

*Rights & Protection of
Lesbian, Gay, Bisexual, Transgender & Intersex
Refugees & Asylum Seekers
Under the Yogyakarta Principles*

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ORAM – Organization for Refuge, Asylum & Migration

**San Francisco, California
September 2010**

In memoriam

Josef D. Grüngras 1918 – 2010

His perseverance and inventiveness in refugeehood as in stability will not be forgotten.

This publication is a collaborative work of ORAM's board, staff, interns and supporters who spent tens of hours researching, writing and editing its pages and its tenets. Your commitment to excellence and to refugee justice is our inspiration.

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ABOUT ORAM

ORAM – Organization for Refuge, Asylum & Migration is a San Francisco, USA based not-for-profit international organization providing advocacy on behalf of refugees feeling sexual or gender based violence.

Many of **ORAM**'s clients have undergone or have been marked for imminent imprisonment or torture. Some face execution. They leave home with few or no possessions —some with only a few hours to escape. Virtually all have been cut off from support by their families and receive no assistance from other sources. Some are escaping *from* their families. They often arrive in transit countries to face harassment, physical violence and severe marginalization.

ORAM works to assist and empower its clients directly as it works to ensure their protection and safe resettlement by the governments, inter-governmental organizations (IGOs), non-governmental organizations (NGOs) and communities in whose ambits they fall. **ORAM** achieves its goals through community education, advocacy, counseling and direct legal representation. Educational efforts include lectures, writings and a variety of presentation modes. It conducts advocacy with NGOs, IGOs, governments and community groups. Free-of-charge representation is provided to clients through the creative marriage of modern technology and legal expertise. Further information about **ORAM** is available at www.oraminternational.org.

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1. EXECUTIVE SUMMARY

The 2007 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity are a practical and accessible compendium of legal rights culled from an array of binding human rights instruments. The Principles fill a critical gap, coalescing all major areas in which the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals are known to be violated. The Principles reflect existing formulations of human rights standards within sources of international human rights law, “map” the range of human rights violations experienced by people of diverse sexual orientations and gender identities in different regions of the world, and provide recommendations to states for specific means of implementing the rights they define.

Many of the Principles’ tenets are directly applicable in the adjudication of LGBTI refugee claims and in rendering meaningful protection to these refugees and asylum seekers. Critically important to the refugee field, the Principles make clear the complex and interdependent nature of the rights they enshrine.

A troublesome area in the law is the need for precise definition and consistent application of psychological or psychosocial constructs. The Yogyakarta Principles supply a flexible and practical approach to “sexual orientation” and “gender identity,” focusing on the protected characteristics and self-perceptions of the relevant particular social groups. The definitions of these terms provide a way for refugee policymakers and adjudicators to eschew Western-specific categorizations such as “lesbian,” “gay,” “bisexual,” “transgendered,” “queer” or “intersex,” or groupings such as “LGBT” or “LGBTQI,” in favor of delineations which are more universally applicable.

The Principles provide critically needed guidance on the process by which those fleeing persecution based on their sexual orientation or gender identity can access meaningful refugee protection. They set out a framework for applying the very right to seek asylum or refugee status, set forth guidance in assessing the effect of laws criminalizing consensual same-sex conduct, and help define persecution, including the role of discrimination, in LGBTI-based claims. Importantly, they provide authority in unraveling the requirement that LGBTI individuals conceal their sexual orientation or gender identity in order to avoid persecution. In adjudications, the Principles impart guidance for applying appropriate non-invasive interviewing methods and techniques and for conducting fair credibility assessments.

With their basis on common human rights abuses affecting LGBTI individuals, the Yogyakarta Principles not only help clarify issues for adjudicators performing claims assessment; they also provide practical assistance in identifying and defining the areas in which these refugees and asylum seekers are in most need of practical protection. The guidance from the Yogyakarta Principles relates to LGBTI individuals’ immediate security concerns, spanning all aspects of their lives, whether police protection, housing, medical care, education or social rights. This paper identifies the areas in which the Principles directly support advocacy efforts to ameliorate the protection concerns facing LGBTI refugee communities throughout their refugee journey.

Sexual and gender minorities are exposed to survival challenges often unknown to the broader communities in which they live. Those who have escaped persecution based on their sexual orientation or gender identity commonly suffer the severe compounded effects of

multiple marginalization. The Yogyakarta Principles provide the much-needed authority to guide advocates, government authorities and others involved in the protection of these vulnerable communities to ameliorate the challenges they face in countries of origin, migration and asylum.

2. BACKGROUND & THEORETICAL UNDERPINNINGS

While the human rights mechanisms of the United Nations obligate states to protect all persons from discrimination based on sexual orientation or gender identity, the international response to human rights violations on these bases has been fragmented and inconsistent.¹ The Yogyakarta Principles collect and embody these rights in a single document, rendering them more accessible and more comprehensible.² Equally importantly, the Principles make clear the overlapping and interdependent nature of the rights they enshrine.³

Applied in the context of refugee case adjudication and protection, the Yogyakarta Principles fill a critical gap, as they touch upon and coalesce all major areas in which the rights of LGBTI individuals have been known to be abridged or contravened. Given that refugee claims arise from these very abuses, it is not surprising that many of the Principles are implicated to one extent or another in the adjudication of LGBTI claims, in the adjudications process or in rendering meaningful protection to these refugees and asylum seekers.

The Yogyakarta Principles provide a tripartite approach,⁴ placing human rights principles in the context of specific classes of violations based on sexual orientation and gender identity.⁵ In this approach, the Principles first reflect existing formulations of human rights standards within sources of international human rights law. The parallel formulations reinforce the authority of the Principles as a statement of legal standards.⁶ Second, the Principles “map” the range of human rights violations experienced by people of diverse sexual orientations and gender identities in different regions of the world.⁷ Third, the Principles provide recommendations to states for specific means of implementation.⁸ The placement of the relevant human rights principles within the context of specific kinds of violations based on

¹ International Commission of Jurists (ICJ), *Yogyakarta Principles — Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, <http://www.unhcr.org/refworld/docid/48244e602.html>, at Introduction.

² *Id.*

³ Yogyakarta Principle 1(A), http://www.yogyakartaprinciples.org/principles_en_principles.htm#_Toc161634693.

⁴ Address of the Rapporteur at the launch event of the Principles, Geneva, March 2007, as cited in Michael O’Flaherty and John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 2 (2008), *supra*, at 232.

⁵ *Id.* at 234.

⁶ *Id.* For example, Principle 3 states that “[e]veryone has the right to recognition everywhere as a person before the law.” This very principle is found in the following human rights instruments: Universal Declaration of Human Rights, at Article 6; the International Covenant on Civil and Political Rights, at Article 16; the Convention on the Elimination of All Forms of Discrimination Against Women, at Article 15; the Convention on the Rights of the Child, at Article 8; the American Convention of Human Rights, at Article 3; and the African Charter of Human Rights, at Article 5. See *Jurisprudential Annotations to the Yogyakarta Principles*, <http://www.yogyakartaprinciples.org/yogyakarta-principles-jurisprudential-annotations.pdf>, footnote 20 at 11.

⁷ O’Flaherty and Fisher, *supra* note 4, at 233. To elaborate on the right to legal recognition, Principle 3 prohibits, *inter alia*, forced medical procedures including sex reassignment surgery, sterilization, or hormonal therapy as a requirement for legal recognition of a person’s gender identity. See Yogyakarta Principle 3, http://www.yogyakartaprinciples.org/principles_en_principles.htm#_Toc161634695.

⁸ Yogyakarta Principle 3, *supra* note 7. One such recommendation in Principle 3 is that states “[u]ndertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.”

sexual orientation and gender identity reflects the complexity of circumstances inherent in the experiences of these violations.

The Principles arose partly in opposition to the gender and sexual orientation norms that states and societies commonly impose on individuals through custom, law, and often violence.⁹ The Principles recognized that dignity of the person inherent within international human rights principles includes the right to self-determination, and the imposition of gender and sexual orientation norms runs counter to this right.¹⁰ The Yogyakarta Principles therefore feature minimal usage of such terms as “gay,” “bisexual,” or “transgender” and instead focus on providing uniform definitions of “sexual orientation” and “gender identity,” concepts which create the necessary space for self-identification.¹¹

The minimal usage of specifically named groups also reflects the influence of international refugee law on the development of the Principles. International law accords refugee status not to specific groups of persons but based on categories of protection. Similarly, the Yogyakarta Principles construe sexual orientation and gender identity as categories subject to international human rights protection.¹²

Therefore, the uniform definitions of “sexual orientation” and “gender identity” are a critically important aspect of the Principles. Not only do they address the need for consistent terminology;¹³ they also provide the bases for the development and implementation of other legal instruments further developing affirmative rights applicable to sexual orientation and gender identity. There is therefore enormous potential for using the Yogyakarta Principles as an interpretive guide in the refugee law field at both international and domestic levels.

The following section will discuss the evolution of the Principles, from their theoretical foundations to their contextualizing goal of fitting “existing understandings of law” to “the real shape of violations.”¹⁴

2.1. CONTEXT OF THE PRINCIPLES’ DEVELOPMENT

The Yogyakarta Principles grew out of increasing global concern that states were not living up to their human rights obligations to persons of diverse sexual orientations and gender identities—whether by enacting explicit domestic laws discriminating against LGBT people¹⁵

⁹ Scott Long, *Two Novembers: Movements, Rights, and the Yogyakarta Principles*, in Human Rights Watch World Report 2008, 35–50, at Introduction.

¹⁰ The United States Supreme Court decision overturning laws prohibiting consensual homosexual conduct cited as a presumption of liberty “an autonomy of self that includes freedom of thought, belief, express, and certain intimate conduct.” *Lawrence and Garner v. Texas*, 539 U.S. 558, 558 (2003). The European Court of Human Rights referred to the definition of one’s own gender identity as “one of the most basic essential of self-determination.” *Case of Van Kück v. Germany*, 35968/97, European Court of Human Rights 285 (12 June 2003), at para. 73.

¹¹ Long, *supra* note 9, at 39.

¹² See Part 2.3, *infra*.

¹³ O’Flaherty and Fisher, *supra* note 4, at 232.

¹⁴ Long, *supra* note 9, at 38.

¹⁵ For example, over 80 countries impose criminal penalties on consensual sexual conduct between people of the same sex. See generally Daniel Ottoson, International Lesbian and Gay Association (ILGA), *Legal Survey on the Countries in the World Having Legal Prohibitions on Sexual Activities Between Consenting Adults in Private* (2005–06), <http://www.scribd.com/doc/24546699/Homosexuality-Illegal-Countries-Survey> [“ILGA Legal Survey”].

or by enabling impunity for, and a lack of protection against, violence and harassment.¹⁶ This section traces how international movements representing LGBTI people helped pave the way to the Principles.

In 2003, Brazil introduced a resolution in the United Nations Commission on Human Rights entitled “Human Rights and Sexual Orientation,” calling on states to protect against violations and abuses based on sexual orientation.¹⁷ The resolution faced widespread opposition at the UN Commission.¹⁸ The predominant argument by opponents was that the resolution did not reflect a legitimate concern of the United Nations.¹⁹ The surprise and opposition expressed by many states and the rally of support by advocates and allies reflected the tension between some states’ notions of the applicability of existing human rights law and the actual legal principles which advocates and allies supported.

In 2005, the International Commission of Jurists, based in Geneva, Switzerland, responded to opposition to the Brazilian resolution by compiling a book of references on sexual orientation and gender identity in the UN system.²⁰ This compilation rebutted the argument that the UN had not engaged with and pronounced on issues of sexual orientation and human rights. The International Commission produced a similar reference book on sexual orientation and gender identity within the Inter-American human rights legal regime.²¹

Stemming from an obvious need to clarify the position of sexual orientation and gender identity in international human rights law, human rights experts convened in Yogyakarta, Indonesia in November 2006 to “collate and clarify”²² state obligations applicable to protecting and upholding the human rights of all persons regardless of sexual orientation or gender identity. These experts came from 25 countries and diverse backgrounds, including a special rapporteur to the United Nations Human Rights Council, four present and former members of UN treaty bodies, a member of Kenya’s National Commission on Human Rights, and scholars and activists from—among others—Argentina, Brazil, China, and Nepal.²³

The International Commission led the facilitation of the panel and development of the Principles over the course of a year. From that extensive period of drafting, development, discussion and refinement arose the 29 Yogyakarta Principles. The Principles incorporated

¹⁶ See, e.g., Human Rights Watch, *We Need a Law for Liberation: Gender, Sexuality, and Human Rights in a Changing Turkey* (May 21, 2008), documenting a long and continuing history of violence and abuse based on sexual orientation and gender identity.

¹⁷ U.N. ESCOR, 59th Sess., U.N. Doc. E/CN.4/2003/L.92* (2003). See also International Gay and Lesbian Human Rights Commission (IGLHRC), *Resolution on Sexual Orientation and Human Rights*, <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/213-1.pdf> [“Resolution on Sexual Orientation”].

¹⁸ See Association for Women’s Rights in Development, *Women and LGBT Rights at the 60th CHR Session* (December 2, 2008), <http://www.awid.org/eng/Issues-and-Analysis/Library/Women-and-LGBT-Rights-at-the-60th-CHR-Session>.

¹⁹ See Douglas Sanders, ILGA, *Human Rights and Sexual Orientation in International Law* (17 July 2005), <http://ilga.org/ilga/en/article/577>.

²⁰ See International Commission of Jurists (ICJ), *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the United Nation Human Rights System* (3d ed. 2007), http://www.icj.org/IMG/UN_References.pdf.

²¹ See International Commission of Jurists (ICJ), *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine in the Inter-American System* (July 2007), http://www.icj.org/IMG/Inter-American_References.pdf.

