

# Yogyakarta Plus 10: A Demand for Recognition of SOGIESC

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† Much of this note is based on my personal recollections of relevant interactions that I have had over the years. I attended, and was involved in the organizing of, the first meeting of experts in Yogyakarta, Indonesia, as well as subsequent efforts to disseminate, evaluate, and promote the use of the Yogyakarta Principles. I was also a member of the secretariat for the second meeting in Geneva, Switzerland, with a number of duties including creation of rules of procedure for the meeting, chairing a portion of the proceedings, and engaging in activities to disseminate the principles after their launch. I engaged in those activities in my role as Director, International Programs, The Williams Institute, University of California School of Law, which provided partial financial support for my participation.

At the time of the publication of this note, I served on the Board of Directors of the International Service for Human Rights, and am a paid consultant for the United Nations Office of the High Commissioner for Human Rights, both of which are referenced in herein. While drafting this note, I was also a paid consultant with ILGA (International LGBTI Association) and Human Rights Watch. Those commitments have ended.

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## I. Introduction

The Yogyakarta Principles on the Application of International Human Rights Law in Relations to Sexual Orientation and Gender Identity (hereinafter first Principles), issued in March 2007, have become a central reference document for governments and advocates concerned with the rights of LGBTI people.<sup>1</sup> Authored by twenty-nine experts in international human rights, the first Principles are meant to “affirm binding international legal standards with which all States must comply.”<sup>2</sup> Ten years after their launch, a group of experts met in Geneva, Switzerland, to craft supplemental principles, called Yogyakarta Plus 10, Additional Principles and States Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to compliment the Yogyakarta Principles (hereinafter supplementary Principles).<sup>3</sup> The supplementary principles launched in November 2017 and provide an update to the first Principles.<sup>4</sup>

Together, the two documents—referred to collectively as the Yogyakarta Principles—serve as more than just a comprehensive

<sup>1</sup> See ‘Yogyakarta Principles’ a Milestone for Lesbian, Gay, Bisexual, and Transgender Rights, HUM. RTS. WATCH (Mar. 26, 2007), <https://www.hrw.org/news/2007/03/26/yogyakarta-principles-milestone-lesbian-gay-bisexual-and-transgender-rights#> [<https://perma.cc/73BG-H5V3>].

<sup>2</sup> The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 7 (2007), [hereinafter first Principles] [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf) [<https://perma.cc/ANE8-D8WU>].

<sup>3</sup> The Yogyakarta Principles Plus 10: Additional Principles and State Recommendations on the Application of International Human rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, (2007) [hereinafter supplementary Principles], [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf) [<https://perma.cc/B62L-7UAG>].

<sup>4</sup> See *id.* at 4. The Principles themselves, as well as press materials, translations, and annotations, are available on a special website, [YogyakartaPrinciples.org](http://YogyakartaPrinciples.org). Readers are encouraged to access the Principles there in order to facilitate understanding of this Article.

guide of international human rights for lesbian, gay, bisexual, transgender, and intersex (LGBTI) people.<sup>5</sup> The Principles were created for the larger purpose of seeking a human rights response to stigma, violence, and discrimination against people based on their sexual orientation, gender identity and expression, and sex characteristics (SOGIESC).<sup>6</sup> The goal is far from accomplished. The Principles have served an important role and will continue to function as a means to achieve human rights for LGBTI people. The evolution of the Principles serves as an indicator of the progress toward this goal.<sup>7</sup>

Because the Principles themselves reflect the current state of international law, the signatories of the Principles were bound by international law in many aspects of the drafting process.<sup>8</sup> However, when it came to shaping the thematic scope of the Principles, choosing the rights to be addressed, and selecting what aspects of SOGIESC would receive attention, the signatories had more discretion. This Article assesses the use of that discretion in drafting the Principles. This Article also observes the evolution of

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<sup>5</sup> See Chris Sidoti & Jack Byrne, *Promoting and Protecting Human Rights in Relation to Sexual Orientation, Gender Identity, and Sex Characteristics: A Manual for National Human Rights Institutions*, ASIA PACIFIC F. OF NAT'L HUM. RTS. INSTITUTES 134 (2016); see also *id.* at 131 ("The Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (the Yogyakarta Principles) are the most authoritative statement of what international human rights law obliges States to do and not do in promoting and protecting the rights of persons of diverse sexual orientations and gender identities.").

<sup>6</sup> The Principles "are intended to enhance LGBT activists" and advocates' capacity to successfully challenge some of the more persistent human rights violations faced by the community." See Paula L. Eitelbrick, Esq. & Alia Trabucco Zerán, *The Impact of the Yogyakarta Principles on International Human Rights Law Development: A Study of November 2007 – June 2010*, ASIA PACIFIC F. OF NAT'L HUM. RTS. INSTITUTES 4 (2015).

<sup>7</sup> For the sake of consistency, the term LGBTI is used to refer to the global LGBTI community and issues associated with it. However, until the late 1990s many would have described the movement using the LGB alphabetism, and until very recently, many would have only used LGBT. In understanding the context of the Principles, it is important to note the evolution of the scope of the LGBTI movement over the years. Particular points in this evolution are identified in this Article where they are relevant to the discussion.

<sup>8</sup> See first Principles, *supra* note 2, at 6–7 ("The experts agree that the Yogyakarta Principles reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity."). Michael O'Flaherty, the Rapporteur for the Principles, noted that the efforts of the experts were "grounded in a strong and clear normative base in the form of international human rights law... This is the context within which the Yogyakarta Principles were developed." See Michael O'Flaherty, *The Yogyakarta Principles at Ten*, 33 NORDIC J. OF HUM. RTS. 280, 283 (2015).

the understanding of gender, sex characteristics, and sexual orientation. While the Principles reflect advancements in understanding gender, sex characteristics, and their interaction with human rights standards, sexual orientation remains obscured. The supplemental Principles endorse a limited conception of sexuality, thereby potentially excluding acts of sexual self-determination from human rights protections.

This Article proceeds in six parts. Part II briefly describes the Principles and Part III explores their history and implementation. Part IV describes the first Principles while Part V discusses the supplemental Principles. Part VI compares and contrasts the two, and describes how they represent different types of political demands on behalf of the LGBTI movement.

## II. Overview of the Principles

The first Principles were launched at a public event held in Geneva on March 26, 2007 during a meeting of the U.N. Human Rights Council (UNHRC).<sup>9</sup> The first Principles consist of a set of United Nations-style preambular statements that set out the context and purpose of the Principles.<sup>10</sup> Additionally, they identify sexual orientation and gender identity (hereinafter SOGI) as characteristics that often serve as the basis for human rights violations.<sup>11</sup> This is followed by twenty-nine principles, each one a short, concise statement of international human rights law as it applies to sexual

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<sup>9</sup> *Report on the launch of the Yogyakarta Principles*, ARO INT'L, <http://arc-international.net/yogyakarta-principles/report-yp-launch/> [https://perma.cc/AH8H-WPJR]. The UNHRC is an intergovernmental body made up of 47 U.N. Member States elected to the UNHRC by the General Assembly. It is considered a political body, and its meetings are attended by Ambassador level representatives of its members. The UNHRC was created in 2006. Its predecessor was the U.N. Commission on Human Rights. *About HRC*, UNITED NATIONS HUM. RTS. COUNCIL, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> [https://perma.cc/WG2Y-2QA8].

<sup>10</sup> *Compare* first Principles, *supra* note 2, at 8 (“Recalling that all human beings are born free and equal in dignity and rights”), *with* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR] (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.”).

<sup>11</sup> *See* first Principles, *supra* note 2, at 8 (“Aware that historically people have experienced these human rights violations because they are or are perceived to be lesbian, gay or bisexual.”).

orientation and gender identity.<sup>12</sup> Each principle is followed by a number of State Recommendations which provide more detail on how the principle should be implemented.<sup>13</sup> The first Principles are grouped according to the type of right being addressed:

□ Principles 1 – 3: The universality of human rights, and their applicability to all, without discrimination.

□ Principles 4 – 11: Fundamental rights and freedoms, the right to life, freedom from violence, privacy, access to justice and a fair trial, freedom from arbitrary detention.

□ Principles 12 – 18: The duty not to discriminate with regard to economic, social, and cultural rights: employment, social security, housing, health, and education.

□ Principles 19 – 21: Freedom of expression, association, assembly, and religion.

□ Principles 22 – 23: Migration and asylum.

□ Principles 24 – 26: The right to participation in family, public and cultural life without discrimination.

□ Principles 27 – 29: Promotion of human rights, remedy and accountability.<sup>14</sup>

Because these Principles represent the state of international law at the time of their drafting, it was anticipated that they would need to be updated every few years.<sup>15</sup> That update came in September of 2017, the ten-year anniversary of the first Principles.<sup>16</sup> At that time a group of experts met in Geneva to create supplemental principles, also called the Yogyakarta Principles Plus 10.<sup>17</sup> The supplemental Principles begin with preambular statements similar to those in the first Principles.<sup>18</sup> Among them are statements that identify gender

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<sup>12</sup> *Id.* at 10–33.

<sup>13</sup> For example, after Principle 1: The Right to the Universal Enjoyment of Human Rights is “States shall: ... B. Amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights.” *Id.* at 10.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> See generally supplemental Principles, *supra* note 3, at 4 (expanding of Yogyakarta Principles due to “significant developments in the field of international human rights law and in understanding of violations affecting persons of ‘diverse sexual orientations and gender identities’, as well as recognition of the often distinct violations affecting persons on grounds of ‘gender expression’ and ‘sex characteristics.’”).

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.*

<sup>18</sup> Compare *id.* at 7 (“Recognizing that the needs, characteristics and human rights situations of persons and populations of diverse sexual orientations ... are distinct from

expression and sex characteristics as additional bases for human rights violations.<sup>19</sup> Thus, the supplemental Principles refer to human rights in relation to sexual orientation, gender identity and expression, and sex characteristics (hereinafter SOGIESC).<sup>20</sup> Nine new principles then follow, each with a list of State Recommendations.<sup>21</sup> The supplemental Principles are numbered so as to take up from where the first Principles left off:

- Principle 30: The Right to State Protection from Violence and Discrimination.
- Principle 31: The Right to Legal Recognition.
- Principle 32: The Right to Bodily Integrity.
- Principle 33: The Right to Freedom from Criminalization.
- Principle 34: The Right to Protection from Poverty.
- Principle 36: The Right to Sanitation.
- Principle 36: Human Rights Relating to Information and Communication Technologies.
- Principle 37: The Right to Truth.
- Principle 38: The Right to Cultural Diversity.<sup>22</sup>

The supplemental Principles also contain additional State Recommendations pertaining to implementation of the first principles.<sup>23</sup> Thus, there are additional State Recommendations for principles 2, 6, 9, 10, 16, 17, 19, 20, 23, 24, 25, and 27.<sup>24</sup>

### III. Opportunity Structure: Creating the Principles

Though the Yogyakarta Principles are now a well-recognized statement of international human rights in respect to SOGIESC, their level of influence was not anticipated at the time of their

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each other”), *with* first Principles, *supra* note 2, at 9 (“Recognizing that there is significant value in articulating in a systematic manner international human rights law as applicable to the lives and experiences of persons with diverse sexual orientations and gender identities.”).

<sup>19</sup> See supplemental Principles, *supra* note 3, at 7.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 8–25.

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., *id.* at 17–25 (“Sporting organizations integrate the Yogyakarta Principles (2006) and these Additional Principles (2017), as well as all relevant human rights norms and standards, in their policies and practices.”).

<sup>24</sup> *Id.*

creation.<sup>25</sup> Rather, the Yogyakarta Principles were the result of an opportunity structure,<sup>26</sup> or a series of circumstances and trends present in the mid-2000s, each of which helped propel the first Principles from a document aimed at the elite circle of United Nations human rights mechanisms located in Geneva, to a document that has shaped how LGBTI issues are viewed globally and in many countries.<sup>27</sup>

This section identifies four major components of the opportunity structure that enabled the creation of the first Principles as well as shaped their content. First, the tactics of allies, particularly the women's movement, helped motivate and inspire, at least in part, their creation. Second, the first Principles came at a time when U.N. Member States were beginning to question the traditional belief that human rights were based on heteronormative assumptions. The accelerated erosion of this consensus provided opportunities to challenge these assumptions. Third, the first Principles were based on a strategic consensus within the leadership of the global LGBTI movement to mainstream LGBTI issues into the current scheme of international human rights norms. Fourth, the first Principles were facilitated by international LGBTI and human rights organizations with staff and resources dedicated to the project. Each of these structural components was necessary to the success of the first Principles.

To understand these four factors, it is important to understand the context of LGBTI issues in the international human rights arena—an arena that includes several important actors. The U.N. Human Rights Council is made up of forty-seven U.N. Member States elected by the U.N. General Assembly.<sup>28</sup> As such, it is

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<sup>25</sup> See generally Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 232–47 (2008) (assessing the impact of the Principles since their launch).

<sup>26</sup> An opportunity structure consists of institutional access, the presence of allies, and the existence of alliances and conflicts that help make up the context in which NGO's work to achieve social change. This structure defines windows of opportunity and shapes the trajectory of advocacy, often determining the success or failure of advocacy efforts. See Jutta Joachim, *Framing Issues and Seizing Opportunities: The U.N., NGOs, and Women's Rights*, 47 INT'L STUD. Q. 247, 247–52 (2003).

<sup>27</sup> See O'Flaherty & Fisher, *supra* note 25, at 227–31.

