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Queering International Human Rights: LGBT Access to Domestic Violence Remedies

Natalie E. Serra

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QUEERING INTERNATIONAL HUMAN RIGHTS: LGBT ACCESS TO DOMESTIC VIOLENCE REMEDIES*

NATALIE E. SERRA **

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* Though the word “queer” has been used as a disparaging term for LGBT individuals, “LGBT individuals and communities reclaimed ‘queer’ as an identifying term in the 1980s. The term allows for a positive redefinition of a formerly derogatory term for odd or strange individuals relegated to second-class status. The term is inclusive of the myriad of sexualities . . . [and] allows for seeing sexuality, especially gender, as socially constructed and therefore capable of being ‘deconstructed’ and ‘reconstructed.’” Adele M. Morrison, *Queering Domestic Violence to “Straighten Out” Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law’s Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN’S STUD. 81, 131 (2003). “LGBT” is an abbreviation that appears throughout this note and stands for “lesbian, gay, bisexual, transgender.”

** J.D. Candidate, Brooklyn Law School, 2013; B.A. Women’s and Gender Studies, The College of New Jersey, 2010. The author wishes to thank those who supported and encouraged her to see this article to its completion: her colleagues at the *Brooklyn Journal of International Law*, particularly Professor Claire Kelly and Elizabeth Dahill; the inspiring attorneys, clients, and staff of Sanctuary for Families, particularly Andrew Sta. Ana; the staff members of the *Journal of Gender, Social Policy & the Law*; and the American Bar Association Commission on Domestic & Sexual Violence. The author also wishes to dedicate this article to survivors of violence and all those who work to advocate for and empower them.

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His moods would change abruptly. He fluctuated between being caring and loving to cruel and abusive. If I expressed dissent with the way he treated me he would force me to retreat by threatening to throw me out Mental abuse became physical. One day I was vomiting and could not respond to a question. He accused me of ignoring him and hit me hard across the face [He] jabbed me in the stomach with his elbow causing me to collapse. He pressured me to disassociate from many of my friends when he realized they liked me better than they liked him He exercised emotional control by threatening suicide if I did not return.¹

During the nine years that Elaine and I were together, she was physically and verbally violent to me on a regular basis. She would frequently pull my hair. She tried to strangle me on at least five or six occasions, often pushing me against a wall and hitting me. On numerous occasions, she would grab my face, pull off my glasses, and hit me. I often pled with her not to hit me or raise her voice in front of the baby, but she did not stop and often hit me while Maria was present [S]he threatened me saying that she would “. . . make [my] life a living hell” and said, “I’m going to send my people to kill you.” Although I was terrified of her threats, I let her stay in the house because I wanted to protect Maria. I didn’t want Maria to be alone with her.²

1. This excerpt comes from the personal story of domestic violence experienced by “Adam” at the hands of his former same-sex partner, shared by the Same Sex Domestic Violence Interagency in Sydney, Australia. *My Life Ripped Apart*, ANOTHER CLOSET, <http://www.anothercloset.com.au/myliferippedapart/> (last visited Mar. 11, 2012).

2. This excerpt comes from the personal story of domestic violence experienced by “Claire” at the hands of her former domestic partner, shared by Sanctuary for Families’ LGBT Domestic Violence Initiative in New York City. Names from this passage have been changed to preserve anonymity. For more information about Sanctuary for Families, see generally SANCTUARY FOR FAMILIES, *available at* <http://www.sanctuaryforfamilies.org/> (last visited Nov. 4, 2011).

INTRODUCTION: DOMESTIC VIOLENCE³ IN SAME-SEX RELATIONSHIPS

Domestic violence that occurs within same-sex relationships is a problem that largely exists “under the radar” for national governments, international organizations, domestic violence agencies, and even LGBT communities.⁴ Despite this lack of attention and awareness, same-sex domestic violence causes significant harm and suffering for its survivors⁵ throughout the world. In fact, sources suggest that domestic violence occurs with equal prevalence in same-sex relationships as their opposite-sex counterparts, taking place in approximately twenty-five to thirty-three percent of relationships.⁶

3. The term “domestic violence” has been defined by international organizations, legislatures, and scholars with some variation. The Merriam-Webster online dictionary defines it as “the inflicting of physical injury by one family or household member on another; . . . a repeated or habitual pattern of such behavior.” *Domestic Violence*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/domestic%20violence> (last visited Nov. 4, 2011). This definition is narrow because it only mentions physical abuse, but it is helpful because it indicates that domestic violence can occur in the context of a variety of relationships, such as those between partners, siblings, and parent and child. However, this article focuses on domestic violence that occurs between intimate partners. While this type of abuse is sometimes called “intimate partner violence,” I have chosen to use “domestic violence” so as to mirror the terminology employed by the United Nations in relevant areas of international law and encourage the integration of same-sex domestic violence into international consideration. See, e.g., Elimination of Domestic Violence Against Women, G.A. Res. 58/147, U.N. Doc. A/RES/58/147 (Feb. 19, 2004) [hereinafter Elimination] (mandating that Member States take active steps to eradicate the occurrence of domestic violence against women).

4. See Kathleen F. Duthu, *Why Doesn't Anyone Talk about Gay and Lesbian Domestic Violence?*, 18. T. JEFFERSON L. REV. 23, 24 (1996) (highlighting that domestic violence is significantly underreported in same-sex relationships in spite of its occurrence within the LGBT community). Regarding LGBT communities' denial or lack of awareness about same-sex domestic violence, “[t]here is still a strong belief that same-sex relationships . . . are devoid of intimate violence. Lesbians, bisexual and transgender women simply believe that women are not violent or abusive. Gay, bi and trans men, like their heterosexual and gender-conforming counterparts are likely to see any violence or abusiveness as a normal aspect of being a man In many ways, LGBT communities are at the ‘head in the sand’ stage of this movement.” See also Morrison, *supra* note *, at 148.

5. In this article, I will refer to the abused partner in an intimate relationship as a “survivor” because the term implies more empowering connotations regarding the ability to protect oneself from an abusive partner than the oft-used term “victim.” See, e.g., U.N. Div. for the Advancement of Women & U.N. Office on Drugs and Crime Rep., *Expert Grp. Meeting on Good Practices in Legislation on Violence Against Women*, 12 (May 26-28, 2008), available at http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20%28final%2011.11.08%29.pdf (“The terminology used in this framework is consistent with human rights standards and gender equality [T]he language of ‘victim’ . . . constructs a disempowered picture of persons who experience violence against women.”). But see Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371, 380 (2003) (“[T]he word ‘survivor’ is problematic in its implied commentary on those women who either kill or are killed as a result of the abuse. The implication of the term ‘survivor’ may be that women who do not escape the abuse are failures, weak, or that in some way they consented to the abuse. I propose that a woman who does not flee and ‘survive’ is no more weak than the one who does.”).