²² *Id.*

²³ Long, *supra* note 9, at 36. For a list of the experts who helped draft and approved the Principles, see O’Flaherty and Fisher, *supra* note 4, footnote 136 at 233–34.

developments in the UN and regional human rights systems—as well as the international refugee protection system—to provide an authoritative interpretation of applicable international human rights law regarding sexual orientation and gender identity.²⁴ They also set out rights associated with sexual orientation and gender identity and the obligations of States to respect, protect and fulfill these rights.²⁵ The panel members unanimously adopted the Principles at the end of the meeting in Yogyakarta, and they were finalized in 2007.

2.2. THE PRINCIPLES & INTERNATIONAL REFUGEE LAW

The Universal Declaration of Human Rights recognizes the right of all persons “to seek and to enjoy in other countries asylum from persecution.”²⁶ International refugee law affirms this right to asylum and sets forth a definition for the legal status of a refugee as well as the refugee’s legal rights and duties in the country of refuge.²⁷ The legal framework for enforcing the universal right to asylum as applied to persecution on the basis of sexual orientation and gender identity has developed in a fragmented fashion, with wide consensus among jurisdictions on many issues and divergence on others.

If international refugee law is to extend true protection to persons of diverse sexual orientations and sexual identities within a cohesive framework, it must be informed by concrete and precise definitions—as to both the nature of sexual orientation and gender identity and also the fundamental rights associated with these categories under international law. It is the breach of these rights which gives rise to protectable “persecution” under the 1951 Convention.

The Core concepts of the Principles—“sexual orientation” and “gender identity”—are defined in the Preamble. “Sexual orientation” is defined as a 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.”²⁸ “Gender identity” is defined as 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 . . . and other expressions of gender, including dress, speech and mannerisms.”²⁹

A discussion of the fundamental rights arising from these two categories must necessarily address the positivist argument that “no protection of [these categories] exists in international human rights law, since [they] are not specifically enumerated in the core international human rights treaties.”³⁰ However, the enumeration of categories in many international

²⁴ See generally Jurisprudential Annotations, *supra* note 6.

²⁵ Yogyakarta Principles, *supra* note 1.

²⁶ UN General Assembly, *Universal Declaration of Human Rights* (10 December 1948), <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>, Art. 14(1) [“UDHR”].

²⁷ International Commission of Jurists (ICJ), *Sexual Orientation, Gender Identity, and Human Rights Law: Practitioners Guide No. 4* (2009), 127 [“Practitioners Guide No. 4”]. The 1951 Geneva Convention Relating to the Status of Refugees defines a “refugee” as one who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country....” UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, <http://www.unhcr.org/refworld/docid/3be01b964.html> [“1951 Refugee Convention”].

²⁸ Yogyakarta Principles, *supra* note 1, at Preamble.

²⁹ *Id.*

³⁰ See ICJ, *Practitioners Guide No. 4*, *supra* note 27, at 29.

instruments includes an open category, “or other status.”³¹ The addition of this category indicates that these instruments were not intended to be exhaustive, but inclusive.

Professor James C. Hathaway has written on the rationale for discerning categories of protection in international law by examining the inter-relationship between the five recognized grounds of protection in the modern definition of refugee and the notion of civil and political rights.³² As mentioned above,³³ the definition of “refugee” is premised on generalized categories of protection in international law rather than on protection for named, marginalized groups. The applicable rationale is “not that other persons were less at risk, but rather that, at least in the context of the historical moment, persons affected by these forms of fundamental socio-political disenfranchisement were less likely to be in a position to seek effective redress from within the state.”³⁴ These “forms of fundamental socio-political disenfranchisement” create the categories of protection that exist in civil and political rights instruments as well as the 1951 Refugee Convention.

The development of jurisprudence and legal doctrine supporting the application of international human rights to the protection of sexual orientation and gender identity, as embodied in the Yogyakarta Principles, can be categorized under the principles of equal protection and non-discrimination and privacy rights.

2.2.1. Equal Protection and Non-Discrimination

Although freedom of sexual orientation is not explicitly recognized as an international human right, it is now well established that all persons are equally entitled to all human rights regardless of their sexual orientation or gender identity. The Yogyakarta Principles arose from existing human rights instruments and jurisprudence establishing the right to equal protection and the prohibition against discrimination based on sexual orientation grounds.³⁵

The UN Committee on Economic, Social and Cultural Rights (CESCR) has offered one authoritative statement on how international human rights law should be read to apply to sexual minorities. In its General Comments interpreting provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the CESCR has explicitly pointed out that the Covenant proscribes discrimination on the basis of sex and sexual orientation, where that discrimination “has the intention or effect of nullifying or impairing the equal enjoyment or exercise of [the Covenant].”³⁶ To support its comments, the CESCR cited to the list of discrimination grounds in Article 2.2 of the Covenant which includes “sex” and “other status.”³⁷ The fact that the CESCR distinguished between sex and sexual

³¹ See, e.g., UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3,

<http://www.unhcr.org/refworld/docid/3ae6b36c0.html> [“ICESCR”]. Article 2.2 prohibits the discrimination of any kind in the exercise of the rights therein “as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*” (emphasis added).

³² See James C. Hathaway, *THE LAW OF REFUGEE STATUS* (1991), 136.

³³ See Section B introduction, *supra*.

³⁴ See Hathaway, *supra* note 32.

³⁵ See generally ICJ, *Practitioners Guide No. 4*, *supra* note 27, at 29–32 and O’Flaherty and Fisher, *supra* note 4, at 214–21.

³⁶ See Committee on Economic, Social and Cultural Rights, *General Comment 18: The right to work*, E/C.12/GV/18, 24 November 2005 and General Comment No. 14: The right to the highest attainable standard of health, E/C.12/2000/4, 11 August 2000, both cited in O’Flaherty and Fisher, *supra* note 4, at 215.

³⁷ See ICESCR, *supra* note 31.

orientation in its General Comments indicates that the Committee “locates sexual orientation within the rubric of ‘other status.’”³⁸

The Committee on the Rights of the Child (CRC) adopted the same approach as the CESR in its General Comments locating rights based on sexual orientation within the Convention of the Rights of Child.³⁹ It reiterated the obligation of states to ensure that human beings under age 18 enjoy all rights in the Convention without discrimination on the basis of “race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth *or other status*” (emphasis added) and added that these grounds also cover sexual orientation.⁴⁰ Therefore, like the CESC, the CRC also appears to place sexual orientation within the “other status” category.

The Committee on the Elimination of Discrimination Against Women (CEDAW) has not yet addressed discrimination on the basis of sexual orientation in a General Comment on the Convention on the Elimination of Discrimination Against Women. However, it has criticized states for discriminatory practices.⁴¹ For example, CEDAW recommended to Kyrgyzstan that “lesbianism be reconceptualised as a sexual orientation and that penalties for its practice be abolished.”⁴²

The Human Rights Committee (HRC), commenting on the provisions of the International Covenant on Civil and Political Rights (ICCPR), has also reaffirmed the reach of the ICCPR proscription against discrimination⁴³ to include that related to sexual orientation. Unlike the treaty bodies above, however, the HRC has repeatedly pointed out that discrimination on the basis of sexual orientation “is not inherently invidious, since ‘not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria.’”⁴⁴ Despite this qualification on the invidiousness of discrimination, the HRC has frequently criticized countries for discriminatory measures on the basis of sexual orientation.⁴⁵

The regional human rights body of the European Court of Human Rights (ECtHR) has addressed in numerous cases discrimination based on sexual orientation.⁴⁶ However, in its decisions, it has declined to specifically locate the discrimination within any of the

³⁸ O’Flaherty and Fisher, *supra* note 4, at 215.

³⁹ See Committee on the Rights of the Child, *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, 1 July 2003, CRC/GC/2003/4, cited in O’Flaherty and Fisher, *supra*.

⁴⁰ O’Flaherty and Fisher, *supra*.

⁴¹ *Id.*

⁴² See Concluding Observations of the Committee on the Elimination of Discrimination Against Women Regarding Kyrgyzstan, 1 September 2000, E/C.12/1/Add.49, at para. 17, cited in O’Flaherty and Fisher, *supra*, at 216.

⁴³ Articles 2.1 and 26, in particular.

⁴⁴ *Young v. Australia* (941/2000), CCPR/C/78/D/941/2000 (2003) at para. 10.4, cited in O’Flaherty and Fisher, *supra* note 4, at 216–17.

⁴⁵ O’Flaherty and Fisher, *supra* note 4, at 218, describing HRC critiques between 2000 and 2006 of, e.g., “a failure to prohibit employment-related discrimination . . . , a lack of education programmes to combat discriminatory attitudes and unequal ages of consent for sexual activity.”

⁴⁶ See *Salgueiro da Silva Mouta v. Portugal*, 1999-IX 309; (1999) 31 EHRR 1055; *Karner v. Austria*, 2003-IX 199; (2003) 38 EHRR 24; *L. and V. v. Austria*, 2003-I 29; (2003) 36 EHRR 55; and *S.L. v. Austria*, 2003-I 71; (2003) 37 EHRR 39, cited in O’Flaherty and Fisher, *supra*, at 219.

categories—whether “sex,” “other status,” or otherwise—enumerated in the European Convention on Human Rights.⁴⁷

Although the treaty bodies have at times differed in their approaches of locating within their respective human rights instruments the proscription against discrimination based on sexual orientation, they notably share the failure to explicitly address discrimination based specifically on gender identity. However, ECtHR has issued decisions on cases covering issues of gender identity, thus far interpreting them in the context of sexual discrimination.⁴⁸

2.2.2. Privacy Rights

Protected by many international human rights instruments,⁴⁹ the scope of the right to private life is broad, covering the “integrity of the home, body and family, the determination and development of one’s own personality, personal identity and inter-personal relationships.”⁵⁰ The International Covenant on Civil and Political Rights prohibits “arbitrary or unlawful interference with [a person’s] privacy, family, home or correspondence” and grants “the right to the protection of the law against such interference.”⁵¹

The jurisprudence applying the right to privacy to sexual orientation or gender identity originates in the European Court of Human Rights.⁵² The Court found that the criminalization of same-sex sexual relations violated privacy rights under Article 8 of the European Convention of Human Rights⁵³ in *Dudgeon v. United Kingdom*, *Norris v. Ireland*, and in *Modinos v. Cyprus*.⁵⁴ In *Modinos*, the Court held further that even a “consistent policy” of not prosecuting under a law criminalizing same-sex relations was not tantamount to full repeal.⁵⁵

⁴⁷ O’Flaherty and Fisher, *supra*, at 218–19.

⁴⁸ See, e.g., *Sarah Margaret Richards v. Secretary of State for Work and Pensions* (Judgment of 27 April 2006), Case C-423/04 (for which the Court considered the scope of Council Directive 79/7/EEC), cited in Practitioners Guide No. 4, *supra* note 27, at 41.

⁴⁹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> [“CRC”], Art. 16; UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, <http://www.unhcr.org/refworld/docid/3ae6b3980.html>, Art. 14; UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106, <http://www.unhcr.org/refworld/docid/45f973632.html>, Art. 22; Organization of American States, *American Convention on Human Rights, “Pact of San Jose,” Costa Rica*, 22 November 1969, <http://www.unhcr.org/refworld/docid/3ae6b36510.html> [“American Convention”], Art. 11; League of Arab States, *Arab Charter on Human Rights*, 15 September 1994, <http://www.unhcr.org/refworld/docid/3ae6b38540.html>, Art. 21; and Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), <http://www.unhcr.org/refworld/docid/3ae6b38c18.html> [“African Charter”], Art. 10.

⁵⁰ ICJ, *Practitioners Guide No. 4*, *supra* note 27, at 47.

⁵¹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> [“ICCPR”].

⁵² O’Flaherty and Fisher, *supra* note 4, at 220–21.

⁵³ “1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” European Convention of Human Rights, Article 8, <http://www.hri.org/docs/ECHR50.html>.

⁵⁴ *Dudgeon v. UK*, A 45 (1981); (1982) 4 EHRR 149; *Norris v. Ireland*, A 142 (1988); (1988) 13 EHRR 186; *Modinos v. Cyprus*, A 259 (1993); (1993) 16 EHRR 485, cited in O’Flaherty and Fisher, *supra* note 4, at 220.

⁵⁵ *Id.*

The Court also applied the right to private life in a case dealing with gender identity. *Van Kück v. Germany*⁵⁶ involved a transsexual woman who was refused redress in German courts for having been denied insurance coverage for the costs of sex-reassignment surgery. The Court held that Germany had violated the woman’s right to autonomy of gender identity, calling this autonomy “one of the most basic essentials of self-determination.”⁵⁷ In *Pretty v. UK*, the Court explicitly stated that the right to privacy “can sometimes embrace aspects of an individual’s physical and social identity.” According to the Court “gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 [of the European Convention].”⁵⁸

Other human rights treaty bodies, including regional bodies, have not applied privacy rights to issues of sexual orientation and gender identity to nearly the same extent as the European Court.⁵⁹ Decisions under the privacy rights provisions of other treaties have dealt mainly with criminal prohibitions of same-sex sexual conduct.

Although the jurisprudence and legal doctrine underlying the application of privacy, equal protection and non-discrimination rights to sexual minorities has been extensive, it has also been fragmented and divergent within different international human rights regimes. This has thus far been the case in international refugee law. The next section will examine first, the applicable provision of the 1951 Refugee Convention for seeking asylum based on sexual orientation and gender identity and second, the challenges that LGBTI refugee claimants have faced that would benefit from applying the structure and weight of the Yogyakarta Principles.