<sup>28</sup> About HRC, UNITED NATIONS HUM. RTS. COUNCIL, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> [<https://perma.cc/WG2Y-2QA8>].

considered a political body, subject to the foreign policy priorities of its members.<sup>29</sup> Additionally, treaty bodies are committees of independent experts that interpret and monitor implementation of the nine core international human rights treaties.<sup>30</sup> Treaty bodies and independent experts are considered expert bodies, because individuals are appointed to these positions due to their expertise and are not expected to adhere to the foreign policy positions of their governments.<sup>31</sup> All of this work is supported and coordinated by the U.N. Office of the High Commissioner for Human Rights, the principle U.N. office for promoting human rights.<sup>32</sup>

Among the political bodies, LGBTI issues were considered by many a third-rail issue during the late 1990s due to a controversy surrounding the consultative status of the International Lesbian and Gay Association (ILGA), a global LGBTI umbrella organization with then-250 (now 1,300) members.<sup>33</sup> Jesse Helms, a powerful U.S. Senator who was virulently anti-gay as well as anti-U.N.,<sup>34</sup> led a campaign for the United States to withdraw from the United Nations unless the United Nations revoked ILGA's status.<sup>35</sup> He did so based on the fact that one of its members, the North American Man/Boy Love Association (NAMBLA), advocated pedophilia.<sup>36</sup>

<sup>29</sup> See Yvonne Terlingen, *The Human Rights Council: A New Era in U.N. Human Rights?*, 21 ETHICS & INT'L AFF. 167, 170–72 (2006); see also Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. OF INT'L L. 783, 791 (2006); Patrizia Scannella & Peter Splinter, *The United Nations Human Rights Council: A Promise to Be Fulfilled*, 7 HUM. RTS. L. REV. 41, 49–50 (2007).

<sup>30</sup> See Scannella & Splinter, *supra* note 29, at 789–90.

<sup>31</sup> Heather Collister, Thomas Helm, Pooja Patel & Olivia Starrenburg, *A Simple Guide to U.N. Treaty Bodies*, INT'L SERV. FOR HUM. RTS. 6 (2015).

<sup>32</sup> *About Us*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx> [https://perma.cc/9RRX-7LP8].

<sup>33</sup> *About Us*, INT'L LESBIAN AND GAY ASS'N, <https://ilga.org/about-us> [https://perma.cc/5FRW-DQTS].

<sup>34</sup> See Barbara Crosette, *Helms, in Visit to U.N., Offers Harsh Message*, N.Y. TIMES (Jan. 21, 2000), <https://www.nytimes.com/2000/01/21/world/helms-in-visit-to-un-offers-harsh-message.html> [https://perma.cc/62UP-VXXB]; see also Garance Franke-Ruta, *How America Got Past the Anti-Gay Politics of the '90s*, ATLANTIC (Apr. 8, 2018), <https://www.theatlantic.com/politics/archive/2013/04/how-america-got-past-the-anti-gay-politics-of-the-90s/266976/> [https://perma.cc/U73F-PPPU].

<sup>35</sup> *U.N. Suspends Group in Dispute Over Pedophilia*, N.Y. TIMES (Sept. 18, 1994), <https://www.nytimes.com/1994/09/18/world/un-suspends-group-in-dispute-over-pedophilia.html> [https://perma.cc/E2B7-F9VF].

<sup>36</sup> *Id.*



Though ILGA moved to eject NAMBLA and other pedophile groups from its membership,<sup>37</sup> Senator Helms succeeded in getting ILGA ejected from the U.N.<sup>38</sup> This incident cast a pall over ILGA and LGBTI advocacy at the United Nations for years.<sup>39</sup>

Among the expert bodies at the United Nations, LGBTI issues were gaining some attention.<sup>40</sup> Most famously, the U.N. Human Rights Committee, the body with the official duty of interpreting the International Convention on Civil and Political Rights (ICCPR), issued a 1994 decision finding that Tasmania's sodomy law violated the ICCPR's protections of privacy and equality.<sup>41</sup> That decision included an individual opinion finding that the unequal treatment of people engaging in same-sex behavior also constituted discrimination based on sex, which was listed as a protected class in the ICCPR.<sup>42</sup> Other treaty bodies and independent experts were, somewhat quietly, issuing a small number of statements and treaty interpretations that expanded the scope of human rights norms to include LGBTI people.<sup>43</sup> Mary Robinson, the former president of Ireland, had been appointed U.N. High Commissioner for Human Rights in 1997.<sup>44</sup> Early in her legal career, Robinson had represented litigants challenging the constitutionality of Ireland's sodomy law, resulting in a successful judgement by the European Court for Human Rights.<sup>45</sup> As High Commissioner, she provided space for the discussion of LGBTI Rights within the bureaucracy.<sup>46</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Elizabeth Baisley, *Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity*, HUM RTS. Q. 134, 143–46 (2016).

<sup>40</sup> See O'Flaherty & Fisher, *supra* note 25, at 227–31.

<sup>41</sup> See *Toonen v. Australia*, Views, Human Rights Comm., 50th Sess., No. 488/1992, U.N. Doc. No. CCPR/C/WG/44/D/488/1992 (1994).

<sup>42</sup> *Id.* at ¶ 8.7 (authoring an individual opinion finding the provisions of the Tasmanian Criminal Code are discriminatory towards same-sex behavior violating article 26 of the International Convention on Civil and Political Rights).

<sup>43</sup> O'Flaherty & Fisher, *supra* note 25, at 214–31.

<sup>44</sup> *Mary Robinson*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/ABOUTUS/Pages/Robinson.aspx> [<https://perma.cc/KM75-6ZAC>].

<sup>45</sup> *Norris v. Ireland*, App. No. 10581/83, 83 Eur. Comm'n H.R. (1988).

<sup>46</sup> See Denis Staunton, *Obama Presents Medal of Freedom to "Crusader for Rights" Robinson*, IRISH TIMES (Aug. 13, 2009), <https://www.irishtimes.com/news/obama-presents-medal-of-freedom-to-crusader-for-rights-robinson-1.717975>

### A. *Models for Tactical Approach*

As LGBTI advocates considered different tactics to accomplish the goal of inclusion in the international human rights regime, some advocates were noticing—indeed many advocates were a part of—the success of the global women’s movement.<sup>47</sup> A series of international conferences on women’s rights and development had produced documents and declarations meant to guide governments and other stakeholders.<sup>48</sup> These declarations reframed women’s health and development issues in rights-based language.<sup>49</sup> The 1994 International Conference on Population and Development resulted in a Platform of Action signed by 179 countries.<sup>50</sup> This Platform defined reproductive health as including the ability “to have a satisfying and safe sex life and . . . the capability to reproduce and the freedom to decide if, when and how often to do so.”<sup>51</sup>

The following year, the Fourth World Conference on Women affirmed the right to an autonomous sexual life, free from the obligations of procreation.<sup>52</sup> Held in Beijing, these conferences became critical community organizing events.<sup>53</sup> The Beijing conference attracted 17,000 official participants and 30,000 activists.<sup>54</sup> Lesbian groups staged “Lesbians are Women Too” events; however, sections of the final platform sought by gay and lesbian activists opposing discrimination on the basis of sexual

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[<https://perma.cc/E73N-5ALY>].

<sup>47</sup> LGBT rights were introduced at the third U.N. Conference on Women by a member of the Dutch delegation, who sought recognition of the rights of lesbians. This marked the first time LGBT rights were raised at a U.N. Conference. See Joke Swiebel, *Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy*, 15 CONTEMP. POL. 25 (2009).

<sup>48</sup> Elisabeth Jay Friedman, *Gendering the Agenda: The Impact of the Transnational Women’s Rights Movement at the Un Conferences of the 1990s*, 26 WOMEN’S STUDIES INT’L F. 313–31 (2003).

<sup>49</sup> *Id.*

<sup>50</sup> *International Conference on Population and Development*, UNITED NATIONS POPULATION FUND, <https://www.unfpa.org/icpd> [<https://perma.cc/62RU-EWFC>].

<sup>51</sup> Rep. of the Int’l Conference on Population and Dev., U.N. Doc. A/Conf.171/13, at ¶ 7.2 (Oct. 18, 1994).

<sup>52</sup> Report of the Fourth World Conference on Women, A/CONF.177/20/Rev. 1, at ¶ 223 (Sept. 4, 1995).

<sup>53</sup> See Ruth P. Dawson, *When Women Gather: The NGO Forum of the Fourth World Conference on Women, Beijing 1995*, 10 INT’L J. OF POL., CULTURE AND SOC’Y 7–8 (1996).

<sup>54</sup> See Swiebel, *supra* note 47.

orientation were dropped at the last minute from the final draft.<sup>55</sup>

During this same period, the International Planned Parenthood Federation (IPPF) released a charter on Sexual and Reproductive Rights in 1996,<sup>56</sup> which was later updated in 2003.<sup>57</sup> The World Association of Sexology issued a definition of sexual rights,<sup>58</sup> and in 2002, the World Health Organization drafted a proposed statement on sexual rights (although it was not officially published until 2006).<sup>59</sup> Each of these highly visible declarations and statements advanced advocacy of sexual rights by identifying how human rights related to issues of sexuality, reproduction, health, and gender.

LGBTI advocates looked to conferences as a tactic to formulate and disseminate declarations to more visibly frame issues of SOGIESC, to organize the community, and to collectively create a growing consensus. One such attempt was the Declaration of Montreal on Lesbian, Gay, Bisexual, and Transgender Human Rights (Montreal Declaration).<sup>60</sup> A human rights conference held in Montreal at the same time as the World Outgames<sup>61</sup> brought together global LGBTI advocates as well as keynote speakers such as Louise Arbour.<sup>62</sup> In 2002, Arbour, a former justice of the

<sup>55</sup> *Fourth World Conference on Women*, SF GATE (Sept. 15, 1995), <https://www.sfgate.com/news/article/FOURTH-WORLD-CONFERENCE-ON-WOMEN-3130721.php> [<https://perma.cc/9GSD-9VSV>].

<sup>56</sup> *International Planned Parenthood Federation (IPPF) on Sexual and Reproductive Rights Guidelines*, INT'L PLANNED PARENTHOOD FED' N (1997), [https://www.ippf.org/sites/default/files/ippf\\_charter\\_on\\_sexual\\_and\\_reproductive\\_rights\\_guidelines.pdf](https://www.ippf.org/sites/default/files/ippf_charter_on_sexual_and_reproductive_rights_guidelines.pdf) [<https://perma.cc/ZZ85-D9JB>].

<sup>57</sup> *Id.*

<sup>58</sup> *Declaration of Sexual Rights*, WORLD ASS'N FOR SEXUAL HEALTH (1999), <http://www.worldsexology.org/wp-content/uploads/2013/08/declaration-of-sexual-rights.pdf>. [<https://perma.cc/6NXM-STEM>].

<sup>59</sup> *Defining sexual health: report of a technical consultation on sexual health*, WORLD HEALTH ORGANIZATION [WHO] (2006), [https://www.who.int/reproductivehealth/publications/sexual\\_health/defining\\_sexual\\_health.pdf](https://www.who.int/reproductivehealth/publications/sexual_health/defining_sexual_health.pdf) [<https://perma.cc/DY5Q-P6WN>].

<sup>60</sup> *Montreal Declaration*, INT'L CONFERENCE ON LGBT HUM. RTS. (2006), <http://www.declarationofmontreal.org/DeclarationofMontreal.pdf> [<https://perma.cc/6FRB-45CH>].

<sup>61</sup> *Introduction*, DECLARATION OF MONTREAL (last updated Jan 2, 2015), <http://www.declarationofmontreal.org> [<https://perma.cc/7ZCD-CVR7>].

<sup>62</sup> *Louise Arbour*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/ABOUTUS/Pages/LouiseArbour.aspx> [<https://perma.cc/EPC5-2YR4>].

Canadian Supreme Court, had been appointed to succeed Mary Robinson as U.N. High Commissioner for Human Rights.<sup>63</sup> The Conference issued the Montreal Declaration,<sup>64</sup> which, in the words of the main drafter of the text, was a “political document . . . [that] stressed the commonality of the demands of the women’s movement and those of the LGBT movement.”<sup>65</sup>

*B. Erosion of the Hetero-normative Political Consensus*

Until 2003, LGBTI issues had not been gaining much traction at the U.N. political bodies such as the General Assembly or the U.N. Commission on Human Rights—which would become the U.N. Human Rights Council in 2006.<sup>66</sup> These efforts were diplomatically ignored by most U.N. Member States and never gained enough momentum to challenge the dominant consensus that international human rights standards were not meant to be applied to SOGIESC issues.<sup>67</sup>

In 2003, Brazil questioned this consensus when it introduced a resolution recognizing the human rights of all people regardless of sexual orientation and calling upon States and U.N. bodies to promote and protect these rights.<sup>68</sup> Nearly a year would pass between the time the resolution was introduced and the time it was expected to come up on the agenda of the Commission.<sup>69</sup> During that time, the LGBTI community mounted the largest mass mobilization of LGBTI advocates that had ever occurred at the U.N.<sup>70</sup> Advocates lobbied their foreign ministries and supportive

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<sup>63</sup> *Id.*

<sup>64</sup> See *Montreal Declaration*, *supra* note 60.

<sup>65</sup> See Swiebel, *supra* note 47.

<sup>66</sup> G.A. Res. 60/251 (Apr. 3, 2006).

<sup>67</sup> See Ignacio Saiz, *Bracketing Sexuality: Human Rights and Sexual Orientation - A Decade of Development and Denial at the United Nations*, 7 HEALTH AND HUM. RTS. 48, 57 (2004); see also Swiebel, *supra* note 47, at 26–27.

<sup>68</sup> See Econ. and Soc. Council, Protection and Promotion of Human Rights, E/CN.4/2003/L.92 (Apr. 17, 2003).

<sup>69</sup> Interview by the International Lesbian, Gay, Bisexual, Trans and Intersex Association with Rosanna Flamer-Caldera and Kursad Kahramanoglu, Co-Secretaries General of the International Lesbian and Gay Association (Oct. 1, 2009), available at <https://ilga.org/the-brazilian-resolution-and-beyond> [<https://perma.cc/WR5X-AFKQ>].

<sup>70</sup> DODO KARSAY, HOW FAR HAS SOGII ADVOCACY COME AT THE U.N. AND WHERE IS IT HEADING? ASSESSING SEXUAL ORIENTATION, GENDER IDENTITY, AND INTERSEX ACTIVISM AND KEY DEVELOPMENTS AT THE U.N. 8 (2014), available at <http://arc-international.net/wp-content/uploads/2013/09/How-far-has-SOGII-for-web.pdf>

States sought increased support from other States.<sup>71</sup> In a later survey of LGBTI leaders, some identify the “Brazil Resolution” as the first milestone in the transition to an era when discussions about LGBTI issues have become routine.<sup>72</sup> For LGBTI leaders, this was the time when many of them learned how to engage in advocacy in the byzantine system of the U.N.