6. See Morrison, *supra* note *, at 117; see also Sandra E. Lundy, *Abuse That Dare*

Like their counterparts in opposite-sex relationships, survivors of same-sex domestic violence may experience physical abuse, such as punching, kicking, biting, slapping, scratching, strangling, burning, hair-pulling, striking with heavy or sharp objects, using weapons, or “withholding access to medication, medical care, food, fluids, and/or sleep”;⁷ sexual abuse; psychological abuse, such as the use of harassment, blackmail, isolation, religious or cultural justifications, or the threat of harm to the survivor, loved ones, or pets; verbal abuse; the destruction of property; the use of finances, immigration status, or HIV status to manipulate or control the survivor; and levying false criminal or civil complaints against the survivor.⁸ Furthermore, in cases of both same-sex and opposite-sex domestic violence, this conduct often follows a repeated pattern or cycle “that is used by one partner to gain or maintain power and control over another intimate partner.”⁹

Unlike most survivors of opposite-sex domestic violence, LGBT survivors are vulnerable to a distinct form of abuse derived from homophobia in their own societies.¹⁰ The abusers in same-sex relationships may exert control over their partners by threatening to expose their sexual

Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts, 28 NEW ENG. L. REV. 273, 277 (1993) (“The figures may be higher for gay men than for lesbians. In fact, domestic violence has been called ‘the third most severe health problem facing gay men today.’”). *But see* Ryah Lilit, *Reconsidering the Abuse That Dare Not Speak Its Name: A Criticism of Recent Legal Scholarship Regarding Same-Gender Domestic Violence*, 7 MICH. J. GENDER & L. 181, 190-91 (2001) (“Legal scholarship claims that lesbian and gay domestic violence occurs with the same frequency as heterosexual domestic violence. . . . However, while social scientists are becoming increasingly interested in same-gender domestic violence, relatively few studies have been published. Thus, legal scholarship can only draw from the same small pool of studies.”).

7. See generally *Signs of Abuse*, SANCTUARY FOR FAMILIES, http://www.sanctuaryforfamilies.org/index.php?option=com_content&task=view&id=49&Itemid=78 (last visited Mar. 14, 2012) (enumerating types of behavior commonly used by perpetrators of domestic violence).

8. This list of manifestations of domestic violence is based on the “Power and Control Wheel” created by the Domestic Abuse Intervention Project, as well as its interpretation by Sanctuary for Families. See, e.g., *id.*; *Wheel Gallery*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <http://www.theduluthmodel.org/training/.html> (last visited Mar. 14, 2012).

9. See Denise Bricker, *Fatal Defense: An Analysis of Battered Woman’s Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379, 1383-84 (1993); Lee Hasselbacher, *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection*, 8 NW. U. J. INT’L HUM. RTS. 190, 190 (2010); see also Morrison, *supra* note *, at 116 (remarking that LGBT survivors may be reluctant to report domestic violence due to the negative stigma already associated with LGBT identity and conduct). For more information on the characteristics of repeated cycles of domestic violence, see *Cycle of Violence*, SANCTUARY FOR FAMILIES, http://www.sanctuaryforfamilies.org/index.php?option=com_content&task=&id=146&Itemid=169 (last visited Mar. 14, 2012).

10. See Sharon Cammack & Patrice Pujol, *Domestic Violence: A National Epidemic*, 42 HOUS. LAW. 10, 12 (2004).

orientation or gender identity to others, taking advantage of the following dynamic:

Society's fear and hatred of homosexuality causes isolation and increases the vulnerability of gay men and lesbians to domestic abuse [T]he batterer may threaten "to out" the victim to family, friends, co-workers and ex-spouses who are not aware of and will not accept his or her sexuality. When forced "out of the closet," victims may lose child custody, prestigious careers, and valued personal relationships. Since there are few positive gay and lesbian role models, batterers may convince "newly out" partners that their relationship is normal and abuse occurs in all gay or lesbian relationships. They may also take advantage of their partners' own internal homophobia and guilt to convince them that they do not deserve any better because they are homosexual.¹¹

Being "outed" in this way creates especially serious consequences for survivors in states that retain criminal penalties for same-sexual conduct—these survivors may be incarcerated or even executed for their exposed identities.¹²

Acknowledging the harmful and widespread consequences of domestic violence in the context of male perpetrators abusing their female partners, international activists, scholars, and policy-makers recognized that domestic violence encroaches upon the fundamental human rights of its survivors.¹³ In response, various organs of the United Nations created an international framework of binding and non-binding guidelines to combat violence against women, and these efforts have successfully garnered universal attention and encouraged the development of domestic violence statutes in states throughout the world.¹⁴ Following this call to action, at least eighty-nine states have introduced or refined legislation criminalizing domestic violence and offering civil remedies and other services to

11. Duthu, *supra* note 4, at 31; see also Marnie J. Franklin, *The Closet Becomes Darker for the Abused: A Perspective on Lesbian Partner Abuse*, 9 CARDOZO WOMEN'S L.J. 299, 299 (2003) ("The key distinguishing factor that differentiates same-sex domestic violence from heterosexual intimate abuse is the victim's feelings of being disenfranchised and powerless because of her sexual orientation.").

12. See U.N. High Comm'r for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, ¶¶ 40, 45, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011) [hereinafter *OHCHR Report*] ("Seventy-six countries retain laws that are used to criminalize people on the basis of sexual orientation or gender identity In at least five countries the death penalty may be applied to those found guilty of offences relating to consensual, adult homosexual conduct.").

13. The prior director of the United Nations Development Fund for Women stated that "[v]iolence obliterates women's self-esteem, destroys their health, denies their human rights and undermines their full involvement in society." See Subrata Paul, *Combating Domestic Violence Through Positive International Action in the International Community and in the United Kingdom, India, and Africa*, 7 CARDOZO J. INT'L & COMP. L. 227, 231 (1999).

14. See *infra* Part I.

survivors,¹⁵ and the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) maintains detailed reports on the domestic violence policies of each of the 193 UN member states.¹⁶

Because survivors of domestic violence in same-sex relationships suffer proportionally from the same recognizable patterns of control and abuse as survivors in opposite-sex relationships, it follows that LGBT survivors experience the same breach of essential human rights to life, dignity, and bodily integrity when they are abused by their partners.¹⁷ This Article argues that same-sex domestic violence warrants the attention of the international community and should be incorporated into the international discourse on LGBT human rights that has been emerging and developing at the United Nations within the last two decades.¹⁸ This international discussion of same-sex domestic violence should include its characteristics, resulting dangers, and human rights implications, as well as guidelines for states to adapt existing domestic violence remedies so as to offer equal access to LGBT survivors within their borders.¹⁹

As international law on the rights of LGBT individuals and the obligations of states to protect them grows and develops, it is urgent that a discussion of same-sex domestic violence be included in the emerging doctrine, particularly because of the problem's current invisibility, prevalence, and harm to already-marginalized communities. Existing international law on domestic violence against women²⁰ should serve as a model for drafting guidelines to combat same-sex domestic violence, and this international doctrine on same-sex domestic violence is apt to garner compliance from states that have already shown some degree of commitment to LGBT rights to freedom from violence and discrimination.²¹

15. The number of states that have enacted domestic violence legislation comes from the most recent study by the UN Secretary-General on this topic. See U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, U.N. Doc. A/61/122/Add.1, at 89 (July 6, 2006) [hereinafter *Ending Violence Against Women: From Words to Action*].

16. See *Countries*, THE UN SECRETARY-GENERAL'S DATABASE ON VIOLENCE AGAINST WOMEN, [hereinafter *Countries*] <http://webapps01.un.org/vawdatabase/.action> (last visited Mar. 14, 2012).

17. See Andreea Vesa, *International and Regional Standards for Protecting Victims of Domestic Violence*, 12 AM. U. J. GENDER SOC. POL'Y & L. 309, 320 (2004).

18. See *infra* Part II.

19. See *infra* Part IV.

20. See *infra* Part I.

21. Tragically, efforts to incorporate the rights of same-sex domestic violence survivors into international law are likely to be ignored and resisted by the "more than 70 countries [where] laws make it a crime to be homosexual, exposing millions to the risk of arrest, imprisonment and, in some cases, execution." UNITED NATIONS, THE UNITED NATIONS SPEAKS OUT: TACKLING DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY (2011), *available at* http://www.ohchr.org/Issues/Discrimination/LGBT_discrimination.pdf [hereinafter

This Article proceeds according to the following structure: Part I provides a chronology of the development of international law regarding domestic violence in opposite-sex relationships to present it as a model for international law on same-sex domestic violence. Part II addresses existing international discussion of LGBT human rights and its support in the international community to present it as an appropriate forum for developing international law on same-sex domestic violence. Part III highlights the gap between international law on domestic violence against women and existing discourse on sexual orientation and gender identity, which excludes same-sex domestic violence and presents barriers to the protection of LGBT survivors. Part IV presents the details of a proposal to improve LGBT access to domestic violence remedies by incorporating same-sex domestic violence into emerging international doctrine on LGBT human rights.