2.3. SEXUAL ORIENTATION, GENDER IDENTITY & PARTICULAR SOCIAL GROUP MEMBERSHIP

The core ground for protection under the 1951 Refugee Convention for persecution based on sexual orientation and gender identity is one’s “membership of a particular social group.”⁶⁰

The UNHCR Guidelines on International Protection provide the following regarding “membership of a particular social group:”

A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”⁶¹

⁵⁶ *Van Kück v. Germany*, *supra* note 10, also cited in O’Flaherty and Fisher, *supra*.

⁵⁷ *Id.*

⁵⁸ *Case of Pretty v. The United Kingdom*, Application No. 13710/02, para. 61, cited in ICJ, *Practitioners Guide No. 4*, *supra* note 27, at 48.

⁵⁹ O’Flaherty and Fisher, *supra* note 4 at 221.

⁶⁰ 1951 Refugee Convention, *supra* note 27, at Art. 1(A)(2).

⁶¹ UN High Commissioner for Refugees, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, <http://www.unhcr.org/refworld/docid/3d36f23f4.html>.

The guidelines delineate two distinct approaches for determining the asylum claimant's "membership of a particular social group:" 1) the "protected characteristics" or immutability approach⁶² and 2) the "social perception" or "objective observer" approach.⁶³

Under the "protected characteristics" approach, the group at issue must share a "common, immutable characteristic" that its members either "cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."⁶⁴

If the characteristic of a social group is found neither unalterable nor fundamental, the decision maker takes the "social perception" approach. Under this approach, the inquiry focuses on whether the claimant's actual or would-be persecutors believe the claimant to be a member of the claimed persecuted group. A further analysis requires a determination of whether the general population in the country of claimed persecution views the shared characteristics of this collection of persons to be unacceptable.⁶⁵ This approach is therefore also called the "objective observer" approach because it asks how an objective observer of society would assess the treatment of the group at issue.⁶⁶

A wide variety of jurisdictions have applied either of the two approaches to conclude that social-group protection against persecution exists for gays and lesbians.⁶⁷ For example, in *Re GJ*, New Zealand's Refugee Status Appeals Authority followed the protected characteristics approach described in the seminal US Board of Immigration Appeal case *Matter of Acosta*⁶⁸ to conclude that homosexuals formed "a particular social group." The Appeals Authority accordingly opined that sexual orientation is either an innate or unchangeable characteristic or so fundamental to identity and/or human dignity that it ought not to change.⁶⁹

Similarly, the EU definition of "social group" includes sexual orientation and requires EU member states to recognise that "depending on the circumstances in the country of origin, a particular social group might also include a group based on a common characteristic of sexual orientation."⁷⁰ EU legislation likewise encompasses gender identity.⁷¹

⁶² See, e.g., *Refugee Appeal No. 1312/93, Re GJ*, No 1312/93, New Zealand: Refugee Status Appeals Authority, 30 August 1995, <http://www.unhcr.org/refworld/docid/3ae6b6938.html> ["Re GJ"].

⁶³ See e.g., *Re X.M.U* [1995] C.R.D.D. No. 149 (I.R.B.) (QL); S.ZR., [1995] C.R.D.D. No. 150 (I.R.B.) (QL). In this case, the Tribunal held that persecution was founded not on the claimant's homosexuality, but rather on his perceived homosexuality, as it remained factually unknown to his persecutors.

⁶⁴ *Matter of Acosta*, 19 I. & N. Dec 211, 233 (BIA 1985).

⁶⁵ Maryellen Fullerton, *Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany* (1990), 4 GEO. IMMIGR. L.J. 381, 408, describing Judgment of Apr. 26, 1983, No.IV/I E 062 44/81 in Verwaltungsgericht Weisbaden, the administrative court in Weisbaden, Germany

⁶⁶ *Id.*

⁶⁷ See generally *Re GJ*, *supra* note 62. See also *Matter of Toboso Alfonso*, 201 & N. Dec. 819 (BIA 1990), the case United States Attorney General Janet Reno declared as precedential for its categorization of homosexuals as a particular social group.

⁶⁸ See *Matter of Acosta*, *supra* note 64.

⁶⁹ *Id.* See also *Matter of Toboso-Alfonso*, 201 & N. Dec. 819 (BIA 1990), declared by United States Attorney General Janet Reno to be a precedent in all proceedings involving the categorization of homosexuals as a particular social group. Attorney General's Order No. 1895-94, 19 June 1994. See further *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; *Re GJ*, *supra* note 62; *R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)* [1999] UKHL 20, 25 March 1999 (United Kingdom House of Lords), <http://www.unhcr.org/refworld/docid/3dec8abe4.html>; *Singh v. Minister for Immigration and Multicultural Affairs* [2001] FCA 1653, 27 November 2001 (Federal Court of Australia), <http://www.unhcr.org/refworld/docid/47dfb33d.html>.

⁷⁰ European Union: Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as*

Claims of bisexuals on social group grounds have not fared as well.⁷² Bisexuality refers to the “the possibility of being attracted to both men and women.”⁷³ The UNHCR’s *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* touches briefly upon the claims of bisexuals, stating that these —along with claims of transsexuals—have occurred less commonly.⁷⁴ Unfortunately, the prevalent perception of bisexuality contradicts the concept of immutability which has dominated social group refugee claims of gays and lesbians.⁷⁵ Refugee decision makers have attributed to bisexuality a certain flexibility and fleeting quality which many believe inconsistent with the requirement of “immutability.”⁷⁶ This misconception of bisexuality appears to recall earlier decisions rejecting social group claims by gay asylum seekers on the ground that the asylum seekers either were concealing, or could have chosen to conceal, their sexual orientation.⁷⁷

Relative to social group claims based on sexual orientation, claims based on gender identity have also met with far less success. Some decision makers have difficulty distinguishing issues of sexual orientation from gender identity.⁷⁸ In one case, a Lebanese asylum seeker who considered himself heterosexual “testified...that he had been born a female but had dressed and acted like a male since childhood.”⁷⁹ The Board considered the claimant to be a transsexual but classified the case as one based on sexual orientation.⁸⁰ Nevertheless, there has been at least one decision explicitly recognizing transsexuals as a particular social group.⁸¹ No published decisions have been found regarding intersex individuals, who often suffer persecution for having physical and sexual attributes of both sexes.⁸²

Claims of refugee status based on sexual orientation and gender identity are often considered under a group-by-group analysis for named groups (e.g., gays and lesbians).⁸³ This is contrary to international refugee protection conventions, however, which are premised on

Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 19 May 2004, 2004/83/EC, <http://www.unhcr.org/refworld/docid/4157e75e4.html>, Art. 10(1)(d).

⁷¹ *Id.*

⁷² See generally, Sean Rehaag, *Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia* (2009), 13 INT’L J. HUM. RTS 415–36; Sean Rehaag, *Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada* (2008), 53 MCGILL L.J. 59.

⁷³ Gender Equity Resource Center, University of California, Berkeley, *Frequently Asked Questions* [“FAQs”], <http://geneq.berkeley.edu/faqs#8>.

⁷⁴ UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, <http://www.unhcr.org/refworld/docid/48abd5660.html>, at Para. 32 [“UNHCR Guidance Note”].

⁷⁵ See Rehaag, *Patrolling the Borders*, *supra* note 72, at 74, citing Jenni Millbank, *Gender, Sex, and Visibility in Refugee Claims on the Basis of Sexual Orientation*, 18 GEO. IMMIGR. L.J. 71, at 93.

⁷⁶ *Id.*

⁷⁷ See, e.g., *R v. Secretary of State for the Home Department, Ex Parte Binbasi* (1989), Imm. AR 595 (QBD).

⁷⁸ *U.U.U. (Re)*, [1999] CRDD no. 45 (QL) (Canadian Immigration and Refugee Board, cited in UNHCR Guidance Note, *supra* note 74, at 183–84.)

⁷⁹ *Id.* at 184.

⁸⁰ *Id.*

⁸¹ See, e.g., *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084 (9th Cir. 2000), <http://www.unhcr.org/refworld/docid/3ba9c1119.html> [“Hernandez-Montiel v. INS”], recognizing “gay men with female sexual identities” as constituting a particular social group.

⁸² “Intersex” refers to individuals who “may have sex chromosomes, anatomy or physiology that are not socially considered standard for either male or female. Intersex conditions are often visible at birth, but some develop later during puberty.” Transgender refers to “individuals whose gender identity does not conform with what society has commonly associated with their biological sex.” Gender Equity Resource Center, *FAQs*, *supra* note 73.

⁸³ See Part 2.2, *supra*.

generalized categories of protection. The Yogyakarta Principles provide, for the first time, a reliable framework that steers away from the group-by-group approach by deemphasizing named groups and focusing instead on the broader concepts of sexual orientation and gender identity under the “particular social group” rubric.

2.4. SELF-IDENTIFICATION IN SEXUAL ORIENTATION & GENDER IDENTITY TERMS

A consistently troublesome area in the law is the need for precise definition and consistent application of psychological or psychosocial constructs.⁸⁴ This becomes particularly difficult when applicants are required or expected to self-identify or self-define in terms they themselves find unacceptable or repugnant.⁸⁵ In fact, it frequently occurs that LGBTI asylum or refugee applicants fail to lodge valid claims because they either are not able to bring themselves to identify as LGBTI or because their own perceptions of themselves differ from readily-available definitions.⁸⁶

The Yogyakarta Principles provide a more flexible and practical approach to “sexual orientation” and “gender identity,” including the protected characteristics and self-perceptions of the relevant particular social groups. The Principles define sexual orientation as

each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.⁸⁷

As defined in the Principles, the concept of sexual orientation encompasses all possibilities for a person’s capacity for romantic, emotional, and intimate attraction to another person.

The Principles define gender identity as

each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.⁸⁸

“Gender identity” thus refers to how one perceives one’s own gender. The resulting inquiry is a deeply personal one based on one’s experiences and feelings. It allows for the possibility that one may identify with a gender not assigned at birth. Gender identity may, but does not have to, involve making changes to one’s physical characteristics—whether to the body or as part of outward expressions of gender, such as clothing choices. The subjectivity of this view of gender identity acknowledges that predominant conceptions of gender roles comprise only some of the ways that one may perceive oneself.

⁸⁴ See Pratima Narayan, *Somewhere Over the Rainbow . . . International Human Rights Protections for Sexual Minorities in the New Millennium* (2006), 24 BOS. U. INT’L L.J. 313–48, 316–20.

⁸⁵ Jenni Millbank, *Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants* (2009), 22 J. REFUG. STUD. 195–223, 198–201 [“Millbank, Personal Narratives”].

⁸⁶ Jenni Millbank, *Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation* (2003), 1 SEA J. SOC. JUSTICE 725–36, 725–27.

⁸⁷ Yogyakarta Principles, *supra* note 1, at Preamble.

⁸⁸ *Id.*

It is important to reiterate that the Yogyakarta Principles consciously focus on the broader concepts of “sexual orientation” and “gender identity,” rather than fixed terms such as “lesbian,” “gay,” “bisexual,” “transgendered,” “queer” or “intersex,” or the oft-used groupings such as “LGBT” or “LGBTQI.” Examination of the diversity of perceptions and interpretations within the refugee law jurisprudence on sexual orientation and gender identity exposes how these terms—useful and convenient as they may be—have often been encrusted with a decidedly Western understanding of the constructs of sexual orientation and gender identity. This is troublesome not only for the purpose of refugee protection of non-Westerners. Just as cultural norms have compelled societies to outlaw particular kinds of sexual conduct, so too have norms governed the understanding of terms such as “bisexual” or “transgendered.” These terms may not cover all the possible experiences that stem from a person’s sexual orientation or gender identity. By adopting the more capacious notions of sexual orientation and gender identity, international refugee law will be better able to protect asylum claimants and refugees who may not necessarily claim or fit within these largely self-identifying categories.⁸⁹

This subtle but significant nuance in the approach of the Principles reflects an acknowledgement that so-called “gay rights” has been unhelpfully portrayed as following a European or American template.⁹⁰ Nowhere is this suspicion more evident than in discourses in some countries in the Global South and Global East, where criminalization of homosexuality is often used to demarcate the distinction between local and “Western” culture.⁹¹ The anti-homosexuality laws of many countries in the Global South and Global East originated in colonial times. Ironically, these very states are now highly resistant to change emanating from former colonial powers such as Britain and France.

By focusing on these nuanced categories, the Yogyakarta Principles enable decision-makers to more accurately capture applicants’ “particular social group” membership, thus extending more complete protection to those who fear persecution based on their sexual orientation or gender identity.

⁸⁹ *Hernandez-Montiel v. INS*, *supra* note 80. The BIA had initially denied Hernandez-Montiel’s claim, reasoning that because he sometimes dressed in male as well as female clothing, his dressing in female clothing was not an immutable characteristic. The Ninth Circuit overturned this decision on appeal, holding that Hernandez-Montiel’s act of dressing in female clothing was a manifestation of his sexual orientation, which was an immutable characteristic: “That Geovanni could not remember how he was dressed on one occasion several years before does not support the BIA’s conclusion that, because Geovanni can change his clothes, he can change his identity as quickly as the taxi drivers in *Acosta* can change jobs.”

⁹⁰ Long, *supra* note 4, at 39, describing Mahmoud Ahmadinejad’s visit to the United States in 2007: “[H]e made a stir by saying: ‘We in Iran . . . we do not have homosexuals [*hamjensbaz*, a derogatory term] as you have in your country . . . In Iran, absolute such a thing does not exist as a phenomenon.’” The article describes a similar statement by Namibia’s President Sam Nujoma in 2001. In response to an interviewer who raised the subject, Nujoma said: “Don’t repeat those words [“gay” and “lesbian”]. They are unacceptable here . . . Those words you are mentioning are un-Namibian.”