The efforts to secure support for the Resolution were not successful, and it was withdrawn before it could be presented to the Commission on Human Rights.<sup>73</sup> However, the process did open, and leave unanswered, the question of whether human rights standards applied to SOGIESC. Advocates pressured Louise Arbour, the new U.N. High Commissioner on Human Rights, to continue to move forward on the issue. Her public response was to seek an answer to the question: “What are human rights for LGBTI people?”<sup>74</sup> She sought a comprehensive articulation of how each of the human rights treaties mapped the lives of LGBTI people and what terms should be used for groups of diverse genders and sexualities.<sup>75</sup>

### C. *Strategic consensus within the LGBT community*

The question of how international human rights applies to LGBTI people went far beyond a legal analysis of treaty provisions. At its core was an important strategic consideration of whether to mainstream LGBTI issues into the protections already in place under current human rights treaties, or to seek a new human rights treaty specifically applicable to LGBTI people.<sup>76</sup> The Convention on the Elimination of All forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, and other group-specific treaties served as examples of such efforts.<sup>77</sup>

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[<https://perma.cc/WCA8-NTKZ>].

<sup>71</sup> Econ. and Soc. Council, Protection and Promotion of Human Rights, *supra* note 68.

<sup>72</sup> *Id.* at 20.

<sup>73</sup> Eduard Jordaan, *The Challenge of Adopting Sexual Orientation Resolutions at the U.N. Human Rights Council*, 8 J. OF HUM. RTS. PRAC. 298–310 (July 8, 2016).

<sup>74</sup> See O’Flaherty & Fisher, *supra* note 25.

<sup>75</sup> *Id.*

<sup>76</sup> Luci Cviklova, *Advancement of Human Rights Standards for LGBT People Through the Perspective of International Human Rights Law*, 3 J. OF COMP. RES. IN ANTHROPOLOGY AND SOC. 45, 57 (2012).

<sup>77</sup> See U.N. OFFICE OF THE HIGH COMM’R FOR HUM. RTS., THE CORE INTERNATIONAL

At a meeting of global LGBTI advocates in December 2004, hosted by ARC International in Geneva, advocates sought to clarify the strategy at the U.N.<sup>78</sup> At that time a strong case could be made that international human rights bodies were not moving fast enough to recognize LGBTI rights under current treaty standards.<sup>79</sup> Seeking a new treaty meant that LGBTI advocates could define a set of rights tailored to the life experiences of LGBTI people. However, most agreed that if Brazil's modest resolution could not garner sufficient support, an entirely new mechanism had little chance.<sup>80</sup> Activists reached a general agreement to seek recognition of a "mainstreamed" set of rights based on the already-existing rights set out in the human rights system.<sup>81</sup>

That strategy, which has guided global LGBTI advocacy ever since, is vulnerable to opponent's claims that international human rights treaties were not meant to encompass issues of SOGIESC. Thus, many of the tactics of international LGBTI advocacy have been focused on framing SOGIESC issues as human rights issues, even if those issues have been framed locally as concerning religion, health, economics, family, and other frameworks.<sup>82</sup> Ultimately, in order to be successful, LGBTI advocates will have to establish a political consensus that human rights standards apply to SOGIESC.

#### *D. Dedicated Institutional Capacity*

The first Principles would not have happened without the dedicated resources of several institutions who lent their time, skills, funding, and respected reputations. However, the institutional capacity that was eventually secured differed significantly from the initial intentions of those involved. In late 2004, LGBTI groups engaged in discussions with the UNOHCHR about having the staff in that office produce, with the help of LGBTI NGOs, a research paper that would elaborate how human rights standards applied to

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HUMAN RIGHTS TREATIES (2014), available at [https://www.ohchr.org/Documents/Publications/CoreInternationalHumanRightsTreaties\\_en.pdf](https://www.ohchr.org/Documents/Publications/CoreInternationalHumanRightsTreaties_en.pdf). [<https://perma.cc/R33S-2KCR>].

<sup>78</sup> See PAULA L. ETTTELBRICK & ALIA TRABUCCO ZERÁN, *THE IMPACT OF THE YOGYAKARTA PRINCIPLES ON INTERNATIONAL HUMAN RIGHTS LAW DEVELOPMENT* 3–4 (2010).

<sup>79</sup> *Id.* at 3.

<sup>80</sup> See Jordaan, *supra* note 73.

<sup>81</sup> *Id.*

<sup>82</sup> See O'Flaherty & Fisher, *supra* note 25, at 234.

LGBTI people. However, though LGBTI advocates wanted the paper to have the imprimatur of the U.N., they were nervous that the outcome would be timid in its approach to issues of gender and sexuality. UNOHCHR staff worried about the political scrutiny such a project would draw from anti-gay U.N. Member States. The U.N. human rights bodies were in the process of a major organizational overhaul, and everyone was feeling vulnerable.

The next option was for NGOs to undertake a similar process. The concept was to assemble an expert panel which would write an analysis of each international human rights treaty and how it applied to LGBTI people. The document would carry the names and logos of all the participating organizations. ILGA offered to host meetings in Istanbul, which offered the advantage of a location that was not considered western and wealthy.

All the participants recognized the value of the participation of Amnesty International (Amnesty) and Human Rights Watch (HRW), given their wide reach and high credibility within the human rights movement.<sup>83</sup> However, though staff at Amnesty and HRW were very supportive, each organization had strict rules about maintaining control over any document that carried their name and logo. In addition, ILGA began asking for final editorial control of any document that came out of any event it hosted. Essentially, the process of drafting the document could not begin until organizational sponsors were in place, and the organizations would not commit to sponsorship until they saw and approved of the document. Multiple efforts to find a workable configuration of authorship and organizational affiliation were attempted without success.

Around mid-2005, as efforts to corral everyone seemed to be stagnating, a new vision of the project emerged from discussions in Geneva. They were driven largely by the strategic vision and diplomatic skill of the Geneva-based International Services for Human Rights (ISHR), led by Chris Sidoti,<sup>84</sup> a seasoned operator in

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<sup>83</sup> See generally ANDRÉS BALLESTEROS ET AL., *THE WORK OF AMNESTY INTERNATIONAL AND HUMAN RIGHTS WATCH: EVIDENCE FROM COLUMBIA* (2007) (discussing the importance of the two organizations in international human rights realm and then critiquing their reporting in Columbia).

<sup>84</sup> See *Mr. Chris Sidoti*, AUSTL. CATH. U., <https://www.acu.edu.au/about-acu/faculties-directorates-and-staff/faculty-of-law-and-business/thomas-more-law-school/school-staff/chris-sidoti> [<https://perma.cc/SB27-U33M>].

the United Nations system as well as a former Australian Human Rights Commissioner.<sup>85</sup> Following this vision, the Yogyakarta process became a joint project between the ISHR and the Geneva-based International Commission of Jurists, two non-LGBTI, non-partisan, so to speak, groups whose mission included supporting global human rights infrastructure.<sup>86</sup> ARC International would serve as the project's secretariat.<sup>87</sup> Michael O'Flaherty, having just ended his term as a member of the treaty body for the ICCPR, served as rapporteur.<sup>88</sup> This meant he had the task of crafting a text that reflected the conclusion of the experts.

The content would be left entirely to the committee of experts, each of whom would be asked to affirmatively approve of the text by becoming a signatory.<sup>89</sup> No organization would have editorial control. The final product would bear no logo or any indication of NGO affiliation, beyond the usual acknowledgements in the preface. The result was a process that truly placed the experts in control of the document.

#### IV. The First Yogyakarta Principles

In November 2006 the first meeting of the experts took place in Yogyakarta, Indonesia.<sup>90</sup> Care was taken to ensure that the group of experts included a person from each region of the world and from each of the major United Nations treaty bodies.<sup>91</sup> Also included were three high court judges, several people who had been appointed as independent human rights experts by the U.N., a former president, and several long-time LGBTI advocates.<sup>92</sup>

Several drafts had been prepared beforehand. Nonetheless,

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<sup>85</sup> *Id.*

<sup>86</sup> See first Principles, *supra* note 2, at 7; see also *History of the ICJ*, INT'L COMMISSION OF JURISTS, <https://www.icj.org/history/> [<https://perma.cc/L2MB-CLMU>]; *About Us*, INT'L SERV. FOR HUM. RTS., <http://www.ishr.ch/about-us> [<https://perma.cc/5VS9-KXL6>].

<sup>87</sup> See *generally Background*, ARC INT'L, <https://arc-international.net/about/background/> [<https://perma.cc/E5MD-M5CE>] (explaining the history of ARC International).

<sup>88</sup> First Principles, *supra* note 2, at 7.

<sup>89</sup> *Id.* at 43.

<sup>90</sup> See O'Flaherty & Fisher, *supra* note 25, at 234.

<sup>91</sup> *Id.* at 233.

<sup>92</sup> The entire list of the signatories with their titles is attached to the Principles. See first Principles, *supra* note 2, at *Annex*.



during the beginning of the wet season in Yogyakarta, the expert group gathered each day of the multi-day meeting in an un-airconditioned conference room at Gadjah Mada University. They were armed with books and e-libraries of international human rights law—this was before the days of easy Wi-Fi access—to review and revise, phrase-by-phrase, the entire document as it was projected onto a screen at the front of the room. As is the case in these kinds of meetings, the group alternated between meeting in plenary and breaking into smaller groups to address specific issues as they arose.

The first Principles, as well as translations, were publicly launched in Geneva on March 26, 2007, when the Human Rights Council was in session.<sup>93</sup> Very quickly afterwards, the Principles accomplished three things: (1) they offered an advocacy tool for advocates, (2) they offered a simple guide to human rights compliance for governments, and (3) they provided a new language for issues relevant to the LGBTI people.<sup>94</sup>

First, they provided a lens for advocates to articulate a basis for LGBTI issues.<sup>95</sup> A survey of LGBTI leaders reported that many “saw the development of the Yogyakarta Principles as one of the greatest SOGI accomplishments ... the Principles have given advocates an empowering tool to communicate and identify SOGI issues quickly and to back them up with existing principles and obligations in the international human rights law.”<sup>96</sup> In the years following their launch, a group of roughly half-a-dozen private and public foundations made over a hundred small grants to groups around the world who needed funds to help promote the first Principles.<sup>97</sup> An Activist’s Guide on how to use the first Principles in local advocacy efforts was produced, based on the work of some of these groups.<sup>98</sup> Groups translated the first Principles into local

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<sup>93</sup> See O’Flaherty & Fisher, *supra* note 25, at 237.

<sup>94</sup> See ETTTELBRICK & ZERÁN, *supra* note 78, at 4.

<sup>95</sup> See *id.*

<sup>96</sup> See KARSAY, *supra* note 70, at 8.

<sup>97</sup> In 2007 and 2008, I served as the Coordinating Chair of the International Human Rights Funders Group (now the Human Rights Funders Network), a global association of public and private foundations supporting human rights advocacy. In that role I was able to coordinate the creation of several temporary pools of funding that were distributed by a small number of foundations active in LGBTI advocacy.

<sup>98</sup> SHEILA QUINN, AN ACTIVIST’S GUIDE TO THE YOGYAKARTA PRINCIPLES (2010), [http://ypinaction.org/wp-content/uploads/2016/10/Activists\\_Guide\\_English\\_nov\\_14\\_2010.pdf](http://ypinaction.org/wp-content/uploads/2016/10/Activists_Guide_English_nov_14_2010.pdf)

languages, used them as the basis for training local human rights defenders, and presented them to local governments as a way to seek additional accountability.<sup>99</sup>

Second, they offered governments a useable resource, which fulfilled two important functions. While non-binding, they were a normative statement of obligations already faced by governments.<sup>100</sup> As such, they served as a guide for those governments who wished to comply with human rights standards regarding LGBTI populations.<sup>101</sup> In comparison, documents such as the Montreal Declaration included claims to legal standards that had not yet been upheld by authoritative international human rights bodies.<sup>102</sup> The non-aspirational nature of the first Principles facilitated their uptake by governments. Also, the first Principles offered governments an approach to SOGIESC issues that was based solely on legal expertise, unattached to any advocacy or political platform.<sup>103</sup> The first Principles do not carry any logo or association with a particular NGO or advocacy community.<sup>104</sup> Compare the first Principles to IPPF's Declaration on Sexual Rights, which clearly is connected to IPPF.<sup>105</sup> Even if a government agrees with obligations listed in the Declaration, it would be difficult to endorse the Declaration without also creating an association with IPPF. The first Principles pose no such issue. Their authority stems from the expertise and reputations of the individual signatories, many of whom were well-known to government officials around the world.<sup>106</sup>

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[<https://perma.cc/FSS3-BPYR>].

<sup>99</sup> *Id.*

<sup>100</sup> First Principles, *supra* note 2, at 7 (“The Yogyakarta Principles affirm binding international legal standards with which all States must comply.”).

<sup>101</sup> See, e.g., ETTLEBRICK & ZERÁN, *supra* note 78, at 11.

<sup>102</sup> *Montreal Declaration*, *supra* note 60, at 1 (“A first demand is to safeguard and protect the most basic rights of LGBT people, rights which are well-established and not legally controversial.”).

<sup>103</sup> See ETTLEBRICK & ZERÁN, *supra* note 78, at 10 (“The Principles they developed are not aspirational. They are a straightforward application of existing human rights law.”).

<sup>104</sup> See *generally* first Principles, *supra* note 2 (lacking a logo anywhere on the document).

<sup>105</sup> See *generally* *Sexual Rights: An IPPF Declaration*, INT’L PLANNED PARENTHOOD F., <https://www.ippfwhr.org/resource/sexual-rights-an-ippf-declaration/> [<https://perma.cc/86XG-BRK2>] (containing a statement about the organization before the Declaration).

<sup>106</sup> See David Brown, *Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles*, 31 MICH.

Finally, the first Principles gathered relevant norms from a number of treaties and organized them into one document.<sup>107</sup> Because their scope includes all major human rights instruments and the corresponding SOGI issues, they provide a unitary answer to a multifaceted question.

