

**The Impact of the Yogyakarta Principles on
International Human Rights Law Development**

A Study of November 2007 – June 2010

Final Report

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“The [Yogyakarta] principles are intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation or gender identity.”...

“The Constitution of India recognizes, protects and celebrates diversity. To stigmatize or to criminalize homosexuals only on account of their sexual orientation would be against the constitutional morality.”

--The Delhi High Court, July 2, 2009.

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Introduction

In November 2007, a coalition of international human rights organizations presented a document entitled “The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity” in a series of launches at the United Nations in New York and Geneva. Simply put, the Yogyakarta Principles are a statement of the status of current international human rights law as it applies to sexual orientation and gender identity. The Yogyakarta Principles (hereinafter referred to by their full name or “the Principles” or the “YPs”) are derived from a careful study of the central international human rights treaties¹ and the interpretation given to those treaties by various authoritative bodies within the United Nations. As a supplement to the Principles themselves, the document articulates obligations of States to adopt measures in accordance with their legal responsibilities under these treaties, as well as recommendations to virtually all sectors of the international community.

This report attempts to capture the global impact of the Yogyakarta Principles by documenting States’ responses and references to the Principles in the three primary governmental areas in which domestic law is developed, implemented and enforced: judicial decisions, legislative enactments, and executive policies. Both enacted statutes and pending bills are reported. In addition, judicial decisions as well as briefs submitted that cite the Yogyakarta Principles for their value as a guide or precedent are included. In both instances, it is anticipated that there will be some resulting law or opinion that is likely to reference the Principles and, thus, should be monitored. The report also captures the use of and development of the Yogyakarta Principles within the United Nations and regional and inter-governmental human rights bodies. All of this is to provide a global snapshot of the impact that the Yogyakarta Principles have had to date in promoting domestic laws, decisions and policies that ensure the human rights of people as they relate to an individual’s sexual orientation and/or gender identity and in developing international human rights jurisprudence within the United Nations and other human rights bodies.

The project of reporting on the “law” has raised interesting and dynamic debates about what constitutes human rights law. The Principles are referred to interchangeably as “binding human rights law” and as “non-binding law.” Debate is and will be ongoing about the precise legal impact of a legislative branch “adopting” the Yogyakarta Principles wholesale as opposed to adopting legislation that addresses the more discrete recommendations that further the rights mandated by international treaties in concrete and specific ways. How law is developed from an

¹ The main treaties examined were the International Covenant of Civil and Political Rights, the Covenant of Economic, Cultural and Social Rights, the Convention on the Elimination of Discrimination Against Women and the Covenant on the Rights of the Child.

activist and advocate's perspective is also briefly discussed. And, finally further recommendations are provided with the hope of enhancing the use of the Principles and further integration of international human rights law into domestic law by advocates at all levels.

Annexed to this report is each and every law, opinion and policy referenced within, an accumulation of thousands of pages of documentation. That documentation will be provided to a website managed by ARC International, www.ypinaction.org, and updated into the future. While it is hoped that this report is comprehensive, it would be naïve to believe that to be true. The Principles are being used every day by activists, advocates and international human rights communities in dynamic and constant ways. But the website allows any one to offer newly discovered or enacted laws in order to ensure that the documentation process and public access to the developments prompted by the Yogyakarta Principles continues.

Background to the Yogyakarta Principles

Promoting the rights of lesbian, gay, bisexual and transgender (LGBT) people is a community-by-community, city-by-city, province-by-province, country-by-country endeavor. It is culturally idiosyncratic and as much defined by the successes of the proponents of the LGBT community as it is by the reactions of the opposition. The development of a stronger international human rights advocacy and monitoring structure over the last decade, the unfettered access to ideas and information provided by the internet, and dramatically increased, though still woefully meager on a global scale, institutional funding that supports it, has substantially increased the pace by which local communities advance the rights of LGBT people. Activists, acting independently and together, have conveyed an urgency unknown previously in history to the global need to address the injustices all too commonly faced by LGBT people and to rally local and international support to condemning homophobic statements, actions and policies as promoted by States and their leaders.

Until 2003, attention to sexual orientation and gender identity (SOGI) issues within the UN had been deliberatively, but slowly, developing over the course of two decades.² Then, in the meeting of the Commission on Human Rights (now the Human Rights Council)³ in 2003, Brazil, by offering a Resolution on Sexual Orientation and Human Rights, caught everyone by surprise. The gauntlet had been thrown down. A few international and domestic LGBT NGOs whose small numbers had been slowly working the halls of the United Nations had to turn full attention to defending this stunning development against the immediately hostile reaction from expected quarters. Funds were raised from European partners and one significant funder in the United States to bring the largest delegation of LGBT domestic and international activists ever to the Human Rights Commission's session in 2004 in Geneva to speak to the Brazil Resolution and about the lives of LGBT people from every region of the globe. In that relatively small setting, the 52+ LGBT activists from around the world were rather prominent.

In 2004, the discussion of the resolution was postponed, then deferred and ultimately, in 2005, the Brazil Resolution and its approach was abandoned without ever coming to a discussion or a vote in its merits. LGBT advocates, pulled together out of the necessity of defending the Resolution, discussed next steps for building upon this increased visibility generated by it. At an International Dialogue hosted by ARC International in Geneva in December 2004, activists recognized that no one resolution could overcome the significant obstacles to progress in this area, and that advancing LGBT rights internationally would be a long-term, incremental process.

² cite reports/articles that recount this history

³ The Brazilian resolution was first presented to the Economic and Social Council of the United Nations in 2003 (E/CN.4/2003/L.92) and came under the Commission on Human Rights, fifty-ninth session.

Discussions shifted to focus on integrating sexual orientation and gender identity throughout the work of the United Nations. In the course of the Dialogue, a meeting was arranged between activists from diverse regions and the then High Commissioner for Human Rights, Louise Arbour. A question was posed in the course of that meeting, “What *is* the current status of international human rights law as applied to LGBT people?” An underlying, but unstated, question, was also on the minds of activists, “Is a separate sexual orientation and gender identity treaty necessary?” The High Commissioner herself suggested that an experts’ meeting to articulate the status of international law in relations to sexual orientation and gender identity would greatly assist her Office in addressing these issues. From that discussion, a number of international NGOs representing the interests of LGBT people (ARC International, International Gay and Lesbian Human Rights Commission, International Service for Human Rights, Human Rights Watch, International Lesbian and Gay Association, International Commission of Jurists) coalesced around formulating a plan for convening an international group of human rights experts to examine human rights jurisprudence to answer this question. The group decided that the International Service for Human Rights (ISHR) and the International Commission of Jurists (ICJ) would take the lead in coordinating the selection of renowned human rights experts from around the world who would study and address the question of the state of international law as applied to sexual orientation and gender identity discrimination.

An impressive group of experts – lawyers and scholars, domestic activists and international professionals, UN-affiliated and NGO leaders - gathered in Yogyakarta, Indonesia in November 2006 prepared to tackle the task. The Yogyakarta Principles are that comprehensive statement of current human rights law as gathered from the text of international treaties and the jurisprudence developed by authorities and bodies within the United Nations and beyond.

The Yogyakarta Principles were developed for two purposes. First, to provide a fair assessment of the current state of human rights law as applied to sexual minorities, in particular, lesbian, gay, bisexual and transgender (LGBT) people. At the core of the YPs are the human rights norms of universality and non-discrimination. That no human being or group of human beings are considered outside of the clear and straightforward language of the international treaties that are the foundation of international human rights law. That LGBT people are no exception to this basic understanding of the application of human rights law. Second, the YPs, by detailing obligations for State action with each of the 29 principles, are intended to enhance LGBT activists’ and advocates’ capacity to successfully challenge some of the more persistent human rights violations faced by the community.

Methodology and Order of the Report’s Contents

Goal of the Report

The primary goal of this report is to document all official uses of the Yogyakarta Principles by domestic government and international human rights authorities so as to present a snapshot of their legal impact around the world over the last 3 years. In addition, given the short time in which the Yogyakarta Principles have been put to active use, we have captured efforts that are underway to promote legislative, judicial and executive level implementation of the Principles as well as a sampling of civil society actions, media references, and academic research that are all contributing to the visibility and public understanding of the human rights situation facing LGBT people around the world, and to the Yogyakarta Principles themselves. We do not claim to have found everything possible, but do believe we have captured most of the official actions. In addition, we attempt to put each region and the UN into a brief context to help the reader

understand the disparity of uses, by activists and governments, of the Yogyakarta Principles among the main regions of the world. We hope that future research and reporting on the development of the Principles will provide more enriching contexts along these lines.

Language and reference points

First, a note about language and reference points. To vary the reading (and writing) of this report, the Yogyakarta Principles are referenced interchangeably in the following ways: Yogyakarta Principles, the Principles, and the YPs. We also use the short hand of LGBT (lesbian, gay, bisexual and transgender) when referring to the broader and primary community of people and activists engaged in promoting human rights related to sexual orientation and gender identity.

Methodology

Our first step in gathering official documentation was to use advanced internet search engines to gather information in each region and in specific countries. This resulted in a wide range of media reports, academic uses and civil society actions related to the Yogyakarta Principles. It also uncovered some legislative and executive level government initiatives. When bills, judicial rulings or executive actions were found, we contacted the sources and tracked down the official documents. All these documents or links to them are included as annexes to this report. This process, however, was limited for two primary reasons. The first were language barriers, given that between us we had proficiency only in Spanish and English, and second was the fact that much of the official information we sought is not available on public websites.

Thus, our second approach was to identify and contact international and local LGBT human rights leaders and NGOs whom we knew were active in presenting and raising awareness of the Yogyakarta Principles regionally or domestically. Regionally-based international LGBT human rights groups were helpful in allowing us to reach domestic activists and in helping us to interpret and understand the actions in various regions.

Of course, a critical indicator of the credibility of the Yogyakarta Principles as an authoritative interpretation of the state of international human rights law is their use within the United Nations systems and regional human rights bodies. While much of the official use of the Yogyakarta Principles is available on UN websites, it would have been impossible to have gathered it easily without the help of those international NGOs most active in promoting the use of the Yogyakarta Principles within the United Nations who guided us to specific sources. In addition, the tedious and time consuming process of reviewing uses of the Principles within the Universal Periodic Review process, for example, has likely only allowed us to capture some of the references made as no single international NGO has yet tracked each reference at that level. Great, great thanks to John Fisher and Kim Vance from ARC International for their very significant contributions to the United Nations portion of the report and for their commitment to developing the website that will house the documents collected in this research and those developed going forward.

In Latin America, Marcelo Ferreyra at IGLHRC sent our questionnaire to most of the LGBT and human rights activists throughout Latin America requesting information relevant to the use and adoption of the Yogyakarta Principles. We received answers from more than 30 LGBT and human rights organizations.⁴ Responses, which came from NGOs dedicated to human rights

⁴ “Intra-Post Muros Network” (Women and LGBT people in prison in Argentina); “Comunidad Homosexual Argentina” (Gay Community in Argentina); “PromSex” (sexual and reproductive rights in Peru); Office of the High Commissioner for Human Rights in Colombia; “Asociación para una vida mayor

related to lesbian and gay rights, transgendered persons, women's rights, sexual and reproductive rights, HIV-AIDS, health and sexuality institutions, as well as official governmental answers from Brazil and Mexico, were sent directly to an email account created for this purpose. Government highlights included responses from the National Commission for Human Rights in Mexico, which sent us an official document tracking its own investigation into any use of the Yogyakarta Principles within governmental initiatives⁵ and direct contact with Congress Representatives both from Mexico and Argentina.⁶ An email dialogue was held with Congresswomen Diana Maffia from Buenos Aires's Legislature (through Lohana Berkins, from Maffia's staff) and Congresswoman Enoe Uranga, from Mexico. Both of them provided us with the official bills that they were promoting and explained any other initiative were the Principles were quotes. In addition, we held a conference call with officials from INADI, in Argentina, who explained to us the legal implications of INADI's resolutions.

For the United States and Canada we also used advanced search engines to find information regarding LGBT activism and academic activities. Additionally, interviews with Kimberly Vance from ARC International provided leads to Parliamentary initiatives within Canada. Douglas Elliott, a prominent Canadian lawyer dedicated to advancing constitutional rights for LGBT people in Canada, and Akim Ade Larcher, until recently the Research & Policy Director for Egale Canada were important contributors to our understanding of the meaning of the Parliamentary bill introduced to incorporate the Principles nationally. In addition, their insights into the fact that activists in Canada seem to not be using the Principles in their work were helpful.

To gather information on the Yogyakarta Principle's impact in Asia and the Pacific, Grace Poore, IGLHRC's Regional Coordinator for Asia and the Pacific Islands, sent our questionnaire to more than 30 LGBT and human rights activists in the API region, to which 10 responded. The countries we reached included India, Nepal, New Zealand, China, Indonesia, Philippines, Thailand, Australia, Taiwan, Malaysia and Sri Lanka. In addition, we consulted with Pip Dargan, from the Asia Pacific Forum, and Chris Sidoti, an Australian human rights lawyer who, as a consultant, is spearheading the work with the Asia Pacific Forum regarding the implementation of the Yogyakarta Principles by member National Human Rights Institutes. In addition, when he was the director of the International Service for Human Rights (ISHR), Chris was one of the leaders planning and staffing the Committee of Experts meeting in Yogyakarta that resulted in the Principles. Collectively, they were able to provide relevant information regarding the only domestic Supreme Court rulings referencing the Yogyakarta Principles, all of which are in the Asia Pacific region, as well as translations, activist's actions and academic references. Chris and Pip augmented our data collection and among them we received information from activists in Thailand, India, Nepal, The Philippines, Indonesia, and Japan.

To gather information on Africa and the Middle East, we again turned to IGLHRC, namely Monica Mbaru, IGLHRC's African Regional Coordinator, and Hossein Alizadeh, IGLHRC's

de personas infectadas por VIH-SIDA" (LGBT NGO working for people with HIV-AIDS in Honduras); "Encuentro por la Diversidad-Cordoba" (LGBT NGO in Argentina); Centre for Health, Sexuality and Human Development in Peru; ADESPROC (LGBT institution in Bolivia); Trans-Ser (Transgender and transsexual rights in Colombia); Trans Group "Las Divas"; Organization of Transsexual persons in Chile; "Corporacion Femm" (Lesbians, Bisexual and Trans women in Bogota, Colombia); Sexuality Policy Watch; Diversity rights in Oruro, Bolivia; Gender and Sexual Diversity Centre; Fundación Diversencia (SOGI issues); Caribe Afirmativo (SOGI issues in the Caribbe)

⁵ National Commission for Human Rights, Mexico.

⁶ Congresswomen Diana Maffia from Buenos Aires's Legislature, Lohana Berkins (Transexual women working for Diana Maffia) and Congresswoman Enoe Uranga, from Mexico.

Middle East Coordinator. They confirmed that, in relation to other regions, the Yogyakarta Principles have not yet become widely used either by governments or activists as a guide for human rights related to sexual orientation and gender identity. In fact one of the few bits of information that we received from Uganda turned out to have been fabricated, and we thank Allison Jernow, a lawyer with the International Commission for Jurists in Geneva, for being the first to alert us to that fact.

In Europe, we used the European Union’s website and search engines, as well as country by country searches, and direct contact with NGOs. Boris Dittrich, Advocacy Director of the LGBT Program at Human Rights Watch was especially helpful in guiding us on the European system and leading us to specific action that has been taken. We also were in contact with Joel Bedos from IDAHO (International Day Against Homophobia) and Nigel Warner, long-time ILGA-Europe leader, from the UK. Dennis van der Veur, Special Assistant to the European Commissioner on Human Rights, provided us with a full range of materials illustrating that bodies’ commitment to the Yogyakarta Principles.

Finally, while obtaining actual legal documentation was the primary goal of this report, understanding the meaning of both the Yogyakarta Principles and the “adoption” of them by local and international authorities from a legal perspective was needed to present the impact of the principles. Allison Jernow from the International Commission of Jurists in Geneva, was exceedingly helpful in advising us on the legal meaning to be derived from the various State actions taken to incorporate treaty obligations into domestic law. She has also shared many items she has found in her own legal research.

The Contents and Organization of the Report

We start with an overview and brief analysis of the official uses of the Yogyakarta Principles. The data is reported within 6 categories: the United Nations, Africa, The Americas (including Latin America, North America, and the Caribbean) Asia and The Pacific Islands, Europe, and the Middle East. The information is generally sub-classified into the following categories, though there are some deviations in regions where little has been uncovered:

United Nations:

Official uses and references to the Yogyakarta Principles are organized under the specific functioning bodies of the UN. Where possible, we provide a commentary on the relative importance of the reference from the standpoint of the authority and mandate it provides to domestic governments.

Regional or Sub Regional References:

This category gathers any reference to the Yogyakarta Principles made by either regional or sub-regional international governmental organizations (IGOs), including official resolutions, governmental declarations, and working group’s minutes. Nothing in this category constitutes law or binding policy, but is important for the growing consensus regarding sexual orientation and gender identity issues.

Domestic References:

This category gathers references to the Yogyakarta Principles made by the legislative, judicial or executive branch of any country, specifying the type of reference and, when possible, its legal impact. We have included both national and local actions or references. The most important documents are attached, summarized and sometimes translated.

While we hoped to cite only strictly legal references, such an approach would make a very short report. It would also miss the flavor of the global debate and conversation about sexual orientation and gender identity in the context of human rights, as would it miss the significant role that the Yogyakarta Principles are playing in promoting those discussions, debates, and long sought visibility. And, such an approach would miss the pace with which significant developments, especially in Latin America, are within reach.

Thus, judicial references include not only final judicial decisions, of which there are very few, but also legal briefs submitted to courts which cite the Yogyakarta Principles so that we can look for imminent decisions. Given the fact that most judicial systems in the world are still operating in a written non-electronic format, the information gathered under this category was usually obtained through NGOs and direct contacts. Official sources are very difficult to find and will, in the future, depend on lawyers and activists in each country actively using the Principles in litigation, monitoring their presentation and use in domestic courts, and reporting on the judicial developments to the international community.

Legislative references incorporate both bills enacted and those pending, at the local and national level. We have eliminated any political posturing where promises to introduce a bill incorporating the Yogyakarta Principles have not led to action.

Executive resolutions gather any reference to the Principles made by central, regional or local authorities, including ministerial decisions, public policies, municipal decrees and any other decision made by governmental human rights organizations that seem to carry the imprimatur of government acknowledgement of the value of the Principles. In some cases, we have interpreted government funding of the translation and printing of the Principles as a tacit approval of their substance.

Academic references:

Academic references to the Yogyakarta Principles include any written or oral presentations we could find, including books, papers and articles. While most of what we categorize as “academic references” do, indeed, come from academics, many are either unidentifiable or clearly from other writers. As it would be impossible to determine who they all are, we have lumped them into this general category.

Media references:

Media references to the YP include news articles on the launch of the Principles and news on other topics that include references to the Principles. Sources include mainstream media, LGBT websites and communication platforms and independent media. In Latin America, in particular, it would be impossible to cite every reference. So, this section is more illustrative than comprehensive.

Civil Society actions:

Because of the fact that, without activists and civil society groups there would be no development of human rights principles and law, we have provided a range of civil society actions to highlight the relative level of engagement in using the Principles pro-actively. Our references may include activity related to the Principles made by NGOs, professional associations or other forms of civil society organizations. Awareness rising campaigns and training courses are examples of this kind of activity. Given the amount of information gathered under this category, a sample on Latin America is attached.

Translations:

The Yogyakarta Principles were published in English and officially translated through the context of the original Experts' Convening into five additional languages: French, Spanish, Chinese, Arabic, and Russian. In addition, some local activists, governments and unaffiliated persons have translated them further to allow their further accessibility. Sometimes we are able to identify the entity that did the translation; often not. Because we cannot vouch for the accuracy of the additional translations and their reflection of the meaning intended by the Experts, we refer to them as the "unofficial translations." This is simply to distinguish them from those that accompanied the original launch of the Principles, and not to diminish the joy of discovering the never-ending number of translations that have been done so far. In each region, we recount the translations available as a way of assessing the accessibility of the Yogyakarta Principles to activists and communities in each region.

Recommendations and Next Steps:

Given the fact that only 3 ½ years have passed since the Principles' launch, this section makes recommendations that we believe could assist in furthering the strategy of promoting the use of the Principles in legal contexts and in monitoring and following up on the organic uses of the Principles in UN proceedings and elsewhere. awareness of the Principles, the continued and consistent documentation of developments going forward, and the use of the Principles in legislative, judicial and executive level advocacy domestically.

Finally, due to the enormous amount of information that was gathered during the research of this report, an index with all the attached documents is also included and will be, as promised, uploaded onto the ARC International-sponsored websites.