⁹¹ David Smith, *Desmond Tutu leads fight to halt anti-gay terror sweeping Africa*, THE OBSERVER, April 4, 2010, <http://www.guardian.co.uk/world/2010/apr/04/homosexual-africa-arrest-desmond-tutu>. “A favourite claim among critics of homosexuality is that it is an import from the decadent west and alien to African culture. But this has been challenged by historical evidence of homosexual people and practices being accepted in traditional societies before the arrival of European settlers.”

3. SPECIFIC AREAS OF THE PRINCIPLES' APPLICATION TO REFUGEE LAW & PROCEDURE

The following sections will focus on the Principles' applicability to three diverse areas which have proven particularly problematic in the LGBTI claims adjudication and protection context:

1. Access to meaningful protection;
2. The effect of laws criminalizing consensual same-sex conduct; and
3. The requirement that LGBTIs conceal their sexual orientation or gender identity in order to avoid persecution.

In all three areas, the Principles provide nuanced tools for bridging wide extant gaps in protecting LGBTI individuals.

3.1. ACCESS TO MEANINGFUL PROTECTION

To the extent that refugee protection is meaningful, it must take into account the particular needs of the applicant at issue. Protecting LGBTIs sometimes requires consideration of unique issues which rarely arise among other applicant groups. The Principles provide essential guidance to meeting those needs adequately and humanely, including the right to seek asylum and the claims adjudication process itself.

3.1.1. Right to Seek Asylum

The most fundamental of the Yogyakarta Principles' promises is the very right of LGBTIs to seek asylum. This right is articulated in Principle 23:

Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.⁹²

Clause by clause, Principle 23 directly reflects existing provisions not just from the 1951 Refugee Convention, but also from other human rights treaties and authorities that establish the asylum protection due sexual minorities. The first clause—“*[e]veryone has the right to seek and enjoy in other countries asylum from persecution*”—reiterates the premise of the 1951 Refugee Convention, which in turn derived, in part, from the Universal Declaration of Human Rights. Other treaties articulate this same right.⁹³

The second clause—“*including persecution related to sexual orientation or gender identity*”—specifically applies the human right to asylum to persons of differing sexual

⁹² Yogyakarta Principles, *supra* note 1.

⁹³ 1951 Refugee Convention, *supra* note 27; UDHR, *supra* note 26, at Art. 14(1); CRC, *supra* note 49, at Art. 22; UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, <http://www.unhcr.org/refworld/docid/3ae6b39ec.html>, at note 2, Part I, para. 23; American Convention, *supra* note 49, at Art. 22(7); and African Charter, *supra* note 49, at Art. 12(3).

orientations and gender identity. As discussed earlier, this statement is informed by UNHCR policy establishing eligibility for “gays and lesbians” to attain refugee status and also jurisprudence from various jurisdictions worldwide, applying the 1951 Refugee Convention protection to sexual minorities.⁹⁴

The third clause—“[a] State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment”—reiterates the principle of *non-refoulement*. This principle forbids the forcible deportation of an individual to a place where he or she will be exposed to a real risk of serious harm. The *non-refoulement* obligation supersedes states’ right to expel a refugee lawfully in their territory for reasons of national security or public order.⁹⁵ The obligation originated in the 1951 Refugee Convention and has become binding on states through the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and many regional human rights instruments.⁹⁶ It is considered by some to be a *jus cogens* or peremptory norm—binding on all states.⁹⁷

In the fourth clause, the application of the principle of *non-refoulement* to asylum claimants facing a well-founded fear of harm “on the basis of sexual orientation or gender identity” acknowledges the special forms of persecution to which sexual minorities have been subjected and are at risk of facing once more if deported. These forms of persecution will be discussed in the next section.

Principle 23 also enumerates recommendations to states for ensuring refugee protection for all persons regardless of sexual orientation or gender identity:

- A. Review, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum;
- B. Ensure that no policy or practice discriminates against asylum seekers on the basis of sexual orientation or gender identity; and
- C. Ensure that no person is removed, expelled or extradited to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of that person’s sexual orientation or gender identity.⁹⁸

Recommendation A directs states to examine and implement legislation ensuring that sexual orientation and gender identity are accepted as grounds for asylum.

⁹⁴ See Part 2.3, *supra*.

⁹⁵ 1951 Refugee Convention, *supra* note 27, Art. 32(1).

⁹⁶ See, e.g., UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, <http://www.unhcr.org/refworld/docid/3ae6b3a94.html>, at Art. 3; 1951 Refugee Convention, *supra*, at Art. 33(1). See also ICJ, *Practitioners Guide No. 4*, *supra* note 27, at footnote 583, 129.

⁹⁷ Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (3d ed. 2007), at 217.

⁹⁸ Yogyakarta Principle 23(a)–(c), *supra* note 92.

Recommendation B reminds states to take the measures necessary to extend the reach of human rights protection against discrimination to all domestic policies and practices. Note that this recommendation contains no limiting language as to the states' efforts. States may (and should) take all measures necessary, whether legislative (as in Recommendation A), administrative or other.

Recommendation C urges states to follow the obligation of *non-refoulement* by guaranteeing that no sexual minority be deported to countries known for persecution based on sexual orientation or gender identity.

As will become clear in subsequent sections, the Yogyakarta Principles do not simply take existing human rights and argue for their applicability to sexual orientation and gender identity by decree. The rights are not abstractions or highly generalized principles. Rather, they portray well-documented abuses LGBTIs face worldwide. As described in the Preamble, the Principles "aim to articulate in a systematic manner international human rights law as applicable to the lives and experiences of persons of diverse sexual orientations and gender identities."⁹⁹

3.1.2. The Refugee Status Determination (RSD) Process

Refugee status determination (RSD) is the process by which a state or UNHCR assesses whether an asylum seeker meets the definition of refugee and can enjoy protection from persecution in another country. An asylum seeker who is mistakenly determined not to be a refugee can be sent back to the country of origin at great risk to life and limb. Thus, the stakes within the RSD process are as high as the feared human rights violations. The following section discusses aspects of RSD that bear particular rights dangers for LGBTI asylum claimants, as informed by relevant Yogyakarta Principles.

3.1.2.1. Interviews

Yogyakarta Principle 6 covers the right to privacy:

Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choices to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.¹⁰⁰

It is assumed in the present discussion that it is the applicant who will raise sexual orientation or gender identity as a basis for protection. Forced disclosure is thus not implicated here. Nevertheless, Principle 6 would prohibit overly invasive questioning. The Principle recognizes the deeply personal nature of one's sexual orientation or gender identity and provides that all persons have the right to choose whether to divulge information regarding

⁹⁹ Yogyakarta Principles, *supra* note 1, Preamble at para. 8.

¹⁰⁰ Yogyakarta Principle 6, http://www.yogyakartaprinciples.org/principles_en_principles.htm# Toc161634698.

these characteristics. This information could include decisions and choices about one’s own body as well as specific sexual practices.

The accompanying recommendation to Principle 6 most relevant to upholding a person’s right to privacy within RSD interviews directs states to:

[e]nsure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others.

This recommendation urges the utmost sensitivity when placing an asylum claimant or refugee status applicant in the position of disclosing sexual orientation or gender identity-related information. This includes protecting against unnecessary disclosure and breaches of confidentiality.

Because the very nature of an RSD interview is to ascertain information in support of the claim, Principle 6 and its recommendation oblige states to take steps to ensure that the applicant feels comfortable disclosing information relevant to sexual orientation or gender identity. As one scholar points out, “Feelings of shame and self-repression in revealing the kind of information necessary to make a claim of group membership manifest distinctively in sexual orientation claims, even though similar difficulties may arise in detailing persecution on other grounds.”¹⁰¹ For these reasons, a particularly nuanced, sensitive approach is required in the RSD interview as in analysis of the LGBTI-based persecution claim.

The right to privacy under Principle 6 also requires that an individual not be required to disclose arbitrary or unnecessary information. A report investigating the process and outcome of LGB asylum claims in the United Kingdom described some of the interview techniques Border Agency officials utilized.¹⁰² Asylum seekers reported being asked to specifically describe their sexual activities and preferences.¹⁰³ Reticence of the asylum seekers to answer these intrusive questions led some caseworkers to conclude that the applicants were lying about all aspects of their claim.¹⁰⁴ Under Principle 6, it is clear that without due application of sensitivity and direction, the manner of such questioning interferes with the applicant’s right to choose “to disclose or not to disclose information relating to one’s sexual orientation or gender identity.”

The well-documented examples of violative questioning that LGBT asylum seekers have faced demonstrate the lack of training or guidance on how to approach these claimants. The Yogyakarta Principles provide decision-makers with the proper framework for upholding the human rights of these asylum seekers.

¹⁰¹ Millbank, *Personal Narratives*, *supra* note 35, at 196.

¹⁰² Stonewall, *No Going Back: Lesbian and Gay People and the Asylum System* (May 24, 2010), <http://www.stonewall.org.uk/other/startdownload.asp?openType=forced&documentID=2213> .

¹⁰³ *Id.* at 3, 14.

¹⁰⁴ *Id.* at 14.

3.1.2.2. Human Rights Abuses in Assessing Credibility of LGBTI Claimants

At least one state has apparently utilized a highly intrusive physical procedure to assess the credibility of sexual orientation-based asylum applicants.¹⁰⁵ The state has required applicants to submit to “phallometry,” a procedure in which electrodes are applied to the penis in order to detect physical response to visual stimuli.¹⁰⁶ The same method has in the past been offered as evidence in sex offender cases primarily to identify (or disprove) men’s tendencies toward pedophilia.¹⁰⁷ The challenges to the use of phallometry as evidence in legal proceedings focus on its lack of reliability and its invasiveness.¹⁰⁸ One case addressing the use of phallometry in the refugee law context rejected the practice as a violation of European Convention on Human Rights Article 3.¹⁰⁹

State parties and civil societies involved in RSD must systematically examine current and potential practices within the determination process in light of the threats to human rights portrayed in the Yogyakarta Principles. The use of highly intrusive or coerced techniques such as phallometry clearly implicates not only Principle 6 discussed above, but also the right to protection from medical abuses under Principle 18, which provides:

No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person’s sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured, or suppressed.

By way of elaboration and clarification, Principle 18 urges States to:

[t]ake all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms.¹¹⁰

Principle 18 demonstrates how the Yogyakarta Principles can act as a guide in understanding and better scrutinizing RSD procedures in a manner consistent with the applicants’ human rights.

3.1.3. Meaning of Persecution

Where an asylum seeker is applying for refugee protection on “membership of a particular social group” grounds, the assessment of credibility plays a major role in RSD because

¹⁰⁵ See, e.g., LGBT Asylum News, *EU-Regulations [sic] and Asylum Issues*, November 2, 2008, <http://madikazemi.blogspot.com/2008/11/eu-regulations-and-asylum-issues.html>.

¹⁰⁶ Jason R. Odeshoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders*, 14 TEMP. POL. & CIV. RTS. L. REV. 1 (Fall 2004), 2.

¹⁰⁷ See, e.g., *Children’s Aid Society of the Region of Peel v. S.R.-T*, O.J. No. 6141 (2003).

¹⁰⁸ See, e.g., *Decker v. Hogan*, WL 3165830 (2009); *Harrington v. Almy*, 977 F.2d 37, 44 (1st Cir. 1993).

¹⁰⁹ See N97/16114 [1998] RRTA 4882 (2 November 1988) (Refugee Review Tribunal of Australia).

¹¹⁰ Yogyakarta Principle 18(a),

http://www.yogyakartaprinciples.org/principles_en_principles.htm# Toc161634710.

“disbelief regarding actual group membership will almost always doom the claim to failure.”¹¹¹ Refugee status determination invariably relies heavily on the applicant’s personal testimony. However, this reliance is even more pronounced in claims based on sexual orientation.¹¹² This is because reliable acceptable methods to verify sexual orientation or gender identity during the RSD interview are still unavailable or unknown.¹¹³ It is therefore all the more critical that the RSD interview process for sexual orientation or gender identity-based social group membership claims be conducted with full respect for the Yogyakarta Principles.

Ample guidance is available regarding the propriety of RSD decision makers’ methods of assessing credibility. Common approaches include looking out for consistency within the applicant’s narrative, examining demeanor, and comparing the applicant’s answers to a reasonable notion of how a person claiming such group membership would behave.¹¹⁴ The following section focuses exclusively on the decision makers’ questioning technique and its potential for violating Yogyakarta Principle 6.

3.1.3.1. Discrimination

Yogyakarta Principle 2 affirms that “Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity.”¹¹⁵ Yet on its own, discrimination is not generally considered to be persecution which triggers protection under international law. UNHCR guidance provides that discrimination may amount to persecution:

where [discriminatory] measures, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned. This may be the case, for instance, where a LGBT person is consistently denied access to normally available services, be they in his or her private life or workplace, such as education, welfare, health, and the judiciary.¹¹⁶

Phrased simply, acts of discrimination amount to persecution when, viewed cumulatively, they substantially interfere with one’s enjoyment of another fundamental right.

Although they can be simply expressed, the conditions under which discrimination may rise to the level of persecution for sexual minorities far outnumber the several useful examples provided in the UNHCR Guidance Note. They are at least as numerous as the fundamental rights articulated within the Yogyakarta Principles. This is because the Principles are organized to emphasize the “interrelatedness, interdependence and indivisibility” of the rights implicated.¹¹⁷ The recognition of the rights of LGBTIs in an integrated fashion illuminates the extent to which discrimination based on sexual orientation and gender identity can cumulatively amount to persecution. It is also an implicit recognition of the effects of the multiple marginalizations which LGBTI individuals face and their far-reaching ramifications.