Within a few years of their issuance, many governments had adopted the first Principles in some way or another.<sup>108</sup> To cite a few examples, national legislatures in Argentina, Brazil, Canada, Uruguay, the Netherlands, Germany, and Mexico<sup>109</sup> introduced or passed bills citing the first Principles. Brazil's Ministry of Education, Bolivia's Justice Ministry, Ecuador's Ministry of Public Health, and several national human rights institutions in Asia have actively engaged in a process of examining whether the domestic law in their respective countries fulfills the standards set out by the Principles.<sup>110</sup> The Dutch Senate referred to the Yogyakarta Principles when reforming their gender identity laws.<sup>111</sup> The Australian Government issued Guidelines on the Recognition of Sex and Gender, which relied on the first Principles.<sup>112</sup> They have been repeatedly referred to as reflecting binding international legal standards by national courts, international intergovernmental organizations, governments, and academics.<sup>113</sup>

Ultimately, the first Principles have created a new language when referring to issues relevant to LGBTI people. First, by

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J. INT'L L. 821, 839–40 (2010).

<sup>107</sup> *Id.* at 847–51.

<sup>108</sup> ETTTELBRICK & ZERÁN, *supra* note 78.

<sup>109</sup> *Id.*

<sup>110</sup> Andrew Park, Int'l Program Dir. at the Williams Inst., Presentation at the Montenegro Ministry of Foreign Affairs and European Integration Roundtable (July 14 2014), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/IntegratingYYPMontenegro.pdf> [<https://perma.cc/KW5X-FHVK>].

<sup>111</sup> See *The Netherlands: Victory for Transgender Rights*, HUM. RTS. WATCH (Dec. 19, 2013), <https://www.hrw.org/news/2013/12/19/netherlands-victory-transgender-rights#> [<https://perma.cc/269L-C9DC>].

<sup>112</sup> The Law Council of Australia issued the publication on April 24, 2013, which relies heavily on the Yogyakarta Principles. See AUSTL. GOV'T, AUSTRALIAN GOVERNMENT GUIDELINES ON THE RECOGNITION OF SEX AND GENDER ¶¶ 11–12 (2013), <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf> [<https://perma.cc/H4E4-FMWZ>].

<sup>113</sup> See ETTTELBRICK & ZERÁN, *supra* note 78, at 11. I also had the privilege of attending that dialogue.

including issues of gender identity, the Principles confirmed that transgender people were part of the same movement as lesbians, gays, and bisexuals. At the time of the first Yogyakarta meeting, the international consensus to include the “T” in “LGBT” was only a few years old.<sup>114</sup> Indeed, the Brazil Resolution itself included sexual orientation but did not include gender identity.<sup>115</sup> Second, the first Principles popularized the shift in community nomenclature from a description of populations to a description of characteristics, i.e. from LGBTI to SOGI. At the time of the first Principles, advocates used the term LGBTI, or, more accurately for that time period, LGB or LGBT.<sup>116</sup> Clearly, the primary intent of the first Principles is to address human rights violations experienced by a particular population, specifically LGBTI people.<sup>117</sup> However, given that the first Principles expound universal human rights shared by all, attributing rights to a particular population would have been antithetical to the larger purpose of the first Principles. In other words, because there is no such thing as a right that is held only by LGBTI people, describing rights as relating to LGBTI would have been inappropriate.

The first Principles anchored themselves in the assumption that sexuality and gender is a universal characteristic of all people.<sup>118</sup> Though it manifests differently in different people and in different cultures, everyone has a sexual orientation and a gender identity, or at least they do according to the definition of those concepts in the first Principles.<sup>119</sup> Thus, as a human rights document, all references

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<sup>114</sup> See Brian Kritz, *Article: The Global Transgender Population and the International Criminal Court*, 17 YALE H.R. & DEV. L.J. 1, 1–6 (2014).

<sup>115</sup> Econ. and Soc. Council, Protection and Promotion of Human Rights, *supra* note 68.

<sup>116</sup> See Kritz, *supra* note 114.

<sup>117</sup> First Principles, *supra* note 2, at 7.

<sup>118</sup> *Id.*

<sup>119</sup> As an empirical statement, this is an easily contested claim. Do the categories of sexual orientation and gender identity, as defined in the Principles, reflect the lived experience of all people? In my view, the weight of empirical evidence points to the conclusion that these categories are artificially constructed and do not mirror the lived experience of large numbers of people, particularly when applied to individuals in certain cultural contexts. Commentators have made strong arguments from a sociological or anthropological perspective that the Principles fail to capture cultural truths of most people on earth. However, such is not the purpose of the Principles. The Principles are a legal document. We should be concerned that the Principles reflect the cultural truth of sexuality and gender insofar as wanting to ensure that the legal standards articulated in the principles

are to the characteristics of sexual orientation and gender identity, or SOGI.<sup>120</sup>

After the first Principles were launched, SOGI became the international moniker for issues concerning LGBTI people.<sup>121</sup> This language has been adopted by United Nations bodies and Member States.<sup>122</sup> A global survey of LGBTI leaders found that the first Principles have “played a crucial role in establishing a language on SOGI that is now used by a growing number of U.N. actors and States.”<sup>123</sup>

## V. The Supplemental Principles

Because the first Principles reflect the state of international human rights law at the time they were issued, there was an expectation that they would need to be supplemented with new standards. The meeting to revise them happened in Geneva in September of 2017.<sup>124</sup> To the extent that the meeting in Yogyakarta lacked technological frills, the meeting in Geneva had them. Drafts were displayed on multiple large monitors which encircled the meeting participants. Some forty or more signatories plus members of the secretariat were all logged on to the same document where everyone’s revisions could be individually tracked and managed. Nonetheless, the group took the same approach, reviewing each part of the document phrase-by-phrase throughout each day of the meeting.

The supplemental Principles fell into one of three categories. First, some supplemental principles were driven by changes in international law.<sup>125</sup> For these revisions, the signatories had little

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can be applied to individuals in a way that enhances their human rights. Thus, the primary issue is one of legal interpretation and practice, which can be informed by an anthropological or sociological analysis, but not the other way around. Many legal protection and regulatory schemes are based on the categorization of individuals according to criteria that are exogenous to the reality of those individuals. The legal standards articulated by the Principles can be used to protect the human rights of individuals, even those who would not otherwise categorize themselves into the same categories described in the Principles.

<sup>120</sup> See supplemental Principles, *supra* note 3, at 6–7.

<sup>121</sup> See KARSAY, *supra* note 70, at 8.

<sup>122</sup> See *id.*

<sup>123</sup> *Id.*

<sup>124</sup> See supplemental Principles, *supra* note 3, at 5.

<sup>125</sup> As with Additional Principle 36, where technology had evolved in such a way as

leeway in crafting the Principles. The goal was to craft principles and additional State Recommendations so as to accurately reflect changes in international law. Additional Principle 36, the Right to Enjoyment of Human Rights in Relation to Information and Communication Technologies, serves as an example.<sup>126</sup> When the first Principles were being drafted, Facebook was only available to students of a few universities,<sup>127</sup> and the iPhone did not yet exist.<sup>128</sup> Principle 36 recognizes international conventions that have come into existence, for the most part, after 2006.<sup>129</sup> Also included is a relatively long list of new State Recommendations that pertain to Principle 23, the Right to Seek Asylum, included in the first Principles.<sup>130</sup> Laws relating to asylum have advanced significantly, and these State Recommendations incorporate those advancements.<sup>131</sup>

Second, other supplemental Principles were driven by newly acknowledged patterns of stigma and discrimination. In these cases, human rights standards, including those that may have been established prior to the first Principles, were applied to human rights abuses that have become more visible since the issuance of the first

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to demand recognition in international law. *See id.* 13–14.

<sup>126</sup> *Id.*

<sup>127</sup> Sarah Phillips, *A Brief History of Facebook*, *GUARDIAN* (Jul. 25, 2007), <https://www.theguardian.com/technology/2007/jul/25/media.newmedia> [<https://perma.cc/VD8Q-XYGG>].

<sup>128</sup> David Pierce & Lauren Goode, *A Wired Guide to the iPhone*, *WIRED* (Dec. 7, 2018), <https://www.wired.com/story/guide-iphone/> [<https://perma.cc/T5XA-KHLP>].

<sup>129</sup> *See* G.A. Res. 68/167, *The Right to Privacy in the Digital Age* (Dec. 18, 2013); G.A. Res. 20/8, *The Promotion, Protection and Enjoyment of Human Rights on the Internet* (Jul. 5, 2012); Human Rights Comm., *Rep. on Concluding Observations on the Initial Report of South Africa*, U.N. Doc. CCPR/C/ZAF/CO/1, at ¶¶ 42–43 (2016); Human Rights Council, *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/HRC/29/32, at ¶ 56 (2015).

<sup>130</sup> Supplemental Principles, *supra* note 3, at 22.

<sup>131</sup> *See* Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 32, Gender-Related Dimensions of Refugee Status, Asylum, Nationality, and Statelessness of Women*, U.N. Doc. CEDAW/C/GC/32 (Nov. 5, 2014); U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 9*, U.N. Doc. HCR/GIP/12/01 (Oct. 23, 2012); U.N. High Comm'r for Refugees, *Discussion Paper on The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers and Refugees* (Sept. 23, 2010); U.N. High Comm'r for Refugees, *Guidance for Working with Lesbian, Gay, Bisexual, Transgender & Intersex Persons in Forced Displacement*, at 7–11 (2011); U.N. High Comm'r for Refugees, *Resettlement Assessment Tool: Lesbian, Gay, Bisexual, Transgender and Intersex Refugees*, at 7–11 (2013).

Principles.<sup>132</sup> For example, in the past decade, the issue of access to bathrooms has become a flashpoint in advocacy for the rights of transgender people.<sup>133</sup> Conservative lawmakers have begun seeking policies mandating individuals use the bathroom corresponding to their sex assigned at birth rather than their current gender.<sup>134</sup> A United Nations independent expert recently drew light to the issue by including it in a report to the U.N. General Assembly.<sup>135</sup> Though the underlying human rights standards had already been in place at the time of the first Principles, in the Right to an Adequate Standard of Living,<sup>136</sup> the signatories felt that the recent visibility of the issue warranted a new stand-alone principle. In cases like this, the signatories had greater discretion in choosing which human rights violations would be the subject of stand-alone principles, but they were still bound by their obligation to craft a principle that would accurately reflect the state of the law.

As another example, the Right to Truth had been established by human rights bodies prior to 2006.<sup>137</sup> It has been recognized primarily in situations of systemic violations, such as summary executions, enforced disappearances, abduction, and torture.<sup>138</sup> It is the right of victims and their families to know the complete truth as to the circumstances of the human right violations, who participated in them, and whether and how violators were punished.<sup>139</sup> Many

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<sup>132</sup> See *Understanding Transgender Access Laws*, N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/us/transgender-bathroom-law.html> [<https://perma.cc/K5PH-7VY5>].

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Human Rights Council, Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, U.N. Doc. A/HRC/33/49 (Jul. 27, 2016).

<sup>136</sup> First Principles, *supra* note 2, at 20.

<sup>137</sup> Econ. and Soc. Council, Rep. on the Promotion and Protection of Human Rights: Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights, U.N. Doc. E/CN.4/2006/91 (Feb. 6, 2006).

<sup>138</sup> *Id.*

<sup>139</sup> See Econ. and Soc. Council, Rep. of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia, U.N. Doc. E/CN.4/2006/9 (May 16, 2006); Econ. and Soc. Council, Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1, Principle 4 (Feb. 8, 2005); see also Econ. and Soc. Council, Rep. on Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Namibia, U.N. Doc. CEDAW/C/NAM/CO/4-5, at ¶ 37(b) (Jul. 28, 2015); World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance,

intersex people who were born with genitals that did not fit medical norms for male or female have discovered, later in life, that they were subjected to “irreversible sex assignment, involuntary sterilization, involuntary genital normalizing surgery, performed without their informed consent.”<sup>140</sup> These medical procedures were performed according to widespread medical practices premised on the notion not only that intersex infants should not be permitted to develop on their own but also that they should not be told about the medical procedures performed on them at a young age.<sup>141</sup> Some intersex individuals experience years of medical complications, not discovering the cause until a medical crisis drives a deeper inquiry into their medical background.<sup>142</sup> The Right to Truth requires the preservation of medical histories and mandates that they be available to those who have been subjected to such surgeries.<sup>143</sup>

Lastly, some of the revisions relate almost entirely to the evolving understandings of the LGBTI community and its global priorities. Unlike the first two categories, where the signatories were bound to adhere to the current status of international law,<sup>144</sup> changes related to understandings of the LGBTI community were based more heavily on the discretion of the signatories—in particular the drafting committee. In the Yogyakarta Plus 10 process, the committee replaced the role of the rapporteur who had been responsible for the text of the first Principles.<sup>145</sup> The drafting committee included long-term leaders of regional and global LGBTI organizations.<sup>146</sup> The changes in this category are reflected

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*Durban Declaration and Programme of Action*, at ¶ 98, (2001).

<sup>140</sup> Human Rights Council, Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/HRC/22/53, at 18 (Feb. 1, 2013).

<sup>141</sup> *Id.*

<sup>142</sup> *A Changing Paradigm: Provider Discomfort with Intersex Care Practices*, HUM. RTS. WATCH (Oct. 26, 2017), <https://www.hrw.org/report/2017/10/26/changing-paradigm/us-medical-provider-discomfort-intersex-care-practices> [<https://perma.cc/5X7R-X7TA>].

<sup>143</sup> First Principles, *supra* note 2, at 14.

<sup>144</sup> See O’Flaherty & Fisher, *supra* note 25, at 235–36 (“[T]he experts sought to capture the state of existing human rights law.”).

<sup>145</sup> See first Principles, *supra* note 2, at 5.

<sup>146</sup> The Committee Members were Mauro Cabral Grinspan, Morgan Carpenter, Julia Ehrt, Sheheerzade Kara, Arvind Narrain, Pooja Patel, Chris Sidoti, and Monica Tabengwa. *Id.* at 5.



in the preamble, which recognizes that human rights violations can take place because of an individual's gender expression or sex characteristics.<sup>147</sup> This was in addition to the characteristics of sexual orientation and gender identity, which had already been recognized in the first Principles.<sup>148</sup> Thus, SOGI (sexual orientation and gender identity) became expanded to SOGIESC (sexual orientation, gender identity and expression, and sex characteristics).<sup>149</sup>

## VI. Assessment of the Principles

The Principles serve as an indicator of the progress of advocacy efforts toward the goal of achieving full human rights protections for LGBTI people. This can be seen in the legal standards, which were included in the Principles and how those legal standards were invoked.<sup>150</sup> To the extent that the Principles reflect the status of international law, a critique of the Principles is actually a critique of international human rights law. However, the Principles are also a product of the signatories' choices of which rights to highlight, and of how the signatories chose to reflect the realities of sexuality and gender. The Principles, then, can be assessed as a manifestation of political and social perspectives on human rights.