Overview and Perspectives

The developments presented in this report are first and foremost a tribute to activism. To human rights activists. To those who unapologetically and courageously live openly as lesbian, gay, transgender, or sexually multi-faceted people who are part of the natural complexity of humanity. To those who organize grassroots uprisings against violence and cruelty in their communities. To those who form NGOs – domestically and internationally – to implore leaders in their communities and in their countries and in regional and international contexts to put muscle into the universal call for human dignity and equality. To gay and lesbian, bisexual and transgender, intersex, sexually and gender non-conforming people, and straight allies and human rights defenders around the world who, everyday, challenge the premise that human sexuality is monolithic and that gender is binary. And that there is ever an excusable justification for treating an individual's sexuality or gender identity with such cruelty and disgust. They are *the essential elements* in the multi-layered process of achieving the goal of universal application of the principles of dignity and equality to LGBT people and sexual minorities in general. Without their persistence, dedication, strategic intelligence, humor, and hunger for dignified treatment regardless of person's sexual orientation or gender identity, nothing reported herein would have ever come about.

This report is also a testament to the critical difference visionary and strategic funding can make in helping activists and NGOs transform the human rights debate from that of defensively responding to homophobia to offensively presenting clear direction with regard to core values of human dignity and equality that are the centerpiece of human rights law. Armed with the clarity, simplicity and legal credibility of the Yogyakarta Principles, activists and NGOs have been able to rally leaders at the United Nations, within regional human rights bodies, and in judicial, legislative and executive levels of government toward concrete enactment of law into practice as never before. In its physical form – consisting of the Preamble, the 29 principles, and the specific

obligations and recommendations that accompany them - the English version of the Yogyakarta Principles, printed in its compact purple booklet, reduced thousands of pages of treaties, jurisprudence, reports and other human rights action developing human rights law related to sexual orientation and gender identity into a bite-sized 26 pages. The Yogyakarta Principles are a comprehensible roadmap. If followed, they will exponentially and concretely change the conditions under which LGBT people live.

The Yogyakarta Principles in Context

Human rights treaties constitute the “hard law” of human rights and are a mandate for those States that are signatories to them. They are a baseline, a beginning point for a process in which a variety of mechanisms (courts, treaty bodies, resolutions, special procedures) are used in the complex process of applying the law to different contexts and groups of people. The application of treaty law and its promises of universal application of the equality and dignity to a never-ending range of human experience is a dynamic and evolutionary process. For some, this process includes confronting social, cultural and religious traditions that create systems of laws and practices that are considered to be in direct conflict with the edicts of equality and dignity. This is certainly the case for people whose expression of their sexual orientation and/or gender identity has resulted in such vile and brutal treatment, especially when they dare to claim their rights. Thus, international forums created to promote discussion, debate, analysis, and consensus about the application of human rights law to specific contexts is an important and fully expected part of the human rights law process.

For example, the series of UN Conferences on Women, starting in 1975 in Mexico City and convening most recently in Beijing in 1995, have been an indisputably vital component of furthering the application of human rights law to the lives of women. A place where debate and engagement of activists, NGOs, States and UN representatives have contributed to distinct normative shifts in human rights law. Where the Beijing Platform for Action outlined goals for the achievement of full rights for women that were directly tied to the obligations States had already incurred by signing international human rights treaties. At the Beijing Conference finally came the acknowledgement by States that that women have human rights and that they apply through the treaties. What should have been self-evident in the drafting and ratification of treaties that promised universal application of principles of equality and dignity to all human beings, required decades’ long struggle to acknowledge that application to more than ½ of the worlds’ human beings.

Similarly, out of the World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in 2001, came the Durban Declaration reaffirming the application of human rights law to issues of race and related intolerance. Again, a seemingly self-evident assumption, but a reminder that the process of human rights law application is one that cannot be accomplished without the process of human discussion, debate and intellectual development.

While without the fanfare and the huge number of participants, not to mention United Nations financial and institutional support, the conveners of the Yogyakarta Principles Committee of Experts sought on a smaller scale to confront the denialism among many factions within the human rights legal process that human rights law does not apply to LGBT people. The Principles they developed are not aspirational. They are the straightforward application of existing human rights law to the lives of people whose sexual orientation and gender identity are the lightning rod for discrimination. They were developed by participants whose human rights credentials far

outrank those of most State representatives within the United Nations. As such, the criticism and skepticism of their value is misplaced.

The Initial Impact of the Yogyakarta Principles

The Yogyakarta Principles represent the status of human rights law as applied to the social classifications of sexual orientation and gender identity as studied and debated by 29 global human rights scholars, practitioners and activists who gathered in Yogyakarta Indonesia in November 2006 and published a year later. The Yogyakarta Principles in and of themselves are not binding law, though they do represent an authoritative interpretation of international law, as distilled from the text and legal interpretation of a number of international human rights treaties, which *are* binding on signatory States.

To be sure, the three years since the Principles were launched in November 2007 are hardly enough to make a decisive dent in the treatment of LGBT people around the world. The role played by the Yogyakarta Principles in the development of legislation, judicial decisions, and executive policy is a story that is just beginning to unfold. But, what is clear from the findings in this report is that the streamlined nature of the Principles in bringing together the range of legal precedent and interpretation, first and foremost, articulates a straightforward guide that is already moving States to follow through on already existing obligations under international law in areas most problematic for LGBT people. They have been repeatedly referred to as reflecting binding international legal standards.

One development worthy of mention is the frequent adoption of the Principles' definitions of "sexual orientation" and "gender identity" found in the Preamble by a number of authorities and States. The importance of this cross-cultural and cross-discipline consensus among the Committee of Experts on these basic terms cannot be overstated. Agreement as to who is included in the social grouping that is the subject of the law and its application is the necessary first step to actually interpreting and applying the law. These definitions – devoid of the morally and medically stigmatizing connotations often found in the law – have started already to build an important link among States and other authorities that have already adopted or referenced them in the context of legislative, judicial or executive level law making, reporting, or debate. Should this trend continue, the Yogyakarta Principles themselves will have made one of the more significant contributions to date to the development of international human rights norms as applied to the lives of LGBT people. Gaining universal acceptance, adoption and understanding of these definitional terms in legislation, judicial opinions, and executive policy should be among the leading goals of activists, lawyers, and policy leaders going forward.

It is no surprise that the Yogyakarta Principles have had significant traction within the United Nations. Issues related to sexual orientation and gender identity have been added to the strategic plan of the Office of the High Commissioner for Human Rights for the first time in the wake of the launch of the Principles. In the context of its Guidance Note on Refugee Claims, The UN High Commissioner for Refugees drew from the Principles to reinforce the perspective that LGBT persons are entitled to all human rights and that the "Yogyakarta Principles reflect binding international legal standards. At the United Nations, States have recommended them to fellow States as a guide for fulfilling treaty obligations.

In regional bodies in Latin America, activists have employed the Yogyakarta Principles from the moment they were launched to work for the adoption of their principles within the Organization of American States and the MERCOSUR. They have had some initial success. In Asia, a number of the National Human Rights Institutes within the Asia Pacific Forum are actively

engaged in a process of examining domestic law in their respective countries with regard to the treatment of LGBT people. They are using the Yogyakarta Principles as their primary guide for determining the degree to which international human rights law has been incorporated into domestic law. And, in Europe, the world's single leading proponent of the Yogyakarta Principles is the European Commissioner for Human Rights, Thomas Hammarberg, who has supported and called for full application of the Principles in his numerous reports and entreaties to his European colleagues.

Domestically, while the Supreme Court of the Philippines gave the most attention to the Principles before harshly criticizing and rejecting them, The Supreme Court of Nepal and the Delhi High Court favorably cited them in delivering two of the world's most recently important legal decisions with regard to the constitutional and human rights of LGBT people. Legal briefs citing the Principles have been filed in Argentina and Colombia, thus creating the potential for further judicial incorporation of the Principles into domestic law.

National legislatures in Argentina, Brazil, Canada, Uruguay, and Mexico have introduced or passed bills citing the Yogyakarta Principles as among the documents outlining international human rights law. Provincial legislatures in Buenos Aires and El Chaco (Argentina) have drawn on the Principles in enacting laws addressing issues of gender identity.

While few clear executive level policies amounting to legal mandates have issued as a direct result of the influence of the Yogyakarta Principles, a number of national ministries have utilized the Principles. Some examples are Brazil's Ministry of Education, Bolivia's Justice Ministry, Spain's Social Affairs Ministry, and the Foreign Ministries of Belgium, the Netherlands and the United Kingdom. Further, the Yogyakarta Principles have found their way into human rights reports prepared at the State executive level in Guatemala, Ecuador, and Mexico, among others. And, Germany and Brazil have funded the translation and publication of the Yogyakarta Principles into German and Portuguese, respectively – a small sign of their tacit approval of the Principles as a vehicle for enhancing human rights.

Finally, the documented use and reference of the Principles by civil society organizations, the media, and written and oral scholarly and advocacy contexts grows by the month. The importance of civil society, human rights NGOs, grass roots activists, and the media to the process of human rights development and enforcement is indisputable. Human rights laws would be virtually meaningless without organized actions, public discussions, and strategies demanding their enforcement, as States seldom unilaterally enforce their treaty obligations by incorporating them into legislation or administrative policy. Judges would never take up the arguments were it not for lawyers representing the interests of the community facing human rights violations arguing the text and interpretation of the law to them. NGOs and activists give these laws life, flush out their meaning over time, and ensure that the universality of the application of human rights treaties to *all* people is, in fact, a reality for all. NGOs and activists are the most important monitors of human rights violations. Many document and respond to the actions of the police or government leaders. They organize communities to provide strength in standing up to officials who target individuals or groups for discriminatory treatment or abuse. They present their documentation formally and informally to human rights authorities charged with raising the violations directly with governments and commanding adherence to the law. They publicize the violations in the media or on the internet, often rallying support from other quarters and sometimes unleashing further violations. They propose laws and policies to prevent future violations. They submit legal briefs that transfer the international mandates into enforceable domestic law.

The United Nations

International human rights law generally starts in and with the United Nations. On November 7, 2007, the Yogyakarta Principles were launched at United Nations Headquarters in New York. The launch was co-hosted by the Governments of Brazil, Argentina and Uruguay, in conjunction with the Third Committee of the General Assembly, and attended by diplomatic representatives of some 20 States.

The Signatories to the Yogyakarta Principles made a number of specific recommendations to the bodies within United Nations whose primary purpose is to monitor and promote State compliance with international human rights law. It is clear that the Yogyakarta Principles have catapulted discussion and action on human rights related to sexual orientation and gender identity to new highs within the United Nations. First, the Principles provide a neat and tidy baseline understanding of the scope of human rights law from the text and jurisprudence of a number of international treaties. Second, they provide a single reference point for gauging how far any particular Member State has committed itself to fully supporting the comprehensive rights of LGBT people. Third, the specific language and recommendations of the 29 Principles provide a concrete and authoritative measure for monitoring State compliance, or lack thereof, to specific issues. Fourth, they provide an important universal definitional point for the terms “sexual orientation” and “gender identity”, which have been quoted in hundreds of academic papers, bills, resolutions and other documents around the world. Fifth, they have prompted unprecedented discussion of SOGI issues throughout the human rights bodies at the UN, and have resulted in concrete advances in the acceptance of the notion that human rights law genuinely applies in a non-discriminatory manner to all, regardless of sexual orientation or gender identity.

Following are some of the developments within the United Nations, organized according to the recommendations presented in the Yogyakarta Principles to this international organization and its different bodies.

A. Office of the High Commissioner for Human Rights (OHCHR)

The High Commissioner for Human Rights is the principal human rights official of the United Nations. The High Commissioner heads the OHCHR and spearheads the United Nations' human rights efforts by offering leadership, working objectively, educating and taking action to empower individuals and assist States in upholding human rights. The OHCHR is a part of the United Nations Secretariat with headquarters in Geneva. The current High Commissioner is Navanethem (Navi) Pillay.

Recommendation A from the Additional Recommendations provided by the Yogyakarta Principles calls on the High Commissioner's office to “endorse the Principles, promote their implementation worldwide, and integrate them into the work of the OHCHR.”

Even though concrete actions with regard to the implementation of these recommendations are yet to be seen, it is very likely that many actions will take place from 2010 on, given the OHCHR decision to establish SOGI issues as a priority.

Following are some examples on what has happened with these recommendations.

High Commissioner

In December 2009, the High Commissioner published the 2010-2011 Strategic Plan for the OHCHR⁷ which designated SOGI issues as a thematic priority for the next two years. This was

⁷ High Commissioner's Strategic Management Plan 2010-2011, Published December 2009. See Annex.

the first time they have ever been a priority. According to John Fisher from ARC International, though the Yogyakarta Principles were not specifically cited as the prompt for this decision, they have very clearly contributed to the increasing priority and attention paid to these issues by the High Commissioner in recent years. This is a very important development from the highest human rights administrator at the UN.

Prior to Navanethem Pillay's mandate, Louis Arbour had publicly supported the Yogyakarta Principles by releasing a statement on their launching and affirming "the commitment of my Office to promote and protect the human rights of all people regardless of their sexual orientation or gender identity." This approach has been continued by Pillay, who has expressed full support for the UN Joint Statement on Sexual Orientation and Gender Identity. Even though she did not quote the Yogyakarta Principles, the categorical statement from the UN's highest authority on human rights issues suggests a trend toward a broader acceptance of sexual and gender concerns.⁸

One of the most significant areas in which the commitment to human rights issues related to sexual orientation and gender identity by the Office of the High Commissioner for Human Rights is likely to have an impact in the years to come is in the work of the OHCHR field presences in countries and regions around the world. The OHCHR field office in Nepal has relied upon the Yogyakarta Principles to support local LGBT initiatives, including issuing a statement of support for the launch of the Nepali translation of the Principles. The Yogyakarta Principles have also been used by ARC International in annual briefings between the OHCHR field presences and NGOs.

Special Procedures

Recommendation C of the Yogyakarta Principles calls upon the UN Human Rights Special Procedures to pay due attention to human rights violations based on SOGI and to integrate the Principles into the implementation of their respective mandates. It is worth mentioning that 8 UN Special Rapporteurs participated as experts in the process of creating the Yogyakarta Principles.

"Special procedures" is the general name given to the mechanisms established to address either specific country situations or thematic issues in all parts of the world. Currently, there are 31 thematic and 8 country mandates. The Office of the High Commissioner for Human Rights provides these mechanisms with personnel, policy, research and logistical support for the discharge of their mandates.

Special procedures' mandates usually call on mandate holders to examine, monitor, advise and publicly report on human rights situations in specific countries or territories, known as country mandates, or on major phenomena of human rights violations worldwide, known as thematic mandates.

Copies of the Yogyakarta Principles have been made available to all Special Procedures and have been the subject of annual briefings by NGOs. As new Special Rapporteurs are appointed, they are similarly made aware of the Yogyakarta Principles and provided with copies at the Annual Meeting by NGOs such as ARC International, the International Commission of Jurists, and the International Service for Human Rights.

Of the 31 thematic special procedures, at least three have specifically referenced the Yogyakarta Principles in their reports:

*** Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health:**

⁸ Lucy Morgan, "Sexual and Gender Rights and the United Nations Human Rights Framework: Towards a Resolution of the Debate." See annex.

The Yogyakarta Principles have been raised by both the past Special Rapporteur on health, Mr. Paul Hunt, and the current Special Rapporteur on health, Mr. Anand Grover.

This report, published in April 2010, examines the relationship between the right to the highest attainable standard of health and the criminalization of three forms of private, adult, consensual sexual behavior: same sex conduct and sexual orientation, sex work and HIV transmission. The report quotes the Yogyakarta Principles to define “sexual orientation” and “gender identity” and cites Michael O’Flaherty and John Fisher’s paper.

Additionally, and within this same special procedure, Egypt raised the Yogyakarta Principles during interactive dialogue in Council plenary with this Special Rapporteur, citing the definition of ‘sexual orientation’ and then challenging the Special Rapporteur for signing the Principles “in his capacity as UN Representative.” In his reply, as noted by Fisher and O’Flaherty, the Special Rapporteur noted that his position on “the illegality of discrimination on the grounds of sexual orientation’ was consistent with that taken by the High Commissioner for Human Rights and a number of Special Procedures, eight of whom had endorsed the Yogyakarta Principles in their official capacity.” In an informal briefing, the Special Rapporteur responded to similar challenges, noting that just as 10 years ago female genital mutilation was not regarded as a human rights issue but is now recognized as incompatible with the right to health, so too 10 years from now violations of LGBT rights may well be fully recognized by the international community as inconsistent with human rights standards.

*** Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism:**

This Report was extremely controversial. It identifies the ways in which those subject to gender-based abuse are often caught between targeting by terrorist groups and the State’s counter-terrorism measures that may fail to prevent, investigate, prosecute or punish these acts and perpetrate new human rights violations with impunity. The report states that counter-terrorism measures disproportionately affect women and transgender asylum-seekers, thus jeopardizing “the right of persons of diverse sexual orientations and gender identities to recognition before the law.” The report quotes the Yogyakarta Principles, and states: “In this regard, the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity identify that States must ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex ... reflect the person’s profound self-defined gender identity.”

This report on gender aspects in human rights and countering terrorism was challenged by several governments and was highly controversial:

* Tanzania on behalf of the African Group: The Tanzania/African Group argued that Scheinin’s report “paid total disregard to the respect for acceptable sources. He exceeded the mandate in citing the Yogyakarta Principles, which undermined independent nature of his mandate.”

* St. Lucia stated that “the reference to the Yogyakarta Principles is inappropriate, as they are not evidence-based standards. The Special Rapporteur thus exceeded his mandate. The right not to be discriminated falls outside of Special Rapporteur’s mandate. Addressing sexual orientation and gender identity issues goes at cost of addressing the effects of counter-terrorism measures on women. St. Lucia submits a request for real guidance on counter terrorism from a gender perspective.”

* Malaysia, on behalf of the Organization of Islamic Conference, stated that “The Special Rapporteur however redefines the notion gender, far away from the intent of the Member States. He introduces principles (meaning Yogyakarta Principles) that are not recognized by the majority of Member States.”

* Sudan, on behalf of the Arab Group, stated that “The Special Rapporteur violates the code of conduct. The Yogyakarta Principles enjoy no international recognition, and are thus imprudent to cite.”

Despite this reaction, the Report was supported by several countries, the US, Australia, Sweden on behalf of the European Union, Argentina, Chile, Cuba, Uruguay, Finland, and Canada, among others. However, none of them specifically defended the Rapporteur’s citation to the Yogyakarta Principles. He had to defend his report and his references to the Principles himself. In order to do so, Martin Scheinin stated “on the use of sources, the Yogyakarta Principles is introduced as comparison and as soft-law document, which enriches the discussion on human rights legislation.”⁹

*** Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment of Punishment**

The Special Rapporteur on Torture was one of the signatories to the Yogyakarta Principles, and has consistently brought attention to torture and other cruel, inhuman or degrading treatment experienced by LGBT people. He noted, for example, in his 2010 report that “most people would not like their dogs or cats to be treated the same way that human beings are treated in detention... Within detention facilities, there is usually a strict hierarchy, and those at the bottom of this hierarchy, such as...gays, lesbians, bisexuals and transgender persons, suffer double or triple discrimination.”

While not specifically referencing the Yogyakarta Principles in his reports, the Special Rapporteur was challenged by Egypt at the 10th Session of the Human Rights Council for signing the “so called Yogyakarta Principles” in an official capacity. As Egypt protested: “Why use the UN title in a non-UN document? To give the UN stamp to this?”

*** Special Rapporteur on Freedom of Expression**

Finally, Fisher and O’Flaherty note that the Czech Republic made favorable reference to the Principles during a Council dialogue with the Special Rapporteur on freedom of expression. These kinds of references are very common. The Czech Republic during interactive dialogue with the Special Rapporteur on Freedom of Expression stated: “In view of the joint statement adopted by 54 States at the last session of this Council, urging all Special Procedures to integrate consideration of human rights violations based on sexual orientation and gender identity within their mandates, may we ask you to give particular consideration in your next report to violations of the right to freedom of expression based on sexual orientation and gender identity? In this respect, the Czech Republic would also like to draw your attention to the recently-adopted Yogyakarta Principles.”

B. The Committee on Economic, Social and Cultural Rights (CESCR)

Recommendation E calls upon treaty bodies to integrate the Principles and to adopt General Comments of other interpretive texts on the application of human rights law to persons of diverse sexual orientation and gender identities.

The CESCR (Committee on Economic, Social and Cultural Rights) is the treaty body that monitors State compliance with the International Covenant on Economic, Social and Cultural Rights. It serves as the central forum within the UN for discussing international economic and social issues and for formulating policy recommendations addressed to Member States and the

⁹ Report of the Discussion of the Scheinin report on Gender aspects in Human Rights and Countering Terrorism, UN Third Committee October 26, 2009. See Annex.

United Nations system. Its main tasks include promotion of higher standards of living, full employment, and economic and social progress. It is the highest authority for interpreting the provisions of the treaty, which it does through General Comments.