¹¹¹ Jenni Millbank, *‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations* (2009), 21 INT’L J. REFUGEE L. 1, 4.

¹¹² Millbank, *Personal Narratives*, *supra* note 35, at 196.

¹¹³ *Id.* at 197–98.

¹¹⁴ See generally, *id.*

¹¹⁵ Yogyakarta Principle 2, http://www.yogyakartaprinciples.org/principles_en_principles.htm#_Toc161634694.

¹¹⁶ UNHCR Guidance Note, *supra* note 74, at para. 10, 7.

¹¹⁷ Yogyakarta Principle 1(A), *supra* note 3.

Thus, the Yogyakarta emphasis on the indivisibility and interdependence of the rights of LGBTI individuals creates a more systematic approach for showing both the numerous rights at stake and for establishing the existence of past or future persecution.

3.1.3.2. Laws Criminalizing Consensual Same-Sex Conduct

As a general rule, one who is subject to lawful prosecution in one's country of origin may not seek asylum from persecution in another state based on that prosecution. The rationale is that lawful prosecution is not tantamount to persecution.

This presents an anomaly in the case of LGBTI protection claim, as sexual minorities throughout the world in fact face persecution in the form of prosecution. 80 countries criminalize consensual same-sex relations between adults.¹¹⁸ Five of those countries impose the death penalty for such relations.¹¹⁹ In this regard, it is recognized that a law may be persecutory *per se* if it reflects social or cultural norms that do not conform to international human rights standards.¹²⁰

3.1.3.2.1. *Applicable Human Rights Standards, as Articulated in the Yogyakarta Principles*

There is a “substantive body of international and national jurisprudence” affirming the human rights standard against criminalizing consensual same-sex relations.”¹²¹ Laws criminalizing homosexual conduct have been found to be discriminatory (Principle 2) and to constitute a violation of the rights to privacy (Principle 6) and freedom of expression (Principle 17).¹²² In one oft-cited decision, the Human Rights Committee noted that proscription of the private sexual conduct of the applicant not only interfered with his right to privacy, but also with his ability to openly express his sexuality, a right articulated in Yogyakarta Principle 19.¹²³

3.1.3.2.2. *Punishment or Penalty*

An examination of the nature and severity of the penalty or punishment attached to laws against consensual sexual activity also implicates the rights to life and to freedom from torture and cruel, inhuman or degrading treatment under Yogyakarta Principles 4 and 10,

¹¹⁸ See Ottoson, ILGA, *Legal Survey*, *supra* note 15, at 2.

¹¹⁹ Daniel Ottoson, ILGA, *State-Sponsored Homophobia. A World Survey of Laws Prohibiting Same Sex Activity Between Consenting Adults* (May 2009), <http://ilga.org/ilga/en/article/1251>.

¹²⁰ UNHCR Guidance Note, *supra* note 74, para. 18, at 10.

¹²¹ See e.g., *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, 1998 (12) BCLR 1517 (CC), 9 October 1998 (Constitutional Court of South Africa), para. 113, <http://www.unhcr.org/refworld/docid/48246cf72.html>, cited in ICJ, *Practitioners Guide No. 4*, *supra* note 74, at footnote 30.

¹²² See *Toonen v. Australia*, CCPR/C/50/#/488/1992, 4 April 1994 (Human Rights Committee), paras. 8.6–8.7, <http://www.unhcr.org/refworld/docid/48298b8d2.html>; *Dudgeon v. United Kingdom*, Application No. 7525/76, 22 October 1981 (ECtHR), <http://www.unhcr.org/refworld/docid/47fdfa7d.html>. Yogyakarta Principle 17, http://www.yogyakartaprinciples.org/principles_en_principles.htm#_Toc161634709.

¹²³ Yogyakarta Principle 19, http://www.yogyakartaprinciples.org/principles_en_principles.htm#_Toc161634711, protects the “expression of identity or personhood through speech, department, dress, bodily characteristics, choice of name, or any other means.” Principle 3, *supra* note 7, acknowledges as integral to personality or personhood a person’s “self-defined sexual orientation and gender identity.” Therefore, in *Toonen*, the inability of the applicant to express his sexuality constituted, by extension, interference with his Principle 19 right to express his identity.

respectively.¹²⁴ The right to life requires, *inter alia*, the repeal of all crimes that either purposely or effectively prohibit consensual sexual activity among persons of the same sex.¹²⁵ The same right also proscribes the death penalty for crimes related to consensual same-sex conduct.¹²⁶ Principle 10 clarifies that the human right to freedom from torture and cruel, inhuman or degrading treatment or punishment also applies to such treatment or punishment that is “perpetrated for reasons relating to the sexual orientation or gender identity of the victim.”¹²⁷

In its Guidance Note on gender-related refugee claims of LGBT applicants, UNHCR explicitly invokes Principle 4 to point out that the persecutory character of certain harsh penalties is particularly evident when they diverge from international human rights standards: “Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution....”¹²⁸ The Note adds that “too narrow [a] focus on the severity of the penalty could in effect reinforce the misconception that being LGBT constitutes a crime.”¹²⁹

3.1.3.2.3. *Enforcement*

An existing albeit unenforced law may be used to demonstrate an applicant’s well-founded fear of persecution because the very existence of that law and its ramifications infringe on rights enshrined in the Yogyakarta Principles. For instance, the threat of enforcement of an anti-homosexuality law may hang over the head of an LGBTI person. In the grip of this fear, the individual will abstain from same-sex relationships or may severely curtail social activities and personal expression to avoid arrest, extra-legal detention, harassment, extortion, or prosecution.

An unenforced law may also impinge on the right to recognition under Yogyakarta Principle 3 by “imped[ing] the access of LGBT persons to State protection”¹³⁰—not just in the state from which asylum seeker is fleeing but also in the country of refuge, if same-sex relations are criminalized there, too. The existence of laws similar to those of the applicant’s home country can either prevent the applicant from accessing the asylum process, or can deter the person from presenting a LGBTI-based protection claim.

The wide range of rights set forth in the Yogyakarta Principles encourage refugee policymakers and adjudicators to examine criminalization-based cases not only in terms of the actual penalty meted out, but also of the potential penalty and its “chilling effect” on protected human rights.

¹²⁴ Yogyakarta Principles 4, http://www.yogyakartaprinciples.org/principles_en_principles.htm# Toc161634696, and 10, http://www.yogyakartaprinciples.org/principles_en_principles.htm# Toc161634702.

¹²⁵ Yogyakarta Principle 4(A), *supra*.

¹²⁶ Yogyakarta Principle 4(B), *supra*.

¹²⁷ Yogyakarta Principle 10(A), *supra*.

¹²⁸ UN High Commissioner for Refugees, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, <http://www.unhcr.org/refworld/docid/3d36f1c64.html>, at para. 17.

¹²⁹ *Id.*

¹³⁰ Yogyakarta Principle 3, *supra* note 7.

3.1.3.3. Forcible Concealment of One’s Sexual Identity

Numerous jurisdictions have affirmed that a person “cannot be expected or required by the State to change or conceal his or her identity in order to avoid persecution. . . . [P]ersecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action.”¹³¹

Forced concealment of sexual orientation or gender identity when instigated or condoned by the state may amount to persecution. The effect of such coercion is similar to that of unenforced laws criminalizing same-sex conduct, discussed above. In either situation, the LGBTI person is forced to live in continual fear of being publicly identified. Policy makers and adjudicators must bear in mind that in countries of origin, LGBTI individuals must conceal their sexual orientation or gender identity “to avoid the severe consequences . . . including the risk of incurring harsh criminal penalties, arbitrary house raids, dismissal from employment and societal disapproval.” LGBTI persons in such countries in fact do not “choose” to hide their identities. One does not “freely waive” one’s human rights through concealment where the only alternative is persecution.

Most fundamentally, requiring one to conceal one’s sexual orientation or gender identity contravenes the very premise of the Yogyakarta Principles: that the full panoply of human rights belongs to all individuals, regardless of their sexual orientation or gender identity. As the Immigration and Refugee Board of Canada pointed out, “We do not tell claimants that they have a right to practise their religion so long as they hide it. A hidden right is not a right.”¹³²

3.2. PROTECTION

3.2.1. Security

Within the maze of vulnerabilities in which LGBTI refugees and asylum seekers must survive, no protection gap is more fundamental or more pervasive than that of security. LGBTI refugees have often escaped actual or imminent physical violence in their countries of origin, to be confronted with new violence and harassment in their countries of first asylum or resettlement.

Concerns regarding physical safety and security permeate virtually all other protection areas for LGBTIs, from housing, to employment, to education. Moreover, physical violence and its aftermath play a critical part in the multiple marginalization mix which characterizes their plight.

¹³¹ See e.g., *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*; *Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* [2003] HCA 71, 9 December 2003 (High Court of Australia), <http://www.unhcr.org/refworld/docid/3fd9eca84.html> [“Appellant S395/2002”], paras. 34–60; *Re GJ*, *supra* note 72. See also *Nasser Mustapha Karouni v. Alberto Gonzales, Attorney General*, No. 02-72651, 399 F.3d 1163 (9th Cir. 2005), <http://www.unhcr.org/refworld/docid/4721b5c32.html>; and *DW (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica v. Secretary of State for the Home Department* CG [2005] UKAIT 00168, 28 November 2005 (UK AIT), para. 78, <http://www.unhcr.org/refworld/docid/46836aa80.html>, all cited in UNHCR Guidance Note, *supra* note 74, para. 25.

¹³² *Id.*, citing *Decision VA5-02751*, 16 February 2007 (IRB of Canada), <http://www.unhcr.org/refworld/docid/48235a5f2.html>.

Not surprisingly, central to the Yogyakarta Principles is the notion that LGBTI individuals have the right to live freely without fear of violence or harm, whether inflicted by private citizens or agents of the State. Principle 5, “The Right to Security of the Person,” provides:

Everyone, regardless of sexual orientation or gender identity has the right to security of the person and to protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual or group.¹³³

This principle recognizes the widespread violence and targeting directed at LGBTI individuals based on their sexual orientation or gender identity. Identity-based violence is often as pervasive in the countries where LGBTI individuals seek safe haven from persecution as in their countries of origin. While the security challenges faced by LGBTI refugees vary from one environment to another, the following patterns appear pervasive:

- (a) barriers accessing asylum procedures and refugee protection;¹³⁴
- (b) abuse and mistreatment by government authorities;
- (c) violent targeting and harassment by local communities and other refugees;
- (d) lack of police protection from identity-related violence; and
- (e) lack of access to effective legal remedies.¹³⁵

An important requirement of advocacy around LGBTI refugee protection is access to data reflecting LGBTI migration patterns from countries of origin to countries of transit, asylum and resettlement. Acquiring these data is one of the greatest challenges facing advocates in this field. This dearth of information is due in part to the fact that the case bases are not tracked. Few jurisdictions collect data reflecting the number of refugee cases based on sexual orientation or gender identity. Likewise, where UNHCR conducts refugee status determination, it does not systematically identify claim grounds. An initiative to gather this data by UNHCR, which conducts RSD in more than 50 countries and in 2009 received 13 percent of the world’s asylum applications,¹³⁶ would go a long way toward bridging this critical information gap. Similar efforts by key asylum countries including the US, Canada, Australia, France, Germany and the UK would likewise provide critically-needed information.

Besides a lack of documentation by agencies receiving asylum applications, a critical reason for the lack of information regarding flows of LGBTI refugees is that untold numbers face barriers to international protection. Vast mixed flows of migrants and refugees travel through countries that criminalize homosexuality and transgender identity to greater and lesser degrees. A 2009 study found that 80 countries criminalize consensual same sex acts among adults. Five of these impose the death penalty for homosexual acts.¹³⁷ In extreme cases, refugee-assisting NGOs in these countries may themselves be criminally charged or harassed for knowingly assisting LGBTI refugees. Cultural stigma around non-traditional sexual orientations and gender identities is equally punishing. Even in many countries of transit or

¹³³ Yogyakarta Principle 5, http://www.yogyakartaprinciples.org/principles_en_principles.htm#_Toc161634697.

¹³⁴ See also Yogyakarta Principle 23, *supra* note 92.

¹³⁵ See also Yogyakarta Principle 28,

http://www.yogyakartaprinciples.org/principles_en_principles.htm#_Toc161634720.

¹³⁶ UN High Commissioner for Refugees, *2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, <http://www.unhcr.org/4c11f0be9.html>, at 16.

¹³⁷ ILGA, *State-Sponsored Homophobia*, *supra* note 119.

migration where same-sex sexuality is not criminalized, “lesbians and gay men live in fear due to the hostility they face from the State and society simply because of their sexual identity.”¹³⁸ All these factors make it virtually impossible for these individuals to approach government authorities or agencies with claims for protection based on their sexual orientation or gender identity: they fear that in doing so, they will be charged with a crime or will face severe discrimination, abuse or ridicule by government or NGO employees. In some situations, the most positive outcome is that they will be flatly turned away without receiving protection. Thus, the first and perhaps greatest challenge facing LGBTI refugees is the elusiveness of an environment safe enough to come forward with their claims.

