assessing the Yogyakarta Principles’ Accuracy as a Restatement of Existing, Binding International Law .......... 845</th>
</tr>
</thead>
<tbody>
<tr>
<td>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 ........................................ 847</td>
</tr>
<tr>
<td>1. Two Fundamental Principles: Universality and Non-Discrimination ........................................ 847</td>
</tr>
</tbody>
</table>

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* J.D., University of Michigan Law School, 2009; B.A., International Relations and Latin American Studies, 2002. I am greatly indebted to Professors James Hathaway and Steven Ratner for their shepherding this Note, and its author, through varied difficulties. I would also like to thank Claire Mahon and Philip Dayle for their input. In addition, I would like to thank the editorial board of the Michigan Journal of International Law, especially Louisa Marion, Stephen Rooke, and Hayley Neyholt, for their patience and direction in preparing this Note for publication.
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).\textsuperscript{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."\textsuperscript{2} This is a remarkable assertion given that no major human rights treaty explicitly mentions discrimination on the basis of


\textsuperscript{2} Id. at 7.
sexual orientation or gender identity, and, given the wide diversity of state practice, customary law might likewise appear silent.

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. 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. These same bodies hold opposite views today, due primarily to a broader understanding of international human rights law as prohibiting arbitrary


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.


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

Because these changes remain controversial and have not yet been put into practice in all countries or in all areas of law,\textsuperscript{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.\textsuperscript{12}

\begin{footnotes}

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.


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

\begin{footnotesize}
\begin{enumerate}
\item 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.
\item 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
\end{enumerate}
\end{footnotesize}
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. The Principles have also met limited success among non-lawyers. For example, they remain relatively unknown among human rights activists at the municipal level.

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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. States perpetrate a host of abuses on account of sexual orientation and gender identity. Invariably, in states where such abuse is policy, private violence and discrimination against persons perceived to be homosexual also flourishes.

The arrest and prosecution of people for homosexual activity or for failing to conform to legally-mandated gender roles is widespread. 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. In five of these countries, the offense may be punishable by death. 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.

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.


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 Ottosson, supra note 4, at 12-47.
stereotypes. 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. 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," 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." Not all of these laws are gender-specific, or even mention gender or sexuality at all. North African nations have made liberal use in recent years of crimes such as "contempt for religion," and "outrage[s] on . . . Islamic morals" 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.

29. See generally sources cited supra note 6.
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. 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. Lesbian, gay, bisexual, and transgender (LGBT) human rights defenders are particularly vulnerable to such violence.

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. 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.


gender stereotypes are sometimes denied their right to education, either due to bullying and harassment tolerated by school administrators, or because of expulsion. The right of access to courts is also sometimes denied on account of sexual orientation. Forcéd “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. 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.

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. Only forty-eight countries prohibit sexual orientation discrimination in employment, and only sixteen prohibit gender identity discrimination. In other countries, employers are free to fire, and


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. Denial of access to hospitals and to housing 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. 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. 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. 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. Two years ago in Tennessee,


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


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

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.” 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). The drafters chose to have the

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

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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.

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. 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. Principle 27, "the right to promote human rights," is drawn from the United Nations Declaration on Human Rights Defenders. The two closing principles are rights the drafters felt necessary to ensure that the other principles would be guaranteed in practice. Principle 28, which mandates the "right to effective remedies and redress," is based on the remedies clauses of a variety of different treaties. 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.

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


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.

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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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

\textsuperscript{77} O’Flaherty & Fisher, \textit{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”).

\textsuperscript{78} \textit{Yogyakarta Principles, supra} note 1, princ. 5.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.} at 7.
relations with, individuals of a different gender or the same gender or more than one gender." 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.

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.

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. 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. 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 "reflection of the existing state of international human rights law," or its claim to be binding on states.