I. DOMESTIC VIOLENCE AND INTERNATIONAL LAW²²

Within the past three to four decades, activism, attention, and legislation have solidified domestic violence into an issue of pressing international concern.²³ International discourse on domestic violence had its earliest roots in the Convention on the Elimination of All Forms of Discrimination Against Women (the Convention), which was adopted by the UN General Assembly in 1979 and entered into force in 1981.²⁴ The purpose of this international treaty was to promote the equality of women in all spheres, discourage discrimination on the basis of gender in all its varied manifestations, and reaffirm women's rights derived from the International Bill of Human Rights.²⁵ Article 17 of the Convention established the

THE U.N. SPEAKS OUT]. Constrained by this state of affairs, this article will focus on positive international change in states that are more amenable to the existence and relationships of LGBT individuals. For examples of such states, see *infra* note 87.

22. For more in-depth treatment of the issue of domestic violence in international law, see generally Rebecca Adams, *Violence Against Women and International Law: The Fundamental Right to State Protection from Domestic Violence*, 20 N.Y. INT'L L. REV. 57 (2007); Vesa, *supra* note 17.

23. See generally *Ending Violence Against Women: From Words to Action*, *supra* note 15, at 13-14.

24. See Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979) [hereinafter CEDAW Convention], available at <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>.

25. See *id.*; see also *Fact Sheet No.2*, The International Bill of Human Rights (June 1996), <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> ("The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights."). In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights "as a common standard of achievements for all peoples and all nations. It [set] out, for the first time, fundamental human rights to be universally protected." See Universal Declaration of Human Rights, available at <http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx>

Committee on the Elimination of Discrimination against Women (CEDAW) to oversee the implementation of the Convention in the international community.²⁶

In 1992, CEDAW made a general recommendation that “gender-based violence” be added to the definition of discrimination against women, explaining that it consisted of “acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”²⁷ It also expressed that discrimination against women in the form of gender-based violence “impairs [and] nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions.”²⁸ Furthermore, the general recommendation emphasized that failing “to act with due diligence to prevent[,] . . . investigate[,] . . . punish[,] . . . and [provide] compensation” for acts of gender-based violence perpetrated by public or private actors could constitute a breach of the Convention by member states.²⁹

Within the same general recommendation, CEDAW listed policies that member states could adopt in order to fulfill their obligations under the Convention and protect women against gender-based violence. The recommendation included the following strategies:

- (i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family . . . ;
- (ii) Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;
- (iii) Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence.³⁰

(last visited Mar. 14, 2012).

26. See CEDAW Convention, *supra* note 24. According to the Office of the United Nations High Commissioner for Human Rights, “At least every four years, the States parties are expected to submit a national report to [CEDAW], indicating the measures they have adopted to give effect to the provisions of the Convention. During its annual session, the Committee members discuss these reports with the Government representatives and explore with them areas for further action by the specific country. The Committee also makes *general recommendations* to the States parties on matters concerning the elimination of discrimination against women.” *Id.* (emphasis added).

27. See General Recommendation No. 19, § 6 (1992) [hereinafter Gen. Recommendation], available at <http://www.un.org/womenwatch/daw/cedaw/recomm.htm#recom19> (defining gender-based violence as “violence that is directed against a woman because she is a woman or that affects women disproportionately”).

28. See *id.* § 7. The general recommendation explained that these human rights and fundamental freedoms include, among other things, “the right to liberty and security of person; the right to equal protection under the law; [and] the right to equality in the family.” *Id.*

29. *Id.* §§ 6, 8-9.

30. *Id.* § 24(t).

The recommendation also alerted states that “[g]ender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention.”³¹

Since CEDAW identified violence against women as an issue of international importance and concern, organs of the United Nations such as the General Assembly,³² Security Council,³³ and Human Rights Council³⁴ have adopted and released numerous resolutions and reports regarding violence against women. These resolutions and reports reiterated the importance of the issue of violence against women to international human rights, the international community’s commitment to eradicating it, and further strategies whereby member states could combat it. In addition to addressing the international problems of trafficking in women and girls, violence against female migrant workers, sexual violence, so-called “honour” crimes, and “traditional or customary practices affecting the health of women and girls,”³⁵ the General Assembly adopted a resolution specifically seeking the “[e]limination of domestic violence against women” in 2004.³⁶

The *Elimination of Domestic Violence Against Women* resolution provided a holistic description of domestic violence, including a discussion of the challenges implicit in identifying and combating domestic violence as well as the broad array of harms it creates for women and girls who

31. *Id.* § 24(b).

32. Between 1993 and 2010, the General Assembly adopted thirty-two resolutions regarding multiple manifestations of violence against women, and the Secretary-General issued twenty-five reports on the same topics. See generally *Work of the General Assembly on Violence Against Women*, UN WOMEN, <http://www.un.org/womenwatch/daw/vaw/v-work-ga.htm> (last visited Mar. 14, 2012).

33. Between 2000 and 2009, the Security Council adopted six resolutions regarding violence against women and focusing specifically on “women, peace and security.” See generally *Work of the Security Council on Violence Against Women*, UN WOMEN, <http://www.un.org/womenwatch/daw/vaw/v-sc-work.htm> (last visited Mar. 14, 2012).

34. Between 2006 and 2010, the Human Rights Council adopted seven resolutions; the High Commissioner for Human Rights issued four reports; and the Special Rapporteur issued twelve reports regarding violence against women. The Human Rights Council was established by the General Assembly in 2006 and replaced the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights. Between 1993 and 2006, these previously existing organs of the United Nations adopted forty-six resolutions regarding multiple manifestations of violence against women, and the High Commissioner for Human Rights issued six reports on the same topics. See generally *Work of the Human Rights Council and the Commission on Human Rights*, UN WOMEN, <http://www.un.org/womenwatch/daw/v-hrc.htm> (last visited Mar. 14, 2012).

35. See generally *Work of the General Assembly on Violence Against Women*, *supra* note 32.

36. See *Elimination*, *supra* note 3. The Secretary-General has recognized that domestic violence is “[t]he most common form of violence experienced by women globally.” *Ending Violence Against Women: From Words to Action*, *supra* note 15, at 37.

experience it.³⁷ The resolution recognized the following factors:

- (a) That domestic violence is violence that occurs within the private sphere, generally between individuals who are related through blood or intimacy;
- (b) That domestic violence is one of the most common and least visible forms of violence against women and that its consequences affect many areas of the lives of victims;
- (c) That domestic violence can take many different forms, including physical, psychological and sexual violence;
- (d) That domestic violence is of public concern and requires States to take serious action to protect victims and prevent domestic violence;
- (e) That domestic violence can include economic deprivation and isolation and that such conduct may cause imminent harm to the safety, health or well-being of women.³⁸

Additionally, the resolution discussed the underlying causes and significance of domestic violence to international human rights, stating “that domestic violence against women and girls is a human rights issue, [and] recognizing that domestic violence against women is, inter alia, a societal problem and a manifestation of unequal power relations between women and men.”³⁹

Like the general recommendation made by CEDAW in 1992, the *Elimination of Domestic Violence Against Women* resolution directly urged states to take immediate measures to prevent domestic violence and provide legal remedies and other services to its survivors.⁴⁰ Despite the “private” nature of domestic violence, which emanates from the conduct’s recognized link to the family and home,⁴¹ the call to states to eliminate and facilitate the prosecution of domestic violence within their borders was framed and emphasized as an “obligation,” the negation of which “violates and impairs or nullifies the enjoyment of [domestic violence victims’] human rights and fundamental freedoms.”⁴²

Among the different measures enumerated in the resolution, the *Elimination of Domestic Violence Against Women* called upon national governments “to adopt, strengthen and implement legislation that prohibits domestic violence, prescribes punitive measures and establishes adequate

37. See *Elimination*, *supra* note 3, § 2.

38. *Id.* § 1.