General Comments are CESCR resolutions where the Committee published its interpretations of the content of human rights provisions. They are authoritative statements by the Committee on Economic, Social and Cultural Rights on the meaning of the provisions in the ICESCR. General Comments aim to clarify the understanding of substantive areas of the Covenant and on the obligations of the State. At a more practical level, General Comments also point to information that should be included in State Party reports.

General Comment 20 (May 25th, 2009)

The Yogyakarta Principles were cited by the CESCR last year when, in General Comment 20 (May 25th 2009) on “Non Discrimination in Economic, Social and Cultural Rights” the Committee recommended that States prohibit discrimination on grounds of gender identity. The Committee cited the Yogyakarta Principles’ definition of gender identity. Even though the General Comment did not cite a specific principle or any other substantial rights interpretation, the use of this definition by an official UN treaty body highlights the many possible uses of the Yogyakarta Principles and positions them in a very visible place within the United Nations.

C. UN High Commissioner for Refugees (UNHCR)

The United Nations High Commissioner for Refugees (UNHCR) is mandated to lead and coordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees.

The following references to the Yogyakarta Principles were found within the UNHCR:

Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity:

In November 2008, the UNHCR published this 18-page guidance note. Guidance Notes seek to clarify applicable law and legal standards with the aim of providing guidance in the particular thematic area concerned, analyzing legal principles, jurisprudence and other relevant materials to ultimately enhance the protection of refugees and asylum-seekers. It is a non-binding document that seeks to clarify and interpret current standards of international law in refugee protection.

This Guidance Note quotes the Yogyakarta Principles multiple times in providing guidance on how sexual orientation or gender identity can be the basis of a well-founded fear of persecution. Additionally, the document states that while sexual orientation is not explicitly delineated in any human rights treaty, “it is now well established that LGBT persons are entitled to all human rights on an equal basis with others [...]. The Yogyakarta Principles reflect binding international legal standards with regard to sexual orientation which are derived from key human rights instruments.”

This guidance is a welcome addition to the materials on SOGI issues available to asylum applicants.

This may be among the most significant developments from a practical perspective for a subgroup of LGBT people – those who are refugees. The UNHCR’s Guidance Note will guide consideration of every State report.

In addition, in October 2009, the Division of International Protection Services of the United Nations High Commissioner for Refugees published a collection of instruments relevant to sexual orientation and gender identity to be used in cases of refugee claims. It is important to highlight

that this Division included the Yogyakarta Principles and classified them as a relevant non-binding international instrument. This reference could be interpreted as incompatible with the one provided by the Guidance Note. However, this apparent discrepancy could provide us with a great example: for the Guidance Notes the Principles *reflect binding standards* which are actually derived from other treaties that are themselves binding. The Collection of Instruments, on the other side, clarifies that it is not the Principles the one that are binding. Eventually, it would be important to clarify that the fact that the Yogyakarta Principles are not an internationally binding treaty does not imply that the principles don't reflect rights that are already established in international binding treaties and thus are binding human rights for every State and organization.

The report also includes academic literature regarding the Principles.

D. UN Human Rights Council

The Human Rights Council is an inter-governmental body within the UN system made up of 47 States responsible for strengthening the promotion and protection of human rights around the globe. The Council was created by the UN General Assembly on 15 March 2006 with the main purpose of addressing situations of human rights violations and make recommendations on them.

General Proceedings of the Council

According to John Fisher and Michael O'Flaherty, after the launch of the Yogyakarta Principles, many references have been made to them within the Council proceeding. Seven States (Czech Republic, Switzerland, Denmark, Finland, Iceland, Sweden and Norway) specifically referred to them, describing them as “groundbreaking” and as articulating “legally-binding international standards that all States must respect” and commending them to the attention of the UN Human Rights Council, the High Commissioner for Human Rights, Special Procedures and treaty bodies.¹⁰

Although, as argued by the authors, endorsement by the Council as a body may be seen as ambitious, some specific references to the Yogyakarta Principles were found within this UN body and some more generic references to SOGI issues can be seen as precedents for future debates. For instance, the Norwegian joint statement on sexual orientation, gender identity and human rights (delivered by Norway on behalf of 54 States from four of the five UN regions), which called for the President to discuss SOGI issues and for Special Procedures and treaty bodies to integrate these issues within their relevant mandate.¹¹

After the aforementioned intervention, Norway delivered a new statement on behalf of Nordic States of Denmark, Finland, Iceland and Sweden. In this statement, Norway referred to its previous statement in welcoming “the launching last Monday of the groundbreaking Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity,” adding the following: “We believe they will make a useful contribution to the promotion and protection of human rights on the ground, and we commend them to the attention of States, treaty bodies and Special Rapporteurs.”

Immediately after the Yogyakarta Principles' launch in Geneva, the representative from Switzerland, during General Debate, stated: “Switzerland is concerned by the cases of serious discrimination, violence, arbitrary detention, torture and even death, directed against people because of their sexual orientation or their gender identity...We would also like to draw the attention of the Council to the Yogyakarta Principles, adopted last November in Indonesia. These are a set of principles on the application of international human rights law in relation to sexual

¹⁰ Michael O'Flaherty and John Fisher, “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles” - *Human Rights Law Review* 8:2 (2008), 207-248.

¹¹ Norwegian Joint Statement on Sexual Orientation, Gender Identity and Human Rights (2006)

orientation and gender identity. These Principles focus on legally binding international standards that all States must respect. We invite the High Commissioner for Human Rights, this Council, the Special Procedures and the treaty bodies to apply these Principles in their future work. We ask the Council to grant all necessary attention to human rights violations based on sexual orientation and gender identity and we support holding a discussion on this issue in the near future.”

On March 5, 2008, Slovenia, on behalf of the EU, also referenced the *Yogyakarta Principles* during a Human Rights Council panel on “Human Rights Voluntary Goals.” This represented the first affirmation of the Yogyakarta Principles by the EU as a whole.¹² According to the statement, “these principles reflect existing international human rights law and invites States to duly consider and reflect them in national policy and practice.”

In the same panel, Ireland affirmed: “Ireland is proud of the involvement of its former President Mary Robinson in the signature and preparation of the Yogyakarta Principles on sexual orientation. One of our well-known Irish writers once posed the question: Why have our differences been so unfruitful? In our society, which was for a long time less open than at present to such differences, we have discovered in recent decades that the celebration of difference can be of benefit to all in society. In that regard, it would be a valid goal for States to seek to ensure that the obligations as defined in the Yogyakarta Principles be reflected in domestic law.”

In that same session of the Human Rights Council (March 2, 2008), the Yogyakarta Principles were the subject of a strong Ministerial Statement by the Netherlands, during the high-level segment. Mr. Maxime Verhagen, Minister of Foreign Affairs of the Kingdom of the Netherlands stated:

“Human rights apply to all people, in all places and at all times. ... Human rights also apply to lesbian, gay, bisexual and transgender people. In 85 countries, homosexuality is still punishable by law and people can be prosecuted because of their sexual orientation. In five countries in the world – Afghanistan, Iran, Saudi Arabia, Sudan and Yemen – consensual sexual acts by people of the same sex are even capital crimes. There is no excuse for the humiliation and exclusion of homosexual people – let alone for imposing the death penalty on them. Decriminalizing homosexuality and countering discrimination based on sexual orientation are priorities within Dutch human rights policy. The Dutch government subscribes to the *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity*. I call upon other States to embrace these principles as well.”¹³

Universal Periodic Review

The UPR is a newly adopted human rights mechanism of the United Nations Human Rights Council aimed at improving the human rights situation on the ground of each of the 192 UN Member States. Under this mechanism, the human rights situation of all UN Member States is reviewed every 4 years. The result of each review is reflected in an “outcome report” listing the recommendations made to the State under review. These recommendations come either from the Council or from other States.

The UPR is already proving to be a valuable tool for enhancing international attention and response to human rights violations based on sexual orientation and gender identity. Through this mechanism, many northern countries have suggested others to implement or consider the Yogyakarta Principles in their public policies. It is interesting to highlight that The Netherlands,

¹² ARC International report “UN General Assembly Joint Statement on Sexual Orientation and Gender Identity: Building on the Past, looking to the future.” See annex.

¹³ For full speech visit:

http://www.minbuza.nl/nl/Actueel/Toespraken/2008/03/Statement_by_Maxime_Verhagen_at_the_7th_session_of_the_Human_Rights_Council_Geneva_3_March_2008

despite frequently suggesting to other countries that they apply the Yogyakarta Principles, does not use them at a domestic level but only as a part of their foreign policies. This has been criticized by local NGOs and it is certainly a phenomenon that should be analyzed.

The State responses to recommendations with regard to use of the Yogyakarta Principles are varied. Some have accepted the recommendation, some reject them, and other simply do not respond either way. But, one thing is certain: the Yogyakarta Principles have been persistently quoted within the new Universal Periodic Review mechanism, thus acquiring an important status as an international instrument to be considered within the UN forum. ARC International recently released a “Guide for Sexual Orientation and Gender Identity Advocates” which included several recommendations on how to use the Yogyakarta Principles within the UPR process.

Before mentioning each of the quotations to the Yogyakarta Principles that were found within the UPR mechanism, it is necessary to clarify that there were many difficulties in finding this information. Often the recommendation comes from shadow reports or reviews that are still not public or are not published within the UPR’s final report because of the extent of the recommendations. So, many recommendations provided by NGOs (often IGLHRC and ARC) are not included in the following list, but could be easily tracked by these NGOs in the future. Only government’s recommendations that are actually published in the UN official documents were included.

Following are just some of the recent references and responses:

** Four countries have accepted the recommendation to use the Principles, which Ecuador implicitly accepting them:*

1. Canada

The Netherlands commended Canada for its commitment to human rights, its active role in the Council as Vice-President and the constructive dialogue in the UPR process. It welcomed the extension of equal rights to same-sex couples and protection from hate crimes on grounds including sexual orientation, recommending that the Yogyakarta principles be applied as a guide to assist in further policy development. Canada accepted the recommendation.

It is interesting to note that, according to Akim Adé Larcher, the former Research & Policy Director for Egale (Canada’s main national LGBT NGO), Canada seems to have one position in the international arena and another one domestically. While it references the Principles at the Human Rights Council, in signing the UN statement on SOGI, and the accepting recommendation within the UPR, within the Canadian National or Governmental context, the current administration is silent in issues such as sexual diversity. Nonetheless, the endorsement of the Principles by the Canadian government may provide a valuable tool to national advocates seeking, for example, to ensure that gender identity is explicitly recognized as a prohibited ground of discrimination in federal human rights legislation.

2. Chile

It was recommended that Chile adopt public education and equality initiatives to prevent discrimination on the basis of sexual orientation and gender identity, prohibit such discrimination by law, ensure its Criminal Code is not used to persecute sexual minorities, and follow the Yogyakarta Principles as a guide to assist policy development. These recommendations were suggested by the Netherlands as a general action to be taken by the government. Chile accepted all these recommendations.

3. Czech Republic

Slovenia recommended the Czech Republic to consider using the Yogyakarta Principles as a guide to assist human rights policies. This recommendation was defined as a “considering

action.”

In its written response to this recommendation, the Czech delegation made the following remarks:

“In 2007, the Government Council for Human Rights set up a Working Group for the issues of sexual minorities. An Analysis of the State of Lesbian, Gay, Bisexual and Transgender Minorities was prepared. The analysis contains a number of recommendations for the Government, most of them being in line with the Yogyakarta Principles. Currently, a Committee for the issues of sexual minorities is being set up under the Government Council for Human Rights. The Committee will work on the implementation of both recommendations stemming from the analysis and from the Yogyakarta Principles.”

4. Finland

Slovenia recommended Finland to consider using the Yogyakarta Principles as a guide to assist in its policies development. This recommendation was defined as a “considering action” and was accepted by the government.

5. Ecuador

Slovenia recommended that Ecuador further strengthen its commitment to nondiscrimination on the basis of sexual orientation and gender identity and apply the Yogyakarta Principles. Ecuador accepted the recommendation to strengthen its commitment to non-discrimination on the grounds of sexual orientation and gender identity. It did not specifically refer to the Principles, although in response to a challenge from Egypt that issues of sexual orientation fall outside the international human rights framework, Ecuador responded:

“We have accepted all the recommendations which were put forward during the interactive dialogue....These are recommendations on issues on which Ecuador is already working, these are issues on which Ecuador wishes to do more work, and they are issues on which Ecuador *will* do more work in the future.”

The following 4 countries that have rejected the recommendation:

1. Malta

The Netherlands recommended Malta taking further measures to advance equality on the ground of sexual orientation and gender identity, and among others using the Yogyakarta Principles as a guide for policy-making. This recommendation was defined as a “general action.”

Additionally, Malta Gay Rights Movement, along with ILGA Europe submitted a report on the status of LGBT people in Malta in the framework of the UPR. This Report was fully based on the Yogyakarta Principles and quoted YPs 2, 3, 5 and 24.

In the course of the discussion, the UPR recommended that Malta adopt further measures to fight discrimination on basis of sexual orientation or gender identity, use the Yogyakarta Principles as a guide for policy-making, ensure that same-sex couples enjoy some of the rights and obligations enjoyed by different-sex couples, and ensure effective access to health advisory services, notably for matters related to sexuality and sexual and reproductive rights.

Malta’s responses were either negative or non-committal. With regard to the Yogyakarta Principles, Malta stated: “Malta will not use the Yogyakarta Principles as a guide for policy making; these principles were discussed and adopted by a number of experts acting on their own behalf.”

2. San Marino

The Czech Republic recommended to “explicitly include sexual orientation and gender identity as protected grounds under the principle of non-discrimination in relevant legislation and programs,

and to apply the Yogyakarta Principles with regard to human rights and sexual orientation and gender identity.”

San Marino rejected this recommendation and argued that the Declaration on Citizens’ Rights and Fundamental Principles of San Marino already includes all grounds for discrimination.

3. Qatar

Sweden requested the delegation to elaborate on measures the government might be considering to establish non-discrimination policies and laws, including on grounds of sexual orientation or identity, in line with the Yogyakarta Principles. Qatar declined to accept the recommendation.

4. Ukraine

Slovenia recommended that the Ukraine apply the Yogyakarta Principles as a guide to assist in policy development. The recommendation was rejected.

The following 8 States have not answered or had unclear answers to the recommendation:

1. Albania

In January 2010, Spain recommended that the Albanian government include sexual orientation and gender identity specifically in anti-discrimination legislation and consider “using the Yogyakarta Principles.” In its response, Albania did not specifically refer to the Yogyakarta Principles, although it did accept recommendations to include sexual orientation and gender identity within anti-discrimination legislation and to implement sensitivity training, including for police, and public educations programs on these grounds.

2. Dominica:

Canada recommended that Dominica consider utilizing the Yogyakarta Principles as a guide to assist in policy development. This recommendation will be examined by Dominica. In its response, Dominica did not specifically reference the Principles and declined to decriminalize homosexuality. It did, however, under the heading “discrimination based on sexual orientation” note that the Government promotes non-discrimination with regard to all of its citizens and that discriminatory laws may be struck down by the Courts.

3. Germany

The Canadian HIV/AIDS Legal Network commended Germany for accepting recommendations to take further initiatives to combat hate crimes based on sexual orientation. It commended Germany for accepting recommendations to change laws governing gender registration of transgender people and to grant them the right to maintain their existing marriages. However, concerns remained that the proposed law still contained intrusive and unnecessary restrictions, such as requiring transgender people to undergo sterilization and hormone treatment to be able to change their official documentation. The Network recommended that the new law should conform to the Yogyakarta Principles on sexual orientation and gender identity. There is no information on Germany’s response to this recommendation.

4. Kingdom of Bhutan

ILGA, IGLHRC and ARC International submitted a joint report on the Kingdom of Bhutan which referred specifically to the government’s criminal sanctions against sexual activity between consenting adults. In this report, these NGOs quoted the Yogyakarta Principles both as a whole and some specifically YP 2 and 6. Bhutan responded as follows:

“The Bhutan Penal Code 2004 was the result of study and examination of existing practices in

other States, some of which reflect remnants of colonial legacies. Sections 213 and 214 of the Bhutan Penal Code concerning “unnatural acts” have never since enactment been evoked for same sex acts between two consenting adults. These provisions can be reviewed when there is a felt need and desire from our people.”

5. Peru

Slovenia recommended applying the Yogyakarta Principles as a guide to assist in policy development. The Peruvian government provided no clear response, although we note for reference that NGOs in Peru have an annual LGBT Human Rights Report, measuring Peru’s laws and practices against the standards set out in each of the Yogyakarta Principles..

6. Serbia

The Netherlands recommended that Serbia apply the Yogyakarta Principles as a guide for new policies in the area of lesbian, gay, bisexual and transgender rights. Serbia’s response: “In connection with the recommendation for the implementation of the Yogyakarta principles, the RS [Republic of Serbia] shall study those principles and work on the advancement of the position of the LGBT population.”

7. Tunisia

Several NGOs (ILGA, IGLHRC, and ARC International, among others) presented a shadow report on Tunisia which quoted Principles 2 and 6 and referred to the Yogyakarta Principles as an important articulation of States’ international obligations to respect the human rights of all persons. While not specifically calling on Tunisia to adopt the Principles, the groups particularly emphasized Tunisia’s obligation to “bring its legislation into conformity with its international human rights obligations by repealing all provisions which criminalize sodomy or other sexual activity between consenting adults.” There is no information on Tunisia’s answer to this recommendation. A further note, no State had put these recommendations to Tunisia.

8. Yemen

Several NGOs (ILGA, IGLHRC, ARC International, among others) presented a shadow report in on Yemen. Under the chapter on Yemen’s international human rights obligations, the report cites the Yogyakarta Principles (principles number 2 and 6) and then states that the former UN High Commissioner for Human Rights has welcomed the Yogyakarta Principles as a “timely reminder” of the basic tenets of universality and non-discrimination, and noted that “respect for cultural diversity is insufficient to justify the existence of laws that violate the fundamental rights to life, security and privacy by criminalizing harmless private relations between consenting adults.” There is no information on Yemen’s answer to these recommendations.

No recommendations relating to the Yogyakarta Principles were directly put to Yemen during the UPR review, although the Czech Republic recommended that Yemen “review all relevant existing and prepared legislation, including the Penal Code, with a view to ensuring its compliance with international human rights law, namely with protection of privacy and prohibition of discrimination.” Yemen accepted this recommendation, noting that “the Government has set up a national committee to ensure that domestic legislation is consistent with the international treaties which Yemen has ratified.”

E. UNAIDS

UNAIDS serves as the leading advocate for global action against HIV/AIDS. Its mission is to guide, strengthen and support worldwide efforts to turn the tide against the epidemic.

In the *Review of Legal Frameworks and the Situation of Human Rights related to Sexual Diversity in Low and Middle Income Countries* (Study Commissioned by UNAIDS) the

definitions of gender identity and sexual orientation provided by the Yogyakarta Principles are explicitly adopted.

F. UN Office on Drugs and Crimes

The Yogyakarta Principles have been extensively relied on by the UN Office on Drugs and Crimes in a handbook on Prisoners with Special Needs. Under the heading “International Standards,” the Handbook cites three sources: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Yogyakarta Principles, particularly Principle 9 on the Right to Treatment with Humanity while in Detention, together with the accompanying State obligations set forth in the YP publication.

As a final note, from the United Nations, the Yogyakarta Principles have been referenced in campaigns at the ECOSOC to secure accreditation for LGBT NGOs.

Domestic and Regional Implementation

Africa

There are multiple reasons, all easily imaginable, as to why so little was found in Africa. LGBT organizing throughout much of Africa is a relatively recent development and is done within extremely hostile and dangerous environments. From the criminalization stand point alone, 38 of the 78 sodomy laws in effect around the world are within Africa. Human rights law and standards in general are viewed with suspicion as attempts by the Global North to monitor and impose its values on Africa.

Regional Intergovernmental Organizations

African Commission for Human and All Peoples Rights

The Principles were circulated among the NGOs who participated in the 46th ordinary session of the African Commission on Human and People’s Rights in November 2009. The participating NGOs agreed on a resolution to end all forms of discrimination based on sexual orientation and sexual identity in Africa¹⁴. This resolution –which has not been officially approved by the African Commission- states that “human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights, as established in the Yogyakarta Principles...”¹⁵.

A. Domestic

Kenya

Executive

In May 2009, the Commissioner (Lawrence Mute) and the Executive Director (Muthoni Wanyeki) of the Kenya National Commission on Human Rights marked International Day Against Homophobia by speaking on a public panel about the status of LGBT rights in Kenya.

¹⁴ Resolution “All forms of discrimination based on sexual orientation and gender identity in Africa.” Resolution TRES/005/05/2010. See annex.

¹⁵ Thematic Resolution of the Forum on the Participation of NGOs in the 46th ordinary session of the African Commission on Human Rights and People’s Rights and 20th African Human Rights Book Fair (7-9 November, 2009). Resolution TRES/001/11/09.

Mr. Mute spoke specifically about the use of Yogyakarta Principles to advance human rights for LGBTI people in Kenya.