Those who do request refugee protection, whether in countries of first or permanent asylum, are often confronted with discriminatory treatment by government authorities. This targeting varies with the cultural and legal treatment of sexual minorities and with concepts of gender.¹³⁹ A vast number of murders and other forms of violence towards LGBTIs perpetrated by state agents have been covered in the press and by human rights organizations. In many of these cases, the violence goes uninvestigated and the perpetrators are unpunished.¹⁴⁰ In multiple documented instances in Ecuador, for example, police participated in a “social cleansing” initiative of transgender sex workers.¹⁴¹ A similar “social cleansing” project took place in Namibia, where the home affairs minister reportedly encouraged new police officers to “eliminate homosexuals.”¹⁴² In Colombia, elimination and abuse of homosexuals is carried out by paramilitary officers, who “impose rigid gender norms on communities under their influence and exact severe punishments for violations of those norms such as ‘flogging, mutilation, disfigurement of the face or other parts of the body with acid or sharp instruments and public humiliation.’”¹⁴³

Violence perpetrated by state actors against LGBTI refugees is less well-documented, and significantly more field research is required to engage in effective international advocacy on this issue. However, the little research that has been done indicates that LGBTI refugees are as vulnerable as LGBTI citizens, if not more so. This is due to the fact that immigration and asylum systems routinely require that refugees reside in state-run accommodation and detention facilities, where they are vulnerable to attack by government employees. Many gay Iraqi refugees, for instance, described their fear of physical attacks, rape and mental abuse in Danish and Swedish reception centers.¹⁴⁴ Similarly, a male-to-female transgender woman detailed her sexual assault and severe mistreatment by a guard at an immigration detention

¹³⁸ Barry O’Leary, ‘We Cannot Claim Any Particular Knowledge of the Ways of Homosexuals, Still Less of Iranian Homosexuals...’: *The Particular Problems Facing Those Who Seek Asylum on the Basis of Their Sexual Identity*, 16 FEMINIST LEGAL STUD. (2008), 87–95.

¹³⁹ A common manifestation of the differential attitudes toward lesbians and gay men is the fact that many countries criminalize same-sex sexual conduct among men but not women. *See, e.g.*, laws in Ghana, Sierra Leone, Zambia, Zimbabwe, Belize, Jamaica, Guyana, Turkmenistan, among others. *See also* Christopher Kendall, *Lesbian and Gay Refugees in Australia: Now That ‘Acting Discreetly’ Is No Longer an Option, Will Equality be Forthcoming?* INT. J. REFUGEE LAW 15(4): 715–49 (2003).

¹⁴⁰ *See* O’Flaherty and Fisher, *supra* note 4, at 208.

¹⁴¹ Kendall, *Lesbian and Gay Refugees in Australia*, *supra* note 139, at 725.

¹⁴² John Leland, *Gays Seeking Asylum Find Familiar Prejudices in U.S.*, N.Y. TIMES, August 2, 2001, <http://www.nytimes.com/2001/08/01/national/01ASYL.html>.

¹⁴³ Toni M. Johnson, *Flamers, Flaunting and Permissible Persecution*, FEMINIST LEGAL STUD. 15 (2007), at 100.

¹⁴⁴ UN High Commissioner for Refugees, *Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia*, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=4c2325780&skip=0&query=fleeing%20for%20love> (December 2009).

facility in California.¹⁴⁵ In many countries, even if there is no direct policy mandating physical punishment for homosexuality, unofficial tolerance and a reticence to prosecute perpetrators permit the abuses to flourish.

Civilian violence against LGBTI individuals is international in scope. In private and family life, lesbians are especially susceptible to abuse, including “being beaten, raped, forcibly impregnated or married, and otherwise attacked by family members to punish them or “correct” their sexual identity.¹⁴⁶ Transgender individuals, who often are forced into survival sex work, are also extremely susceptible to violent targeting. In Turkey, for example, eight transgender individuals were murdered over a 15-month period between 2008 and 2010.¹⁴⁷ Some other recent examples of civilian violence against LGBTI individuals include

- a gay man sprayed with gasoline and set on fire in Belgium;
- the murder of a transgender human rights defender in Argentina;
- a nail bomb explosion in a gay bar in the United Kingdom, killing three people and injuring dozens of others;
- the murder of a gay rights activist by multiple knife wounds in Jamaica, prompting a crowd to gather outside his home, laughing and calling out “let’s get them one at a time”;
- the recent execution-style murder of two lesbian human rights defenders in South Africa.¹⁴⁸

The little research available indicates that police are often unwilling to respond to the complaints of violence or harassment reported by LGBTI refugees.¹⁴⁹ In some cases, accused perpetrators of identity-based targeting are held in custody or criminally processed. But in many countries of first asylum, the criminal justice system is so inadequate that those accused are released quickly into the community where they can continue to pose a threat to LGBTI refugees. Also pernicious is the common advice provided by police to LGBTI individuals to conceal their identities in order to avoid violence.¹⁵⁰ This contravenes another important right set out in the Principles: the right to “expression of identity or personhood” whether through one’s speech, dress or mannerism.¹⁵¹

There is a clear correlation between police mistreatment and indifference on one hand, and fear among LGBTI refugees of approaching those police for further protection on the other. The former has a debilitating, isolating impact, creating an environment which is ever more dangerous for these vulnerable refugees.¹⁵² As discussed below, LGBTI refugees confront discrimination and identity-based violence in most public spheres, whether in medical care, housing, employment or education. When police and other public authorities explicitly or

¹⁴⁵ Human Rights Watch, *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, <http://www.hrw.org/en/reports/2010/08/25/detained-and-risk-0> August 2010, at 14.

¹⁴⁶ Amnesty International USA, *A Fact Sheet on Lesbians, Gender and Human Rights Violations, Violence and Abuse of Women* (July 2005), <http://www.amnestyusa.org/violence-against-women/violence-against-women---a-fact-sheet/page.do?id=1108440>.

¹⁴⁷ Human Rights Watch, *Turkey: Stop Violence Against Transgender People* (February 2010), <http://www.hrw.org/en/news/2010/02/19/turkey-stop-violence-against-transgender-people>.

¹⁴⁸ See O’Flaherty and Fisher, *supra* note 4, at 208

¹⁴⁹ Neil Grungras, Rachel Levitan and Amy Slotek, *Unsafe Haven: Security Challenges Facing LGBT Asylum Seekers and Refugees in Turkey*, PRAXIS: THE FLETCHER J. HUM. SECURITY 24 (2009), at 41–61.

¹⁵⁰ *Id.*

¹⁵¹ See Yogyakarta Principle 19, *supra* note 123. See also Part 3.1.3.3, *supra*.

¹⁵² Grungras *et al.*, *Unsafe Haven*, *supra* note 149.

implicitly send the message to LGBTI refugees that they will not be protected and have no avenue of redress, those refugees are often compelled to go “underground.” They retreat into isolated, dim environments, where they fall to poverty, exploitation, violence and depression. They are thus “re-marginalized” by societies in their country of asylum, migration or resettlement.

While there have been a handful of ground-breaking studies touching on the security concerns of LGBTI refugees,¹⁵³ much more field research is needed to fully grasp the scope and implications of this serious human rights gap. Read together with the Yogyakarta Principles, this additional research can be a powerful advocacy tool to identify security gaps and increase the protection of LGBTI refugees worldwide.

3.2.2. Adequate Housing

Having escaped persecution in their countries of origin, LGBTI individuals often scramble to find safe, adequate housing in countries of transit or first asylum. Finding adequate housing is a challenge for virtually all refugees—particularly those in urban settings.¹⁵⁴ However, LGBTI individuals face several distinct protection gaps in this area. First, lacking traditional support available to other refugee communities, their pool of accessible housing is greatly diminished. Second, they must find housing with individuals who will either tolerate or share their sexual orientation or gender identity. Third, particularly while living with other LGBTI individuals, they are exposed to LGBTI-focused targeting. Finally, even where safe, adequate housing is found, they must avoid eviction and exploitation by landlords keen to profit from their desperation.¹⁵⁵

Yogyakarta Principle 15 recognizes the primacy of safe, adequate housing, providing in relevant part:

Everyone has the right to adequate housing, including protection from eviction, without discrimination on the basis of sexual orientation or gender identity.¹⁵⁶

The same Principle calls upon states to

[t]ake all necessary legislative, administrative and other measures to ensure security of tenure and access to affordable, habitable, accessible, culturally appropriate and safe housing, including shelters and other emergency accommodation, without discrimination on the basis of sexual orientation, gender identity or marital or family status.¹⁵⁷

¹⁵³ See, e.g., Refugee Support, *Over Not Out: The Housing and Homelessness Issues Specific to Lesbian, Gay, Bisexual and Transgender Asylum Seekers* (May 2009), http://www.refugeesupport.org.uk/documents/MST_LGBTreport_screen_0509.pdf [“Over Not Out”]; Grungras *et al.*, *Unsafe Haven*, *supra* note 149; UNHCR, “Fleeing for Love,” *supra* note 144 at 19.

¹⁵⁴ UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 21, The Human Right to Adequate Housing* (June 1994), <http://www.unhcr.org/refworld/docid/479477400.htm>, at 24–25.

¹⁵⁵ Kofi Kobia and Leilla Cranfield, *Literature Review: Urban Refugees* (September 2009), <http://www.unhcr.org/4b0a528c9.pdf>, at 11–12

¹⁵⁶ See also Yogyakarta Principle 15, http://www.yogyakartaprinciples.org/principles_en_principles.htm# Toc161634707.

¹⁵⁷ See also Yogyakarta Principle 15A, *supra*.

The reality for LGBTI refugees in particular often falls far from these edicts. Cut off from loved ones, known support structures and coping mechanisms developed in their countries of origin, these refugees are relegated to what has been described as “double marginality.” Being both asylum seekers and LGBTIs, these refugees’ hardship, vulnerability and experience of abuse is not the cumulative sum of belonging to both groups, but rather the *compounded* effect of the two.¹⁵⁸ As a result, LGBTI refugees find themselves “profound[ly] distanc[ed] from traditional support systems and resources.”¹⁵⁹

A recent report issued by Refugee Support, a UK-based refugee advocacy organization, documented a range of serious barriers faced by LGBTIs in accessing safe housing.¹⁶⁰ The group found that many LGBTI asylum seekers had “little or no source of viable personal income” and were living in conditions of “hidden homelessness.” Some lived with friends or others who provided them with accommodation—often “expecting sexual favors in return.”¹⁶¹ A number reported homophobic or transphobic discrimination or harassment at the hands of landlords and as a result feared for their safety. This constituted yet another hardship atop economic instability and other concerns.¹⁶²

LGBTI asylum seekers and refugees in Turkey have reported being evicted when their sexual orientation was discovered. They likewise reported experiencing harassment by neighbors.¹⁶³ Some described being denied housing altogether, either because their sexual orientation or gender identity was obvious, or in combination with the fact that they were foreign.¹⁶⁴

LGBTI asylum seekers who spend time in official government facilities, whether reception centers or subsidized housing, report problems arising from living in close quarters with other asylum seekers. A study of LGBTI asylum claims in Scandinavia examined conditions in government reception facilities, noting that the “lack of privacy makes it impossible for some to openly express their sexual orientation.” The study opined that these conditions in turn negatively affect the assessment of their credibility during refugee status determination procedures, and also violate their right to live openly.¹⁶⁵

Some LGBTI asylum seekers reportedly fled reception centers in Denmark and Sweden after “being subjected to physical attacks, rape and mental abuse.”¹⁶⁶ In the United Kingdom, refugees and asylum seekers residing in UK Border Agency (UKBA) and Social Services asylum support accommodations reported having to hide their sexual orientation or gender identity. They reported being “susceptible to anti-LGBTI discrimination” as they were “often placed with asylum seekers who held anti-LGBTI sentiments.”¹⁶⁷ Among those living in UKBA accommodations, nearly two-thirds (63%) had experienced homophobic or

¹⁵⁸ Timothy Randazzo, *Social and Legal Barriers: Sexual Orientation and Asylum in the United States*, in QUEER MIGRATIONS: SEXUALITY, U.S. CITIZENSHIP AND BORDER CROSSINGS (Eithne Luibheid & Lionel Cantu, Jr. eds., 2005), 38.

¹⁵⁹ Helsinki Citizens’ Assembly – Turkey (HCA) and ORAM (Organization for Refuge, Asylum & Migration), *Unsafe Haven: The Security Challenges Facing Lesbian, Gay, Bisexual & Transgender Asylum Seekers in Turkey* (June 2009), <http://www.oraminternational.org/images/stories/unsafe%E2%80%93haven-final.pdf>, at 22.

¹⁶⁰ Refugee Support, *Over Not Out*, *supra* note 153.

¹⁶¹ *Id.* at 16.

¹⁶² *Id.* at 17.

¹⁶³ HCA and ORAM, *Unsafe Haven*, *supra* note 159, at 22.

¹⁶⁴ *Id.*

¹⁶⁵ UNHCR, *Fleeing for Love*, *supra* note 144.

¹⁶⁶ *Id.* at 19.

¹⁶⁷ Refugee Support, *Over Not Out*, *supra* note 153 at 17.

transphobic discrimination during their stay.”¹⁶⁸ This is consistent with treatment generally reported by LGBTI individuals in other forms of state care.¹⁶⁹

Compounding matters, LGBTI refugees often fear reporting the violence or mistreatment they endure for fear of being deported, facing hostility or apathy from government authorities, or being subjected to retribution from perpetrators. As a result, LGBTIs are often left with no protection or legal recourse from wrongs or violence perpetrated in connection with their accommodation. The experience of “persecution is intensified when sexual minorities seek government protection and are further abused by government officials,”¹⁷⁰ and so too, their vulnerability greatly increases. Given these protection gaps, resettlement countries and agencies hosting asylum seekers must take affirmative steps to ensure or provide safe housing for LGBTI refugees, as well as avenues for redress, as provided in Yogyakarta Principle 28.¹⁷¹

3.2.3. Access to Secure and Safe Employment

Ubiquitously cut off from family and traditional sources of financial support during the refugee process, LGBTIs must work in order to secure their survival. Yet just as these refugees and asylum seekers are often blocked from accessing safe employment in countries of origin, they are often shunned from job markets in countries of migration, first asylum and resettlement. In these countries, where refugees often lack adequate language skills and have minimal community ties, many face a spiral of destitution. They too often turn to exploitative or dangerous occupations, including survival sex.