39. *Id.* § 2.

40. See *id.* §§ 2-5.

41. *Id.* § 1(a); see *id.* § 7(b) (“The intimate context of the violence produces an almost visceral reaction that what happens within the boundaries of a home is venerable, impervious to the strictures of law and law enforcement The intimacy complicates the victim’s understanding of the violence, her ability to escape it, and the approach of society to her experience.”).

42. *Id.* § 5.

legal protection against domestic violence,”⁴³ in addition to “[ensuring] that such cases are brought to justice swiftly.”⁴⁴ Furthermore, the resolution encouraged states to implement the following measures:

- (e) [Ensure] greater protection for women, inter alia, by means of . . . orders restraining violent spouses from entering the family home, or by banning violent spouses from contacting the victim;
- (f) [Provide] or facilitate the provision of adequate training . . . to all professionals who deal with domestic violence, . . . [including] police officers, judicial and legal personnel, health personnel, educators, youth workers and social workers;
- (g) [Provide] or facilitate the provision of assistance to victims of domestic violence in lodging police reports and receiving treatment and support, which may include the setting up of one-stop centres, as well as the establishing of safe shelters and centres for victims of domestic violence . . . ;
- (i) [Establish] and/or strengthen police response protocols and procedures to ensure that all appropriate actions are taken to protect victims of domestic violence and prevent further acts of domestic violence;
- (r) [Collect], update and improve the collection of data on violence against women, . . . which should be made public and disseminated widely.⁴⁵

Since the issues of gender-based violence and domestic violence were incorporated into the Convention, an impressive body of international law and study by international scholars and non-governmental organizations has developed, encouraging states to create and strengthen policies that counter domestic violence within their borders. International law created to eliminate violence and discrimination against women, such as the Convention and the *Elimination of Domestic Violence Against Women* resolution, has set forth important guidelines for states to fulfill this obligation by proposing specific legal measures that can be utilized to combat domestic violence and protect its survivors.⁴⁶ This body of law facilitates states’ enactment of criminal and civil domestic violence statutes and the implementation of programs that train state officials to approach the complexities of opposite-sex domestic violence with sensitivity and proficiency.⁴⁷

By creating a strong and comprehensive framework of international law

43. *Id.* § 7(a).

44. *Id.* § 6.

45. *Id.* at 3-5.

46. See generally Gen. Recommendation, *supra* note 27 (establishing guidelines to end domestic violence against women).

47. *Ending Violence Against Women: From Words to Action*, *supra* note 15, at 84-87.

on violence against women, human rights bodies have successfully emphasized the urgency of the issue and underscored its importance in protecting fundamental human rights. As a result of these coordinated efforts, at least eighty-nine states have introduced or refined legislation criminalizing domestic violence and offering civil remedies and other services to survivors within their borders.⁴⁸ According to the first Special Rapporteur on violence against women in the U.N., the movement to combat domestic violence has developed into “perhaps the greatest success story of international mobilization around a specific human rights issue, leading to the articulation of international norms and standards and the formulation of international programmes and policies.”⁴⁹

II. SEXUAL ORIENTATION,⁵⁰ GENDER IDENTITY,⁵¹ AND INTERNATIONAL LAW⁵²

Within the last two decades, international leaders and human rights bodies have called for the protection of LGBT individuals from violence and discrimination with growing frequency.⁵³ Within this emerging field, LGBT human rights advocates have insisted that states repeal statutes that criminalize consensual same-sexual conduct and other discriminatory laws.⁵⁴ However, the discussion of LGBT human rights in international

48. *Id.* at 89.

49. *Id.* at 17.

50. See INT’L COMM’N OF JURISTS, THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 6 (2007) [hereinafter YOGYAKARTA PRINCIPLES], available at <http://www.unhcr.org/refworld/docid/48244e602.html> (defining sexual orientation as “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”).

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

52. See generally Françoise Girard, *Negotiating Sexual Rights and Sexual Orientation at the UN*, in SEXPOLITICS: REPORTS FROM THE FRONT LINES 311 (Richard Parker et al. eds., 2004) (explaining how issues of sexual orientation and gender identity are treated in international law).

53. See THE U.N. SPEAKS OUT, *supra* note 21 (“The United Nations is committed to fighting all forms of discrimination More recently, the United Nations has become increasingly concerned with the prevalence of discrimination on grounds of sexual orientation and gender identity The UN human rights treaty bodies . . . have consistently held that States have an obligation under existing treaty provisions to protect people from violence and discrimination on the basis of their sexual orientation.”). See generally James D. Willets, *The Human Rights of Sexual Minorities: A Comparative and International Law Perspective*, HUM. RTS. 22 (1995).

54. See *supra* note 12 and accompanying text (discussing laws that target and punish individuals for their LGBT identity and conduct).

fora has not occurred without considerable controversy and opposition.⁵⁵

In 1994, the UN Human Rights Committee unanimously “ruled in *Toonen v. Australia* that Tasmania’s [law criminalizing same-sexual conduct] violated the equal protection and privacy rights of Tasmania’s gay citizens[,] . . . bas[ing] its decision on the International Covenant on Civil and Political Rights.”⁵⁶ According to experts appointed by the UN Human Rights Council, significant harm often flows from the criminalization of same-sexual conduct—harm that goes beyond the violation of LGBT individuals’ rights to privacy and non-discrimination.⁵⁷ For example, these Special Rapporteurs:

have emphasized the link between criminalization and homophobic hate crimes, police abuse, torture, and family and community violence, as well as constraints . . . on work of human rights defenders . . . [They have also] noted that sanctioned punishment by States reinforces existing prejudices, . . . increases social stigmatization[,] and [makes] people more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity.⁵⁸

Human rights advocates, international treaty bodies, and other organs of the U.N. have also vocalized their opposition to laws and practices around the world that discriminate against LGBT individuals and expose them to prejudice and violence.⁵⁹ In 2007, a group of experts from twenty-five states released the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity

55. See, e.g., Letter from Zamir Akram, Ambassador and Permanent Representative of Pakistan, to Laura Dupuy Lasserre, President of the Human Rights Council (Feb. 14, 2012), available at <http://www.unwatch.org/atf/cf/%7B6deb65dabe5b-4cae-8056-8bf0bedf4d17%7D/OIC%20TO%20PRESIDENT.pdf> (“[We] are deeply concerned by the introduction in the Human Rights Council of a resolution that intends to discuss a very controversial notions [*sic*] i.e. the so-called sexual orientation and gender identity We are seriously concerned at the attempt to introduce to the United Nations some notions that have no legal foundation in any international human rights instrument . . . and have nothing to do with fundamental human rights.”).

56. Wilets, *supra* note 53, at 24.

57. *OHCHR Report*, *supra* note 12, ¶ 42.

58. *Id.* (internal quotations omitted).