South Africa

Legislation

Only one official government use or reference to the Yogyakarta Principles could be found from within Africa. At a Conference on Gender, Sexuality, HIV/AIDS and Human Rights, sponsored by ARC International and the Coalition of African Lesbians¹⁶ in December 2007, the Speaker of the Johannesburg Municipal Council, Councilor Nkele Ntingane expressed his criticism of the South African government's policies against discrimination in the Gender and Sexuality Conference. He called on conference participants to ensure that "both the Constitution and the Yogyakarta Principles become accepted by all members of our increasingly diverse communities."¹⁷

C. Other uses of the Yogyakarta Principles

Civil Society

* The November 2008 AWID (Association of Women In Development) conference, held in South Africa, drew participants from around the world as well as across Africa. Kimberly Vance from ARC International and Alejandra Sardá, a noted human rights activist from Argentina, presented a panel on "Using the Yogyakarta Principles to advance global activism across movements and to build linkages between grass-roots and public policy advocacy."

- The South African-based Anti Hate Crime Campaign, organized to respond to the murders of lesbians in Soweto, used the YPs' Principle 5, right to the security of the person, to call "upon the government to implement the associated recommendations"¹⁸.
- Gender DynamiX, a globally known South African activist group promoting rights for transgender people in South Africa actively invokes the YPs in its calls for rights and justice, as it did in challenging Uganda's arrest of a trans activist in September 2008 and in presentation at a Global Arc of Justice Conference in South Africa which convened LGBT activists from around the world.
- Integrity Uganda, a Chapter of Integrity USA, which represents the gay and lesbian community within the Anglican Church has integrated the YPs into its "Best Practices for Advancing Human Rights" manual and uses the Principles to push for improved access to social services, among other things.
- *The Inner Circle Newsletter* follows African news on LGBT issues. The Inner Circle is a non-profit human rights organization based in South Africa that is dedicated to help LGBT persons to reconcile Islam with their sexuality. They organize study circles, workshops, training courses and publish an online newsletter which addresses LGBT issues. They recently published Lawrence Mute's paper "Africa's Hypocrisy on Human Rights, Sexual Orientation and Gender Identity." This paper is featured and draws significantly on the YPs: "African States must acknowledge that there is an irreducible

¹⁶ For more information on the sponsoring organizations visit: <http://www.cal.org.za> and <http://www.arc-international.net/>.

¹⁷ Cited by O'Flaherty, Michael and Fisher, John "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles", *Human Rights Law Review* 8:2, page 244, footnote 174.

¹⁸ The Alliance for Campaign 07 – 07- 07, 'Call to Action', Johannesburg, 10 December 2007, cited by Michael O'Flaherty and John Fisher "Sexual Orientation, Identity and Human Rights Law: Contextualizing the Yogyakarta Principles", *Human Rights Law Review* 8:2. Foot note 185

minimum of rights which must apply to LGBTI peoples simply because they do apply to all other human beings in our various jurisdictions. As articulated in the Yogyakarta Principles on the Application of International Human Rights Law in Relation to sexual Orientation and Gender Identity, this irreducible minimum of rights that must be protected does not envisage the promulgation of new rights, but rather stresses the imperativeness of ensuring already existent rights, including protection of LGBTI people from discrimination, respect of the right to privacy and ensuring their rights to life, liberty, expression and movement. The Yogyakarta Principles are a critical component in the toolkit of States and advocates as we seek to ensure that the rights of LGBTI communities are realized; and their localization in an African context should happen”¹⁹.

- In December 2007, at an Africa-European Union Summit which gathers Heads of States from Africa and the European Union, African and European LGBT organizations led by ILGA Europe and Pan African ILGA denounced State-sponsored homophobia in the African continent and called on all States to fight homophobia and adopt the Yogyakarta Principles²⁰.

D. Translations

Since almost every African country was at one time a colony, the official English version and French translation, as well as the Portuguese translation funded by the Brazilian government, are all useful in this region. In North Africa, the official Arabic translation would be most useful. There do not appear to be any other translations into any of the hundreds of indigenous languages contemplated or done.

The Americas

Within the American Continents and the Caribbean Islands we found the most passionate engagement and promotion of the Yogyakarta Principles by NGOs in the world (Latin America) and the most underutilized use of the Principles. (North America and The Caribbean) While Canada has been a consistent supporter of the Principles at the UN and on the international stage in general, activists in the country have not utilized them to promote further progression on human rights related to sexual orientation and gender identity. And, for reasons explained below, the United States LGBT community has not taken them up at all with the exception of a few conference discussions and academic papers. No uses were found within the independent States in the Caribbean Islands.

A. Regional Intergovernmental Organizations

Organization of American States (OAS)

The OAS is the most important political forum within the Americas. Within the OAS, the Inter American Human Rights Commission and the Inter American Human Rights Court are the two major human rights organs. The Court has not yet solved any cases regarding LGBT issues, while the Commission has not yet referred to the YP in its resolutions. However, for the first time the Yogyakarta Principles were cited by a Member State in deliberations before the Permanent Council of the OAS, specifically the Committee on Juridical and Political Affairs, creating something of a precedent for future references to LGBT issues within the Inter America Human Rights System.

In May 2008, the Brazilian delegation presented a draft resolution on “Human Rights, Sexual

¹⁹ Visit: <http://theinnercircle.org.za/wp-content/uploads/110209.pdf>

²⁰ For more information visit <http://www.pinknews.co.uk/news/articles/2005-6249.html/>

Orientation and Gender Identity” before the Committee on Juridical and Political Affairs of the OAS. This resolution seeks “to condemn human rights violations based on sexual orientation and gender identity,” taking note of “the issuance of the Yogyakarta Principles” and proposing the Permanent Council of the OAS to “convene a special meeting to discuss the application of the principles and norms of the Inter-American human rights system to combat human rights violations based on sexual orientation and gender identity [...] taking into account, among other things, the international human rights instruments in force and the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.”

The reaction to this draft resolution was mixed. Argentina, Chile and Canada supported it, while other countries were concerned with the reference to the Yogyakarta Principles, manifesting their criticism to the draft. Ecuador, Venezuela, Colombia and Costa Rica supported the resolution with the exception of the reference to the Yogyakarta Principles. Peru suggested the elimination of any reference to the Principles, while Guyana and the United States stated their need for further consultation on the issue. Despite these mixed reactions, the Brazilian delegation made no attempt to withdraw the draft resolution. Ultimately, the resolution was adopted by consensus in each of the three consecutive years, 2008-10, but without and explicit reference to the Yogyakarta Principles.

B. Latin America

After more than twenty years of political instability, characterized by gross and systematic human rights violations, Latin America is now the center of important social, cultural and economic changes. The development of human rights organizing and effectiveness has increased dramatically over the last decade. With regard to sexual orientation and gender identity issues, Latin American governments, domestically and on the international stage, are swiftly becoming the leading champions. The prolific organizing efforts of LGBT and sexual rights NGOs and grassroots movements in Latin America have resulted in significant advancements in both intergovernmental organizations and domestically.

The Yogyakarta Principles have provided an additional tool for Latin American activists who had already been among the most active in actively engaging international human rights mandates in their work. LGBT and sexual rights advocates have used them most effectively in forging consensus at the regional and sub regional levels as to the basic premise that human rights law demands a standard of non-discrimination that includes sexual orientation and gender identity. Domestically, from a review of both established legal impact, pending government action, and references in media and other communications, there appears to be no other region in which the Principles have been put to use as widely and to increasing effect. While there are still only a handful of direct legislative and other official references to them within the region, the widespread awareness of the Principles and repeated use of them as a reference point in advocacy is bound to be a continuing factor in human rights developments in the region.

Sub-Regional Intergovernmental Organization

Mercado Comun Del Sur (MERCOSUR) – The Common Market of the South

On a sub regional level, there are several bilateral and multilateral forums in Latin America, which gather together two or more countries for economic, political or strategic reasons. One of the most important sub regional organizations in Latin America is MERCOSUR, the largest trading bloc in South America. Its full Member States are Argentina, Brazil, Paraguay and Uruguay, with Venezuela to join soon. Chile, Bolivia, Colombia, Ecuador and Peru are associate members. MERCOSUR’s primary purpose, as stated in the 1991 Treaty of Asunción, is to allow free trade between Member States, with the ultimate goal of creating full South American

economic integration. However, it has also expanded its mandate to include key political issues, such as human rights and democracy, which are discussed in special forums such as the Public Policies and Human Rights Observatory. Within this Observatory a group called the High Authorities on Human Rights and Foreign Ministries (RAADDHH for its name in Spanish) holds periodic meetings each year and it was within this institutional body where the Yogyakarta Principles have been addressed.

In August 2007, within the IX RAADDHH Meeting, a Seminar on “Sexual Diversity, Identity and Gender” was presented – representing the first time in the history of this regional organization that sexual diversity was addressed. The final Declaration of this Seminar stated, among other things: “We are committed to organize an upcoming seminar (on sexual diversity, gender and identity) promoting the participation of foreign affairs ministers and officials from each of the countries different branches; to permanently incorporate sexual diversity issues to the RAADDHH, including it in each of its working commissions and programs; to incorporate sexual diversity in each of the countries human rights periodic reports, such as ECOSOC and CERD’s reports; and to study and consider the incorporation of the Yogyakarta Principles in the next meeting, in order to consider their support from the Member States.” This Declaration was supported by the States representatives, and by the end of the seminar the RAADDHH decided to create a permanent subgroup on Sexual Diversity as a part of the working group on Racism, Xenophobia and all other forms of Discrimination.

The minutes of the IX RAADDHH Meeting reflect the views of Argentina and Uruguay highlighting the importance of the Sexual Diversity Seminar. Argentina suggested that the future subgroup on Sexual Diversity “should assume the commitment of bringing the Yogyakarta Principles to each of the different national working areas.” The RAADDHH decided to support the Seminar’s final Declaration and to present it to the MERCOSUR’s Political Consultation Forum.

In November 2007, the X RAADDHH Meeting was held and the . Sexual Diversity Subgroup called its first meeting, which included a presentation on the Yogyakarta Principles. The Sexual Diversity Subgroup made several positive recommendations to the MERCOSUR Members, including the following: “According to the proposal of MERCOSUR in the RAADDHH IX Meeting, this working subgroup reviewed and studied the Yogyakarta Principles, which were launched in the United Nations in New York with the support of the Argentinean, Brazilian and Uruguayan governments. This working subgroup requests the RAADDHH to present this proposal to the MERCOSUR’s Political Consultation Forum to be approved by the MERCOSUR’s Presidents Summit.” The Paraguayan representative publicly rejected this recommendation, stating that “consultations are still being made among the domestic authorities on the YP”, so they “could not support right now the recommendation adopted by the subgroup.” On the other hand, the Brazilian Government stated that the Yogyakarta Principles “are already a reference document in MERCOSUR IGOs to incorporate the Yogyakarta Principles into regional human rights treaties and practices.” By the end of this Meeting, the RAADDHH accepted all of the recommendations made by the Sexual Diversity Subgroup except for the recommendation to adopt the Yogyakarta Principles, which was considered to be “still under analysis in some of the countries.”

Finally, in April 2009, within the XV RAADDHH Meeting, there was a new meeting of the Sexual Diversity Subgroup. The meeting minutes show that Marcelo Ferreyra from IGLHRC’s Latin America office, asked the Paraguayan government representative about “their advancements on the study of the Yogyakarta Principles”, to which Paraguay answered that they “were still analyzing them.”

Since 2009, no new references have been made to the Yogyakarta Principles within

MERCOSUR.

Latin American Countries

Argentina

Legislation

Domestically, Argentina, specifically Buenos Aires, has been the site of the most prolific use of the Yogyakarta Principles, most likely a result of the vigilant advocacy by the Buenos Aires-based IGLHRC Latin America office, strong local NGOs, as well as the leadership of one of the Yogyakarta Principles experts, Mauro Cabral, an Argentinean academic and trans activist. Most of the legislative advocacy has been directed at securing the rights of travesti and transgender people. The Principles are often used as a legal reference in general and, specifically, as an adopted definitional reference for concepts such as gender and sexual identity. As will be apparent, most of the laws found are still pending adoption.

Pending National Legislation

* *Legal reform to Anti-Discrimination Law No. 23,592 (1988) “Discriminatory Acts over the basis of Sexual Orientation and Gender Identity”*

The objective of this national legal reform, presented in September 2009, was to incorporate “sex”, “gender identity” and “sexual orientation” as forbidden grounds for discrimination in Argentinean anti-discrimination which already bans discrimination based upon race, religion and nationality. The bill establishes a right to reparation for the victim of discriminatory acts and increases the punishment for certain crimes proven to have motivated by hatred or desire to persecute persons for their “sex, sexual orientation or sexual identity” among other categories. In the Preamble, the bill adopts the definitions of “sexual orientation” and “gender identity” provided by the Principles, further stating: “The Yogyakarta Principles offer a different future for persons with different sexual orientations and identities. Their recognition in our legal system will provide an adequate legal framework for the coexistence and wellbeing of all our fellow citizens. The Civil Association of Intilla and the Buenos Aires’s Network for Sexual Diversity have considered the presentation of this bill to be adequate in order to adopt these principles into our national legislation.” This bill is still being debated by the Argentinean National Congress.

* *Gender Identity Law (1736-D-2009).*

This bill, presented in 2009, aims to ensure and guarantee the dignity and chosen identity of transgender, transsexual and travesti persons. The bill adopts the Yogyakarta Principles’ definition of “gender identity” and the right to recognition before the law as outlined in YP 3. This bill has not yet been approved.

Enacted Provincial Laws

* *Bill on Gender Identity (Exp. 836/2008) Approved by the Province of Buenos Aires)*

This law, now binding within the Province of Buenos Aires, was enacted to “guarantee travesties and transsexual persons the respect of their gender identity.” Article 2° of this law guarantees their right to use a different name from the one that appears in their official identity document in any administrative act or public act where the City of Buenos Aires has an interest. International treaty law in general, and the Yogyakarta Principles in particular, were explicit legal reference points for promoting passage of the law. The definition of “gender identity” was adopted from the Principles as was YP 3, the right to recognition before the law, and all recommendations associated with this right as outlined in the Yogyakarta Principles.

* *Bill on Gender Identity (Province of El Chaco)*

In May 2009, the Province of El Chaco approved a bill guaranteeing the right of transsexual and transgender persons to use their chosen name in official acts and documents. This bill was based on the Gender Identity bill approved in the province of Buenos Aires and literally quoted that bill in all of its references to the YP.

Pending Provincial Laws

** Bill promoting public policies, programs and affirmative action to guarantee the right to equality of LGBT persons (2918-D-2008)*

This bill seeks to promote a non-discriminatory culture and to protect LGBT persons in different levels within the Province of Buenos Aires: education, social security, health access, employment, among others. The bill references the Introduction to the Yogyakarta Principles, which addresses the need for international human rights law to address the severity of the discrimination suffered by LGBT persons. And, it adopts YP X promoting equality for LGBT people.

** Bill Declaring “Nadia Echazú” Education Institute, in Buenos Aires, to be of “social interest” to the State*

This bill declares the “Nadia Echazú” Education Institute (Institute) to be of “Social Interest” to the State. The Institute is an educational institution dedicated to training transsexual and transgendered persons and to place them into the job market. Under Argentinean law, conveying through legislation the status of “social interest to the State” preserves the Institute’s stated mission and protects the it from future attempts by government authorities to change that mission. Directly drawing from the Yogyakarta Principles, the bill states: “The implementation of effective legal measures to guarantee the recognition of the right to gender identity and freedom of the citizens are part of the recommendation made by the Yogyakarta Principles to the States [...] We believe that this initiative reflects that spirit.”

** Bill Promoting the Protection, Care and Prevention of Sexually Transmitted Diseases in Persons with Gender Identity different from biological sex (D/1.981/09-10):*

This bill seeks to promote equality for transgender persons in the access to health care in the Province of Buenos Aires. It prohibits any kind of health studies to be used for discriminatory purposes and establishes measures to promote education and prevention of sexually transmitted diseases. Again, the Preamble of the YP is used to explain the necessity of the bill for addressing the severity of the discrimination suffered by transgender persons

Judicial Decisions

The only reference found in a judicial context in Argentina was in the brief submitted by the petitioner in the *Constitutional Action against Social Security Administration in Argentina*. The case seeks to invalidate a Court’s decision denying a gay man the right to a widow’s pension after the death of his life partner. In its legal arguments, the petitioner quotes several international treaties and case-law, and then refers to the Yogyakarta Principles: “Another element to consider and that concurs with the position taken by the Human Rights Committee are the Yogyakarta Principles. These principles, considered pioneers, were adopted and presented in March 2007 and confirm international binding laws that States must comply with. They establish guidelines for the United Nations and for governments to ensure the universal reach of the protection of human rights. They were adopted by a distinguished group of 29 experts in international law in a meeting held in Yogyakarta [...]” The brief cites YP 13, the right to social security and to other social protection measures, and highlights the recommendations to the States that are outlined by the Committee of Experts under YP 13.

Executive Policy

The Argentinean National Institute against Discrimination, Xenophobia and Racism (INADI) is the executive-level authority that has used the Yogyakarta Principles most actively. It is a decentralized agency created in 2005 that depends on the Justice, Security and Human Rights Ministry. Among its objectives, INADI is in charge of the design and implementation of public policies against discrimination. In addition, it offers free legal counseling to persons or groups facing discrimination. The INADI receives discrimination complaints and makes the factual determination as to whether a legal case of discrimination has been made. The INADI has issued at least 4 resolutions (“dictámenes”) addressing discrimination on the basis of sexual orientation or gender identity in which it quoted the Yogyakarta Principles as a legal reference. Because the INADI is a consultative-administrative body within the executive branch, these resolutions are not binding and cannot be legally enforced by the police as would be a judicial ruling. However, they are much respected within the judiciary and the executive branch and represent important legal precedent should the case be brought to court. Three of the most important resolutions are:

- *Resolution No. 029/09*: The complaint was presented by a transvestite professor who was fired from the school where he taught. INADI’s resolution determined that the termination was discriminatory. The INADI adopted the definition of gender identity provided by the Yogyakarta Principles, and based its findings, in part, on violations of YP 2 (the right to equality and non-discrimination) and YP 12 (the right to work). The resolution referenced the Principles in recognizing that this case was not an isolated situation, but a part of a global pattern.
- *Resolution No. 019/09*: The complaint was presented by a man who claimed that the G.I. Foundation, a catholic organization, was promoting discrimination by organizing a conference on sexual health that sought to “heal the homosexuals.” INADI stated that assuming that homosexuals are sick or abnormal persons constitutes discrimination and quoted the Yogyakarta Principles to define discrimination on the basis of sexual orientation and gender identity.
- *INADI’s participation in MERCOSUR’s Sexual Diversity Seminar*: INADI also presented an important document in the Sexual Diversity Seminar organized by MERCOSUR. In its presentation, the INADI representative stated that “the principles that we want to fulfill [...] are already established in the Yogyakarta Principles, which urge all MERCOSUR and associated countries to promote anti-discriminatory legislation and public policies [...] Thus, our delegation’s proposal is to unconditionally support the Yogyakarta Declaration and the OAS Convention Draft.”

Brazil

Legislation

Even though the Brazilian government has been actively supporting the Yogyakarta Principles since their launch in 2007, there are few references to them in a legislative level.

Pending National Legislation

i) Legal reform to Anti-Discrimination Law N° 7,716 (1989) “Discriminatory Acts over the basis of Gender, Sex, Sexual Orientation and Gender Identity”

This bill, presented in 2009, seeks to extend the scope of the 1989 anti-discrimination law to any discriminatory act affecting LGBT persons. The legal and historical arguments provided by the bill in its analytical section quotes the Yogyakarta Principles as an important milestone in guaranteeing LGBT rights on an international level. Even though this bill has not yet been approved, it is the first time the Principles have been used to promote LGBT inclusive principles

at the national legislative level in Brazil.

Judicial Cases

Amicus Curiae presented by the LGBT Network of Minas Gerais, Federal University of Minas Gerais and other Brazilian LGBT organizations in a Constitutional Action regarding same-sex marriage.

This Amicus Curiae was presented to support a discrimination case filed to challenge the different status provided to married couples and same-sex civil unions. The 90-page document provides and analysis of all applicable international human rights law and uses the Yogyakarta Principles as a benchmark and a source for future binding law. “In the current stage of international human rights law, it is not possible to restrict family rights to heterosexual marriage, thus restrictively interpreting the right to get married. For this reason, a movement began with the objective of recognizing the international obligation of acknowledging same-sex marriage as a way to combat structural discrimination suffered by sexual minorities. A group of experts from 26 countries of different regions of the world met in Yogyakarta, Indonesia by the end of 2007 and developed the Yogyakarta Principles [...]” The amicus then quotes the definitions of sexual orientation and gender identity provided by the Principles and states: “Even though this instrument is not legally binding, it represents a systematization of the sources of international human rights law in this area. Thus, political aspirations and other rights that have not yet met international status were not included, despite the possibility of doing so if the rights evolve in that area.”