The movement from the first Principles to the supplemental Principles indicates a shift from a demand for equal inclusion, in the first Principles, to a more ambitious demand for recognition, in the supplemental Principles.<sup>151</sup> Based primarily on the concept of

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<sup>147</sup> See supplemental Principles, *supra* note 3, at 6–7.

<sup>148</sup> See first Principles, *supra* note 2, at 8–10.

<sup>149</sup> *Call for Submissions | 10 Year Review of the Yogyakarta Principles*, INT'L SERV. FOR HUM. RTS. (June 1, 2017), <https://www.ishr.ch/news/call-submissions-10-year-review-yogyakarta-principles> [<https://perma.cc/EK4B-8WAL>].

<sup>150</sup> The Right to Life is a non-derogable right per Article 4(2) of the ICCPR. See International Covenant on Civil and Political Rights art. 10(1), adopted Dec. 19, 1966, U.N.T.S. 171. It is also Principle 4 of the first Principles, and one its accompanying state's recommendations is to "remit sentences of death and release all those currently awaiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent." See first Principles, *supra* note 2, at 12–13.

<sup>151</sup> Compare first Principles, *supra* note 2, at 9 ("Observing that international human rights law affirms that all persons, regardless of sexual orientation or gender identity"), with supplemental Principles, *supra* note 3, at 7 ("Recognising the needs, characteristics and human rights situations of persons and populations of diverse sexual orientations, gender identities, gender expressions and sex characteristics are distinct from each other.").

universalism, the first Principles frame SOGIESC issues in terms of inclusion in current legal norms.<sup>152</sup> However, the first Principles do not seek structural reform of those norms.

The supplemental Principles seek recognition of separate identities, communities, and culture.<sup>153</sup> They demand that recognition be accompanied by the ability to broadly reform governance structures and legal norms in order to fulfill the human rights of LGBTI people.<sup>154</sup> The first step in making the escalating demands, from inclusion to recognition, was to establish a consensus that LGBTI people fit within the international human rights regime.

*A. An Expert Consensus on the SOGIESC and Human Rights*

The Principles have successfully accomplished one of their underlying purposes, which was to achieve agreement from expert voices that current international human rights norms protect LGBTI people by virtue of the universal application of those rights.<sup>155</sup> The Office of the High Commissioner for Human Rights has echoed this perspective:<sup>156</sup>

Protecting LGBT people from violence and discrimination does not require the creation of a new set of LGBT-specific rights, nor does it require the establishment of new international human rights standards. The legal obligations of States to safeguard the human rights of LGBT people are well established

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<sup>152</sup> See, e.g., first Principles, *supra* note 2, at 10 (“Principle 1: All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of human rights.”).

<sup>153</sup> The Preamble to the Yogyakarta Plus “[r]ecogni[zes] that the needs, characteristics and human rights situations of persons and populations of diverse sexual orientations, gender identities, gender expressions and sex characteristics are distinct from each other.” Supplemental Principles, *supra* note 3, at 7.

<sup>154</sup> Principle 30 holds that “[e]veryone, regardless of their sexual orientation . . . has the right to State protection from violence, discrimination and other harm.” See Supplemental Principles, *supra* note 3, at 8.

<sup>155</sup> Kerstin Braun, *Do Ask, Do Tell: Where Is the Protection against Sexual Orientation Discrimination in International Human Rights Law?*, 29 AM. U. INT’L L. REV. 4, 871–903 (2014).

<sup>156</sup> Issues related to sexual orientation and gender identity were added to the strategic plan of the Office of the High Commissioner for Human Rights for the first time since the Principles’ launch. See ETTTELBRICK & ZERÁN, *supra* note 78, at 11.

in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights standards.<sup>157</sup>

While the High Commissioner for Human Rights does not have final authority to interpret the many international and regional human rights treaties, the High Commissioner is considered the U.N.'s top human rights expert whose views are based on a system-wide appraisal of international human rights norms.<sup>158</sup> The High Commissioner's position on this issue is similar to the normative statement that Brazil tried to advocate for in 2003. Based on this view, LGBTI people should be able to access, without exception, the protections of current human rights treaties. To those treaty enforcement bodies that have not yet supported claims brought by LGBTI people, this statement sends an influential message.

### *B. Shifting the Demand on States*

#### *1. The First Yogyakarta Principles: A Demand for Equal Inclusion*

All of the Principles set out duties which the States must fulfill in order to comply with human rights norms. However, from a political perspective, the demands made by the first Principles are different than those made by the supplemental Principles. The first Principles make the demand of equal inclusion in the international human rights scheme, which, at the time of their drafting, represented a significant advancement.<sup>159</sup> Simple claims of inclusion, like the Brazil Resolution, had not gained enough support to succeed.<sup>160</sup> Though the larger purpose of the first Principles was to explain how international human rights applied to SOGI, the more basic element of that question was whether LGBTI people had

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<sup>157</sup> See *Combatting Discrimination Based on Sexual Orientation and Gender Identity*, U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER, <https://www.ohchr.org/en/issues/discrimination/pages/lgbt.aspx> [<https://perma.cc/T6FD-4R67>].

<sup>158</sup> See G.A. Res. 48/141, ¶¶ 3–4 (Jan. 7, 1994).

<sup>159</sup> First Principles, *supra* note 2, at 6–7.

<sup>160</sup> See *supra* Part III-B.

rights at all.<sup>161</sup>

Accordingly, the language used in the first Principles was that of inclusion and equality.<sup>162</sup> In many areas of international human rights, jurisprudence had not evolved to include LGBTI people.<sup>163</sup> Advocacy for inclusion of LGBTI people was premised on the notion of universality of human rights.<sup>164</sup> Thus, the articulation of the rights themselves closely mirrored the blackletter legal standard articulated in the treaties, or by the treaty bodies, and were applied to SOGI by virtue of the universal nature of rights.<sup>165</sup>

Twenty of the first twenty-nine principles start with a phrase such as “[e]veryone has the right,” or “[e]veryone is entitled to,” followed by a statement of the right itself, followed by phrases such as “regardless of sexual orientation or gender identity,” or “without discrimination on the basis of sexual orientation and gender identity.”<sup>166</sup> Nine of those twenty principles say nothing more than this simple statement of equal application of the law.<sup>167</sup> The other eleven principles contain an additional sentence drawing attention to how the non-discrimination ideal also applied to SOGI.<sup>168</sup>

The first Principles do little to draw attention to any actual differences between the lived experience of different groups or variations of the kinds of stigma and oppression they faced. Rights-holders are referred to as “all human beings,” “human beings of all sexual orientations and gender identities,” or simply “everyone.”<sup>169</sup> In the text of the first Principles, any mention of sexual orientation is accompanied by a reference to gender identity.<sup>170</sup> Thus, any impression that one set of rights might be more salient to one group than another is minimized. Claims that governments, in their

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<sup>161</sup> First Principles, *supra* note 2, at 6–7.

<sup>162</sup> *Id.*

<sup>163</sup> See KARSAY, *supra* note 70, at 4.

<sup>164</sup> See generally Suzanne M. Marks, *Global Recognition of Human Rights for Lesbian, Gay, Bisexual and Transgender People*, 9 HEALTH & HUM. RTS. J. 33 (2006) (discussing human rights as fundamental for every human being and as such must be enjoyed fully by LGBTI people).

<sup>165</sup> See KARSAY, *supra* note 70, at 8.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> First Principles, *supra* note 2, at Principles 2, 6, 8, 18, 20, 21, 22, 24, 27, 28.

<sup>169</sup> See, e.g., *id.* at Principle 2.

<sup>170</sup> See, e.g., *id.* (“Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.”).

exercise of universal duties, would need to take special measures to eliminate abuses against LGBTI people are relegated to the subsidiary language of State Recommendations.<sup>171</sup> The Principles themselves are written so as to assume that LGBTI rights-holders are just like heterosexual cisgender people.<sup>172</sup>

The emphasis on sameness can also be found in the descriptions of sexual orientation and gender identity. As will be discussed in more detail below, the first Principles were drafted so as to create images of LGBTI people that would minimize deviations from prevailing heteronormative perspectives. The definition of sexual orientation in the first Principles includes two important elements: sexual behavior and sexual attraction.<sup>173</sup> The definition qualifies these elements using terms that cast sexual behavior and attraction in nonthreatening images of love and emotion.<sup>174</sup> Sexual orientation is defined as “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.”<sup>175</sup> However, the prevailing practice of defining sexual orientation does not require attraction to be profound, emotional, and affectional, nor is there a requirement that sexual behavior be intimate or relational.<sup>176</sup> The addition of such language helps portray a sexuality that adheres to norms of acceptability.

Transgender issues are framed in a similarly palatable approach. For some, gender is a concept that can only be understood through a consideration of an individual’s social context and can change as that context changes.<sup>177</sup> Critics of the definition of gender identity

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<sup>171</sup> For example, Principle 18, Protection from Medical Abuses, states that no one should be forced to undergo any forced medical facility. The accompanying State Recommendations include establishing child protection mechanisms so that no child is at risk of medical abuse. *Id.* at 23.

<sup>172</sup> There are no references to gender or heteronormative gender pronouns in the first Principles.

<sup>173</sup> First Principles, *supra* note 2, at 8.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 6.

<sup>176</sup> See generally Randall Sell, *Defining and Measuring Sexual Orientation: A Review*, 26 ARCHIVES OF SEXUAL BEH. 643 (1997) (reviewing the terms used to define “sexual orientation.”).

<sup>177</sup> Judith Butler, *Performative Acts and Gender Constitution*, 40 THEATRE J. 519, 519–20 (1988).

used in the first Principles have said that it portrays gender as a unitary, essential identity that can exist and be named prior to being expressed and constructed socially.<sup>178</sup> This concept follows, and thus supports, more heteronormative notions that gender is stable, subject to identification, and can therefore be placed in hierarchies.<sup>179</sup> However, some individuals may not identify their gender at all because they do not see themselves as participating in the social system of gender.<sup>180</sup> Mauro Cabral, a signatory to the first Principles and one of only two openly transgender signatories, along with Stephen Whittle,<sup>181</sup> had misgivings about the definition. He ultimately accepted it as a strategy to engage with other human rights expert attendees at the conference, some of whom had little connection with transgender issues.<sup>182</sup>

## 2. *Yogyakarta Plus 10: A Demand for Recognition*

Each set of principles emphasizes a different demand on the State. While the first Principles demanded equal inclusion, the supplemental Principles demand recognition.<sup>183</sup> The demands made by the first Principles rely heavily on the universality of rights.<sup>184</sup> The demand for equal inclusion stresses the sameness of all people by seeking acknowledgement that all people have a SOGIESC, and thus all people can be categorized by it.<sup>185</sup> The demand asserts that

<sup>178</sup> Matthew Waites, *Critique of 'Sexual Orientation' and 'Gender Identity' in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles*, 15 CONTEMP. POL. 137, 147 (2009).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> ROUTLEDGE HANDBOOK OF QUEER DEVELOPMENT STUDIES 144 (Corinne Mason ed., 2018).

<sup>182</sup> *Id.*

<sup>183</sup> Charles Taylor, one of the early writers on the politics of recognition, defined two types of demands that can be made by minority groups. He identifies a politics of dignity, which requires that we treat people in a difference-blind manner. He contrasts this with the politics of difference, which recognizes the development of individual identity. An important feature of the politics of difference is the demand that characteristics that are not shared by all are given equal status and credit. Charles Taylor, *The Politics of Recognition*, in CONTEMPORARY POLITICAL THEORY 269 (Colin Farrelly ed., 2004).

<sup>184</sup> First Principles, *supra* note 2, at 6 (“All human rights are universal, interdependent, and interrelated.”).

<sup>185</sup> *Id.* at 9 (“International human rights law affirms that all persons, regardless of their sexual orientation or gender identity, are entitled to the full enjoyment of all human rights.”).

each person should be equally valued because they have a SOGIESC. The consequential responsibility is that the State must ensure dignity and equal treatment under the law.

The demand for recognition seeks an understanding of not only the characteristics of SOGIESC but also the different kinds of SOGIESC. The State must make efforts to understand the lived reality of people of diverse SOGIESC and assign equal value to the different SOGIESCs. For example, a State would be granting equal inclusion to both a lesbian woman and a heterosexual woman if it recognized that each had a sexual orientation and that such a characteristic deserved equality and protection. However, equal inclusion does not require the State to value particular sexual orientations. A demand for recognition asks the State to both assign value to the category of sexual orientation and to assign value to heterosexuality and homosexuality separately, and other sexual orientations. Difference is a central component of the demand for recognition, as it asks the State to recognize differences and value each of these differences equally.

Each of these demands holds a critique of the other. The demand for equal inclusion seeks to avoid the risks that difference can trigger, such as conflict, low social adhesion and legal compliance, complicated legal structures, and a worry that no form of government will be able to truly recognize and meet the needs of individual differences. The demand for recognition recognizes the inadequacies of the equality principle. In many cases, equality permits the States to treat people poorly as long as it treats everyone as badly as everyone else.<sup>186</sup> The demand for recognition is also wary of the impulse of assimilation and interference with rights of

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<sup>186</sup> For example, in one of the seminal cases for LGBT equality in the United States, Jamie Nabozny sued his high school in Ashland, Wisconsin, claiming that federal law was violated because he was not provided equal access to education. Since eighth grade, he had been relentlessly harassed by fellow students. He was urinated on, mock raped in front of others, and beaten and kicked so hard in the stomach that he required surgery. He complained regularly to his guidance counselor and school administrators, who told him that he should expect such behavior. After attempting suicide twice, he ran away from home in order to avoid going back to school.