59. *Id.* ¶¶ 3, 42; see THE U.N. SPEAKS OUT, *supra* note 21 (indicating that international leaders from diverse bodies including the United Nations Development Programme; the Office of the High Commissioner for Human Rights; the UN Children’s Fund; the UN Educational, Scientific and Cultural Organization; the Office of the UN High Commissioner for Refugees; the International Labour Organization; the UN Population Fund; CEDAW; the World Health Organization; the Joint United Nations Programme on HIV/AIDS; the UN Committee on Economic, Social and Cultural Rights; the UN Committee on the Rights of the Child; the UN Committee against Torture; and the UN Working Group on Arbitrary Detention have denounced violence and discrimination based on sexual orientation and gender identity and encouraged the protection of LGBT human rights).

(Yogyakarta Principles).⁶⁰ In addition to conveying principles affirming LGBT individuals' "right to the universal enjoyment of human rights,"⁶¹ "the right to life,"⁶² "the right to privacy,"⁶³ and "the right to freedom of opinion and expression,"⁶⁴ the Yogyakarta Principles repeatedly emphasize states' obligations to foster legal institutions that offer LGBT individuals "equal protection of the law,"⁶⁵ including equal access to civil and criminal remedies.⁶⁶

For example, the Yogyakarta Principles frame the following measures as mandatory obligations of states:

[1] Ensure that perpetration of [violence against LGBT persons] is vigorously investigated, and that . . . those responsible are prosecuted, tried and duly punished, and that victims are provided with appropriate remedies and redress[;] . . .

[2] [P]rohibit and eliminate prejudicial treatment on the basis of sexual orientation or gender identity at every stage of the judicial process, in civil and criminal proceedings and all other . . . proceedings which determine rights and obligations[;] . . .

[3] [E]nsure that any obligation, entitlement, privilege, obligation [sic] or benefit available to [opposite-sex] partners is equally available to same-sex . . . partners.⁶⁷

Recognizing that state actors working within these legal institutions may hold prejudicial views toward LGBT individuals, the Yogyakarta Principles encourage states to "[u]ndertake programmes of training and awareness-raising for judges, court personnel, prosecutors, lawyers and others regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity."⁶⁸ Since their publication in 2007, the Yogyakarta Principles have been favorably cited numerous times by states and international organizations and have advanced and shaped emerging discourse on LGBT human rights.⁶⁹

60. YOGYAKARTA PRINCIPLES, *supra* note 50; Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 233 (2008).

61. YOGYAKARTA PRINCIPLES, *supra* note 50, § 1.

62. *Id.* § 4.

63. *Id.* § 6.

64. *Id.* § 19.

65. *See id.* § 2.

66. *See, e.g., id.* §§ 2, 3, 5, 8, 24, 28.

67. *Id.* §§ 5(d), 8(a), 24(e).

68. *Id.* § 8(c).

69. OHCHR Report, *supra* note 12, ¶ 75; O'Flaherty & Fisher, *supra* note 60, at 238. However, some scholars believe that the Yogyakarta Principles' impact has been limited by the process by which they were drafted—namely, by a body of so-called international human rights experts instead of UN member state representatives with the capability of voting on issues of international law or a group that was more inclusive of

2011 was a groundbreaking year for LGBT human rights on the international stage because it featured both the first UN resolution on LGBT human rights⁷⁰ and the “first-ever UN study documenting disturbing abuses against LGBT people worldwide [with] recommendations for Member States to address the issue.”⁷¹ In July 2011, the Human Rights Council adopted the resolution on “[h]uman rights, sexual orientation and gender identity.”⁷² This resolution, grounded upon the International Bill of Human Rights,⁷³ “[expressed] grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.”⁷⁴ Furthermore, the resolution declared that LGBT human rights had become a “priority issue”⁷⁵ and encouraged the states represented on the Human Rights Council to commence a “constructive, informed and transparent dialogue on the issue of discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity.”⁷⁶

Responding to the Human Rights Council’s request in *Human Rights, Sexual Orientation and Gender Identity*,⁷⁷ the UN Office of the High Commissioner for Human Rights (OHCHR) released its first report on “[d]iscriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity” in November 2011.⁷⁸ The OHCHR report called upon states to address certain “critical human rights concerns.”⁷⁹ First, the report highlights specific manifestations of discriminatory violence that are perpetrated

members of international LGBT communities themselves. See *id.* at 244 (“[T]he non (or at least limited)-participatory approach inherent in an expert-led process of drafting the Principles raised a risk that the process or text might be rejected as elitist by the very communities whose situation it was intended to address and the support of whom is of crucial significance.”).

70. See H.R.C. Res. 17/19, U.N. Doc. A/HRC/17/19 (July 14, 2011) [hereinafter Human Rights].

71. OHCHR Report, *supra* note 12.

72. See Human Rights, *supra* note 70. Out of forty-five represented states on the Human Rights Council at the time, twenty-three states voted to pass *Human Rights, Sexual Orientation and Gender Identity*. These states included Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Guatemala, Hungary, Japan, Mauritius, Mexico, Norway, Poland, Republic of Korea, Slovakia, Spain, Switzerland, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, and Uruguay. Other “committed” states that were involved with promulgating the resolution included Greece, Ireland, Slovenia, South Africa, and Sweden. Three states abstained from voting. *Id.* at 2.

73. *Id.* at 1.

74. *Id.*

75. *Id.* § 4.

76. *Id.* § 2.

77. *Id.* § 1.

78. OHCHR Report, *supra* note 12, ¶ 1.

79. *Id.* ¶ 4.

against LGBT individuals around the world, such as murder, rape, torture, and “other forms of cruel, inhuman and degrading treatment.”⁸⁰ Next, it details laws and practices that harm LGBT people around the world, such as laws that criminalize same-sexual conduct,⁸¹ the arbitrary arrest and detention of LGBT individuals,⁸² and discrimination within employment, health care, and education,⁸³ and recommends that states repeal discriminatory laws and protect LGBT individuals from discriminatory practices.⁸⁴ Like the Yogyakarta Principles, the OHCHR report recognizes the potential for prejudice within state institutions that are supposed to uphold and protect LGBT human rights, particularly among law enforcement officials.⁸⁵ The report recommends that states “[i]mplement appropriate sensitization and training programmes for police, prison officers, . . . and other law enforcement personnel, and support public information campaigns to counter homophobia and transphobia.”⁸⁶

Despite consistent and vociferous opposition to the incorporation of LGBT human rights into international discourse,⁸⁷ developments within the last two decades indicate that norms about human rights are evolving and consensus in support of LGBT human rights is gradually emerging. These developments represent important building blocks in the larger effort to increase states’ awareness, acceptance, and protection of LGBT individuals’ existence and needs and provide an apt framework within which to insist upon a broader range of protection for LGBT human rights. Influential international figures, such as the UN Secretary-General and High Commissioner for Human Rights, have consistently called upon states to combat violence and discrimination against LGBT people within their borders,⁸⁸ and these calls have not gone unnoticed in the international

80. *Id.* ¶¶ 8-13.

81. *Id.* ¶¶ 13-15.

82. *Id.* ¶ 15.

83. *Id.* ¶¶ 16-19.

84. *Id.* ¶ 24.

85. *Id.* ¶¶ 23, 30, 75, 84(g).

86. *Id.* ¶ 84(g).

87. See *Human Rights Council Holds Panel Discussion on Discrimination and Violence Based on Sexual Orientation and Gender Identity*, UNITED NATIONS HUMAN RIGHTS (Mar. 7, 2012) [hereinafter *Panel Discussion*], <http://www.ohchr.org/en/Pages/DisplayNews.aspx?NewsID=11920&LangID=> (explaining that, out of forty-five represented states on the Human Rights Council at the time, nineteen states voted against *Human Rights, Sexual Orientation and Gender Identity*, including Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Republic of Moldova, Russian Federation, Saudi Arabia, Senegal, and Uganda).