81. Id. at 8.
82. Id.
83. Id. at 32-33.
85. Yogyakarta Principles, supra note 1, at 7, 34-5.
86. Id. princ. 7.
An Introduction to the Yogyakarta Principles

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. 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." To further fill the void, a second document, "Jurisprudential Annotations to the Yogyakarta Principles," was published in November 2007. 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.

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. However, references to the explanatory documents began to appear in non-scholarly contexts in the summer of 2009.

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

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.
The Yogyakarta Principles benefit from being drafted by highly regarded practitioners of international human rights law. The twenty-nine signatories, mostly lawyers and judges with strong human rights credentials, hail from twenty-five countries and six continents. 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. 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. 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. 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.

2. NGOs

Two NGOs participated in the drafting conference: the International Commission of Jurists (ICJUR) and the International Service for Human Rights (ISHR). Both organizations are well-known and long-established human rights legal organizations. 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

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94. See Yogyakarta Principles, supra note 1, at 34–35.
95. Id.
96. Id.
97. Id.
99. Sonia Corrêa, id. at 4:10.
100. Yogyakarta Principles, supra note 1, at 7.
Combating Terrorism, adopted in 2004, has already been incorporated into the human rights policies of various countries\(^\text{102}\) 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.\(^\text{103}\) These two groups recruited most of the participants and provided logistical research and support.\(^\text{104}\) In fact, six of the twenty-nine drafters are current or former ICJUR Commissioners.\(^\text{105}\)

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.\(^\text{106}\)

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.\(^\text{107}\) First,
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. 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.

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. 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. By announcing the translation of the Principles into the local

109. See id.
110. E.g., Brief of ICIJR 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, IGLHRClnt'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, IGLHRClnt'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).
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


113. ICJUR, supra note 12, at 2.

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


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


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.

identity has always existed in every culture,\textsuperscript{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.\textsuperscript{123} Without such a basis, it cannot be more than a declaration of ideals.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{127} This section seeks to further explore the law behind the Principles, as well as evaluate their claim to accuracy as a restatement.

\textsuperscript{122} See generally Francis Mark Mondimore, *A Natural History of Homosexuality* (1996) (discussing the existence of sexual diversity across cultures and throughout history).
\textsuperscript{123} Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute].
Since 1981, when the ECtHR decided in *Dudgeon v. U.K.* that the right to privacy in the European Convention applied to homosexuals, sexual orientation and, more recently, gender identity have been taken into account comprehensively throughout the international human rights system. 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. Supreme Courts on five continents have found these rights protected by international law. 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. 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. Some of the principles truly do restate binding law. Those principles simply restating rules of *jus cogens* are binding by definition. The two foundational principles

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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*. 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. 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. There is also some contrary law, especially related to the “right to found a family,” that undermines the Principles’ claim to authority. 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.” 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. 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.*
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

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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).


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. 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."

The right to equality and non-discrimination, Principle 2 of the Yogyakarta Principles, is also an accurate restatement of existing law. It is based on the emerging consensus that all forms of arbitrary distinction are prohibited by international human rights law. 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_." 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. The court subsequently reiterated these observations in another case, specifying that any "distinction that lacks objective and reasonable justification is discriminatory."

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. Like the IACtHR, the ECtHR considers "a difference in treatment between persons in analogous or relevantly similar positions [to be]
discriminatory if it has no objective and reasonable justification." It has specifically applied this view to sexual orientation in the context of a child custody case. 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."

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." 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..." Based on these precedents, the Commission is currently in the process of developing a "draft paper on Sexual Orientation in Africa."

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." 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

157. Id. ¶ 34–36.
the view that sexual orientation and gender identity discrimination are prohibited under the ICESCR.162


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


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 lawmaker, 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).
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. 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.”

As this assertion directly conflicts with the laws or practices of about eighty states, 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. However, the right to privacy is not part of customary international law.