The brief cites YP 2 (the rights to equality and non-discrimination) to state: “The Yogyakarta Principles can be considered a rich source in relation to the current state of international law on the matter, since they systematize and clarify the state of the art in terms of sexual orientation and gender identity without creating new law. It is a source that has a laudable evolutionary force and a real instrument to fight discrimination and to disseminate tolerance.” The Amicus recognizes that “the right to gay marriage has not been included in the YP due to the fact that the International Human Rights Law has not yet reached this level of evolution” but then quotes YP 24 (the right to found a family) as the basis for arguing: “So, even if the State does not recognize the right to found a family through marriage, there is a positive obligation to prevent that that situation establishes a structural discrimination to the vulnerable group.” As we can see, this Amicus uses the Yogyakarta Principles to build an argument in favor of same-sex marriage even though it is not explicitly guaranteed. This is one of the documents that uses the Principles not only to define some concepts, but to interpret domestic law in a way that guarantees human rights of LGBT persons.

Executive Policy

Despite so few domestic laws or judicial rulings recognizing the human rights of LGBT people, on the international stage, the Brazilian government’s positions are in full support of equality for LGBT people and it is a proven and staunch advocate. That leadership, emanating from the national Executive branch, has also been evident domestically in numerous ways, including the following initiatives:

** Full Publication of Yogyakarta Principles*

In August 2009, the Brazilian government launched a Portuguese version of the Principles and distributed it with the Brazilian government’s emblem on it, signifying the government’s official support.

** National and Federal LGBT Conferences*

The Ministry of Education, the Presidency of the Republic and the Sao Paulo Regional Government have organized several LGBT Conferences and Seminars. These Conferences have

used the YP as an argument to justify the need to discuss LGBT issues in Brazil and have also quoted the Principles as part of the international legal framework regarding LGBT rights and for several definitions. Two thousand copies were included in the folder of participants of the National Conference on Public Policies for the LGBT population (June 2008).

** Ministry of Education Training Materials*

In 2009, The Ministry of Education published a 450-page document on Homophobia in Schools. This document quotes the Yogyakarta Principles as part of the international legal framework on LGBT issues and publishes a link to the YP website. Additionally, in 2009 a Teacher's Training Material on "Gender and Diversity in School" was distributed by the Ministry of Education. This document used the Principles to define concepts such as sexual orientation and gender identity.

Regional Government of Fortaleza's Resolution on the Right to use of chosen name by travesties and transsexuals

In January 2010, the Fortaleza's Education Secretariat agreed on a resolution to guarantee travesties and transsexuals their right to use their chosen name in schools and other public institutions. The legal and historical arguments provided by the resolution quotes the Yogyakarta Principles, specifically YP 16 (the right to education). A similar resolution was adopted in Belo Horizonte and in Alagoas in 2010. Both of them cited YP 16.

** Federal Government's Training Material for the Media "Communicators Supporting Non-Discrimination"*

This training material is directed to the Media and seeks to eliminate discriminatory language within this area and to promote an inclusive language in the media. In its chapter on LGBT rights, the document quoted Principle 26 of the YP.

Bolivia

Bolivia is one of the few countries in the world with a domestic Constitutional provision banning sexual orientation discrimination. It is the only known country whose Constitution bans gender identity discrimination.

Executive Policy

In December 2008, the Bolivian Justice Ministry presented a National Plan for Human Rights 2009-2013. This 260-page document has a special chapter on LGBT rights, where the Yogyakarta Principles are included as part of the international legal framework, though described as non-binding. The National Plan addresses the problem of lack of knowledge of international standards within the population, and suggests the need to "promote the Yogyakarta Principles as guidelines on how to apply the international legislation and standards to LGBT issues in Bolivia." This specific goal was given a budget and a deadline (2010) and is to be implemented by the Justice Ministry, the Ombudsmen and the Municipal Governments.

Colombia

Judicial

An Amicus Curiae brief presented by IGLHRC in a Constitutional Action regarding same-sex unions in Colombia quotes the Yogyakarta Principles. In presenting the overarching non-discrimination argument at the core of international human rights law, IGLHRC argues that the Yogyakarta Principles "urge the States to adopt legislative, administrative or other measures to guarantee non-discrimination, and to extend the protective measures designed for heterosexual couples that are not married to same-sex couples."

Executive Policy

The Mayor of Bogota launched in 2008 a campaign promoting public policies in support of LGBT rights. In its chapter of international legislation, the main document of this campaign quoted the YP and published a link to the YP's website. Over the basis of this campaign, the municipal council signed an agreement to promote public policies for LGBT population which also quoted the YP and statements made by Vitit Muntarhorn, the president of the experts group.

Ecuador

Ecuador is among the very few countries with a sexual orientation non-discrimination provision in its national Constitution.

Executive Policy

** Health Ministry's Report on Gender and Sexual Violence*

The Health Ministry of Ecuador published a report on gender and sexual violence in 2009. This document sought to orientate health officials on how to respond to cases of sexual or gender violence and referenced the Yogyakarta Principles' definitions of "gender identity" and "sexual orientation."

** National Police Human Rights Training Course*

The training material for this course cites the Yogyakarta Principles in explaining the rights of transgender persons who are in prison and highlighting the fact that gender identity and sexual orientation are basic aspects of human dignity. Even the final exam for the training course included a question regarding the meaning and application of the Principles.

Guatemala

Executive Policy

The 2009 Guatemalan Human Rights Report, which was presented to the Congress, based its chapter on LGBT rights on the Yogyakarta Principles. The preamble, several principles and many concepts provided by the YP were used in part of the report. Additionally, the report states, "The Yogyakarta Principles establish several human rights related to sexual orientation and reaffirm the obligation to guarantee them."

Mexico

Legislation

** Social Security Bill (Pending)*

This bill aims to reform and add certain dispositions to the current Social Security Legislation and Social and Security Services Institution in order to guarantee the right of equality to all couples regardless of sexual orientation, gender identity or marital status. It was presented in March 2010 by Congresswoman Edoé Uranga. The bill's rationale cites the Yogyakarta Principles, stating that "The Principles ratify existing international legal standards in SOGI issues" and then quoting YP 13, Recommendation A calling on States to provide equal access to social security and other social protection measures.

Executive Policy

** Ombudsman (Human Rights Commission of the Federal District)*

This institution has publicly supported the Principles in several published editorials, news articles and reports. The 2007 Human Rights Annual Report included a chapter on Sexual Orientation and Gender Identity that quoted the Principles as a legal framework for applicable human rights.

** National Commission to Prevent Discrimination – 2007 Report*

This Commission has published several documents quoting the Principles and using the recommendations. A document on Youth, Health and Sexual Diversity” (Dec. 2007), after explaining their origin, stated: “The Yogyakarta Principles are the international recognition of the need to protect persons whose sexualities are ‘beyond the dominant rule’ and to provide them legal tools to guarantee their rights. These Principles are not only a progress because of the recognition of sexual diversity but also for incorporating gender identity as a central part of LGBT persons.”” The document then applies the YP recommendations to health and education contexts.

** National Commission to Prevent Discrimination - 2008 Report*

The Commission issued a report entitled “The Situation of Transgender and Transsexuality in Mexican Legislation in Light of the International Instruments.” This document has a special chapter on the Yogyakarta Principles, explaining their origin and the importance of each of the Principles. The document states, “The Yogyakarta Principles illustrate the international concern for the human rights situation of LGBT persons and provide a legal platform to build public policies on equality and non-discrimination towards this population through the recommendations provided by each principle. This can be seen in Mexico in several bills as well as in research projects directed by the State and by civil society.” The report describes several contexts in which LGBT people typically face discrimination and states that each “violates the Yogyakarta Principles.”

Peru

Executive Policy

** Regional Government of Lambayeque, Resolution on Sexual Health Planning*

The Regional Government of Lambayeque passed a resolution on sexual health planning for 2010-2015. This official resolution quotes the Principles as the framework for protecting vulnerable populations such as LGBT persons.

** Regional Government of Loreto, Anti-Discrimination Resolution*

In February 2010, the Regional Government of Loreto passed a very important resolution for the prevention of discrimination. This resolution serves as a legal framework to prevent and combat discrimination and included the Yogyakarta Principles within the applicable international human rights law context.

** Regional Government of Cusco, Resolution on Sexual Health*

Following the Lambayeque Resolution, Cusco also passed a resolution on Sexual Health during 2010. This resolution quoted the Yogyakarta Principles as one of the international landmarks in LGBT issues.

Uruguay

Uruguay is the most developed Latin American country with regard to ensuring LGBT legal rights. It recently approved a national domestic partnership law. Uruguay generally supports LGBT issues in international forums..

Legislation

** Law protecting the right to gender identity, change of name and of the sex registered in official document*

This law, enacted in 2009, advances rights related to gender identity, including the right to be identified in every official document in a way that fully recognizes that identity. The law incorporates the Yogyakarta Principles’ definition of gender identity and, in the preamble,

outlines some of the State's duties: "This bill has specially considered the international recommendations to regulate change of name procedures [...] Among the recommendations provided by the experts meeting in Yogyakarta we wish to highlight the third principle." The legislature transcribed YP 3, the right to recognition before the law, and all of the recommendations proposed by the Yogyakarta Principles Committee of Experts. In the minutes of the Congressional debate, YP 3 was cited by one of the representatives and referenced in the debate on the right to sex change surgeries.

Venezuela

Legislation

Municipal Bill promoting public policies aimed to guarantee the right to equality of LGBT persons and to fight against discrimination over the basis of sexual orientation or gender identity (2009)

This bill seeks to establish a framework for the future development of public policies to combat discrimination against LGBT persons. In its third article, the bill states that the design and implementation of public policies for LGBT persons should "specially consider the guidelines provided by the Yogyakarta Principles."

Other Uses and References in Latin America

Academic References

Debates, seminars, conferences, theses, books and several papers on the YP and LGBT rights have been developed in Latin America in the past three years. Universities and Research Centers have been the most active institutions in discussing the impact of the YP, and their legitimacy as a valid legal reference seems to grow each year.

A total of 50 academic references to the YP were found through the internet search engines. A detailed analysis of these references show the following results:

Books:

"One Body, One Thousand Sexualities": Launched in May 2010 in Argentina. This book is based in the Yogyakarta Principles and contains several references to them.

"União Homoafetiva": Launched in Brazil. This book on homosexuality has a chapter on the Yogyakarta Principles.

"Homossexualidade Masculina: Escolha ou Destino?": The legal references of this book quote the YP.

Thesis: Of these six thesis uncovered and documented in the annex, (two Brazilian, a Chilean, a Colombian, a Costa Rican and a Cuban), four quote the Yogyakarta Principles as a legal reference and one interviews a lawyer on the importance of the Principles. Only one of them is exclusively about the YP: "The Yogyakarta Principles and their interaction with domestic law and Brazilian public policies," by Daniel Paulo Caye, supervised by Claudia Lima Marques. This thesis studies the evolution of international human rights law regarding LGBT issues.

21 Academic Papers: A total of three papers were exclusively about the Yogyakarta Principles, while 18 were devoted to LGBT issues with citations to the Principles as a legal reference. The ones directly related to the YP addressed the following issues:

* "Yogyakarta Principles" by Sonia Correa. This brief paper explains the Yogyakarta Principles, describes the process of creating them, and analyses their possible impact in the world.

* "The alliances for and against the LGBT sexual rights" by Marco Antonio Torres. This paper

analyses some alliances between the civil society and academia with regard to sexual rights and studies the YP as an important example of this alliance.

* “Yogyakarta Principles” by Marcelo Ferreyra: This paper explains the origins of the Principles, their scope, their importance and their possible impact.

10 Lectures and/or Seminars: At least five special lectures in which the Yogyakarta Principles were the point of discussion took place in Latin American countries between 2007 and May 1st 2010 and five different seminars dedicated to LGBT issues had special panels or discussions on the Principles.

10 Reports and Training Materials: Several Latin American Universities publish regular Human Rights Reports and organize training courses on human rights issues. Every human rights report found from the past three years devoted a chapter to LGBT issues that quoted the Yogyakarta Principles as a legal framework or standard for evaluating human rights violations.

Media References

A Substantial amount of media attention has been given to the Yogyakarta Principles in Latin America. Over 140 news articles from all over the region were found, with the largest portions in Mexico, Brazil and Argentina.

The 2007 launch of the Yogyakarta Principles was broadly covered by LGBT magazines, newspapers, and bulletins. This coverage often involved the full publication of the Spanish or the Portuguese version of the Principles or a link to the YP website. A link to each of these news articles can be found in the annex to this document.

After 2007, dozens of news articles quoted the Principles in discussing LGBT-related issues, such as anti-discrimination campaigns, laws or legislative bills, or with regard to coverage of the MERCOSUR meetings. The Principles were often cited as a legal framework or as a benchmark for human rights vindications and violations pertaining to sexual orientation and gender identity.

The coverage included several conservative websites and bulletins connected with the Catholic Church expressing unfavorable views of the Principles. They often emphasized the “soft law” character of the Principles and rejected the initiatives adopted within MERCOSUR regarding LGBT rights.

Civil Society Actions

Research uncovered more than 150 Latin American LGBT NGOs and other civil society organizations that promoted, publicized or used the Yogyakarta Principles in advocacy contexts between 2007 and 2010. Most of them covered the launch of the principles in 2007 and published the full version on their official websites. Many civil society organizations lobbied for the implementation of the Principles in their home countries, either as law or as a part of public policies within the education or health ministries. Several NGOs sent letters to their representatives, developed awareness-raising campaigns, and used the Principles as teaching materials in training courses and seminars.

It is especially interesting to note that many LGBT organizations used the Principles as guidelines in their Human Rights Reports or in their shadow reports to international organizations. In these documents, groups have typically used the Yogyakarta Principles as a legal framework for interpreting human rights obligations and identifying human rights violations. Many of these documents refer to the Principles as “international law,” rather than “soft law.”

As to professional associations, with the exception of psychologist’s associations, there are few references to the YP.

Translations in Latin America

The official Spanish translation of the Yogyakarta Principles has been actively used in the region. The Principles have been translated into Portuguese for use in Brazil.

Additionally, a Bolivian NGO is reported to be translating them into Quechua, Aymará and Guaraní, which are very important native languages in the region. Quechua is originally from the Andes and thus spoken by indigenous and non-indigenous people in Peru, Bolivia, Ecuador, south of Colombia and the north of Chile and Argentina. Aymara is now spoken in Bolivia, Peru and the north of Chile and Argentina. Finally, Guaraní is one of two official languages in Paraguay and is also spoken in the north of Argentina, south of Brazil and Bolivian Chaco. The final version of these translations will be available in the second half of 2010.

C. North America

From a regional affinity perspective, only two countries comprise North America – Canada, a country whose domestic law and policy is in the global forefront with regard to what have become the basic equality touchstones (no criminal laws, a safe haven for LGBT asylum seekers, general non-discrimination policies, and same-sex marriage), and the United States, a country whose national and state laws and policies are still distinctly anti-LGBT by any global human rights standard. Both Canada and the United States are members of the Organization of American States (OAS) and, thus, participants in current processes underway to strengthen the application of the American Convention on Human Rights on the issues of gender identity and sexual orientation. In fact, the Inter-American Commission on Human Rights is located in Washington, DC, the capitol of the United States.

Canada

There appears to be very little use of the Yogyakarta Principles in Canada. Most likely this is due to the sense of confidence the Canadian LGBT community has developed in its domestic government moving consistently toward ensuring basic rights for LGBT people without heavy reliance on international mandates to do so. Some Canadian advocates detect a “misplaced” sense among many lesbian and gay Canadians that sexual rights have been fully achieved with the provision of same-sex marriage. While much of what the Yogyakarta Principles address has not been incorporated into Canadian law, especially with regard to gender identity issues, the groundwork laid by the Parliament and the Canadian Supreme Court over the past two decades provides some assurance that the progress can continue under the equality values already established by the Supreme Court. Yet, Canadian advocates consistently expressed concern about a gap between Canada’s statements of support on the international stage and the actual movement forward within domestic policy.

Nonetheless, the one major reference found could be very significant, if passed by the Parliament, despite the debate among leading Canadian advocates as to its legal significance.

Legislation

**** Motion in Parliament to Endorse the Yogyakarta Principles***

New Democratic Party MP Bill Siksay tabled a motion in the House of Commons calling for the Canadian government to “(a) endorse the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity; (b) seek to fully implement these principles in Canada; and (c) work towards their acceptance and implementation worldwide through the United Nations, all other human rights and international law forums, and Canada’s relations with other countries.”

MP Siksay stated: “This initiative merits Canada’s full and active support [...] The Yogyakarta Principles are a blueprint for progress on human rights around the world, and are a significant step towards full equality for gay, lesbian, bisexual, transgender, transsexual and intersex people everywhere.” The Canadian government had in another venue described the Principles as “useful blueprints to measure progress on human rights related to sexual orientation and gender identity around the world”²¹.

According to Akin Adé Larcher, former Director of Research & Policy for Egale Canada, the legal value of this initiative is questionable since an endorsement would have lesser impact than if Parliament were to *ratify* the Yogyakarta Principles. He states that once endorsed, the motion calls for implementation. As such “Ministries would have to implement and ensure they are in compliance with the Principles. I’m not sure whether this places a burden or mandatory requirement on the Government after endorsement but it’s a step to hold them accountable.”

Leading Constitutional lawyer, Douglas Elliot largely agrees. According to Elliot, the resolution is merely a statement of principle with no binding legal effect on the Government. However, if the resolution passes, it will definitely create greater awareness within the ministries and may lead some to take up the issues from a policy perspective.

In a related matter, MP Siksay has presented a bill that would include gender identity and expression in the federal human rights law. This bill has passed a second reading in the House of Commons and will soon be reviewed by the Justice Committee. Kim Vance, from the Canadian-based ARC International, has directly encouraged Siksay to use the definitions provided by the Principles and to bring one of the Principles experts to testify before the Justice Committee.

* *Parliament Index (Index to the Status of House Business, 40th Parliament, First Session)*

This index, actively used in the Parliament, cites definitions provided by the Yogyakarta Principles, such as Gender Identity, Homosexuality and Sexual Orientation. These definitions are available for Parliamentary debates.

United States

Not a single legislative, judicial or executive reference to the Yogyakarta Principles was found at any government level in the United States, where huge cultural and legal battles are still underway with regard to equality based upon sexual orientation and gender identity. Though the United States Supreme Court ruled in 2003 that criminalization of same-sex sexuality violates the Constitution, and in 1995 that the equal protection clause of the US Constitution bars discrimination based upon sexual orientation, national legislation still bans LGBT people from serving openly in the military and overtly discriminates against same-sex couples who are legally married, either within the 6 jurisdictions²² within the United States that allow same-sex marriage, or in foreign jurisdictions. Over the last 15 years, approximately 40 States have adopted constitutional amendments or legislative actions barring same-sex couples from marriage, domestic partnership, and/or other legal means for recognizing their relationships. Further, despite the nearly 40 year effort to pass a national law banning discrimination in employment, success still eludes the LGBT community in the US on this basic issue of equality. Only within

²¹ Government of Canada, Response to Petition, Petition No. 391-1634, 6 June 2007. Cited by O’Flaherty and Fisher, “*Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles*”, Human Rights Law Review 8:2, Oxford University Press p. 37.

²² Massachusetts, Vermont, Connecticut, Iowa, New Hampshire, and the District of Columbia/Washington, DC. A federal district court in California ruled in August 2010 that the law barring same-sex couples was unconstitutional, and further appeals are underway.

last year, under the new administration of Barack Obama, did the United States Congress pass the very first law positively addressing sexual orientation and gender identity, a rather mild-mannered the law addressing hate-motivated violence, and repeal the odious federal exclusion of HIV+ people from entry into the United States.

Use of the Yogyakarta Principles, and international law in general, to challenge human rights violations is not likely to be effective anytime soon in the United States. US exceptionalism is an ingrained value in US lawmaking and advocacy, particularly with regard to the advancement of human rights. In fact, the term “human rights” is rarely used in public advocacy - by NGOs or public officials - because of its connection to internationalism and international standards, which in US culture are deemed to strip the US of its independence. The conservative justices on the Supreme Court are overtly hostile to looking beyond US law for guidance in particular cases, preferring to rely solely on “American values” and history. Nonetheless, the lack of *legal* impact of these principles does not imply that they are having no impact at all as illustrated by the many civil society actions and academic references outlined below.