In a decision by the Seventh Circuit Court of Appeals, the Court made it clear that the question was neither the level of abuse inflicted on Nabozny nor its effect on his well-being. "The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the State's action ... Therefore, the question becomes whether Nabozny can show that he received different treatment because of his gender." *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

self-determination.<sup>187</sup>

Once the State has recognized differences and assigned the minority or outside group the same value as the majority or inside group, the State then must examine larger governance structures and public programs to ensure that they reflect equal roles of the different groups. When some larger government structures have preferred one group over another, the demand for recognition seeks reformation of those structures.<sup>188</sup> In the case of the Principles, the demand for recognition is reflected by the invocation of rights. They impose a duty on the State to reexamine and reform various structures that have been built based on hetero-normative assumptions.<sup>189</sup>

### 3. *Recognition of Community and Culture*

The supplemental Principles rely on international human rights norms to seek recognition of LGBTI identities and the communities and cultures built around those identities. References to LGBTI culture and community in the first Principles are found in first Principle 26, which states, “Everyone has the right to participate freely in cultural life regardless of sexual orientation or gender identity, and to express, through cultural participation, the diversity of sexual orientation and gender identity.”<sup>190</sup> However, history and culture are enormously important to self-determination of gender and sexuality. For instance, the centuries-old traditions of transgender populations in southern Asia have been recognized by the Supreme Court of India as having “a strong historical presence . . . in the Hindu mythology and other religious texts.”<sup>191</sup>

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<sup>187</sup> For example, Principle 31: The Right to Legal Recognition mandates that official identity documents only include personal information that is “relevant, reasonable and necessary.” See supplemental Principles, *supra* note 3, at 9.

<sup>188</sup> See, e.g., Swatahsiddha Sarkar, *Review of “The Demands for Recognition: State Anthropology and Ethnopolitics in Darjeeling” by Townsend Middleton*, 36 J. OF THE ASS’N FOR NEPAL AND HIMALAYAN STUD. 151 (2016).

<sup>189</sup> First Principles, *supra* note 2, at 6 (“Many States and societies impose gender and sexual orientation norms on individuals through custom, law, and violence and seek to control how they experience personal relationships and how they identify themselves.”).

<sup>190</sup> First Principles, *supra* note 2, at 29.

<sup>191</sup> National Legal Services Authority v. Union of India and others, Writ Petition (Civil) No. 400 of 2012, India: Supreme Court, 15 Apr. 2014 (“Named ‘hijra’ by Lord Rama, in the epic poem Ramayana, leaving for the forest upon being banished from the kingdom for fourteen years, turns to his followers and asks all the ‘men and women’ to return to the city. Among his followers, the hijras alone do not feel bound by this direction



The cultural traditions of multiple genders and same-sex cultures in Thailand were an important part of the geo-politics of Thailand during the colonial period and continue to be influential today.<sup>192</sup> From the memorialization of LGBTI people in the Holocaust,<sup>193</sup> to the commemoration of LGBTI Pride events,<sup>194</sup> LGBTI people have distinct cultural traditions and practices. Supplemental Principle 38 goes further than the Right to Participate, as in first Principle 26, and also recognizes the culture itself as an important resource.<sup>195</sup> The Principle articulates the Right to Practise, Protect, Preserve and Revive Cultural Diversity,<sup>196</sup> and identifies “cultures, traditions, languages, rituals and festivals, and . . . cultural sites of significance, associated with SOGIESC.”<sup>197</sup> The underlying norms that support this Principle were in place when the first Principles were drafted.<sup>198</sup> Thus, rather than mirroring changes in international law, this Principle reflects a choice by the signatories to expand the focus from the individual’s right to participate to the State’s obligation to help protect unique LGBTI cultural resources. This right not only departs from a “sameness” approach,<sup>199</sup> it also makes a demand on governance structures to understand and protect

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and decide to stay with him. Impressed with their devotion, Rama sanctions them the power to confer blessings on people on auspicious occasions such as childbirth and marriage, and also at inaugural functions which, it is believed, set the stage for the custom of badhai in which hijras sing, dance and confer blessings.”)

<sup>192</sup> Peter Jackson, *Performative genders, Perverse Desires: A Bio-History of Thailand’s Same Sex and Transgender Cultures*, 9 INTERSECTIONS: GENDER, HIST. AND CULTURE IN THE ASIAN CONTEXT 1, ¶ 9 (2003).

<sup>193</sup> Joseph Orangias, Jeannie Simms & Sloane French, *The Cultural Functions and Social Potential of Queer Monuments: A Preliminary Inventory and Analysis*, 65 J. OF HOMOSEXUALITY 705, 705–26 (2018).

<sup>194</sup> See *The History of LGBT Pride, from 1970 to Now*, HUM RTS. CAMPAIGN (June 27, 2014), <https://www.hrc.org/blog/the-history-of-lgbt-pride-from-1970-to-now> [<https://perma.cc/5GKF-6TCR>].

<sup>195</sup> See supplemental Principles, *supra* note 3, at 13–14.

<sup>196</sup> *Id.* at 16.

<sup>197</sup> *Id.*

<sup>198</sup> See U.N. Educ., Sci. and Cultural Org. [UNESCO], *Universal Declaration of Cultural Diversity* (Nov. 2, 2001), <https://www.ohchr.org/Documents/ProfessionalInterest/diversity.pdf> [<https://perma.cc/S2UC-666S>]; see also UNESCO, *The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Oct. 20, 2005), <https://en.unesco.org/creativity/sites/creativity/files/passeport-convention2005-web2.pdf> [<https://perma.cc/Q6U4-FXXS>].

<sup>199</sup> Supplemental Principles, *supra* note 3, at 16.

LGBTI culture.

#### 4. *Recognition of Stigma and its Consequences*

Supplemental Principle 30, the Right to State Protection, articulates the “right to State protection from violence, discrimination and other harm, whether by government officials or by any individual or group.”<sup>200</sup> Here, the demand is not that States be tolerant and inclusive. Instead, it is that States make efforts to understand stigma and protect LGBTI people by preventing, investigating, punishing, and providing remedies for human rights violations. This invokes the State’s duty of due diligence, by which the State is accountable for human rights abuses committed not only by State officials acting under the color of law but also abuses committed by non-State officials and private actors. When the State knows, or has reasonable ground to believe, that such abuses are taking place, the State is responsible. The duty of due diligence has been used in the context of violence against women where perpetrators are often non-State actors.<sup>201</sup> It has also been clarified by the Committee Against Torture to include requirements that the States take measures to understand and eliminate cultural stigma and other social causes of violence and discrimination.<sup>202</sup>

Similarly, supplemental Principle 31, the Right to Legal Recognition, recognizes the right of individuals to obtain identity documents that reflect their gender.<sup>203</sup> The right, by itself, ensures that all people can participate in their government’s system of gender recognition. However, these systems may continue to privilege binary gender assumptions—male and female as the only two options—and assumptions about the relevance of gender to various activities of life by allowing gender to be documented in one’s bank records, driver’s license, housing documents, and other

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<sup>200</sup> *Id.* at 8–9.

<sup>201</sup> See generally ZARIZANA ABDUL AZIZ & JANINE MOUSSA, DUE DILIGENCE FRAMEWORK: STATES ACCOUNTABILITY FRAMEWORK FOR ELIMINATING VIOLENCE AGAINST WOMEN (2016), available at <https://www.oursplatform.org/wp-content/uploads/Due-Diligence-Project-Europe-report.pdf> [<https://perma.cc/6CTG-PHH6>] (reporting on State accountability for eliminating violence against women).

<sup>202</sup> U.N. Office of the High Comm’n on Human Rights [OHCHR], Comm. Against Torture, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, General Comment No. 2: Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

<sup>203</sup> Supplemental Principles, *supra* note 3, at 9.

places.<sup>204</sup> Principle 31 also requires States to provide identity documents “regardless of SOGIESC” and to ensure legal recognition “without reference to, or requiring assignment of disclosure of SOGIESC.”<sup>205</sup>

In observing this right, the State is required to establish administrative systems that recognize each person’s self-defined gender identity.<sup>206</sup> This requires the State to examine the use of gender on documents and in government programs and eliminate references to gender where it serves no legitimate purpose.<sup>207</sup> Accordingly, this Principle requires not only recognition of individual self-discrimination of gender but also a restructuring of how governments recognize and reinforce gender, not just for LGBTI people but for all people.

The supplemental Principles also seek to understand the relationship between stigma and poverty. Discrimination at school and in the workplace are closely linked to higher rates of poverty among LGBTI people.<sup>208</sup> An international review of scholarly articles illustrates how LGBTI people are excluded from jobs and promotions, and that they are subjected to harassment and lack of acceptance in the workplace.<sup>209</sup> Studies reveal some employers explicitly reject LGBTI job applications.<sup>210</sup> In other areas, lesbians and gay men are 1.8 times less likely to have call-back interviews than heterosexual counterparts, and transgender women are half as likely to get a call-back.<sup>211</sup> International studies of wages show that

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<sup>204</sup> Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 731–37 (2008).

<sup>205</sup> Supplemental Principles, *supra* note 3, at 9.

<sup>206</sup> *See id.*

<sup>207</sup> *Id.* (“States Shall: Ensure that official identity documents only include personal information that is relevant, reasonable, and necessary as required by the law for a legitimate purpose.”).

<sup>208</sup> *See* Emir Ozeren, *Sexual Orientation Discrimination in the Workplace: A Systematic Review of Literature*, 109 PROCEEDIA-SOCIAL AND BEHAV. SCI. 1203, 1208–10 (2014).

<sup>209</sup> *See id.* at 1208.

<sup>210</sup> In a survey of LGBT people in China, the Philippines and Thailand, 60% of respondents said they had seen a job advertisement that explicitly excludes their sexual orientation and gender identity. U.N. DEVELOPMENT PROGRAMME & INT’L LABOR ORG. [ILO], *LGBTI PEOPLE AND EMPLOYMENT: DISCRIMINATION BASED ON SEXUAL ORIENTATION, GENDER IDENTITY AND EXPRESSION, AND SEX CHARACTERISTICS IN CHINA, THE PHILIPPINES AND THAILAND* (2018).

<sup>211</sup> *Id.*

gay men are paid 11% less than heterosexual counterparts<sup>212</sup> and bisexual men receive 12% less.<sup>213</sup> In the United States, transgender people were four times more likely to have a household income of less than \$10,000 per year compared to the general population.<sup>214</sup> Transgender people of color had an unemployment rate four times the national average, and almost one in five reported being homeless at least one time in their life.<sup>215</sup>

Supplemental Principle 34, The Right to Protection from Poverty,<sup>216</sup> calls for recognition of economic impacts of stigma, and invokes the due-diligence principle in placing a duty on the government to engage in efforts to eliminate damaging stigma.<sup>217</sup> This claim constitutes one of recognition because it points to an aspect of the LGBTI-lived experience that is often overlooked. It challenges the myth of affluence, the stereotypical belief prevalent in certain cultures that gay people, particularly gay couples, tend to be more wealthy than non-LGBTI people.<sup>218</sup> It also challenges the apparent consensus that LGBTI people are not impacted by poverty, as evidenced by the fact that the vast majority of anti-poverty actors and global organizations that deal with poverty have overlooked the connection between anti-LGBTI stigma and poverty.<sup>219</sup>

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212 Marieka Klawitter, *Meta-Analysis of the Effects of Sexual Orientation on Earnings*, 54 INDUS. REL. 14, 21 (2015), <https://evans.uw.edu/sites/default/files/public/EvansWorkingPaper-2011-08.pdf> [<https://perma.cc/4KZE-QL3U>].

213 *Id.*

214 JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2–8 (2011).

215 *Id.*

216 The right to be free from poverty has been recognized as a collective right. See UDHR, *supra* note 10, at art. 25. The signatories felt that the States duties on the right to be free from poverty were not clear. Thus, the right is articulated in the principles as one of “protection from” poverty.

217 See supplemental Principles, *supra* note 3, at 8–12.

218 See Nathan McDermott, *The Myth of Gay Affluence*, ATLANTIC (Mar. 21, 2014), <https://www.theatlantic.com/business/archive/2014/03/the-myth-of-gay-affluence/284570/> [<https://perma.cc/5WZT-8QT6>].

219 ANDREW PARK, A DEVELOPMENT AGENDA FOR SEXUAL AND GENDER MINORITIES 16 n.10 (2016), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Development-Agenda-for-Sexual-and-Gender-Minorities.pdf> [<https://perma.cc/WQL7-8ZBG>].

### C. *Shaping the Understanding of Gender and Sexuality*

The Yogyakarta Principles include definitions of SOGIESC<sup>220</sup> which have been replicated by many policymakers and institutions.<sup>221</sup> The inclusion of any definition at all is significant. International instruments name, but do not necessarily define, the categories of people that are the focus of concern.<sup>222</sup> By including a definition in the Principles, the signatories lessen the risk that hostile States will create their own definitions and frame SOGIESC in terms of mental illness, disease, political opposition, blasphemy, or sin. The definitions also promote an understanding of the difference between oft-conflated concepts such as sexual orientation, gender identity and expression, and sex characteristics. Defining them helps clarify how each characteristic can face a different set of stigmas and require a different set of rights-based responses.

By the same token, in including a definition, the signatories have also increased the risk that these definitions establish parameters on the behaviors, identities, and desires that can be tied to human rights protections. For example, some commentators have argued that patterns of sexual practice such as polyamory<sup>223</sup> or BDSM (Bondage and Discipline, Dominance and Submission, and Sadism and Masochism)<sup>224</sup> should be considered sexual orientations.<sup>225</sup> Such practices, though they would be protected by many of the same human rights listed in the Principles, do not constitute a sexual orientation according to the definition in the Principles. Accordingly, if practitioners of BDSM or polyamory were to encounter ill-treatment based on such sexual activity or identity,

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<sup>220</sup> Supplemental Principles, *supra* note 3, at 6.

<sup>221</sup> See QUINN, *supra* note 98, at 92–134.

<sup>222</sup> For example, neither the term “woman” nor the term “disability” is defined in the respective treaties related to the human rights of women and people with disabilities. See Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3; *see also* Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>223</sup> See generally Ann Tweedy, *Polyamory: Intimate Practice, Identity or Sexual Orientation?*, 79 U. OF CIN. L. REV. 1461 (2011) (examining the possibility of expanding the definition of “sexual orientation” to include polyamory).

<sup>224</sup> See generally Charles Moser, *Defining Sexual Orientation*, 45 ARCHIVES OF SEXUAL BEHAV. 505, 507 (2016) (focusing on expanding the current understanding of “sexual orientation”).