Yogyakarta Principle 12 asserts that LGBTI individuals have the right to work “without discrimination on the basis of sexual orientation or gender identity,” and the ability to seek redress in the case of being wronged on this basis by employers or co-workers.¹⁷²

The Principle calls upon states to:

- A. Take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation and gender identity in public and private employment, including in relation to vocational training, recruitment, promotion, dismissal, conditions of employment and remuneration; [and to]
- B. Eliminate any discrimination on the basis of sexual orientation or gender identity to ensure equal employment and advancement opportunities in all areas of public service, including all levels of

¹⁶⁸ *Id.* at 19.

¹⁶⁹ See, e.g., European Union Agency for Fundamental Rights (FRA), *Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States, Part II: the Social Situation* (March 2009), http://fra.europa.eu/fraWebsite/attachments/hdgso_part2_summary_en.pdf. LGBTI individuals in elder care facilities, for example, reported facing “social isolation and stereotyping from personnel and other residents.”

¹⁷⁰ Monica Saxena, *More Than Mere Semantics: The Case for an Expansive Definition of Persecution in Sexual Minority Asylum Claims*, MICH. J. GENDER & L. (2006), at 12.

¹⁷¹ Principle 28 provides in relevant part that “Every victim of a human rights violation, including of a violation based on sexual orientation or gender identity, has the right to effective, adequate and appropriate remedies. Yogyakarta Principle 28, *supra* note 35.

¹⁷² Yogyakarta Principle 12, http://www.yogyakartaprinciples.org/principles_en_principles.htm# Toc161634704.

government service and employment in public functions, including serving in the police and military, and provide appropriate training and awareness-raising programmes to counter discriminatory attitudes.

The right to access employment and to work in a discrimination-free work environment is particularly critical to LGBTI individuals, who are often cut off from family and community financial resources which enable other refugees to survive.

In both transit and resettlement countries, LGBTI individuals are often unable to find stable, safe work. Employers decline to hire these individuals in the first place. Those who are lucky to find work are subjected to discrimination and on-the-job harassment, and employers frequently dismiss LGBTI refugees upon learning of their gender identity or sexual orientation. Other refugees are subjected to conditions so intolerable that they are compelled to quit. Exacerbating these conditions are the linguistic and educational barriers common to almost all refugees, which severely limit the employment options available them.

LGBTI refugees often report being denied employment because their outward appearance indicates their sexual orientation or gender identity to their potential employer or customers. They also report facing violent abuse and harassment on the job, often because employers are aware of their economic vulnerability, their irregular employment status and their fear of reporting mistreatment to the police. LGBTI refugees are also subject to violence, harassment and discrimination by their co-workers, some of whom may “out” LGBTI asylum seekers to the boss, leading to further harassment or job loss.

For all these reasons, it is essential that domestic laws and local ordinances adopt and integrate Yogyakarta Principle 12. To secure these rights, LGBTI refugees must be given pro bono legal aid, and must be provided with dependable, secure channels for reporting on-the-job harassment, exploitation or abuse.

Discrimination and harassment in employment is an especially pressing issue among transgender refugees. In general, these individuals have great difficulty securing and maintaining employment. Many resign from jobs or undergo gender reassignment surgery in order to avoid stigmatization.¹⁷³ Unable to find employment, many male-to-female transgender women feel compelled to engage in survival sex work.¹⁷⁴ A study of male-to-female transgender teenagers in Israel found that many turned to sex work to avoid discrimination on the job, because of lack of social and financial support, and as a means of living openly with their gender identities.¹⁷⁵ Some studies have posited that sex work is the main source of income for transgender individuals worldwide.¹⁷⁶

Transgender refugees, whose precarious status renders them even more marginalized than native transgender individuals, are especially cut off from social and financial support mechanisms. This leads many to engage in survival sex work, in turn rendering them vulnerable to further violence, harassment and serious health problems. In an incident

¹⁷³ Council of Europe: Commissioner for Human Rights, *Discrimination Against Transgender Persons Must No Longer be Tolerated* (1 May 2009), <http://www.unhcr.org/refworld/docid/4a700e112.html>. The report further indicates that in some countries, the unemployment rate of transgender persons can reach up to 50 percent.

¹⁷⁴ Ronit D. Leichtentritt and Bilha Davidson Arad, *Adolescent and Young Adult Male-to-Female Transsexuals: Pathways to Prostitution*, BRIT. J. SOC. WORK 34 (2004), 349–74

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

particularly illustrative of their isolation and vulnerability, a group of transgender refugees engaging in sex work in Turkey reported being physically attacked by Turkish transgender sex workers.¹⁷⁷

Gay, lesbian, bisexual and heterosexual refugees often participate in survival sex work due to lack of other avenues of survival. This is particularly true in camp situations or where there is “civil strife and flight” compounded by “poverty, powerlessness and social instability.” In such situations, vulnerable populations including women and children are often “coerced into having sex to obtain their survival needs.”¹⁷⁸ Sexual exploitation is also reported in the resettlement context, with some LGBTI refugees reporting having to trade sexual favors for housing.¹⁷⁹

Acknowledging the unique vulnerability of LGBTI refugee populations to sexual and economic exploitation, Yogyakarta Principle 11 asserts the Right to Protection from all Forms of Exploitation, Sale and Trafficking of Human Beings. This principle encourages states to:

[E]stablish legal, educational and social measures, services and programmes to address factors that increase vulnerability to trafficking, sale and all forms of exploitation... including such factors as social exclusion, discrimination, rejection by families or cultural communities, lack of financial independence, homelessness, discriminatory social attitudes leading to low self-esteem, and lack of protection from discrimination in access to housing, accommodation, employment and social services.¹⁸⁰

While such measures will surely not be accessed by all LGBTI individuals, they will clearly indicate that states are serious about ameliorating the abuses which LGBTI individuals, including refugees, face in their struggle to survive.

In the resettlement context, states must strive to support LGBTI-friendly support networks that allow newly arrived refugees to access vocational and language training that will increase their opportunities to earn a living. They must also foster access to social networks necessary for long-term integration, self-support and avoidance of relegation to survival sex work.

3.2.4. Medical and Mental Health Care

LGBTI individuals worldwide face medical and psychiatric abuse as well barriers accessing high quality, appropriate medical care. In countries of origin, they may be subjected to forced hospitalization or, in at least one country, to quasi-coerced sex change. In countries of transit and first asylum, these refugees are doubly marginalized: Often exposed to violence or to high-risk occupations, they are deprived of the most basic medical protection.

¹⁷⁷ ORAM case files.

¹⁷⁸ Women’s Commission for Refugee Women and Children, *Refugees and AIDS: What should the humanitarian community do?* (January 2002), <http://www.womensrefugeecommission.org/docs/hiv3.pdf>.

¹⁷⁹ Refugee Support, Over Not Out, *supra* note 153.

¹⁸⁰ Yogyakarta Principle 11, http://www.yogyakartaprinciples.org/principles_en_principles.htm# Toc161634703.

Yogyakarta Principle 17 details the right of LGBTIs to “the Highest Attainable Standard of Health.” It provides:

Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right.¹⁸¹

In practice, very few LGBTI refugees or asylum seekers enjoy full access to this right, due to the combined vulnerabilities of being an asylum seeker, LGBTI, and having scant economic resources. Refugees in many countries must cover the expenses of their medical care.

For LGBTI refugees, vocational marginalization, poverty, and other factors render medical care well-nigh inaccessible. Compounding this barrier to protection, transgender—and even some lesbian, gay, and bisexual—individuals may avoid medical assistance for fear of encountering hostile individuals in waiting rooms, or verbal harassment from medical staff. In addition, shame surrounding their sexual orientation or gender identity may cause LGBTI individuals to withhold crucial information about their reproductive health status and practices, or to avoid testing for sexually transmitted diseases (STDs), leaving them untreated and their conditions or illnesses prone to deterioration and further compounding. This is the case for refugees in Egypt, where cultural conservatism heavily stigmatizes homosexuality and non-marital sexual activity, and “it is assumed that HIV/AIDS infection ‘happens [only to] foreigners, the promiscuous, drug addicts and generally, the morally corrupt.’”¹⁸² This is particularly problematic, as displaced persons suffer heightened vulnerability to HIV/AIDS because they are more often victims of sexual assault, and are more likely to resort to survival sex work.¹⁸³ The latter phenomenon is particularly pervasive among transgender refugees and others fleeing persecution based on gender identity or sexual orientation.¹⁸⁴

Primarily for economic reasons, many LGBTI refugees forgo visits to medical professionals until their symptoms are severe and require major medical attention. For example, a diabetic LGBT asylum seeker in Turkey developed liver failure after spending months trying without success to access adequate medical care.¹⁸⁵ Similarly, some are turned away by medical professionals because they are unable to cover the cost of effective treatment. A lesbian refugee in Turkey with a severe kidney infection was twice sent home by local emergency rooms for failing to pay for her care, subsequently requiring hospitalization to save her life.¹⁸⁶

Gaining access to adequate medical care is often most difficult for transgender individuals. These persons face the most discrimination from practitioners, who are unlikely to understand their condition or the specific medical issues relevant to their sex transition. These include endocrinological complications resulting from hormone therapy, as well as possible gynecological or urological complications resulting from botched gender reassignment surgery. In addition, medical professionals may be openly rude with these clients, referring to

¹⁸¹ Yogyakarta Principle 17, *supra* note 122.

¹⁸² Minal Giri, *On Contagion: Sudanese Refugees, HIV/AIDS, and the Social Order in Egypt* (2007), <http://ema.revues.org/index1769.html>.

¹⁸³ *Id.*

¹⁸⁴ HCA and ORAM, *Unsafe Haven*, *supra* note 159, at 25. See also TAMPEP (Transnational AIDS/STD Prevention Among Migrant Prostitutes in Europe Project), *Position Paper on Migration and Sex Work* (2004), http://tampep.eu/documents/positionpaper_migrationsexworkers_en.pdf, at 25.

¹⁸⁵ HCA and ORAM, *Unsafe Haven*, *supra*, at 26.

¹⁸⁶ ORAM client files.

them in the non-preferred gender.¹⁸⁷ A study conducted on the experiences of transgender patients in European Union member states found that “one-third reported they [had been] refused treatment because a medical practitioner did not approve of gender reassignment.”¹⁸⁸ The study further found that “29% of respondents felt that being transgender adversely affected the way they were treated by healthcare professionals.”¹⁸⁹ These individuals are likely to be targeted for sexual harassment as well, as evidenced by the fact that many transgender individuals surveyed reported avoiding visits to the doctor’s office when possible because of fears of “inappropriate behaviour.”¹⁹⁰ Moreover, this population faces difficulty attaining access to hormone therapy and gender modification surgery.

In countries of asylum, the lack of privacy during medical interactions may compound refugees’ concerns relating to being “outed” or risk of violence at the hands of other asylum seekers or private actors.

For all these reasons, states must do their utmost to render health care economically accessible to all refugees, make special efforts to safeguard the privacy of LGBTI clients, and educate health care providers regarding LGBTI-specific issues.

Further to calling for adequate medical care, the Yogyakarta Principles also specifically codify the right to protection from medical abuses, set forth in Principle 18. This Principle provides:

No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity... [A] person’s sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.”¹⁹¹

Protection from medical abuses is especially important for LGBTI refugees, many of whom flee countries where their sexual orientation or gender identity is still classified as a mental illness.¹⁹² Lesbians, gays, bisexuals and transgender individuals have frequently been “forcibly confined in medical institutions, and subjected to ‘aversion therapy,’ including electroshock treatment.”¹⁹³ In the case of *Pitcherskaia v. INS*, a Russian lesbian sought asylum on the grounds that the Russian government subjected her to “involuntary psychiatric treatment, forcible electric shock treatments, and forcible treatment with psychotropic drugs” in order to “cure” her homosexuality.¹⁹⁴ In fact, such treatment is still extant in many countries. Transgender individuals are also at risk of forcible sterilization if they wish to officially change their identity.¹⁹⁵

¹⁸⁷ Thomas Hammarberg, Council of Europe, Commissioner for Human Rights, *Human Rights and Gender Identity* (29 July 2009), <http://www.unhcr.org/refworld/docid/4a7bff742.html>, at Section 3.3.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at footnote 41 and accompanying text.

¹⁹¹ Yogyakarta Principle 18, *supra* note 110.

¹⁹² See Timothy Wei and Margaret Satterthwaitet, *Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation*, COLUM. HUM. RTS. L. REV. 29 (1998), 1–35.

¹⁹³ See O’Flaherty and Fisher, *supra* note 4, at 212.

¹⁹⁴ See Wei and Satterthwaitet, *Shifting Grounds for Asylum*, *supra* note 192.

¹⁹⁵ Hammarberg, COE, *Human Rights and Gender Identity*, *supra* note 187.

In Iran, where same-sex relations are punishable by death,¹⁹⁶ gays and lesbians are sometimes compelled to submit to sex reassignment surgery. Only by doing so can they escape prosecution and eventual execution.¹⁹⁷ The resulting psychological effects from this compulsory surgery can be significant, along with the physical issues.