Legislative Body

The closest the Yogyakarta Principles have come to having support of government leaders is in the following communication put forward by the Congressional LGBT Equality Caucus, established in June, 2008 by members of the United States House of Representatives who are strongly committed to achieving the full enjoyment of human rights for LGBT people in the U.S. and around the world. The group of approximately 14 Members of Congress is chaired by openly lesbian Congresswoman Tammy Baldwin. The fairly tepid endorsement of the Principles by the Caucus is an indication of the challenges faced by NGOs in using the Principles to guide lawmaking: “It would be helpful if (members of) Congress and/or the Democratic and Republican parties would formally express support for the Yogyakarta Principles and would use them as a tool in policy-making. Every year the State Department issues its Human Rights Report. It also gives an oversight of LGBT-issues in many countries in the world. In terms of improvement of the quality of the submissions by American embassies it would be great if the standard instruction to the Embassies on reporting about LGBT-issues would contain reference to the Yogyakarta Principles and would ask the Embassies to use the Principles as a tool in their reporting.”

Other References and Uses

Academic

Important lectures and seminars, as well as many papers have been published in Canada and the United States between 2007 and 2010. Some of the most notable are the following:

Books: “*Urgency Required – Gay and Lesbian Rights are Human Rights.*” This book provides a comprehensive exploration of the state of LGBT rights worldwide. Launched in February 2010 by HIVOS (Humanist Institute for Development Cooperation), this book takes as its reference point the Yogyakarta Principles and analyzes the LGBT situation around the globe.

“*The Global Politics of LGBT Human Rights*” by Kelly Kollman and Mathew Waites (editors). The essays published in this book address LGBT issues in a global, regional (European) and national level, examining the relationships between universal human rights discourses and specific local contexts. The book refers to the Yogyakarta Principles as a symbol of the intensification of international struggles by LGBT movement

Papers and Articles: “*Yogyakarta Principles: Applying existing human rights norms to sexual orientation and gender identity.*” Published in HIV/AIDS Policy and Law Review, December

2008, this paper analyses the possible uses of the Principles and explains some of the debates that surrounded their creation. <http://www.ncbi.nlm.nih.gov/pubmed/19297777>

“Independent human rights documentation and sexual minorities: an ongoing challenge for the Canadian refugee determination process” by Nicole LaViolette (published in International Journal of Human Rights, vol. 13, N. 2-3, April-June 2009): This paper proposes that in the case of gay, lesbian, bisexual and transgender claimants, existing country documentation still fails to provide the kind of information refugees need to support their claims. This is due to the continual struggle of human rights organizations to properly document abuses against sexual minorities. In this context, the paper quotes the Yogyakarta Principles as part of the recent legal evolution.

“A Brief Commentary on the Yogyakarta Principles” by Jakob Cornides: (Berkeley Electronic Press) This paper openly criticizes the Principles as attempting to create privileges for LGBT people. The paper provides arguments to States wishing to “defend themselves against pretensions that the Yogyakarta principles reflect the current status of international law.”

Available at: http://works.bepress.com/jakob_cornides/20

“Six Problems with the Yogyakarta Principles” by P. Tozzi: (International Organizations Research Group): This paper argues that the Principles reflect only the views of a “narrow group of self-identified “experts” and are not binding in international law.” http://www.c-fam.org/docLib/20080610_Yogyakarta_Principles.pdf

“Yogyakarta Principles: Applying existing human rights norms to sexual orientation and gender identity” by Boris Dittrich (HIV AIDS Policy Law Review, Dec. 2008, Issue 13): Boris Dittrich from Human Rights Watch describes the development of the Yogyakarta Principles, which not only list the rights involved but also provide recommendations to States (and others) concerning how the rights should be implemented. <http://www.ncbi.nlm.nih.gov/pubmed/19297777>

“The Role of the Yogyakarta Principles” by Douglas Sanders (Sexuality Policy Watch): Former University of British Columbia law professor, Douglas Sanders, states that the UN is divided on the topic of human rights of lesbian, gay, bisexual, transgender and intersex people. In the political bodies many States oppose recognition, but the ground is shifting, if slowly, underneath their feet. In the meantime this paper argues that progress has been occurring in two other parts of the UN system – the treaty bodies and the special procedures. This paper analysis this progress, citing the Yogyakarta Principles as an important landmark in this progress. <http://sxpolitics.dreamhosters.com/wp-content/uploads/2009/03/yogyakarta-principles-2-douglas-sanders.pdf>

“Considerations about the Principles” by Mauro Cabral (Sexuality Policy Watch): This brief article highlights the importance of the YP and the need to actively implement them around the world. <http://sxpolitics.dreamhosters.com/?p=779>

“Two Novembers, Movements, Rights and the Yogyakarta Principles” by Scott Long (Sexuality Policy Watch): In this article Long describes the process of creating the Yogyakarta Principles and highlighting their importance in international human rights law. <http://www.hrw.org/wr2k8/yogyakarta/index.htm>

“The Yogyakarta Principles: Fusing Global Discourse with Local Vernaculars” (ILGA): This paper states that by looking at homophobia and human rights, existing protections for sexual minorities, the potential benefits and pitfalls of a non-binding declaration, the Yogyakarta Principles are likely to be globally and locally compelling because they situate local struggles within global laws that governments have already agreed to obey.

<http://static.toodoc.com/download.php?s=YTo0OntzOjM6InVybCI7czo5MjjoiaHR0cDovL3d3dy5pbGdhLWV1cm9wZS5vcmevY29udGVudC9kb3dubG9hZC84NzUwLzUyNDk2L3ZlcnNpb24>

[vMS9maWxlL1lvZ3lha2FydGErQXJ0aWNsZS5kb2MiO3M6NDoic2l6ZSI7czo1Oii5NTIzMiI7czo0OiiJkYXRlIjtzOjEwOiiyMDEwLzA1LzI0IjtzOjU6InRpdGxIjtzOjQwOiiJUaGUgWW9neWFrYXJ0YSBQcmIuY2lwbGVzOiiBGdXNpbmcgR2xvYmFsIjt9](http://www.allacademic.com/meta/p294870_index.html)

"Bridging the Gap Within the UN: Integrating the LGBT Community into the UN Human Rights Framework" by C. Homan: Paper presented at the annual meeting of the Northeastern Political Science Association, Omni Parker House, Boston, MA. This paper suggests that the Yogyakarta Principles will be used as a legal doctrine to create an LGBT orientated human rights NGO within the UN with the goal of ending the sexual orientation-based inequality within the international sphere. (http://www.allacademic.com/meta/p294870_index.html)

"Human Rights Advocacy on Gender Issues: Challenges and Opportunities" by Stephanie Farrow: This paper states that the traditional human rights law paradigm, with its focus on the state, may be obsolete in dealing with human rights abuses by such diverse non-state actors as powerful militias and global corporations. It highlights just a few opportunities and challenges to come for international human rights advocacy on gender issues. The Yogyakarta Principles are quoted as part of the legal framework of international human rights law. (<http://jhrp.oxfordjournals.org/cgi/reprint/1/1/83.pdf>)

"Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name" by Ryan Richard Thoreson (Journal of Human Rights 8:4, 323-339) The abstract of this paper states: "In this paper I explore the entrenchment of sexual minorities as an at-risk group protected by human rights and the importance of the Yogyakarta Principles in advancing this "norm that dare not speak its name" on the global stage. I identify three reasons why the Principles have been quickly assimilated into policymaking: the modesty of their demands, the stability of their foundations, and the strategic, inventive ways that activists have framed and deployed them from multiple points of entry in the global system." http://arc2.norex.ca/files/50/Norm_that_Dares_Not_Speak_Its_Name.pdf

"Queering International Legal Authority," by Doris E. Buss (American Society of International Law Proceedings 2007): This brief paper, presented at a Lecture in London, cites the Yogyakarta Principles as a benchmark for the LGBT movement.

http://arc2.norex.ca/files/01/00/Wilde__Ralph__Queering_International_Law.pdf

Seminar/Lecture: The Global Arc of Justice Conference: Implementing the Yogyakarta Principles (The Williams Institute, UCLA School of Law): Experts and advocates from around the globe meet for two days to discuss the implementation of the Yogyakarta Principles. The working group sessions focused on addressing the following topics: the history and background of the Yogyakarta Principles, recent examples of their use to illustrate how they can be implemented, critiques of the Principles and recommendations for revising them, and recommendations for implementing the Principles for academics, lawyers, NGOS, and advocates.

"My Name is Truth" by Mauro Cabral. Mauro Cabral's lecture at the Simon Fraser University proposes a critical Latin American-based reading of the way in which identity codifies trans and intersex issues in the context of international human rights movement. The Yogyakarta Principles and the political process that has surrounded them were the focal point of his presentation. <http://www.law.ucla.edu/williamsinstitute/programs/GlobalArcofJustice2009Schedule.html>

Other Commentary:

"The Yogyakarta Principles promote sexual anarchy and threaten the family." (Family Watch International): This brief states that if the Yogyakarta Principles are accepted as international or national policies, they would clearly undermine the family in many ways.

<http://www.familywatchinternational.org/fwi/yogyakarta.pdf>

“Natural and Un-Natural Law” by Jakob Cornides (Family Watch International): This paper states that human rights-related language is used by advocacy groups to promote their particular political agendas and uses the Yogyakarta Principle as an example of this thesis.

http://www.c-fam.org/docLib/20100420_Un-Natural_Law_FINAL.pdf

“The Magna Carta of the Sexual Rights Movements” (Family Watch International): This brief document states that the YP constitutes one of the greatest current threats to the institution of the family. http://www.familywatchinternational.org/fwi/yogyakarta_brief.pdf

Civil Society

With a few exceptions, US domestic NGOs have yet to pick up the banner in promoting the Yogyakarta Principles. However, a growing number of US-based international NGOs have been at the forefront of using the Principles in human rights advocacy.

National Center for Transgender Equality: This organization, dedicated to advancing the equality of transgender people, has addressed federal policy areas where improvements can be made to advance transgender equality. “The Department of State should require the use of the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity or expression and should include a definition for gender identity or expression.”

Letter to Dubravka Simonovic, Chairperson of the Committee on the Elimination of Discrimination against Women: Human Rights Watch, the Center for Women’s Global Leadership, and Human Rights First (all US-based international human rights groups) joined the International Services for Human Rights, Amnesty International, and other NGOs in a letter to this Committee supporting, among other things, the implementation of the Yogyakarta Principles. <http://www.humanrightsfirst.info/pdf/080730-FD-cedaw-ngo-letter.pdf>

Human Rights Watch: HRW sent a petition urging the United Nations to endorse the Principles and, in particular, to call for an end to criminalization of same-sex sexual conduct. “To Ban Ki-moon, Secretary-General of the United Nations [...] The Yogyakarta Principles – named for the Indonesian city where they were adopted in 2006 by a panel of international experts – lay out clear standards for how governments should end violence, abuse, and discrimination against lesbian, gay, bisexual and transgender people, and ensure equality. We urge the United Nations to endorse the Yogyakarta Principles, and to call for an end to violence and abuse based on sexual orientation and gender identity. Tell the world’s governments to stop criminalizing people because of who they are or whom they love.”

International Gay and Lesbian Human Rights Commission: IGLHRC’s publication, “*Equal and Indivisible: Crafting Inclusive Shadow Reports for CEDAW*,” promotes the use of the Yogyakarta Principles in the crafting of shadow reports for CEDAW.

<http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/287-1.pdf>

Amnesty International US: “Lesbian, Gay, Bisexual and Transgender Rights are Human Rights!”: Awareness raising campaign and Activist Resource Packet include several references to the Yogyakarta Principles.

Translations in North America

English is the dominant language in both North American countries, with French as an official language in Canada. In the United States, the Spanish translation would also be useful given the

size of the Spanish-speaking immigrant populations from throughout Latin America.

D. The Caribbean Islands

The Caribbean Islands represent a general grouping of independent states, territories and other affiliations of European and North American countries, and/or political bodies of Latin American states. They circle the Caribbean Sea between the Gulf of Mexico to the west and the Atlantic Ocean to the east, and run from the southeastern coast of North America through the northeastern coast of South America. Many of the independent states are members of the Organization of American States.

The only relationship between the Yogyakarta Principles and a Caribbean State was in the previously cited exchange when Dominica was reviewed within the Universal Periodic Review session of the Human Rights Council in Geneva. However, given the activity of the Latin American LGBT NGOs working within the Organization of American States, it is highly likely that NGOs in The Caribbean will incorporate the Yogyakarta Principles in their work in the near future.

Translations in The Caribbean Islands

The English publication of the Yogyakarta Principles, along with the official Spanish and French translations and the Brazilian Portuguese translation will be useful to NGOs throughout the Islands.

Asia and the Pacific Islands

In contrast to Africa, the Americas, and Europe, there are no regional human rights treaties among the States in the far-flung and infinitely diverse Asia-Pacific region. As such, there are no regional human rights mechanisms, such as a human rights commission or court as they exist or are on the road to existing in other regions. As a result, the work of the Asia Pacific Forum of National Human Rights Institutions represents the only regional entity to take up issues related sexual orientation and gender identity discrimination, making it a very important body to monitor with regard to the general development of these issues in the region.

LGBT NGOs and activism are highly developed in many parts of the region. Activists from Nepal, India, Thailand, Indonesia, Malaysia, China, Japan, the Republic of Korea, The Philippines, and Taiwan, among others, are leading regional efforts for increased visibility and attention to sexual orientation and gender identity issues in the region. Australia's and New Zealand's domestic laws have been at the global forefront for many years, and New Zealand, in particular, has been a leader in raising concern about LGBT issues at the United Nations.

The Yogyakarta Principles have been put to their most eventful use in litigation, as the three most prominent legal decisions citing the Principles are all from the Asia Pacific region. However, no legislative or executive level actions related to the Yogyakarta Principles were uncovered. And, while there was a major launch of the Principles in the region in 2008, very little other reporting of the use of the Principles by LGBT NGOs or civil society groups in general were reported by either international or domestic LGBT groups. Language barriers limited research in this region more than in others regions.

A. Regional and IGOs

Asia Pacific Forum

The Asia Pacific Forum of National Human Rights Institutions (APF) is the leading regional human rights organization in the Asia and the Pacific Islands. The APF provides a framework for

national human rights institutions to work together and cooperate on a regional basis through a wide range of services. The full members of the APF are National Human Rights Institutions (NHRIs) from the following countries: Afghanistan, Australia, India, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, Palestine, Philippines, Qatar, Republic of Korea, Thailand and Timor Leste. In addition, the NHRIs from the Maldives and Sri Lanka are associate members.

National Human Rights Institutions are bodies that have been established by State governments with the specific role of promoting and protecting human rights. They are independent from the government, although they may be required to report to their respective parliaments on regular basis.

The Forum Council is the APF's decision-making body.

The APF addresses a range of human rights issues. Sexual orientation and gender identity issues have gained importance since 2007 in the wake of the Yogyakarta Principles' launch.

Regional Workshop on the Role of National Human Rights Institutions in the Promotion and Implementation of the Yogyakarta Principles

In May 2009, the APF and the National Human Rights Commission of Indonesia hosted a regional workshop on the role of NHRIs in the implementation and promotion of the Yogyakarta Principles. Workshop participants discussed practical ways that NHRIs could use their functions and powers - including investigating complaints, reviewing laws and policies, conducting national inquiries, and promoting public education - to better protect and promote the rights of gay, lesbian, bisexual and transgender people. Participants included representatives from the NHRIs of Australia, Indonesia, Jordan, Malaysia, Nepal, New Zealand, Palestine, Republic of Korea and Thailand.

The Workshop adopted the following conclusions regarding the Yogyakarta Principles:

“The workshop welcomes with appreciation the Yogyakarta Principles as a critical component for the work of national human rights institutions on human rights issues in relation to sexual orientation and gender identity.

“The workshop encourages national human rights institutions to respond to the recommendation to them in the Yogyakarta Principles to ‘promote respect for these Principles by State and non-State actors, and integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities’. The workshop also encourages national human rights institutions to promote respect for the Principles by civil society.”

“The workshop recognized that this was the first occasion on which some national human rights institutions had discussed these issues and welcomed the opportunity to consider country specific and expert reports. It also recognized that the national human rights institutions are at different points in relation to them. Having discussed and considered appropriate responses to the recommendation in the Yogyakarta Principles and the role of national institutions in relation to promotion and implementation of the Yogyakarta Principles, the workshop encourages NHRIs to respond to the recommendation and considers that appropriate responses could include ... c. disseminating and promote the Yogyakarta Principles, especially to those whose rights they affirm, including in local languages.”

Additionally, the workshop requested that the Asia Pacific Forum Council and its Secretariat:

- Ask the Advisory Council of Jurists (ACJ) to review national laws and policies within the APF members and determine if they are consistent with international human rights

standards, including: international human rights law, declarations, resolutions, observations, reports from regional human rights bodies and the Yogyakarta Principles. The result of this research should be presented at the APF Annual Meeting in August 2010.

- Facilitate the exchange of information among member institutions on their human rights work in relation to LGBT issues.
- Assist member institutions build their knowledge and awareness of human rights in relation to LGBT rights through training programs and staff exchanges.
- Include the Yogyakarta workshop as an agenda item at the APF Annual Meeting in August 2010 and invite each APF member to report on its activities in relation to human rights and sexual orientation and gender identity at that meeting.

As this report was being completed, the APF Annual Council Meeting took place in Bali in August 2010. As requested by the workshop participants, the ACJ conducted an in-depth study of the domestic laws and policies relating to sexual orientation and gender identity in each of the 17 countries of the APF member institutions. Chris Sidoti, a coordinator of the meeting, reported that the ACJ presented an oral summary of its conclusions and recommendations. The full written statement of advice will be completed, provided to Forum members, and then posted to the APF website, www.asiapacificforum.net. In addition, the next Annual Council Meeting in Bangkok, Thailand in 2011 will include reports from each of the NHRI members as to their respective responses to the ACJ recommendations and actions taken as a result.

B. Domestic

The only official State references to the Yogyakarta Principles have been by courts ruling on constitutional cases related to the rights of LGBT people.

India

Judicial

Naz Foundation v. Government of NCT of Delhi (Delhi High Court, July 2, 2009)

The NAZ Foundation, an Indian NGO focused on HIV/AIDS, submitted a writ petition (a public interest action) challenging the constitutionality of Indian Penal Code section 377. Section 377, entitled “Of Unnatural Offences,” had effectively been interpreted as criminalizing consensual sexual acts between persons of the same sex. The Naz Foundation submitted that this interpretation of Section 377 violated the right to equality before the law, the prohibition of discrimination on the ground of religion, race, caste, sex or place of birth, freedom of speech, right to life and personal liberty. NAZ also argued that the law drove those who engaged in same-sex conduct or identified as gay, lesbian, transgender, or as a sexual minority underground for fear of criminal prosecution, thus compromising efforts to address sexually transmitted diseases such as HIV/AIDS.

After an eight year legal battle, the Delhi High Court issued a ruling on July 2, 2009 holding that the law was unconstitutional – a ruling that elicited a joyful reaction from the Indian LGBT community and human rights activists who supported the case. Some described the decision as a “progressive” move which will change their “level of dignity.”

The Court rejected the argument that homosexuality was contrary to public and popular morality in India and determined that the Constitution of India protects and promotes diversity. In its ruling, the Court extensively referenced United States’ constitutional privacy jurisprudence, rulings from the European Court of Human Rights, and the United Nations Human Rights Committee determination in *Toonan v. Tasmania*. The Court also referenced specific rights

applicable to LGBT persons and delineated in the Yogyakarta Principles.

As one of the worlds most extensive and important judicial decisions incorporating the Yogyakarta Principles into its analysis and domestic jurisprudence, large portions of the Court’s decision are worth noting:

“There is a growing jurisprudence and other law related practice that identifies a significant application of human rights law with regard to people of diverse sexual orientations and gender identities. This development can be seen at the international level, principally in the form of practice related to the United Nations – sponsored human rights treaties, as well as under the European Convention on Human Rights. The sexual orientation- and gender identity–related human rights legal doctrine can be categorized as follows: (a) non-discrimination; (b) protection of private rights; and (c) the ensuring of special general human rights protection to all, regardless of sexual orientation or gender identity.”.....

“On 26th March, 2007, a group of human rights experts launched the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles). The principles are intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation or gender identity. The experts came from 25 countries representative of all geographical regions. They included one former UN High Commissioner for Human Rights, 13 current or former UN Human Rights Special Mechanism Office Holders or Treaty Body Members, two serving Judges on domestic courts and a number of academics and activists. Although relatively short period of time has elapsed since the launch of the Principles, a number of member and observer States have already cited them in Council proceedings. Within days of the Geneva launch, more than 30 States made positive interventions on sexual orientation and gender identity issues, with seven States specifically referring to the Yogyakarta Principles. [Michael O’Flaherty and John Fisher, “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles” - Human Rights Law Review 8:2 (2008), 207-248].

“The Yogyakarta Principles define the expression “sexual orientation” and “gender identity” as follows: “*Sexual Orientation*” is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.” “*Gender Identity*” is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

“The Principles recognize:

- Human beings of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights;
- All persons are entitled to enjoy the right to privacy, regardless of sexual orientation or gender identity;
- Every citizen has a right to take part in the conduct of public affairs including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, without discrimination on the basis of sexual orientation or gender identity.”