88. See Ban Ki-Moon, Secretary-General, United Nations, Message to Human Rights Council Meeting on Violence and Discrimination Based on Sexual Orientation or Gender Identity (Mar. 7, 2012), available at http://www.un.org/apps/news/infocus/statments_full.asp?statID=1475 (“We see a pattern of violence and discrimination directed at people just because they are gay, lesbian, bisexual or

community. Although “homophobic-based hate crimes” have reportedly increased in all parts of the world,⁸⁹ approximately thirty countries have repealed laws criminalizing same-sexual conduct within the last two decades.⁹⁰ In addition, eleven states have incorporated “explicit constitutional guarantees of protection from discrimination on grounds of sexual orientation” into their national or regional charters,⁹¹ and several more states’ judiciaries have interpreted “general language on non-discrimination . . . as providing equivalent protection.”⁹²

III. THE INVISIBILITY OF SAME-SEX DOMESTIC VIOLENCE

The invisibility of same-sex domestic violence is evidenced by the general lack of statistics on its prevalence in states throughout the world.⁹³ This phenomenon may be explained by several factors. First, the formal recognition of same-sex domestic violence is necessarily limited in states that penalize same-sexual conduct or refuse to acknowledge same-sex relationships.⁹⁴ Second, survivors of same-sex domestic violence may fail to report their experiences of abuse to members of the police, government officials, or the courts because they are citizens of a state that does not extend existing domestic violence remedies to LGBT survivors, or they fear discriminatory treatment from police or judges if they report their experiences of domestic violence.⁹⁵

transgender This is a monumental tragedy for those affected—and a stain on our collective conscience. It is also a violation of international law To those who are lesbian, gay, bisexual or transgender, let me say: You are not alone. Your struggle for an end to violence and discrimination is a shared struggle. Any attack on you is an attack on the universal values the United Nations and I have sworn to defend and uphold. Today, I stand with you, and I call upon all countries and people to stand with you, too.”); *Gays, Lesbians Must Be Treated as Equal Members of Human Family—UN Rights Chief*, UN NEWS CENTRE (Dec. 18, 2008), <http://www.un.org/apps/news/story.asp?NewsID=29364&Cr=pillay&Cr1=&Kw1=sexual+orientation+&Kw2=&Kw3=> (“Those who are lesbian, gay or bisexual, those who are transgender, transsexual or intersex, are full and equal members of the human family and are entitled to be treated as such.”).

89. *Homophobic Hate Crimes on the Rise, UN Human Rights Chief Warns*, UN NEWS CENTRE (May 17, 2011), <http://www.un.org/apps/news/story.asp?NewsID=&Cr=Pillay&Cr1=&Kw1=sexual+orientation+&Kw2=&Kw3=>.

90. *UN Issues First Report on Human Rights of Gay and Lesbian People*, UN NEWS CENTRE (Dec. 15, 2011), <http://www.un.org/apps/news/story.asp?NewsID=&Cr=discrimination&Cr1=&Kw1=sexual+orientation+&Kw2=&Kw3=>.

91. *OHCHR Report*, *supra* note 12, ¶ 49.

92. *Id.*

93. The UN Secretary-General’s database on violence against women includes reports submitted by each of the 192 member states of the United Nations on documented cases of violence against women, including statistics for opposite-sex domestic violence. See *Countries*, *supra* note 16. No similar database exists that displays the prevalence of same-sex domestic violence in any of these states.

94. See *OHCHR Report*, *supra* note 12, ¶ 42.

95. See Morrison, *supra* note *, at 116 (“When society criminalizes, discriminates against, misunderstands, hates and acts violently toward a particular group of people

Another likely explanation of the invisibility of same-sex domestic violence is its omission from international and national laws regarding domestic violence. Although CEDAW has recognized that women's experiences of discrimination intersect with their experiences of discrimination based on sexual orientation and gender identity,⁹⁶ international discourse on domestic violence is framed upon presumptively heterosexual relationships in which male perpetrators abuse their female partners.⁹⁷ Within this framework, government officials and even agencies organized to prevent and remedy the harms of domestic violence may simply be unaware of the existence of same-sex domestic violence or, less innocently, may be opposed to providing available remedies to survivors of same-sex domestic violence because of bigoted and homophobic views about LGBT individuals and same-sex relationships.⁹⁸

Additionally, emerging international discourse on LGBT human rights is largely silent about the existence of same-sex domestic violence.⁹⁹ Despite

because of who they are, how they were born or the life they choose to live, individuals who are part of those groups often choose to, are forced to or are coerced to remain closeted. Victims of domestic violence are often reluctant to seek services for a number of reasons, including fear of additional abuse, lack of economic resources and lack of available services in their area. When homophobia and transphobia are added to these factors, LGBT victims are even less likely to report abuse or seek services . . . [and] are even more hidden.”). This conflicted experience has been dubbed “the second closet,” because survivors of same-sex domestic violence have to “out” themselves twice in order to seek services for their abuse: first as an LGBT individual and next as a survivor of domestic violence. Nancy E. Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 340-43 (1995).

96. GENERAL RECOMMENDATION No. 28, ¶ 18, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement>.

97. The text of international documents on violence against women, such as General Recommendation no. 19 of the CEDAW Convention and General Assembly resolution *Elimination of Domestic Violence Against Women*, clearly indicates that domestic violence is presumed to occur in heterosexual relationships in which male perpetrators abuse their female partners. See *Elimination*, *supra* note 3, at 2; Gen. Recommendation, *supra* note 27. First, their stated purpose of eliminating violence against women necessarily excludes male survivors of same-sex domestic violence. *Id.* Second, the *Elimination of Domestic Violence Against Women* calls upon states to offer “orders restraining violent spouses from entering the family home . . . [or] contacting the victim.” *Elimination*, *supra* note 3, § 7(e). Because most states in the world do not recognize same-sex marriages, it is likely that the resolution was calling upon states to protect female survivors of domestic violence from their abusive husbands. Third, the *Elimination of Domestic Violence Against Women* calls upon states “to highlight the role of men and boys in the prevention and elimination of domestic violence against women, and to encourage . . . the rehabilitation of, perpetrators of violence against women.” *Elimination*, *supra* note 3, § 7(k). Because these two clauses are juxtaposed, the provision implies that men’s responsibility to eliminate domestic violence is linked to their role as perpetrators.

98. See Carla M. Da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN’S STUD. 251, 267 (1994); Morrison, *supra* note *, at 80.

99. There is no mention of same-sex domestic violence in the Human Rights Council resolution *Human Rights, Sexual Orientation and Gender Identity*, the

the failure of international organs to incorporate same-sex domestic violence into their discussions of domestic violence or LGBT human rights, this type of abuse does occur at significant rates and causes serious harm for LGBT survivors throughout the world.¹⁰⁰ International discourse on violence against women has recognized that domestic violence constitutes a violation of women's human rights,¹⁰¹ including women's "right to life, liberty and the security of person"; the "right to physical and mental health"; and the right to be free from "subject[ion] to torture or to cruel, inhuman or degrading treatment."¹⁰² I postulate that LGBT survivors of domestic violence suffer from the same violation of fundamental human rights when their partners abuse them. Therefore, the issue of same-sex domestic violence is entitled to the same degree of international attention as opposite-sex domestic violence and similar mobilization to eradicate the problem and protect its survivors.