166. E.g., ICCPR, supra note 58, art. 4(2).
167. Yogyakarta Principles, supra, note 1, princ. 7.
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.
An Introduction to the Yogyakarta Principles

and so is not universal; it is protected by international law only in states party to a treaty with such protections.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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

\begin{itemize}
\item \textsuperscript{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.
\item \textsuperscript{173} The WGAD is a UN sub-committee 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).
\end{itemize}
equality before the law] of the [ICCPR]." 74 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

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75. WGAD, supra note 172, ¶ 25, 28.
76. Id.
77. 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.")
79. UNHRC, supra note 172.
80. 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, and general human rights principles.

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. 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. Some have asserted that these rights are already protected in international law, while other observers have dismissed them as "radical notions." 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.

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

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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").
right to a satisfying sex life as a part of the right to health. In contrast, the World Health Organization (WHO) has distanced itself from the right, 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. 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. 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 Committee and the ECtHR 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. 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.

Had these rights been included by the Yogyakarta Principles, the document's credibility would have been seriously hindered. Their...
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. 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. This means that a state may choose to accept such interpretations as binding and in practice, the level of compliance with these treaty body decisions is significant, though by no means perfect. At the other extreme, interpretations made by other authorities, such as Special Procedures, are purely advisory. 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.
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. The treaty provisions protecting these rights are subject to limitations for reasons such as protecting public order, health, morals, and the rights of others. 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. 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. 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.

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. 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. 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{210} Notable cases from the time include \textit{Handyside v. United Kingdom}, which allowed censorship of a book whose favorable treatment of homosexuality could “deprave and corrupt minors,”\textsuperscript{211} and \textit{Hertzberg v. Finland}, which found censorship of television programs about homosexuality to be within a state’s margin of discretion to protect public morals.\textsuperscript{212}

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

\begin{footnotesize}
\begin{enumerate}
    \item Handyside v. United Kingdom, 1 E.H.R.R. 737 (1976).
    \item Lindon v. France, 46 Eur. Ct. H.R. 35 (2008) (partly dissenting opinion) (citing \textit{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”).
    \item See generally, WHO, supra note 189, at 8–9.
\end{enumerate}
\end{footnotesize}
at a summit meeting of their foreign ministers and human rights authorities.\textsuperscript{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 . . . .”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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 \textit{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.\textsuperscript{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.”\textsuperscript{221}

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


\textsuperscript{219} \textit{Yogyakarta Principles}, supra note 1, princ. 12.


\textsuperscript{221} \textit{Id.} ¶ 3, 50.
An Introduction to the Yogyakarta Principles

globally by the changing views of the ICCPR. Just four years after Grant, the ECHR in effect overruled it with its decision in Perkins v. the U.K. 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. The ECHR 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.

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. 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. In addition, a number of supreme courts, including Brazil, Colombia, Nepal, and South Africa, as well as a trial court in Argentina, have also held that such discrimination is prohibited variously by the ICCPR, the UDHR, and the American Convention.

223. Id. ¶¶ 22, 30.
224. Id. ¶¶ 38–41.
230. Satchwell v President of the Republic of South Africa 2002 (6) SA 1 (CC) at 11, ¶ 23 (S. Afr.).
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, 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, water, and the highest attainable standard of health. 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.

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.”

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. Given the lack of adjudication and enforcement mechanisms for economic, social, and cultural rights in international law, voluntary

234. See ECOSOC, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 15: The Right to Water, supra note 162.
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.
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. Support for the existence of these rights may be drawn from the principles of non-discrimination and equality before the law. 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. 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


241. See supra Part II.A.
242. See supra Part II.A.1.
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. 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-discrimination have some legal basis in the principle of non-discrimination, but the underlying right actually exceeds states’ obligations under existing treaty law.

The Yogyakarta Principles’ second error is that Principle 24, “The Right to Found a Family,” 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.” 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.”