<sup>225</sup> *Id.*

they would not be able to access human rights protections tied to sexual orientation since BDSM or polyamory are not considered sexual orientations as defined in the Principles.<sup>226</sup> Thus, some sexual activities, identities, and desires are protected by the standards articulated in the Principles, and some are not.

### 1. *Deepening Understanding of Gender*

• The supplemental Principles significantly advance the understanding of gender. The first Principles define gender identity as follows:

A 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.<sup>227</sup>

This definition avoids the use of language that would imply a binary choice between male and female. Unlike some earlier definitions related to gender identity, which cite the notion of living as the “opposite” sex,<sup>228</sup> this definition pivots on whether one's current gender is concordant with the sex assigned at birth.<sup>229</sup> For cisgender people, their current gender is concordant to their sex assigned at birth.<sup>230</sup> For transgender people, their current gender is discordant to their sex assigned at birth.<sup>231</sup>

This definition also recognizes that there are at least two

<sup>226</sup> “Sexual Orientation” is “understood 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.” First Principles, *supra* note 2, at 6.

<sup>227</sup> *Id.*

<sup>228</sup> For instance, the Diagnosis of transsexualism in the International Classification of Diseases (ICD-10) applies to someone who has a “desire to live . . . as a member of the opposite sex.” Stephen Potts & Dinesh Bhugra, *Classification of Sexual Disorders*, 7 INT’L REV. OF PSYCHIATRY 167, 167–74 (2009).

<sup>229</sup> *Id.*

<sup>230</sup> See *Classification of cisgender and transgender*, STATISTICS CAN., <http://www23.statcan.gc.ca/imdb/p3VD.pl?Function=getVD&TVD=469267&CVD=469268&CPV=C&CST=25012018&CLV=1&MLV=2> [https://perma.cc/E9VL-DAY7].

<sup>231</sup> *Id.*

components of gender. The first is gender identity, an internal awareness of one's gender.<sup>232</sup> The second is gender expression, or the expression of gender through speech, mannerisms, and dress.<sup>233</sup> However, the signatories of the supplemental Principles recognized that this definition seems to confusingly conjoin the two, implying that internal and external gender should correspond to each other, or that gender expression is a subcomponent of gender identity. Understanding gender in this way could result in excluding those whose gender does not fit such an understanding.

There are at least two significant groups of people whose gender identity and gender expression do not match.<sup>234</sup> Each of these groups face different patterns of stigma and needs. As a hypothetical example, consider Chris, assigned male at birth, raised as male by parents and family and expressing male behaviors and attributes during his adulthood. During this period of Chris's life, we would consider Chris has having a male gender expression. Assume, as is the case with many transgender people, that Chris had an inner awareness of being female. Even though Chris maintained an outward expression of maleness, the internal identity was that of a woman. At this point, Chris has a gender identity and a gender expression that do not match. In Figure 1, *Gender Identity and Expression*, Chris's gender would correspond to the circle on the left. This circle represents those whose inner identity (female for Chris) is discordant with the sex assigned at birth (SAB) (male for Chris). Chris would not fall into the circle on the right, which includes those whose expressed identity is discordant with SAB. For Chris, both expressed identity and SAB are male. Assume that later in life Chris decided to transition, have surgery, and engage in behaviors and dress as female. After transitioning Chris falls into the intersection between both circles because both her inner identity and expression are discordant with her SAB.

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<sup>232</sup> See first Principles, *supra* note 2, at 6.

<sup>233</sup> *Id.*

<sup>234</sup> See, e.g., *Transgender Identity and Labels*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/sexual-orientation-gender/trans-and-gender-nonconforming-identities/transgender-identity-terms-and-labels> [<https://perma.cc/3683-22Q4>] (showing that intersex and transgender individuals are two such groups of people).

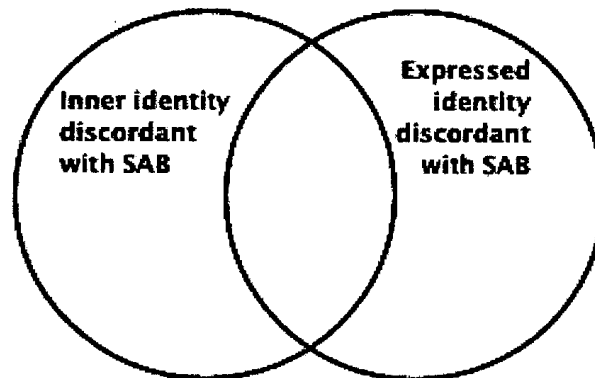


Figure 1. Gender Identity and Expression

The other group possibly left out of the initial definition are those people whose expressed gender does not conform to the expectations of their SAB. Highly effeminate men might serve as an example of this group because they are not perceived as truly male. Thus, they would occupy the space in the circle on the far right of Figure 1. This group can face intense stigma, as revealed in a U.N. Educational, Scientific and Cultural Organization (UNESCO) study on the issue of bullying in Thailand schools.<sup>235</sup> In that study, students who regarded themselves as less masculine than others, regardless of self-identified gender or sexuality, reported higher rates of bullying than those students who self-identified as LGBT.<sup>236</sup>

The supplemental Principles reiterate (or, in U.N.-ese, “recall”) the definition of gender identity by reference to the first Principles

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<sup>235</sup> See generally UNESCO, *Bullying Targeting Secondary School Students Who Are or Are Perceived to Be Transgender or Same-Sex Attracted: Types, Prevalence, Impact, Motivation and Preventive Measures in Five Provinces of Thailand*, UNESCO Doc. No. THA/DOC/HP2/14/009 (Dec. 31, 2014), <http://unesdoc.unesco.org/images/0022/002275/227518e.pdf> [<https://perma.cc/S7RM-Q5TV>] (revealing the abuse directed at Thailand students with regards to their gender identity and gender expression).

<sup>236</sup> *Id.*



where the concept was first defined.<sup>237</sup> In addition, the supplemental Principles also provide a definition of gender expression:

‘Gender expression’ as each person’s presentation of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person’s gender identity.<sup>238</sup>

## 2. *Expanding Understanding of Intersex*

The supplemental Principles significantly advance the protection of intersex people by explicitly incorporating sex characteristics as one of the enumerated characteristics relevant to human rights protections.<sup>239</sup> Taking the same human rights approach, rather than incorporating intersex issues by referencing the population of intersex people, the supplemental Principles define sex characteristics in a manner that can apply to all people:

‘Sex characteristics’[are] each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.<sup>240</sup>

Intersex people have sex characteristics that do not fit typical notions of male or female bodies.<sup>241</sup> Because their bodies are seen as different, intersex children and adults face a range of human rights violations, including non-consensual medically unnecessary surgery and medical treatment, denial of healthcare, discrimination in the workplace and educational institutions, and denial of gender recognition.<sup>242</sup>

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<sup>237</sup> See supplemental Principles, *supra* note 3, at 6 (“Recalling the Yogyakarta Principles’ definitions of ‘sexual orientation’ and ‘gender identity.’”).

<sup>238</sup> *Id.*

<sup>239</sup> See *id.* (“Understanding ‘sex characteristics’ as each person’s physical features relating to ... and secondary physical features emerging from puberty.”).

<sup>240</sup> *Id.*

<sup>241</sup> *What is Intersex?*, INTERSEX SOC’Y OF NORTH AM., [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) [https://perma.cc/25PY-MBDJ].

<sup>242</sup> See *A Changing Paradigm: Provider Discomfort with Intersex Care Practices*,

The first Principles explicitly reference intersex people only once, in the Preamble which lists intersex as one of several groups that face human rights violation.<sup>243</sup> However, no other explicit mention is made of intersex people in the Principles.<sup>244</sup> A few of the first principles, such as Principle 18, The Right Protection from Medical Abuses, are directly relevant to some of the human rights violations faced by intersex people.<sup>245</sup>

Soon after the issuance of the first Principles, it became clear that the supplemental Principles needed to encompass intersex issues. Within a few years after the issuance of the first Principles, connections between intersex advocacy and LGBT advocacy grew, and LGBT organizations began incorporating issues of intersex people into their mission.<sup>246</sup> The inclusion of sex characteristics in the supplemental Principles affirms this evolution in LGBTI advocacy.

### 3. *Obscuring Understanding of Sexuality*

The supplemental Principles did not expand the understanding of sexuality in the same way as they expanded the understanding of gender and sex characteristics. The supplemental Principles left intact a definition of sexual orientation from the first Principles that was flawed from the outset—defining it as:

Each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.<sup>247</sup>

This definition recognizes two components of sexual

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*supra* note 142.

<sup>243</sup> See first Principles, *supra* note 2, at 8–9.

<sup>244</sup> The signatories of the first principles were reluctant to include intersex issues because, at that time, there was a perception that the intersex community had not reached a consensus on the issue of how closely the intersex community wanted to position itself as part of the LGBT community.

<sup>245</sup> See *supra* Part V.

<sup>246</sup> See generally Julie Greenberg, Marybeth Herald & Mark Strasser, *Beyond the Binary: What Can Feminists Learn from Intersex and Transgender Jurisprudence*, 17 MICH. J. GENDER & L. 13 (2010) (discussing the growth of the intersex movement).

<sup>247</sup> First Principles, *supra* note 2, at 6.

orientation. The first is attraction, defined as “profound emotional, affectional, and sexual attraction.”<sup>248</sup> The second factor is behavioral, defined as “intimate and sexual relations.”<sup>249</sup> These two components can operate independently of one another, and each is associated with a different pattern of human rights abuses. An individual may experience attraction to people of the same gender even if they neither engage in sexual behavior nor identify themselves as anything but heterosexual. In some circumstances, admitting to such attraction could lead to forced conversion therapy,<sup>250</sup> ineligibility to serve in certain jobs, and other forms of stigmatization. Conversely, a person who engages in sexual relations may, but does not necessarily, experience attraction. Examples might include: sex in a loveless relationship, hook-up sex, exploratory sex, economically-transacted sex, or sex in a restricted environment such as a prison. In these circumstances, sex may be a means for simple human affection even though sexual desire is not involved.

These two components, attraction and behavior, make up two of the three components that are commonly understood to make up sexual orientation—behavior, attraction, and identity.<sup>251</sup> Current

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<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> “Mental health professions have historically labeled erotic attractions to the same sex as pathological and in need of change.” Susan L. Morrow & A. Lee Beckstead, *The Counseling Psychologist Attracted Clients in Religious Conflict: And Implications for Therapy*, 32 COUNSELING PSYCHOLOGIST 641, 642 (2004). In the United States, an estimated “20,000 LGBT Youth will receive conversion therapy from a licensed health care professional before they reach the age of 18 in the 41 states that do not ban the practice” and “57,000 youth across all states will receive conversion therapy from religious or spiritual advisors.” CHRISTY MALLORY, TAYLOR N. T. BROWN, & KERITH J. CONRON, CONVERSION THERAPY AND LGBT YOUTH 1 (2018), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf> [<https://perma.cc/52GX-GW7P>].

<sup>251</sup> See generally EDWARD O. LAUMANN, *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* (1994). The three-part formulation was popularized by Edward Laumann, who used it to look at how different individuals could be grouped according to these criteria. Laumann’s formulation continues today. In 2009, Statistics New Zealand Tatauranga Aotearoa, the official statistics agency of New Zealand, sought to create a policy regarding how to identify the sexual orientation of citizens and residents of New Zealand. This effort was triggered by the passage of human rights protections for LGBT people. As part of this effort, staff reviewed practices in other parts of the world and came to the simple conclusion that “[s]exual orientation is defined by three key concepts: sexual attraction, sexual behaviour, and sexual identity.” See FRANK PEGA, *SEXUAL ORIENTATION DATA COLLECTION STUDY REPORT 2: ISSUES IN SEXUAL*

best practices in defining and identifying sexual orientation follow this framework.<sup>252</sup> Thus, Figure 2 illustrates how these three aspects of sexual orientation interact.

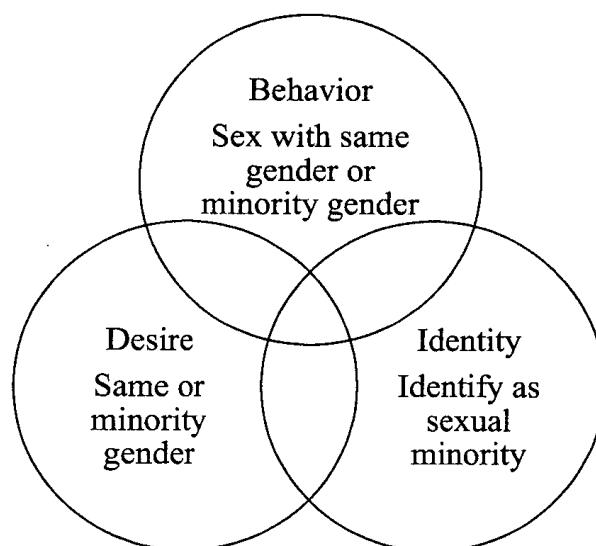


Figure 2. Venn Diagram of Sexual Orientation

Identity is entirely self-determined. In addition to the well-known western identities of gay, lesbian, homosexual, heterosexual, bisexual, and asexual, individuals could choose culturally-specific

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ORIENTATION MEASUREMENT AND DATA COLLECTION 9 (2009), available at <http://archive.stats.govt.nz/~media/Statistics/about-us/statisphere/Files/official-statistics-research-series/Volume%202010/Sexual%20orientation/Report%20%20Issues%20in%20sexual%20orientation%20measurement%20and%20data%20collection.pdf> [https://perma.cc/2MDY-RXC4].