The omission of same-sex domestic violence from international human rights discourse is mirrored by the failure of many states to offer LGBT survivors access to national domestic violence remedies, such as criminal prosecution of perpetrators or the availability of restraining orders for LGBT survivors against their violent partners.¹⁰³ In these states, domestic violence statutes may be worded in such a way so as to apply only to female survivors who are abused by their male spouses or partners.¹⁰⁴ In the alternative, a state's domestic violence statutes may be written without reference to the gender of perpetrator and survivor but are interpreted by the judiciary so as to apply only to male perpetrators and female survivors.¹⁰⁵ In "Queering Domestic Violence to 'Straighten out' Criminal Law," Adele Morrison described two harmful implications that flow from the exclusion of LGBT survivors from criminal domestic violence remedies. She wrote, "The first view is that same-sex domestic violence

OHCHR report, or in international panel discussions regarding LGBT human rights. See *OHCHR Report*, *supra* note 12, ¶ 43; *Human Rights*, *supra* note 70, at 2; *Panel Discussion*, *supra* note 87; see also O'Flaherty & Fisher, *supra* note 60, at 236 ("Another criticism that may be directed to the [Yogyakarta] Principles is that . . . they are not comprehensive For instance, it has been suggested that they could usefully have referred . . . to the phenomenon of domestic violence in same-sex households.").

100. See *supra* notes 6-12 and accompanying text.

101. See *Ending Violence Against Women: From Words to Action*, *supra* note 15, at 17-18.

102. Vesa, *supra* note 17, at 320.

103. See Da Luz, *supra* note 98, at 274.

104. See, e.g., N.C. GEN. STAT. § 50B-1(b) (2009) (explicitly limiting the application of North Carolina's domestic violence statutes to survivors of violence in opposite-sex relationships); see also NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER DOMESTIC VIOLENCE IN THE UNITED STATES IN 2001, at 13-14 [hereinafter AVP], available at http://www.ncavp.org/common/document_files/Reports/2001ncavpdvrpt.pdf.

105. See AVP, *supra* note 104, at 15-16; Morrison, *supra* note *, at 121.

does not constitute a crime at all. The second view is that LGBT people deserve what they get (e.g., to be assaulted, abused and victimized) because they are abnormal, criminal and/or immoral.”¹⁰⁶ Without protection and intervention by the state, LGBT survivors of domestic violence are vulnerable to the following dangerous and potentially life-threatening exclusion:

[T]hese victims cannot receive protection orders and they remain vulnerable and disempowered. Furthermore, because gay men and lesbians are not protected by these statutes, police are not encouraged or mandated to respond to same-sex partner abuse incidents, to report these incidents, to arrest the abusive partners or to inform the victims of their civil and criminal remedies Without intervention, the abuse may continue unnoticed and unchallenged. Victims may be fatally abused or may kill their batterers in a final effort to end the violence.¹⁰⁷

Although emerging discourse on LGBT human rights is an important step forward for the international community and a strong indicator of additional developments to come, the existing discussion fails to address same-sex domestic violence and its harmful effects on the fundamental rights of LGBT survivors to be free from violence and discrimination.¹⁰⁸ Thus, there is a gap in existing international human rights law that ignores the existence of same-sex domestic violence and the urgent needs of LGBT survivors around the world.

IV. A MODEL FOR INTERNATIONAL LAW ON SAME-SEX DOMESTIC VIOLENCE

Human rights experts and advocates have recognized that the analysis of discrimination based on sexual orientation and gender identity is far from complete.¹⁰⁹ Emerging international discourse on LGBT human rights is ripe for the discussion of same-sex domestic violence and the insistence for state protection of LGBT survivors. Same-sex domestic violence fits squarely within the framework that has developed regarding LGBT human rights. The leading documents in this emerging field—*Human Rights, Sexual Orientation and Gender Identity*, the OHCHR report, and the Yogyakarta Principles—frame freedom from violence and discrimination

106. See Morrison, *supra* note *, at 124.

107. Da Luz, *supra* note 98, at 274.

108. See, e.g., OHCHR Report, *supra* note 12; Human Rights, *supra* note 70; Panel Discussion, *supra* note 87.

109. See OHCHR Report, *supra* note 12, at 4, 85 (“[The present report does] not [address] all violations perpetrated in relation to sexual orientation or gender identity The High Commissioner recommends that the Human Rights Council . . . [e]ncourage existing special procedures to continue to investigate and report on human rights violations affecting individuals on the basis of sexual orientation or gender identity.”).

as the most pressing concerns currently facing LGBT individuals and their human rights defenders around the world.¹¹⁰ Within the problem of same-sex domestic violence, LGBT individuals experience both violence and discrimination—violence at the hands of their abusive partners and discrimination by the state actors who deny them access to domestic violence remedies.

This Article proposes that international human rights leaders and advocates incorporate same-sex domestic violence into emerging discourses on LGBT human rights, and that they model their strategies and recommendations on existing bodies of law regarding violence against women. In this way, amenable states that already have domestic violence regimes in place can simply broaden existing structures to extend important protections to LGBT survivors within their borders.

A. Promoting LGBT-Inclusive Domestic Violence Legislation and Interpretation

The most recent study from the Secretary-General, *Ending Violence Against Women: From Words to Action*, encouraged states to strengthen their efforts to combat violence against women by enacting and implementing a legal framework that included criminal and civil avenues of redress for survivors of violence.¹¹¹ The study explained that “good practice” in criminal prosecution of domestic violence featured the following characteristics:

Vigorous arrest and prosecution policies make a statement to society as a whole that violence against women is a serious crime that is not condoned by the authorities . . . Measures that enhance women’s access to justice, including timely arrests, effective proceedings and punishments are good practice . . . Good practice involves safeguarding the rights of victims and creating a system that respects the privacy, dignity and autonomy of all victims and is conducive to reporting.¹¹²

Furthermore, “good practice” in providing civil remedies to survivors of domestic violence featured the following characteristics:

Civil laws complement criminal measures and play an important role in providing victims/survivors with avenues of redress and compensation. Promising practice in this area includes the availability of civil remedies such as civil protection orders . . . Protection orders, also known as

110. See generally *OHCHR Report, supra* note 12; Human Rights, *supra* note 70; YOGYAKARTA PRINCIPLES, *supra* note 50.

111. *Ending Violence Against Women: From Words to Action, supra* note 15, at 83-89. “Laws establish standards of right and wrong, deter wrongdoers through arrests, prosecution and punishment of perpetrators and provide remedies to victims . . . Enacting laws prohibiting specific forms of violence against women is an important step towards eliminating such violence.” *Id.* at 83.

112. *Id.* at 86.

restraining or removal orders, aim to protect women from the immediate threat of violence by restraining the perpetrator from contacting the victim during a specified period or removing the perpetrator from the home.¹¹³

These guidelines can apply equally to instances of same-sex domestic violence, and human rights bodies should encourage states to prosecute the perpetrators of same-sex domestic violence and allow equal access to civil remedies, including orders of protection, to its survivors.

Human rights bodies and advocates should encourage states to broaden their domestic violence statutes so that remedies are explicitly available to abused partners in same-sex relationships. In 1998, the South African legislature enacted a statute of this kind, which applied to survivors of abusive “domestic relationships . . . whether they are of the same or of the opposite sex.”¹¹⁴ The statute explicitly stated that domestic violence remedies, such as protection orders and “emergency monetary relief,”¹¹⁵ were available to both same-sex and opposite-sex survivors and represents a legislative model for other states seeking to offer equal access to LGBT survivors.

Domestic violence statutes that fail to specify the gender of the perpetrator and survivor may be interpreted to apply to survivors in both same-sex and opposite-sex relationships,¹¹⁶ and human rights advocates should encourage states to do so consistently. However, “[t]he ambiguous language of gender-neutral statutes is problematic because the application of these laws in same-sex domestic violence situations will vary based on the personal attitudes of prosecutors and judges assigned to these cases.”¹¹⁷

The *Elimination of Domestic Violence Against Women* resolution made a recommendation that judicial officers undergo training for competency and sensitivity to issues of gender in domestic violence cases,¹¹⁸ and the Yogyakarta Principles recommended that they undergo training to prevent inequitable decisions based on ignorance or prejudice.¹¹⁹ Similarly, human rights advocates should encourage states to implement training for judges and other court officers including components on same-sex domestic violence. This training would promote equal access to domestic violence remedies and sensitive, non-discriminatory interactions with survivors,

113. *Id.* at 87.