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

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.
257. Id.
which speaks even more explicitly of “right of men and women of marriageable age to marry and to raise a family.”\textsuperscript{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.\textsuperscript{259}

Similarly, there was, and remains, almost no support for the view that national laws must “recognise the diversity of family forms.”\textsuperscript{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.”\textsuperscript{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].”\textsuperscript{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.\textsuperscript{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

\begin{thebibliography}{99}
\bibitem{258} American Convention, \textit{supra} note 70, art. 17 \S 2.
\bibitem{259} \textit{Lars Arnell och Lars G\aa{}rdfeldt v. Skatteverket} (Regeringsr	ext{"{a}}tten) (May 9., 2008) (Swed.); \textit{Sent. C-075/07, supra} note 228 (Colum.); Corte Constitucional, sent.1634-02, exp.02-001547-651-VD (Nov. 29, 2002) (Costa Rica).
\bibitem{260} \textit{Yogyakarta Principles, supra} note 1, princ. 24.
\bibitem{261} \textit{Dawood & Others v Minister of Home Affairs & Others} 2000 (8) BCLR 837 (CC) ¶¶ 29–31 (S. Afr.).
\bibitem{262} OHCHR, \textit{General Comment No. 19, supra} note 130, \S 2.
\end{thebibliography}
"families" related by blood, adoption, or legal marriage. The Arab Charter goes further still by saying that "the family is . . . based on marriage between a man and a woman."

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." 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. 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. 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


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.\footnote{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.

\section*{A. The Achievements of the Yogyakarta Principles}

\subsection*{1. Success as a Standard-Setting Document}

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

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

\footnote{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 lead 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 (Malcom 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).


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.” 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. 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.

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).
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.
An Introduction to the Yogyakarta Principles

consideration of states’ reports under Article 40 of the ICCPR.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{285} The foreign ministers of South America are considering the Yogyakarta Principles for adoption in a declaration.\textsuperscript{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.\textsuperscript{287} If

\begin{notes}
\item[283] See, supra note 13 (listing states’ references to the Yogyakarta Principles in the Human Rights Council).
\item[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.
\end{notes}
approved, this would become the first mention of either term in a major human rights treaty. The African Commission on Human and Peoples’ Rights is also studying the possibly 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.

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.” The Foreign Minister has explained that this will include prioritizing its foreign aid in countries that respect the rights embodied in the Yogyakarta Principles. 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. 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.

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

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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).


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

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. 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. 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. 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. 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.

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. Before the Yogyakarta Principles’ launch, there was not a single

297. Witt Amicus, supra note 110, at 806 n.2.
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. 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. 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. 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. Since the launch of the Yogyakarta Principles, gender identity has also appeared for the first time in a national constitution, a supreme court decision, and national human rights policies. 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.


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).


305. BOLIVIA CONST. art. 14, § 2.


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 HOMOFOBIA: PROGRAMA DE COMBATE À VIOLENCIA E À DISCRIMINACAO CONTRA GLTB E DE PROMOCAO 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. 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.”

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. 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. 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).


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[In]g 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.\textsuperscript{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.\textsuperscript{313}

However, several states not members of either bloc have also rejected the Principles outright.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{317} An attempt by a

\textsuperscript{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. Marghood Saleem Butt, [English] 1 minute”) (last visited June 8, 2010).

\textsuperscript{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 \textit{hijra} order; perhaps Pakistan’s position toward LGBT rights on the international stage will change as well.


\textsuperscript{315} See e.g., Observatorio de Sexualidade e Política, supra note 19.

\textsuperscript{316} Id.

\textsuperscript{317} Laohapichitpong, supra note 19.
An Introduction to the Yogyakarta Principles

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. 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. 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, which provides further explanation for why the Yogyakarta Principles are not widely known.


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).


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 and in the drafting of new Inter-American human rights convention. They have guided courts, notably in South Asia, in the overturning of discriminatory legislation. 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.

323. OAS, supra note 287.
## ANNEX 1

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

## ANNEX 2

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