Psychological care and other mental health support for LGBTI refugees in countries of first asylum or those recently resettled is often as critical as medical treatment. As demonstrated in the Turkish context, “LGBT asylum seekers and refugees consistently described mental health problems resulting from the violence and marginalization they experienced,” including reports of “depression, anxiety, suicidal thoughts, nightmares, difficulties sleeping, memory problems, and feelings of isolation and loneliness.”¹⁹⁸

Psychological support is particularly important for LGBTIs who have experienced traumatic sexual violence, a common phenomenon among LGBTIs. In a study of lesbian and bisexual women seeking refugee status based on sexual orientation in Canada, “45% reported having been sexually assaulted. Similar studies in Australia and the UK found 37% of lesbians, and 28% respectively reported experiencing sexual assault.”¹⁹⁹ Transgender individuals also report high levels of sexual violence. The experience of sexual assault and resulting trauma can also have negative effects on their ability to clearly articulate their claims for refugee status. One London-based study of refugees with pre-migration trauma found that “those with a history of sexual violence reported greater overall severity of PTSD [post-traumatic stress disorder] and avoidance symptoms, greater feelings of shame and greater difficulty in disclosure of personal information during their initial refugee interview.”²⁰⁰ Thus, comprehensive psychological services for LGBTI refugees in countries of first asylum and resettlement are critical.

Extensive field research is necessary to expose the medical and mental health protection gaps facing LGBTI refugees in countries of transit, asylum and resettlement. Only in this manner can advocates develop best practices that can be shared and implemented in communities where LGBTI refugees are resettled and integrated.

3.2.5. Education

Exclusion from education is injurious to LGBTI individuals, critically hampering the ability of many to survive in the face of a lifetime of marginalization and rejection from traditional support systems.

In the context of LGBTI refugees and asylum seekers, the exclusion from education and traditional information sources can ultimately result not only in limited vocational opportunities, but in greatly compromised protection. These individuals, many of whom were already excluded from educational opportunities in their countries of origin, often experience intensified marginalization in the educational sphere in countries of first asylum or

¹⁹⁶ See generally ILGA, *General Survey*, *supra* note 15.

¹⁹⁷ Matthew Hays, *Iran’s Gay Plan: A Documentary looks at Iran’s heartbreaking “solution” to homosexuality*, August 26, 2008, CBC NEWS, <http://www.cbc.ca/arts/film/story/2008/08/26/f-homosexuality-iran-sex-change.html>.

¹⁹⁸ HCA and ORAM, *Unsafe Haven*, *supra* note 184, at 27.

¹⁹⁹ See Laurie Berg and Jenni Millbank, *Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants*, J. REFUGEE STUD. (2007), 195–223.

²⁰⁰ *Id.*

resettlement. Their lack of survival skills, including language and vocational training, pushes many outside the margins of society, endangering their physical safety and survival.

Yogyakarta Principle 16 upholds the right to all of education without regard to sexual orientation or gender identity. The Principle provides:

Everyone has the right to education, without discrimination on the basis of, and taking into account, their sexual orientation and gender identity.²⁰¹

Like other refugees and asylum seekers, LGBTI refugees are foreclosed from most educational resources due to a lack of financial resources. This is particularly true in countries of first asylum. Compounding the dearth of opportunities for LGBTI individuals is the discrimination and bullying they often experience in educational settings.

In a 2009 report on EU countries, “incidents of bullying and harassment of LGBT persons” were reported to be ubiquitous.²⁰² Similarly, a 2004 study of California schools reported that 91 percent of all LGBT students had heard their peers utter slurs about sexual orientation, and over 40 percent reported teachers making negative comments or slurs. Two-thirds of the LGBTIs reported having been harassed at least once due to their sexual orientation, and nearly half reported repeated harassment. 27 percent reported being harassed because they weren’t “masculine enough” or “feminine enough.”²⁰³

The above California study bore out the devastating effect of LGBT-specific abuse and marginalization: Those who were harassed on the basis of actual or perceived sexual orientation were three times more likely to miss school because they felt unsafe. Not surprisingly, those harassed on the basis of actual or perceived sexual orientation were also more likely to perform poorly or be victims of violence.²⁰⁴

Persistent harassment and targeting often leads LGBTI refugees to abandon language and vocational training programs, further marginalizing them.²⁰⁵ As discussed above, these refugees and asylum seekers are even more vulnerable to harassment and abuse compared to their domestic peers as a result of the multiple marginalities of being economically disadvantaged, foreign, and LGBTI.

A 2009 study of LGBT refugees and asylum seekers in Turkey reported that many had forgone language and vocational education due to harassment by other asylum seekers and refugees. Some of those who braved attending classes dropped out after being ridiculed, harassed or threatened by other asylum seekers.²⁰⁶

²⁰¹ Yogyakarta Principle 16,

http://www.yogyakartaprinciples.org/principles_en_principles.htm#_Toc161634708.

²⁰² European Union Agency for Fundamental Rights (FRA), *Homophobia and Discrimination on the Grounds of Sexual Orientation in the EU Member States, Part II: the Social Situation* (Updated 2008),

http://www.fra.europa.eu/fraWebsite/attachments/FRA_hdgso_report-part2_en.pdf.

²⁰³ California Safe Schools Coalition and 4-H Center for Youth Development, *Safe Place to Learn: Consequences of Harassment Based on Actual or Perceived Sexual Orientation and Gender Non-Conformity and Steps for Making Schools Safer* (January 2004), <http://www.casafeschools.org/SafePlacetoLearnLow.pdf> [“Safe Place to Learn”], 14.

²⁰⁴ California Safe Schools, *Safe Place to Learn*, *supra* note 203, at 8.

²⁰⁵ See, e.g., HCA and ORAM, *Unsafe Haven*, *supra* note 184, at 28.

²⁰⁶ *Id.*, at 28–29.

In the face of these abuses, LGBTI refugees must have means of local redress. In the resettlement context as in countries of first asylum, the vulnerability of LGBTI students to harassment and abuse must be recognized, and safeguards must be put into place to ensure that fears for personal safety do not prevent LGBTIs from accessing education.

In this regard, Yogyakarta Principle 16 directs states to:

- A. [t]ake all necessary legislative, administrative and other measures to ensure equal access to education, and equal treatment of students, staff and teachers within the education system, without discrimination on the basis of sexual orientation or gender identity.²⁰⁷

This Principle further requires that states:

- E. Ensure that laws and policies provide adequate protection for students, staff and teachers of different sexual orientations and gender identities against all forms of social exclusion and violence within the school environment, including bullying and harassment; [and]
- F. Ensure that students subjected to such exclusion or violence are not marginalised or segregated for reasons of protection.²⁰⁸

In practice, bullying and harassment in educational settings most often goes unreported and unchecked: Even those few who are able to withstand the harassment risk punishment and retribution by others if their LGBTI identity is confirmed.

Given the prevalence of abuse in the educational sector, states must take affirmative steps to aggressively implement these principles. In the absence of such steps, LGBTI refugees will continue to suffer both short- and long-term effects of limited education, particularly in the areas of language and vocational skills.

3.2.6. Social Rights

Sexual minorities worldwide face pervasive discrimination and deprivation of basic rights and abuses in the expression of their identity. When such abuses rise to the level of “persecution,” in countries of origin, they warrant the grant of refugee status. Often, such mistreatment continues in countries of transit or first asylum. Even in states where same-sex sexual activity is not criminalized, LGBTI individuals may be denied rights including those to partnership, privacy, adoption or association, in effect rendering them second-class citizens.²⁰⁹

The Yogyakarta Principles seek to assert full citizenship rights for LGBTIs by protecting the overarching right to Equality and Non-Discrimination. Principle 2 provides as follows:

²⁰⁷ Yogyakarta Principle 16(A), *supra* note 201.

²⁰⁸ Yogyakarta Principle 16(E)–(F), *supra*.

²⁰⁹ See Wei and Satterthwaitet, *Shifting Grounds for Asylum*, *supra* note 192.

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination. Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms.²¹⁰

While the Principles set forth a broad category of discriminatory actions, in order to warrant a grant of refugee status, discrimination must generally “rise to the level of persecution.”²¹¹ Nevertheless, it is important to note that even where a given deprivation is not found to constitute “persecution,” it may still indicate a serious protection gap.

States often maintain the status quo suppression of LGBTI individuals by preventing LGBT groups from mobilizing, and thereby limiting their expression and effectiveness in promoting change or asserting their rights. Examples of interference with the LGBTIs’ freedom of expression, assembly and association, include inflammatory or condemnatory anti-homosexual comments by politicians, police failure to protect participants in such events from violence or complicity in such violence, and discriminatory or arbitrary arrests of peaceful participants.²¹²

A source of much recent attention has been the right of LGBTIs to live “openly.” Yogyakarta Principle 19 recognizes the right to live an “open” life, providing:

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.²¹³

Contrary to the contents of Principle 19, in countries of origin, migration and integration alike, LGBTI refugees are often expected by authorities to hide their sexual orientation or gender identity in order to avoid persecution or threats to their safety.²¹⁴

²¹⁰ Yogyakarta Principle 2, *supra* note 115.

²¹¹ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992), <http://www.unhcr.org/refworld/docid/3ae6b3314.html>, at para. 53. *See, e.g., Fisher v. INS*, 79 F.3d 955,961 (9th Cir. 1996); *Bucur v. INS*, 109 F.3d 399 (7th Cir. 1997).

²¹² O’Flaherty and Fisher, *supra* note 4 at 211.

²¹³ Yogyakarta Principle 19, *supra* note 123.

²¹⁴ *See HCA and ORAM, Unsafe Haven, supra* note 184, at 13.

A sea change in this area occurred in the 2010 UK Supreme Court decision *HJ and HT v. Secretary of State for the Home Department*. In *HJ and HT*, the Court held that “to compel a homosexual person to pretend that his sexuality does not exist or suppress the behaviour by which to manifest itself is to deny his fundamental right to be who he is.” The Court went on to hold that “homosexuals are as much entitled to freedom of association with others who are of the same sexual orientation as people who are straight.”²¹⁵ The Court thus ruled along reasoning similar to that in the 2008 UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity. This Guidance holds that:

Just as a claim based on political opinion or nationality would not be dismissed on grounds that the applicant could avoid the anticipated harm by changing or concealing his or her beliefs or identity, applications based on sexual orientation and gender identity should not be rejected merely on such grounds.²¹⁶

In fact, failing to secure this right for LGBTIs and upholding discretion standards “may result in the host State indirectly colluding with the persecutory State in limiting the extent to which the refugee is free to assert the rights and freedoms about which his claim to asylum may well have been prompted.”²¹⁷ Moreover, discretion standards have an “‘invisibling’ effect,” which “perpetuates the violence of the home state through the host state’s judicial decision making process.”²¹⁸ By upholding a “norm of invisibility” regarding treatment of LGBTI asylum seekers, “decision-makers have continued to employ the violence of the law to force applicants back into their home country closets.”²¹⁹

In the same vein, Yogyakarta Principle 20 provides:

Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations, regardless of sexual orientation or gender identity. Persons may form and have recognised, without discrimination, associations based on sexual orientation or gender identity, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations and gender identities.²²⁰

Of course, punishment for holding peaceful assembly may constitute persecution based on “political opinion,” entitling those affected to refugee protection.²²¹ However, even where the occurrence would not rise to the level of “persecution,” it may still constitute a basic protection gap.

²¹⁵ *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010, <http://www.unhcr.org/refworld/docid/4c3456752.html>. See also *Appellant S395/2002*, *supra* note 131.

²¹⁶ UNHCR Guidance Note, *supra* note 74, at para. 25, 12.

²¹⁷ Patricia Tuitt in Jenni Millbank, *The Role of Rights in Asylum Claims Based on Sexual Orientation* (2004), *HUM. RTS. L. REV.* 4(2): 214.

²¹⁸ Johnson, “Flamers, Flaunting and Permissible Persecution,” *supra* note 143.

²¹⁹ Millbank in “Flamers, Flaunting and Permissible Persecution,” *supra* note 143 at 103.

²²⁰ Yogyakarta Principle 20, http://www.yogyakartaprinciples.org/principles_en_principles.htm#_Toc161634712.

²²¹ See *Case of Baczkowski and others v. Poland*, Application 1543/06 (Judgment of 3 May 2007), cited in ICJ, *Practitioners Guide No. 4*, *supra* note 27, at 120.

Lastly, governments and NGOs participating in resettlement should be aware of the potential for the right of expression (being “out”) to be violated in the case of LGBTI refugees who seek to, or for economic reasons are forced to, integrate themselves into communities of migrants from their home country or similar cultural background. These communities have the potential to provide much-needed social support and sometimes access to jobs, but are often a microcosm of their homeland, complete with the same transphobic and homophobic attitudes. According to the New York Times, sadly, the established “immigrant communities, which historically function as a lifeline for newcomers—helping with the language, the law, employment and credit—often reject or even menace gay men and lesbians seeking asylum.”²²² For hundreds of LGBTI refugees, movement to a new country may provide the potential for freer sexual expression, but leaves them disconnected from previous support networks. The need for support causes many to align themselves with fellow expatriates, despite the fact that doing so may force them back into the closet. While some individuals are incorporated into local gay support networks and communities, others find themselves marginalized due to factors such as race, socio-economic status, and education.

For these reasons, state agencies and NGOs participating in resettlement of LGBTI refugees should also facilitate their resettlement where these legal rights are upheld as a matter of law and practice.

4. CONCLUSION

The Yogyakarta Principles offer refugee policy makers, adjudicators, IGOs, NGOs, academics and community activists a powerful tool with which to increase their effectiveness as they strive to augment protection for LGBTI individuals fleeing persecution. An integrated legal tool, the Principles are as informative in the initial phases of refugee and asylee adjudication and protection as they are in resettlement and integration work. As the challenges facing LGBTI refugees become better-understood and recognized, wider knowledge and application of the Principles can help assure protection of one of the most vulnerable and under-served refugee populations the world has known.

²²² Leland, *Gays Seeking Asylum*, *supra* note 142.

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