114. Domestic Violence Act of 1998, § 1(vii)(b) (S. Afr.), available at <http://www.hsph.harvard.edu/population/domesticviolence/southafrica.dv.98.pdf>.

115. *Id.* §§ 1(xviii), 1(x).

116. See Franklin, *supra* note 11, at 312.

117. Michelle Aulivola, *Outing Domestic Violence: Affording Appropriate Protections to Gay and Lesbian Victims*, 42 FAM. CT. REV. 162, 169 (2004).

118. See *Elimination*, *supra* note 3, § 7(f); see also Gen. Recommendation, *supra* note 27, § 24(b).

119. See YOGYAKARTA PRINCIPLES, *supra* note 50, § 8.

regardless of their sexual orientation and gender identity. For example:

Judges, too, are susceptible to . . . prejudgments, equating gender presentation and size with status as batterer or victim. Judges assessing the credibility of parties appearing before them may find it difficult to believe that butch women could ever be the victims of violence—let alone of violence done by their femme partners—especially in instances where the victims are larger and tougher looking than the batterers.¹²⁰

It is essential that survivors of same-sex domestic violence can receive equal access to domestic violence remedies in order to protect them from their abusive partners, deter future violence, and stop the dangerous cycle of abuse that characterizes domestic violence.¹²¹ For states that have already displayed some degree of commitment to LGBT human rights,¹²² broadening or revising their domestic violence statutes and judicial training programs to ensure LGBT access is a simple and important way to protect LGBT human rights to freedom from violence and discrimination.

B. Promoting Non-discriminatory Enforcement of LGBT-Inclusive Domestic Violence Laws

In *Ending Violence Against Women: From Words to Action*, the Secretary-General also emphasized that the enforcement of domestic violence laws is equally important as their enactment¹²³ and explained that the “[i]mplementation of laws is enhanced by mandatory and systematic gender-sensitivity training of law enforcement officials, prosecutors and judges and by protocols and guidelines on the appropriate application of the law.”¹²⁴ Similarly, § 7(c) of the Yogyakarta Principles recommended that police and other law enforcement officials “undertake programmes of training and awareness-raising . . . regarding the arbitrariness of arrest and detention based on a person’s sexual orientation or gender identity.”¹²⁵

In order to promote the most effective enforcement of LGBT-inclusive domestic violence statutes, it is crucial for law enforcement officials to undergo training on sensitivity and non-discrimination, particularly because

120. Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 109 (2008); see also Morrison, *supra* note *, at 135; Lundy, *supra* note 6, at 297-98.

121. See Murphy, *supra* note 95, at 343-44; Tara R. Pfeifer, *Out of the Shadows: The Positive Impact of Lawrence v. Texas on Victims of Same-Sex Domestic Violence*, 109 PENN ST. L. REV. 1251, 1257 (2005) (“[A]n order of protection is one of the most important tools in attempting to protect a survivor from further abuse.”).

122. See, e.g., *supra* note 72.

123. *Ending Violence Against Women: From Words to Action*, *supra* note 15, at 84 (“The potential of laws on violence against women remains unfulfilled if they are not effectively applied and enforced.”).

124. *Id.*; see also Elimination, *supra* note 3, § 7(f); Gen. Recommendation, *supra* note 27, ¶ 24b.

125. See YOGYAKARTA PRINCIPLES, *supra* note 50, § 7(c).

“there remains a widespread distrust of police on the part of the gay and lesbian communities which is consistent with the distrust of authorities experienced by many minority communities.”¹²⁶ Law enforcement officials around the world have been reported to be complicit or responsible for the harassment or arbitrary detention of LGBT individuals.¹²⁷ This disconnect between law enforcement and LGBT communities likely contributes to the lack of reporting and reliable statistics about incidents of same-sex domestic violence.¹²⁸

When untrained law enforcement officials are unable to determine the identities of the abuser and survivor in a same-sex domestic violence situation, they may choose a course of action based on gender stereotypes, which can be dangerous and ineffective for the LGBT survivor. For example:

If both individuals are men, [one] possible outcome . . . is to assume that they must both be violent because men in general are violent, which leads either to dual arrest or to no arrest. If both are women, the abuse is seen as not serious, which leads to no arrest or no response at all.¹²⁹

States that wish to provide equal protection and consistent enforcement of LGBT-inclusive domestic violence statutes should implement comprehensive training programs on how law enforcement officials can best serve LGBT communities and the unique needs of LGBT survivors. Failing to do so would make LGBT survivors more vulnerable to escalated violence by their partners, who could perpetrate abuse with impunity. Furthermore, when LGBT survivors expect homophobic responses from law enforcement, they are unlikely to report the abuse they experience, contributing to the lack of statistics on same-sex domestic violence and hampering the ability of states to adequately respond to the problem.¹³⁰

126. Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 348 (1999); see also *OHCHR Report*, *supra* note 12, ¶ 75; Morrison, *supra* note *, at 136-37 (“[An] effective approach would be to focus on broad institutional changes by implementing new policies that are LGBT-sensitive and inclusive and by holding accountable those who violate them. This approach would go farther than would trying to change the feelings of each individual.”).

127. See *OHCHR Report*, *supra* note 12, ¶¶ 30, 47; Aulivola, *supra* note 117, at 167; see also Da Luz, *supra* note 98, at 269 (“Experts on domestic violence say the police tend to be homophobic and are less likely to intervene in lesbian battery cases.”).

128. See *supra* note 95 and accompanying text; *OHCHR Report*, *supra* note 12, ¶ 23; Shannon Little, *Challenging Changing Legal Definitions of Family in Same-Sex Domestic Violence*, 19 HASTINGS WOMEN’S L.J. 259, 262 (2008) (“LGBT victims may be less willing to call police out of fear that they will face a homophobic reaction from the authorities.”).

129. Morrison, *supra* note *, at 144.

130. See *supra* note 128 and accompanying text; Morrison, *supra* note * at 103. LGBT survivors are especially unlikely to report incidents of domestic violence to law enforcement in states that criminalize same-sexual conduct, making them especially vulnerable to violence at the hands of their partners. Knauer, *supra* note 126, at 341

CONCLUSION

Within the last two decades, international human rights leaders have begun a tremendously important process: creating international law that insists upon the protection of LGBT rights to freedom from violence and discrimination. Although some states have resisted these efforts, these leaders have made it clear that “where there is tension between cultural attitudes and universal human rights, rights must carry the day.”¹³¹

The failure of states to provide LGBT access to domestic violence remedies presents a clear instance of state-sanctioned discrimination and makes LGBT communities especially vulnerable to domestic violence. This problem must be brought to light, and emerging international discourse on preventing violence and discrimination against LGBT individuals is an ideal forum to introduce a discussion of same-sex domestic violence. For states that have effective domestic violence frameworks in place, providing protection to LGBT survivors can be as simple as broadening statutes to provide LGBT access to criminal and civil domestic violence remedies, complemented by the implementation of targeted training for court and police officials and recording mechanisms to track the prevalence of same-sex domestic violence. These developments would represent an important evolution of international law—one that fosters the protection of LGBT lives and well-being as well as the recognition of LGBT individuals’ fundamental rights as human beings.

(“This presents a potential catch-22 where a victim of domestic violence may first have to assert that he or she is a criminal in order to qualify for protection.”).

131. THE U.N. SPEAKS OUT, *supra* note 21, at 1; *see also supra* notes 55, 87, and accompanying text.