After these extensive references to the Yogyakarta Principles, the Court cited a range of jurisprudential rulings to guide its conclusion that the sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The Court, thus, directly connected its reasoning to standards established in international human rights law, doctrine, foreign ruling and the Yogyakarta Principles, concluding that “Section 377 IPC denies a person's dignity and criminalizes his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution.”

The Court concluded:

“The Constitution of India recognizes, protects and celebrates diversity. To stigmatize or to criminalize homosexuals only on account of their sexual orientation would be against the constitutional morality.”

Nepal

Judicial

Blue Diamond Society, et al. vs. Nepal Government, Writ No. 917 of the year 2064 (BS) (2007 AD) (Supreme Court of Nepal, December 21, 2007).

Four LGBTI organizations, including Blue Diamond Society (BDS), filed a writ petition in April of 2007 demanding that the Nepalese government recognize and protect the equal rights of gay men, lesbians, transgender and intersex individuals under the emerging constitution of the country.

The Supreme Court of Nepal recited the petitioners factual claims as follows: “The contentions of the petitioners also seem that the people of this community are being victimized by the family, domestic, social as well as State violence; they are deprived from the social, economical, cultural, political and civil rights as well; they have been humiliated in the society and family; they have been deprived from the enjoyment of service and benefits provided by the State; and they have also been deprived from the basic rights such as employment, marriage and citizenship etc.”

In a sweeping opinion – probably one of the most sweeping in the world on the rights of LGBT people - the Court addressed four significant issues it identified as relevant to its final conclusion: 1) whether BDS and other petitioners have legal standing under the public interest litigation law to bring the case; 2) whether homosexuality and “3rd gender” identity are mental perversions or natural traits; 3) whether the State has discriminated against individuals because of their sexual orientation and/or gender identity and whether such discrimination is prohibited, and 4) whether petitioner’s request for an order directing the Nepali government to recognize specific rights of the petitioners should be granted.

First, the Court ruled that Blue Diamond Society and others representing the interests of the Nepali LGBTI community with regard to their equal treatment and protection under the law do possess legal standing to present and pursue the action as a public interest case.

Second, after reviewing the jurisprudence and developments within numerous jurisdictions (United Kingdom, South Africa, Australia, United States, India, European Union) the Court made a factual finding that homosexual and transgender individuals do not suffer from a mental perversion which can be cured. Rather, a person’s sexual orientation or gender identity is a natural phenomenon, not a psychiatric disorder, and thus should not be used to stigmatize or discriminate. Insofar as “traditional norms and values in regards to the sex, sexuality, sexual

orientation and gender identity” are fluid and slowly changing, the Court’s view was that Nepal’s laws should reflect the growing international consensus on human rights. The Court cited the Yogyakarta Principles’ definitions of sexual orientation and gender identity.

Third, the Court recognized the hostility and discrimination faced by homosexual and transgender individuals and that social attitudes and administrative rules fostered the stigmatization of these groups. Although Nepal does not criminalize homosexuality, numerous Nepali laws - the “On bestiality,” “On marriage,” and “On husband and wife” provisions of the Country Code (Muluki Ain, 1963), as well as statutory law governing citizenship, identity cards, and birth certificates, attach rigid gender roles based on physical appearance. The Court again examined developments in other jurisdictions (including South Africa, UK, and the EU) as well as the international treaties to which Nepal is a party to hold that discrimination on the basis of sexual orientation and gender identity cannot be supported by the State and that gradual internalization of international human rights practices should proceed in Nepal. The Court referenced the Preamble of the Yogyakarta Principles.

Finally, the Court examined provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR) to conclude that the language of Nepal’s Interim Constitution should be amended to refer to the gender neutral term, ‘sex,’ instead of specific references to ‘men’ and ‘women’. Doing so would have the dual affect of reflecting consistency with international treaties to which Nepal is a party and ensuring that transgender citizens are reflected in the Constitution’s provisions. The Court took the unprecedented step of directing the government to form a committee to undertake a study of international laws concerning same sex marriage and their impact on society. Following the study, the government is directed to make legal provisions based on the recommendations of the committee.

The Supreme Court of Nepal’s decision dramatically changes the legal course for LGBTI people in Nepal.

The Philippines

Judicial

ANG LADLAD LGBT Party v. Commission On Elections (COMELEC) (Philippines Supreme Court, April 8, 2010)

Ang Ladlad is a group composed of men and women who identify themselves as lesbians, gays, bisexuals or transgendered individuals. When the group applied for accreditation to the party list system, the Commission on Elections (COMELEC) refused to accredit Ang Ladlad under Republic Act No. 7941, thus preventing Ang Ladlad from participating in the May 2010 elections. The party-list system is considered to be a “tool for the realization of aspirations of marginalized individuals whose interests are also the Nation’s.” Ang Ladlad had previously been denied in 2003, but took no action. When it applied again in 2009, COMELEC again refused, basing its decision “on moral grounds” and citing verses of the Bible and Koran to conclude that “the petitioner tolerates immorality which offends religious beliefs.” Furthermore, granting the petition would result in “exposing our youth to an environment that does not conform to the teachings of our faith.” The Chairman of the Commission, who broke the 3-3 tie on the 2009 resolution, stated: “Until the time comes when *Ladlad* is able to justify that having mixed sexual orientations and transgender identities is beneficial *to the nation* (emphasis added), its application for accreditation under the party-list system will remain just that.”

On January 6th 2010, after this second refusal, *Ang Ladlad* petitioned the Supreme Court for an annulment of COMELEC's resolution and asked to be granted accreditation before January 25, 2010, the deadline for printing final ballots for the May 2010 election. Because of the deadline, the Supreme Court considered the petition as urgent.

Ang Ladlad argued that the denial of accreditation violated the constitutional guarantees against the establishment of religion. The Petitioner also claimed that COMELEC's resolutions contravened Ang Ladlad's rights to privacy, freedom of speech and assembly, and equal protection of laws under the domestic constitution, and constituted violations of the Philippines' international obligations against discrimination based on sexual orientation.

The Supreme Court granted the petition, finding as follows:

“Against this backdrop, we find that *Ang Ladlad* has sufficiently demonstrated its compliance with the legal requirements for accreditation. Indeed, aside from COMELEC's moral objection and the belated allegation of non-existence, nowhere in the records has the respondent ever found/ruled that *Ang Ladlad* is not qualified to register as a party-list organization under any of the requisites under RA 7941 or the guidelines in *Ang Bagong Bayani*.”

The Supreme Court based part of its ruling on the fact that COMELEC violated the non-establishment clause when it cited the Bible and the Koran to justify the exclusion of Ang Ladlad. According to the Court, moral disapproval was not a legitimate reason for denying the petition.

After grounding its decision in domestic constitutional law, the Court turned to international law, most notably the decision in *Toonen vs. Tasmania*, to further support its ruling in favor of Ang Ladlad and to overturn COMELEC's discriminatory resolution. However, the Court explicitly rejected Petitioner's reference to the Yogyakarta Principles as a reflecting of “binding principles of international law”:

“We stress, however, that although this Court stands willing to assume the responsibility of giving effect to the Philippines' international law obligations, the blanket invocation of international law is not the panacea for all social ills. We refer now to the petitioner's invocation of the *Yogyakarta Principles* (the Application of International Human Rights Law In Relation to Sexual Orientation and Gender Identity), which petitioner declares to reflect binding principles of international law.”

“At this time, we are not prepared to declare that these *Yogyakarta Principles* contain norms that are obligatory on the Philippines. There are declarations and obligations outlined in said Principles which are not reflective of the current state of international law, and do not find basis in any of the sources of international law enumerated under Article 38(1) of the Statute of the International Court of Justice. Petitioner has not undertaken any objective and rigorous analysis of these alleged principles of international law to ascertain their true status.”

“We also hasten to add that not everything that society – or a certain segment of society – wants or demands is automatically a human right. This is not an arbitrary human intervention that may be added to or subtracted from at will. It is unfortunate that much of what passes for human rights today is a much broader context of needs that identifies many social desires as rights in order to further claims that international law obliges States to sanction these innovations. This has the effect of diluting real human rights, and is a result of the notion that if “wants” are couched in “rights” language, then they are no longer controversial.”

“Using even the most liberal of lenses, these *Yogyakarta Principles*, consisting of a declaration formulated by various international law professors, are – at best – *de lege ferenda* – and do not constitute binding obligations on the Philippines. Indeed, so much of contemporary international law is characterized by the “soft law” nomenclature, *i.e.*, international law is full of principles that

promote international cooperation, harmony, and respect for human rights, most of which amount to no more than well-meaning desires, without the support of either State practice or *opinio juris*.”

The Court’s harsh criticism of the Yogyakarta Principles and, indeed, of human rights developments in general, notwithstanding, the petition was granted and Ang Ladlad participated in the May 2010 election.

C. Other Uses of the Yogyakarta Principles

Civil Society

In 2008, lesbian-led groups in Thailand, the Philippines and Indonesia, in partnership with IGLHRC, marked the confluence of three interrelated human rights campaigns and events: the 60th Anniversary of the Declaration of Human Rights, the annual 16 Days of Activism to End Violence Against Women, and the launch in Asia and the Pacific of the Yogyakarta Principles. On December 10, 2008, 200 activists, representing anti-violence, women’s rights, LGBT, HIV/AIDS, human rights and health groups convened in Yogyakarta, Indonesia for a series of workshops and rallies to launch the Yogyakarta Principles. Lesbians from around the region had made and contributed panels of fabric with artwork and solidarity messages related to the Yogyakarta Principles and to celebrate the rights of sexual minorities. Panels for the Banner were sent from LGBT groups in China, Japan, Malaysia, the Philippines, Sri Lanka, Taiwan, Thailand, and Indonesia. IGLHRC has worked with lesbian groups from the region on a documentary video of the event which undoubtedly will raise the visibility of the Principles throughout Asia.

D. Translations

The Yogyakarta Principles have been translated officially into Chinese, and unofficially into Indonesian, Japanese²³ and Nepali. A translation into Bengla (Bengali) is currently being made and some NGOs have manifested their interest in translating them into Korean. It is also our understanding that they have been translated into Thai.

Europe

For validation of the value and effective use to which regional human rights mechanisms can be used to change the culture and laws related to sexual orientation and gender identity, one need only look to Europe as an example. Over the last several decades, effective advocacy within the European Union, the Council of Europe, the European Court of Human Rights, and many of the regions other human rights mechanisms, which have been moved decidedly toward promoting non-discrimination on the basis of sexual orientation and gender identity, has resulted in the most regional unity in the world with regard to basic human rights standards. Among other things, entry into the European Union is conditioned on repeal of criminal sodomy laws and implementation of non-discrimination policies related to sexual orientation and gender identity. Europe has by far the largest concentration of countries that recognize same-sex unions, either through marriage or formal domestic partnership. On the international stage, the largest contingent of States that consistently and vocally support human rights for LGBT people are

²³ One man, Hiroyuki Taniguchi translated the YP into Japanese. The man was an office worker, not a lawyer, and translated them into ordinary Japanese, not the legal tongue (the two vary greatly in Japan). The government officials were reluctant to use the Yogyakarta Principles the way they had been translated. Hiroyuki, when he could not persuade any government official to do the translation, did it himself. Although the government wanted the “official” translation, NGOs in Japan have found the version translated into ordinary Japanese to be more valuable, exemplifying the importance of making the principles accessible to all people.

European. Increasingly, a good deal of that support is coming from central and eastern European States.

Perhaps as a result of (mostly) successful efforts to advance LGBT rights in Europe through domestic and regional bodies, there are relatively few examples of activist use of the Yogyakarta Principles, which are drawn from international human rights treaties and jurisprudence. Nonetheless, they have gotten a fair amount of important attention within the European systems. Most interestingly, the Council of Europe's Committee of Ministers seems to be adopting the Yogyakarta process by appointing a Committee of Experts to examine European law and make recommendations for addressing sexual orientation and gender identity issues more thoroughly. Finally, there are few who have embraced the Yogyakarta Principles as thoroughly and passionately as the European Commissioner for Human Rights, Thomas Hammarberg. Most helpful about his commentary is the recognition that even Europe is far from fulfilling the full range of specific human rights issues reflected in the Yogyakarta Principles. His consistent calls for European States to study and implement the full range of policy proposals outlined in the Principles is a reminder of the day-to-day indignities faced by LGBT people even in the most advanced region in the world.

A. Regional IGOs

The European Union

The European Union is the economic and political union of 27 member States. The EU has developed a common market, allowing for free movement of people and goods among the member countries. The EU is committed to regional integration and the development of common policies and binding laws among its Member States, which represent approximately 500 million Europeans. Sixteen of the EU members share a common currency.

**** The European Parliament***

The 736-member European Parliament is the directly-elected body of the EU. Together with the 27-member Council of Ministers (all of whom are national ministers representing the governments of Member States), the European Parliament forms the bicameral legislative branch of the EU. Essentially, the Parliament and the Council are two chambers in the bicameral legislative branch of the European Union. While the EP representatives are directly elected, the Council members represent the governments of the Member States. The Council has 27 members; all of them national ministers.

The Parliament has legislative power (power to approve, amend or reject legislation), but it does not have legislative initiative, which is an exclusive attribution of the European Commission, the "executive" within the EU. As a procedural matter, the Commission is empowered to draft legislation, which the Parliament is then empowered to enact into law. Furthermore, EU legislation can be divided into two types: directives and regulations (also known as acts or laws). Directives set general or specific objectives but leave the implementation to the individual EU Member States, while Regulations are directly applicable to Member States and take effect without the need for implementing measures.

The Parliament exerts indirect influence through non-binding resolutions, reports, recommendations and committee hearings, which can directly impact domestic policy, but are not enforceable law.

Recommendations do not have legal force but they do have an important political weight. They are voted exactly like binding Directives and Regulations and are often used as preparation of legislation in Member States. This is the path that the Yogyakarta Principles have followed within the EP.

The following is the only reference found within the European Parliament:

** European Parliament Report on the Annual Report on Human Rights in the World 2007 and the European Union's policy on the Matter (Resolution 2007/2274(INI)):*

This Report on general human rights issues contains a Motion for a European Parliament Resolution calling on the Commission and the Council to fully support the Yogyakarta Principles.

The Report: "Calls on the Commission and the Council to take European Union initiatives at international level to fight persecution and discrimination based on sexual orientation and gender identity, e.g. by promoting a resolution on this issue at United Nations level and granting support to NGOs and actors who promote equality and nondiscrimination; condemns the fact that many countries have criminalized homosexual behavior, that Iran, Saudi Arabia, Yemen, Sudan, Mauritania, the United Arab Emirates and parts of Nigeria impose the death penalty for homosexual activities, that 77 countries have laws that allow State authorities to prosecute, and possibly impose a prison sentence on, people for same-sex acts and that several countries, such as Pakistan, Bangladesh, Uganda, Kenya, Tanzania, Zambia, Malawi, Niger, Burkina Faso, Sierra Leone, Malaysia and India (where the relevant provisions of the Penal Code are currently under judicial review) have laws providing for the imposition of terms of imprisonment lasting from 10 years to life; fully supports the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity; urges Member States to grant asylum to persons who risk persecution in their countries of origin because of their sexual orientation and gender identity."

The Council of Europe (CoE)

The Council of Europe is a 47-member inter-government organization that promotes European cooperation and integration. In contrast to the economic centerpiece of the European Union, the CoE particularly emphasizes legal standards, human rights, and democratic development as cornerstone integration issues for Europe. The European Convention on Human Rights is among the most notable achievements of the Council of Europe. The European Court of Human Rights, created by the Convention, supervises compliance with the Convention and is Europe's highest court for human rights.

**** The Committee of Ministers***

The Committee of Ministers is the Council of Europe's decision-making body. It is comprised of the Foreign Affairs Ministers, or their permanent diplomatic representatives, of all the Member States. It is both a governmental body, where national approaches to problems facing European society can be discussed on an equal footing, and a collective forum, where Europe-wide responses to such challenges are formulated.

The Committee of Ministers has made the following references to the Yogyakarta Principles:

** Reply by the European Committee on Legal Cooperation (CDCJ) to the Committee of Ministers on the "Discrimination on the Ground of Sexual Orientation and Gender Identity":*

On July 2, 2008, the Committee of Ministers instructed the CDCJ to "examine the topic of various forms of marital and non-marital partnerships and cohabitation with a view to identifying possible measures to avoid discrimination on grounds of sexual orientation or gender identity and to report back." The CDCJ commissioned the Danish Institute for Human Rights to carry out a study on the subject. One of the Institute's conclusions, supported by the CDCJ was:

"The Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity have taken the same approach as the human rights monitoring bodies, and affirm that it is left to the discretion of States to decide whether or not to recognize

same-sex marriages or partnerships. With respect to States already recognizing such partnerships, the Yogyakarta Principles stress that married or registered same-sex partners should enjoy the same rights as married or registered different-sex partners. In addition the Principles recognize that unmarried or non-registered same-sex couples should enjoy the same rights as unmarried or non-registered different-sex couples. The Yogyakarta Principles suggest a level of protection for LGBT persons and their equal access to rights that is much higher than that generally experienced in the Member States.”

Additionally, the CDCJ noted that the Commissioner for Human Rights considers the Yogyakarta Principles to be “an important tool in identifying the obligations of States to respect, protect and fulfill the human rights of all persons, regardless of their sexual orientation or gender identity,” which the Commissioner recommends that all Council of Europe Member States study and build on through concrete action.

* *Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-LGBT), Strasbourg, 26 January 2009*: This Committee first met in 2009, and was appointed to do a substantive legal analysis of human rights issues with the view of preparing a Committee of Ministers Recommendation on discrimination based on sexual orientation and gender identity. A Recommendation is a non-legally binding instrument in which the Committee of Ministers traditionally calls on Member States to take a number of measures to ensure the better respect and implementation of European and other relevant international standards in specific areas. This work, as appointed by the minutes of their first meeting, involves representatives of civil society, takes into account in particular the case-law of the European Court of Human Rights, and aims to guide States toward measures to be taken to combat discrimination. It is interesting to notice several similarities with the Yogyakarta process but from a more regionally-specific perspective. It is an expert committee that will draft recommendations to the EU Committee of Ministers on how to address SOGI issues. The 1st Meeting of the Committee studied the Yogyakarta Principles as a key document for LGBT rights and non-discrimination. Then, the annotated agenda mentioned the Principles again²⁴, but another document on “Relevant sources of the Council of Europe and other international organizations” did not mention the Yogyakarta Principles.²⁵ The NGO permanent observers to this Committee, who acted as advisors, are ILGA-Europe, Amnesty International, Human Rights Watch, and Transgender Europe. According to Boris Dittrich from Human Rights Watch, the advice of the Experts was adopted by the Committee of Ministers, but at the instigation of Russia, references to the Yogyakarta Principles were removed from the text.

* ***The Parliamentary Assembly of the Council of Europe (PACE)***

The Parliamentary Assembly consists of national parliamentarians from each of the Member States (in contrast to members of the EU Parliament who are directly elected to that body.) The Assembly appoints members as rapporteurs with a mandate to prepare reports on specific subjects.

* *Parliamentary Assembly, Motion for a Recommendation presented by Mr. Jurgens and others, “Discrimination on the basis of sexual orientation”*:

On October 8th 2007, a Motion for a Recommendation was presented in the Parliamentary Assembly with the aim of suggesting that the Assembly update its previous report on discrimination on the basis of sexual orientation and gender identity and present recommendations. The motion was not discussed in the Assembly and, therefore, commits only those members who signed it. The Recommendations affirms the Yogyakarta Principles as one of the positive steps of the past few years on LGBT issues. It is assumed that the new report on

²⁴ See annex.

²⁵ See annex.

LGBT and the recommendations will be premised on recommendations from the Yogyakarta Principles.

Link: <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11423.htm>

* *Report on Discrimination on the Basis of Sexual Orientation and Gender Identity:*

On December 8th 2009, a Rapporteur of the Committee on Legal Affairs and Human Rights published a Report, which contained a draft resolution, draft recommendation and an in-depth analysis. The analysis had a chapter called “Recognition that human rights principles apply to sexual orientation and sexual identity,” which mentions the Yogyakarta Principles and describes them as “an important tool to identify the obligations of States to respect, protect and fulfill the human rights of all persons, regardless of their sexual orientation or gender identity. The principles also recall that human rights are serving human dignity.”

The Resolution and the Recommendation were passed (Resolution Number 1728, 2010 and Recommendation 1915, 2010), but no reference to the Yogyakarta Principles appeared in the text.

Resolution 1728 calls on Member States to address LGBT discrimination and particularly recommends several measures. Among them: to ensure that the fundamental rights of LGBT people are respected; provide legal remedies to victims; recognize that lesbian, bisexual and transgender women face increased risk of gender-based violence and provide them with protection; condemn hate speech and discriminatory statements.

* **Council of Europe’s Commissioner for Human Rights**

The Commissioner for Human Rights is an independent institution within the Council of Europe, mandated to promote the awareness of and respect for human rights in the 47 Council of Europe Member States. Thomas Hammarberg is currently the Commissioner for Human Rights and an ardent promoter of the Yogyakarta Principles.