<sup>252</sup> See generally John C. Gonsiorek, Randall L. Sell, & James D. Weinrich, *Definition and Measurement of Sexual Orientation*, 25 SUICIDE AND LIFE-THREATENING BEHAV. 40–51 (1995) (reviewing major methods and theoretical underpinnings for the definition and measurement of sexual orientation); Elizabeth M. Saewyc et. al, *Measuring Sexual Orientation in Adolescent Health Surveys: Evaluation of Eight School-Based Surveys*, 35 J. OF ADOLESCENT HEALTH (2004) (examining the performance of various items measuring sexual orientation); PEGA, *supra* note 251, at 11 (looking at the main ways of defining sexual orientation).

terms such as “metis” (Nepali),<sup>253</sup> “kathoe” (Thai),<sup>254</sup> “bakla” (Tagalog),<sup>255</sup> “hijra” (Hindi),<sup>256</sup> or any term they wish. In some cases, the same terms to describe gender may also be used to identify sexual orientation identity terms. For example, in India, the term “hijra” can be used to describe sexual orientation, gender identity, caste, religion, and language.<sup>257</sup>

In the same way that attraction does not always predict behavior, identity does not predict behavior or attraction. Studies in Senegal, Uganda, and South Africa have looked at how men identified themselves—according to local language—and whether those identities corresponded to their sexual practice in terms of the gender of their partners.<sup>258</sup> They found an “absence of systematic links between practice and identity.”<sup>259</sup> In response to a survey in Nepal, 33.1% of respondents who said that they most strongly identified with the term “gay” also reported attraction to females.<sup>260</sup> In a group of males that most strongly identified as heterosexual and bisexual, 63% reported attraction to Metis, a Nepali term for people assigned male at birth who have a feminine gender identity.<sup>261</sup> Fifty-seven percent reported attraction to Kothis, a term similar to Meti, and forty-eight percent reported attraction to other males.<sup>262</sup> In one study conducted in China, only three percent of men choosing a gay

<sup>253</sup> U.N. DEV. PROGRAMME, SURVEYING NEPAL’S SEXUAL AND GENDER MINORITIES: AN INCLUSIVE APPROACH 31 (2014), *available at* <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Nepal-Survey-Oct-2014.pdf> [<https://perma.cc/CH2Q-3X22>].

<sup>254</sup> See generally Sam Winter, *Thai Transgenders in Focus: Demographics, Transitions, and Identities*, 9 INT’L J. OF TRANSGENDERISM 15 (2006) (analyzing Thai transgender females including the “kathoe” or a more general Thai term embracing a variety of gender non-conformities).

<sup>255</sup> See generally Kevin L. Nadal, “Tomboys” and “Baklas”: *Experiences of Lesbian and Gay Filipino Americans*, 4 ASIAN AM. J. OF PSYCH. 166 (2013) (exploring the lesbian, gay, bisexual, and transgender Filipino American experience in the U.S which includes the “bakla” or lesbian and gay men).

<sup>256</sup> “Hijras” in India include transgender and intersex people and are legally recognized in the country. See Jeffrey Gettleman, *The Peculiar Position of India’s Third Gender*, N.Y. TIMES (Feb. 17, 2018), <https://www.nytimes.com/2018/02/17/style/india-third-gender-hijras-transgender.html> [<https://perma.cc/K6VX-RLUW>].

<sup>257</sup> U.N. DEV. PROGRAMME, *supra* note 253, at 8.

<sup>258</sup> See Joseph Larmarange et al., *Homosexuality and Bisexuality in Senegal: A Multifform Reality*, 64 POPULATION 635, 635–66 (2009).

<sup>259</sup> *Id.*

<sup>260</sup> U.N. DEV. PROGRAMME, *supra* note 253, at 31.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

response to one of the three dimensions fit in all three.<sup>263</sup>

Despite the importance of identity to the definition of sexual orientation, it was not included in the first Principles<sup>264</sup> and proposals to include it in the supplemental Principles were rejected.<sup>265</sup> By leaving out identity, the Principles have left out a central mechanism by which an individual exercises self-determination and seeks recognition. The ability to obtain recognition of one's own identity has been at the core of much LGBTI advocacy globally. As one commentator of sexual rights has observed, "[t]he insistence of diverse groups on naming themselves and achieving recognition of their distinctness and variety will go on as long as aspirations for democracy exist."<sup>266</sup> Identifying oneself is at the core of self-determination and is often the target of human rights violations.<sup>267</sup>

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<sup>263</sup> Nicole Farris et al., *Sexuality in China*, in INT'L HANDBOOK ON THE DEMOGRAPHY OF SEXUALITY 107, 114–15 (Amanda K. Baumle ed., 2013).

<sup>264</sup> The definition of sexual orientation had not been litigated under international human rights norms at the time of the creation of the first principles. Thus, the drafting committee was not bound by treaty provisions or authoritative interpretation of human rights norms when crafting the definitions. As an attendee of the first Yogyakarta meeting, my recollection is that drafters were concerned that including identity as a component of sexual orientation might place marginalized sexualities of the global south and east at a disadvantage. At that time, the presence at the U.N. of groups and individuals from the global south and east was very small. The drafters feared that listing identity might result in the concept being hijacked by the increasingly globalized identities of the global north and west, thus rendering south and eastern identities invisible. In my view this concern was, and continues to be, valid relating to all aspects of international SOGIESC advocacy. However, the concern does not justify the elimination of identity from the definition of sexual orientation.

<sup>265</sup> A proposal to include an identity component in the definition was submitted to the Yogyakarta Plus 10 drafting committee in response to a public call for comments issued prior to the Yogyakarta Plus 10 meeting. The drafting committee indicated that they had reviewed, but declined to adopt, the proposed approach. See Andrew Park, International Program Director at the Williams Institute, Comment on the Definition of Sexual Orientation and Gender Identity Submitted to The Drafting Committee, Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity (Feb. 17, 2017), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Yogyakarta-Review-SOGI-Definition.pdf> [<https://perma.cc/SJ4N-PMNR>].

<sup>266</sup> Rosalind P. Petchesky, *The Language of "Sexual Minorities" and the Politics of Identity: A Position Paper*, 17 REPROD. HEALTH MATTERS 105, 105–10 (2009).

<sup>267</sup> The first Principles include references to self-determination in relation to sexual orientation identity. It is found in Principle 3, The Right to Recognition Before the Law, see first Principles, *supra* note 2, at 11–12, which is considered the core principle that addresses how the States officially categorize all citizens according to gender. This

The lack of inclusion of identity may impact legal protections. Many people face stigma simply because they say “I’m gay,” or express a sexual orientation that is marginalized. If sexual orientation is only based on attraction and behavior, then such a declaration is not, in and of itself, an indication of their sexual orientation. An individual who was subjected to ill-treatment because of their identity would not receive human rights protections tied to sexual orientation, because identity does not fall within the definition of sexual orientation. Identity becomes an evidentiary issue for concluding that someone may be engaging in same-sex sexual behavior or experiencing desire, and the legal issue shifts to whether the alleged discriminator sought to exclude individuals because of their sexual attractions and behavior. As a human rights matter, the act of identifying one’s own sexual orientation, full stop, should be explicitly protected under international human rights norms.

In addition to the omission of sexual orientation identity, the definition of sexual orientation is flawed because it preferences certain kinds of sexual behavior over others. The description of sexual orientation in the Principles fits the same mold of advocacy messages that have become commonplace in advocacy around marriage equality.<sup>268</sup> It uses language that raises images of deep love, companionship, and meaningful interpersonal relations. This framing may increase the chance of the Principles being positively received by policymakers and government officials, but it may also impact the extent to which the Principles can be used to expand

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question raises fundamental human rights issues in the case of gender which is officially recorded by the government at birth and then included as a gender marker on important government documents throughout one’s life. The passage reads “Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity, and freedom.” *Id.*

The inclusion of sexual orientation in this passage is somewhat superfluous. Governments do not use sexual orientation to categorize each person though the use of official documents in the same way that they use gender. It is likely that the intent of this passage was to establish the principle of self-determination with regard to gender, and that the inclusion of sexual orientation was the result of a drafting convention followed throughout the principles, by which sexual orientation and gender identity were always referenced together. This practice reflects the commitment to universality, such that no right is linked to one group in particular. Except in the preambles and introductions where the terms are introduced and defined in the preamble, neither term is used on its own at any point in any of the principles.

<sup>268</sup> See first Principles, *supra* note 2, at 6.

human rights protections.

While the common definition of sexual orientation might include attraction and behavior,<sup>269</sup> the definition in the Principles seems to limit what kinds of attractions and behaviors qualify as sexual orientation. The definition adds the criteria of “profound emotional, affectional and sexual” to the question of attraction, and the criteria of “intimate and sexual” to the question of behavior.<sup>270</sup> Arvind Narrain, a member of the drafting committee, explains that the definition encompasses “sexual acts that are not sexual acts alone but expressive of something more fundamental such as identity and personhood.”<sup>271</sup> However, limiting the relevant sexual acts to those that are intimate and relational is not consistent with best practices regarding identification of sexual orientation. For example, government agencies such as the Center for Disease Control seek to track health and educational disparities according to sexual orientation by using surveys which ask “with whom have you had sexual contact?” and “how do you identify yourself?”<sup>272</sup> New Zealand defines sexual behavior, for the purposes of determining sexual orientation, as “[a]ny mutually voluntary activity with another person that involves genital contact and sexual excitement or arousal, that is feeling really turned on, even if intercourse or orgasm did not occur.”<sup>273</sup> The issue of whether the sexual contact was intimate, relational, or expressive of something is not relevant.

Regarding attraction, Narrain also explains that the definition is

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<sup>269</sup> *Id.*

<sup>270</sup> It is unclear whether modifiers for the criteria of attraction, “profound emotional, affectional, and sexual,” are to be read jointly or alternatively. If read jointly, which seems to be the case given the use of “and” instead of “or,” then this definition seems to exclude attraction which is sexual but not “profound emotional and affectional.” By the same token, if the modifiers to the criteria of “relations” are jointly read to be “intimate and sexual,” then relations that are superficial or impersonal are not included.

<sup>271</sup> Arvind Narrain, *The Yogyakarta Principles on Sexual Orientation and Gender Identity: Six Conceptual Advances enabled by the Principles*, ARC INT’L, [http://arc-international.net/research-and-publications/new-arc-reports/the-yogyakarta-principles-on-sexual-orientation-and-gender-identity-six-conceptual-advances-enabled-by-the-principles/#\\_ftn1](http://arc-international.net/research-and-publications/new-arc-reports/the-yogyakarta-principles-on-sexual-orientation-and-gender-identity-six-conceptual-advances-enabled-by-the-principles/#_ftn1) [<https://perma.cc/R6J2-7XXB>].

<sup>272</sup> YOUTH RISK BEHAVIOR SURVEY (YRBS) 2019 STANDARD QUESTIONNAIRE ITEM RATIONALE, CTR. FOR DISEASE CONTROL 1, 31, *available at* [https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2019/2019\\_standard\\_YRBS\\_item\\_ratio\\_nale.pdf](https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2019/2019_standard_YRBS_item_ratio_nale.pdf) [<https://perma.cc/5UH4-UPHX>].

<sup>273</sup> PEGA, *supra* note 251, at 11.



meant to target attraction that is personally significant.<sup>274</sup> He says, “While the word ‘profound’ is read with ‘sexual, emotional and affectional’ it communicates a dimension which is linked to the sexual but also belongs to another domain in which sexual acts have deep meanings for those engaging in them.”<sup>275</sup> Certainly, some sexual encounters will be profound, but sometimes it is just about excitement and arousal. Sex may not have deep meaning for those engaging in it. Sexual behaviors and attractions may be temporary, superficial, exploratory, and forgettable. There is no rationale for basing human rights protections on whether sex is deep and meaningful or superficial and frivolous. All people should be protected from human rights abuses related to either type of sex.

By including these terms—profound, emotional, affectional, intimate, relations—this definition sets up what Gayle Rubin calls the “charmed circle,” where she depicts a series of concentric circles each containing a difference set of sexual desires and activities.<sup>276</sup> In the center is sex that conforms to the criteria of cultural acceptability: heterosexual, noncommercial, marital, in private, monogamous, missionary-style, and so on.<sup>277</sup> Heading out of the center, each successive circle contains a category of sex that is progressively less acceptable, so that the outer circles depict sex that is homosexual, in a park, from a hook-up website, casual, public, multiple-partners, paid for, unemotional, and so on.<sup>278</sup>

The definition in the Principles builds its own charmed circle, placing sex which is profound, emotional, and intimate in the middle, and excluding, or at least marginalizing, sex that is less culturally appealing. By doing so, it potentially risks excluding, from human rights protections, those whose sexuality may be more stigmatized. It also forgoes an opportunity to stake a greater claim for sexual freedom. While the Principles are limited by the status of international law in articulating the freedom to engage in sexual behavior,<sup>279</sup> the definition of sexual orientation represents one place

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<sup>274</sup> See Narrain, *supra* note 271.

<sup>275</sup> *Id.*

<sup>276</sup> See Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *CULTURE, SOCIETY AND SEXUALITY* 143, 153 (Peter Aggleton & Richard Parker eds., 2006).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> While sexual activity may receive protection under international human rights law,

where the Principles could have easily relied on current international law to include sexual acts that have been the focus of stigma, discrimination, and violence.<sup>280</sup> By leaving the definition of sexual orientation intact, the supplemental Principles have not sought recognition for the scope of sexuality associated with people of diverse sexual orientations.

The ten years between the creation of the first Principles and the supplemental Principles witnessed significant changes in the global acceptance of LGBTI people. One can easily predict that issues of gender and sexuality will continue to rapidly evolve over the next decade. The Yogyakarta Principles will likely continue to contribute to and develop a narrative in the story of LGBTI people and international human rights.

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no human rights body has articulated a freedom to engage in (adult, private, consensual), sexual activity. Protections arise because government attempts to regulate sexual behavior have been found to violate rights such as privacy or equality. Thus, for instance, the U.N. Office of the High Commissioner has stated, “States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination. Arrests and the detention of individuals on charges relating to sexual orientation and gender identity . . . are discriminatory and arbitrary. Since its landmark decision in *Toonen v. Australia* in 1994, the Human Rights Committee and other mechanisms have repeatedly urged States to reform laws criminalizing consensual same-sex conduct, and welcomed their repeal.” See U.N. High Comm’r for Human Rights, *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, at 1, 12, U.N. Doc. A/HRC/29/23 (May 4, 2015).

Thus, the principles include a statement of these rights, but not a statement of the freedom to engage in sexual activity. I submitted a proposal to the drafting committee in the Yogyakarta plus 10 meeting to include language affirming sexual freedom. My purpose in this submission, as I told the committee, was to ensure sexual freedoms received consideration, which they did. I had little expectation that the proposal would be accepted, as I share the committee’s ultimate conclusion that the freedom to engage in sexual activity is not one that has been established in international law. See Park, *supra* note 265.

<sup>280</sup> *Id.*