* *Document “Written Contribution by the Commissioner for Human Rights to the work of the DH-LGBT”* (Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity) Strasbourg, February 9, 2009 (CommDH2009).²⁶

The aim of this paper, written by Thomas Hammarberg, is to provide the *Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-LGBT)* with a brief overview of the Commissioner’s observations and activities with regard to LGBT rights. The paper states:

“The Commissioner also notes important recent developments in the global efforts in combating discrimination based on sexual orientation and gender identity. He particularly welcomes the *Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity* which he considers as an important tool in identifying the obligations of States to respect, protect and fulfill the human rights of all persons, regardless of their sexual orientation or gender identity.”

The appendix of this paper contains some viewpoint of Commissioner Hammarberg, who states:

“I recommend all governments of the Council of Europe Member States to study the document and build on its principles through concrete action. In fact, some of the Member States have already made them an integral part of their human rights policies. For my part, I fully endorse the Principles.”

²⁶http://www.coe.int/t/e/human_rights/cddh/3_committees/07.%20other%20committees%20and%20working%20groups/05.%20discrimination%20against%20lgbt%20%28dh-lgbt%29/working%20documents/1st/CommDH_2009_7_en.pdf

* *Declaration during mission to Member States of the Council of Europe (Thomas Hammarberg, January 5, 2009):*

The Council of Europe's Commissioner for Human Rights has called on European countries to address discrimination against transgender people, based on the definition of gender identity provided by the Yogyakarta Principles²⁷.

* *Human Rights and Gender Identity* (issue paper by Thomas Hammarberg, July 29, 2009)

The Commissioner for Human Rights commissions and publishes Issue Papers for the purpose of contributing to debate or further reflection on a current and important human rights matter. The opinions in these expert papers do not necessarily reflect the position of the Commissioner. In this issue paper, however, the Commissioner states:

“While not adopted as an international standard, the principles are already cited by UN bodies, national courts, and many governments have made them a guiding tool for defining their policies in the matter. The Commissioner for Human Rights has endorsed the *Yogyakarta Principles* and considers them as an important tool for identifying the obligations of States to respect, protect and fulfill the human rights of all persons, regardless of their gender identity.”

Additionally, when mentioning recommendations to Member States of the Council of Europe, the Commissioner states they should:

Implement international human rights standards without discrimination and prohibit explicitly discrimination on the ground of gender identity in national non-discrimination legislation. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity should be used to provide guidance for national implementation in this field.”

* *Report by the Commissioner for Human Rights on his visit to the Netherlands:*

This Report, published in September 2009, cites the Yogyakarta Principles in a very specific context: He calls for abolishing the sterilization and medical treatment requirements. He cites the Yogyakarta Principles, which the Dutch government considers as authoritative for its policies, for the principle that “No one shall be forced to undergo medical procedures, including (...) sterilization (...) as a requirement for legal recognition of their gender identity.”

* *“Human Rights in Europe: time to honour our pledges”, Viewpoints by Thomas Hammarberg, Commissioner for Human Rights (April, 2009).*

In this document, the Commissioner states:

“The Yogyakarta document goes further than just defining the principles. It also spells out the State's obligations. It asks for legislative and other measures to prohibit and eliminate discrimination against individuals because of their sexual orientation or gender identity. Legislation and action plans against discrimination should include this type of discrimination as well. Laws should be repealed which criminalize consensual sexual acts between people of the same sex. [...] I recommend all governments of the Council of Europe Member States to study the document and build on its principles through concrete action. In fact, some of the Member States have already made them an integral part of their human rights policies. For my part, I fully endorse the Yogyakarta Principles.”

B. Domestic

²⁷ www.coe.int/t/commissioner/Viewpoints/090105_en.asp

Very little has been found in terms of governments in Europe making use of the Yogyakarta Principles to promote policies domestically. In fact, some (Belgium, The Netherlands, and the UK) have explicitly or tacitly acknowledged that while they are willing to promote the Principles through their foreign ministries, thereby urging their adoption by other countries, there is little to no traction for them within domestic policy and law.

Belgium

Legislative

According to the ILGA-Europe website, the Belgian Parliament's resolution reportedly called upon their foreign ministry to use the Yogyakarta Principles as guidelines in foreign policy, similar to the Dutch endorsement outlined below. According to ILGA-Europe, this resolution has been interpreted as a Parliament's "endorsement" of the Yogyakarta Principles, even though their governments use them as a guideline only for their foreign policies and not in domestic policies.

Germany

Executive

The German government has been leading the way in the field of promoting human rights for LGBTI people on international level. The German government funded the translation and publication of the German version of the Yogyakarta Principles.

Ireland

Civil Society

Irish Council for Civil Liberties (ICCL): The ICCL is Ireland's leading independent human rights institution. The ICCL submitted a report to the Minister for Justice, Equality and Law Reform on the Civil Partnership Bill 2008, which was presented by the government. The ICCL states that LGBT rights are protected under the Irish Constitution, European Convention, International Covenant on Civil and Political Rights and the Yogyakarta Principles, which are cited several times throughout the report.

Netherlands

Executive

The Dutch Minister of Foreign Affairs has developed a new human rights strategy to be debated in Parliament, which affirms that "the Yogyakarta Principles are seen by the government as a guideline for its policy," and outlines a number of specific initiatives, including capacity building for international and local NGOs working on these issues²⁸.

The Dutch parliaments voted in favor of resolutions endorsing the Yogyakarta Principles. The Government uses them as a guideline for their foreign relations policies. For instance Dutch embassies around the world are urged to support local LGBT-groups, while the Dutch government tries to persuade the governments of those countries to grant equal rights to LGBT-people. The Dutch embassies are instructed to report on LGBT-issues, using the Yogyakarta Principles as a tool. Finally, the Dutch government has played a leading role in promoting the Yogyakarta Principles at the United Nations.

Northern Ireland

Civil Society

Lesbian Line, an LGBT organization, presented a shadow report for the 6th UPR of United

²⁸ O'Flaherty and Fisher, page 37.

Kingdom of Great Britain and Northern Ireland. The shadow report is fully based on the YP.

Civil society representatives have introduced the Principles for debate at the Bill of Rights Forum of Northern Ireland, constituted to advise on elements for a Bill of Rights²⁹.

Serbia

Civil Society

ILGA-Europe and IGLHRC sent a letter to the Serbian Parliament after it withdrew a bill that aimed to combat discrimination due to pressure from the Serbian Orthodox Church and other conservative religious groups. The letter quoted the Yogyakarta Principles as containing important State obligations to combat discrimination.

Spain

Executive

The Social Affairs Ministry published a book on “Discrimination on the basis of sexual orientation and gender identity in Spanish Law” which contained a 10-page chapter about the Yogyakarta Principles. <http://www.oberaxe.es/files/datos/491178328f3bc/orientacion.pdf>

Sweden³⁰

Executive

The Department for Democracy and Social Development and the Gender Secretariat of the Swedish Government has expressed its support of the Yogyakarta Principles. In the Action Plan for their Work against Gender-Based Violence 2008-2010, SIDA (Swedish International Development Cooperation Agency) quotes the Yogyakarta Principles several times, stating within its legal and policy framework the need to “Support the implementation of the Yogyakarta Principles on the application of human rights law in relation to sexual orientation and gender identity.”

In addition, and in order to promote visibility and awareness Prof. Michael O’Flaherty was invited to Sweden in connection with a seminar for introducing and discussing the Yogyakarta Principles.

During the latest session of the UN Human Rights Council, the Swedish authorities made an intervention stating that the Yogyakarta Principles were “groundbreaking.”

United Kingdom

Executive

According to Nigel Warner, a long-time ILGA-Europe member, the lack of use of the Yogyakarta Principles in the UK is due to the fact that, in general, UK law and practice on sexual orientation and gender identity meets the standards of the Principles or exceeds them. However, in 2008, when the UK foreign office adopted a “toolkit” to assist its embassies in promoting LGBT rights, the documents included the following incongruent statement: “The UK welcomed these (the Yogyakarta Principles) as an important contribution to increasing understanding of these issues, but some of the Principles exceed current UK positions on human rights. Of course, the UK is a signatory to the international human rights documents studied by the Committee of Experts in

²⁹ O’Flaherty and Fisher, page 39.

³⁰ “Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Sweden” by Maja K. Eriksson, Iain Cameron and Thomas Bull, Uppsala, Sweden, February 2008. http://www.pedz.uni-mannheim.de/daten/edz-b/eb/08/FRA-hdgso-NR_SE.pdf

Yogyakarta.

In addition, the Development Ministry has paid for a couple of policy documents produced by the Oakland-based Global Forum on MSM and HIV that refer to the Principles.

C. Other Uses of the Yogyakarta Principles

Academic References

Papers/Articles/Presentations

* *“Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles”* by Michael O’Flaherty and John Fisher: (Human Rights Law Review 8:2, Oxford University Press): This article constitutes the first published critical commentary on the Yogyakarta Principles. It seeks to situate them within the contexts of (a) the actual situation of people of diverse sexual orientations and gender identities, and (b) the applicable international human rights law as it stands today. Thus situated, the Yogyakarta drafting process and the outcome text are examined. The final section of the article provides a preliminary review of the impact and dissemination of the Principles.

<http://hrllr.oxfordjournals.org/content/8/2/207.short?rss=1&ssource=mfc>

* Article about Yogyakarta-Principles by Ueli Peyer in BOA – the Swiss Women-Lesbian-Agenda, Zürich.

The European Network of International Planned Parenthood Magazine, November 2007 “Sexual and Reproductive Health and Rights in Europe.” This paper explains the Yogyakarta Principles.

* Hearing of the European Parliament, Brussels, December 11, 2008. Boris O. Dittrich, advocacy director LGBT program Human Rights Watch, “The rights of people living with HIV and AIDS; the right to freedom from discrimination; vulnerable groups.”

<http://www.stopaidsalliance.org/files/Events/Speech%20BD%20HR%20hearing.pdf>

* Bulletin of the World Health Organization, “Ensuring human and sexual rights for men who have sex with men living with HIV,” Bull World Health Org., vol.87 no.11 Geneva Nov. 2009

* Sex, Love and Marriage: Questioning Gender and Sexuality Rights in International Law, by Aeyal M. Gross, Leiden Journal of International Law, 21 (2008) pp. 235-253.

* “Sexual Orientation, Gender Identity and the Right to Health,” by Claire Mahon. The article cites principles 17 and 18 on the right to health.

* “Derechos Humanos y Derechos LGBT desde una Perspectiva Internacional” (Human Rights and LGBT Rights from an international perspective) by David Montero González, Cataluña Human Rights Institute.

Civil Society

* Liberal International - All liberal political parties in the world, members of Liberal International, supported the Yogyakarta Principles through a Resolution approved on May 17, 2008. Liberal International “reaffirms the Yogyakarta Principles as guiding document in interpreting existing human rights in relation to sexual orientation and gender identity.”

* The PSOE (“Partido Socialista Obrero Español”) a main political force in Spain has supported and published the Yogyakarta Principles on its website.

* P-Lib, a new liberal political party has publicly endorsed the Yogyakarta Principles.

D. Translations

The official translations into Spanish and French, in addition to the official version in English, are those most used in Europe. However, additional translations have been made into Romanian, Hungarian, Dutch, German (financed by the German government), Portuguese (this translation was financed and supported by the Brazilian government but it will be very useful in Portugal), Polish and Macedonian. There is interest in translating them into Catalan, which is spoken in Spain.

In addition, as a part of *Justice in the Balkans* initiative, there is interest in translating them to Serbian and Albanian..

The Middle East

Nothing public has been located with regard to the use of the Yogyakarta Principles in the Middle East – a region that, with a few exceptions, remains overtly hostile to homosexuality and, usually, to issues of gender identity. As a result, it was nearly impossible to obtain information for this report given the methodology adopted. However, it is noted that the National Human Rights Institutes (NHRIs) from Jordan, Palestine, and Qatar are members of the Asia Pacific Forum, which is actively engaged in examining laws related to sexual orientation and gender identity among its members, as outlined in detail above. In addition, Jordan’s NHRI participated in a workshop specifically addressing the role of NHRIs in implementing the Yogyakarta Principles.

Translations

The Principles have been officially translated into Arabic. According to Hossein Alizadeh, IGLHRC’s regional coordinator for the Middle East, they have also been unofficially translated into Persian.

Recommendations and Next Steps

Many who have been helpful in reading and editing drafts of this report have been pleasantly surprised at the reach and use of the Yogyakarta Principles in nearly every region of the world. The Principles have been embraced by activists and policy makers alike for a simple reason: The Yogyakarta Principles de-mystify the large and very legalistic array of international human rights treaties, jurisprudence, and procedural actions. They distill hundreds of pages of documents reflecting decades of advocacy and scholarship into 29 basic principles that emanate from two fundamental, and interlocking, human rights concepts: 1) that human rights law must be universally applied if it is to have any integrity at all, and 2) that every person has the right to be treated with respect and to be free from social and legal discrimination because of who they are. They reflect a growing mainstream understanding of how human rights law is applied to people with regard to their sexual orientation or gender identity.

Of course, the history of moving sexual orientation and gender identity from the social margins of perversion, immorality, and criminality has long pre-dated the Yogyakarta Principles. Rather, the Principles in a way uncover and reflect the result of decades of LGBT rights activists’ demands that discrimination based on one’s sexual orientation or gender identity is no more defensible than that based on any other personal or social characteristic that is used by States or social structures to denigrate or discriminate.

The strategy over the last three years has consisted primarily of launching the Principles in public forums, posting them to websites for public access, including them in seminar and workshop discussions, translating them into numerous additional languages, and using them consistently in many international and regional human rights processes. Upon review of what has resulted from the existence and use of the Principles, there are a few basic strategies worth developing and

funding to bring the Principles closer to achieving their goal, which is to incorporate international human rights law into enforceable domestic law.

*** Focus on the lawyers.** From a legal perspective, there is no clearer way to gauge the development of international human rights law than through the degree to which States' highest courts adopt those laws into their findings and decision-making. It is no mistake that the three most prominent judicial decisions citing the Yogyakarta Principles came from countries where LGBT lawyers and lawyers engaged in the HIV epidemic have consciously pushed for adherence to human rights law as well as their own constitutional development (India), leading activists have astutely utilized the courts and transitional constitutions/legal systems to push forward reforms (Sunil Pant in Nepal), or activists have a long history of engagement with their national legislative and judicial systems (the Philippines).

Recommendation: That an organization or set of organizations take the lead in developing the expertise within the broader human rights legal community with regard to the use of the Yogyakarta Principles in litigation and constitutional contexts. This would include developing a systematic plan for identifying countries or regions where litigation strategies are commonly used by the LGBT community, where there is an active human rights bar, and where activists are or wish to be engaged in legal processes. The plan could include providing seminars and other teaching modules to be presented in mainstream international or regional bar of legal meetings to a) make human rights lawyers and activists interested in pursuing litigation strategies aware of their existence, and b) enhance the general discussion and understanding of how to use the Yogyakarta Principles effectively in litigation. An excellent and willing partner in this endeavor would be the International Bar Association's Human Rights Institute. A cohesive and funded strategy focused on developing the expertise of lawyers engaged in human rights litigation would clearly ensure a strategic use of the Principles in judicial advocacy and a chance to fine-tune the way the Principles can or should be used to promote their legal incorporation.

*** Follow through on Universal Periodic Review opportunities.** The Universal Periodic Review is a unique mechanism of the United Nations whereby every four years each State member of the UN is subject to a review of its human rights record. International and domestic NGOs representing the LGBT community have established a regular practice of working together to submit shadow reports detailing States' records with regard to sexual orientation and gender identity. Invariably, the Yogyakarta Principles are used by the NGOs as the standard for State adherence to their obligations. Increasingly the reference of the Principles in the shadow reports have elicited a direct question or comment from a reviewing State to the representative of the State under review about the degree to which they have reviewed or incorporated the Yogyakarta Principles. (Many of these dialogues are set out above in the UPR section of the United Nations portion of this report.) Some States have responded positively to reviewing the Principles. This short dialogue presents an opening for domestic activists to follow up with their government on any commitment it might have made in the process of the UPR. However, that rarely happens, it would seem. Given that the primary goal of the Yogyakarta Principles project is to get the human rights laws that they represent incorporated into domestic law, systems for connecting the statements and responses of States within the UN to real action at home need to be further developed.

Recommendation: That an international or regionally-based LGBT NGO that is fully engaged in the UPR process hire a staff person for the specific task of monitoring and reporting to the larger global community on the UPR results and following through with domestic advocates to push the dialogue from the relatively non-committal context of the UPR into real action within

domestic policy. This will include providing technical assistance as well as working with lawyers and activists in the country to take the responses further. The use of the Principles in this context is only going to grow. When States make even vague commitments of support, or don't respond at all (as they likely have no idea what the Principles are), there is a fruitful chance to move their commitment or their knowledge further.

*** Triage among NGOs monitoring the UN/regional human rights bodies and domestic advocates.** Similar to the UPR, opportunities to move States toward incorporating the Yogyakarta Principles have arisen from other contexts of the UN. A most interesting opportunity exists among some of the States that are the most vocal and engaged supporters of the LGBT community and of the Yogyakarta Principles. For instance, Canada, the UK and the Netherlands have not only advanced their domestic laws related to sexual orientation and gender identity substantially, but have been among the biggest supporters at the UN of the Principles. Yet, they have not taken action to incorporate into their domestic law most of the obligations set forth in the Yogyakarta Principles. In fact, when the UK foreign office issued its “tool kit” to be used by its Embassies to promote LGBT rights around the world, the Yogyakarta Principles were included as a guide to State obligations, despite the fact that the official statement of the UK is that the Principles go beyond the UK's current law. In fact, no country, regardless of its leadership on human rights related to sexual orientation and gender identity, has incorporated the Principles. And many domestic activists (Canada comes to mind) do not seem to yet see the Yogyakarta Principles as providing a road map for further change. It is time to promote these countries to the next level so that they continue to be the standard-bearers that they have been on LGBT issues. Given the clear advancements in Europe, in particular, many of the European States should be moved forward.

Recommendation: That the international and regional LGBT human rights NGOs hold a strategy, planning and training conference specifically for domestic activists and lawyers from those countries identified as ready for “promotion.” The starting point would be to identify countries that have embraced the Principles when speaking on the international stage, but have not embraced them domestically. That the conference come up with a strategy and a plan among them to further this goal.

*** Apply the Yogyakarta Principles “process” to regional human rights treaties.** Gathering experts to review the regional treaties of the Americas, Africa and Europe could be a fruitful next step that would bring the human rights treaty obligations closer to home. For instance, in Europe where there is the most developed human rights jurisprudence and dialogue on sexual orientation and gender identity, it may be worthwhile to engage in a similar process of identifying the full obligations of European States that results not only from the current case law but from a fair reading and understanding of the Convention on Human Rights. Despite the fact that Asia does not have a set of international treaties, a similar process of review of domestic law by the National Human Rights Institutes that are members of the Asia Pacific Forum is serving the important purpose of raising the stature of the obligation to address rights pertaining to sexual orientation and gender identity. And, the Yogyakarta Principles have been used in that forum as an important guide for the member groups.

Recommendation: Discuss the viability of such a process at the next ARC Dialogue, or similar gathering, where activists most engaged in using the Yogyakarta Principles are gathered. An overarching question would be whether it would make a difference in each region to separately analyze the regional treaty language and jurisprudence.

*** Concentrate on Latin America.** Clearly, Latin American LGBT activists have embraced the Yogyakarta Principles most thoroughly at both local and national levels. In addition, their

engagement with the OAS and the sub-regional MERCUSOR provides a prime opportunity for the region as a whole to be in the leadership of incorporating specific obligations outlined in the Principles, preparing lawyers to use the Principles in domestic cases and in the Inter-American Court, and encouraging their incorporation into executive level policy, especially in places like Brazil, Mexico and Argentina. Latin America is poised to be *the* leading region on the human rights of LGBT people.

Recommendation: Funding.

*** Continue to review and report on progress with a similar report on the impact of the Yogyakarta Principles annually.** Gauging success through documentation projects such as this provides both encouragement and new ideas to activists around the world. It also provides a sense of a unified global mission that is inter-supportive and inter-dependent. Finally, it provides a profound resource for scholars and activists to draw from in interpreting the developments of human rights law going forward.

Recommendation: That ARC International, which will be hosting and updating the website, take the lead in pulling together key NGOs who are committed to coordinating the on-going documentation of further developments with regard to the Yogyakarta Principles. Coordinating responsibility for keeping sections of this report updated among a number of groups as developments occur would be the easiest and most cost effective way of continuing to track the impact of the Principles. In addition, it will allow the core NGOs with an interest in moving this issue forward an immediate chance to intervention or examination about how the Principles are being interpreted. (Example: The Philippine Supreme Court's dismissive rejection of the Principles might be used to foster further discussion within the country about how to present the Principles going forward.)