

GENDER REGISTRATION & INTERNATIONAL LAW:
ARE GENDER MARKERS NECESSARY?

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INTRODUCTION

Sex registration is a concept seemingly entrenched in modern society. Documentation such as a birth certificate, a passport, or a driver's license is likely to list a 'M,' a 'F,' or in some cases an 'X' beside names, and that documentation and social perception may police interactions with gendered accommodations such as public bathrooms, homeless shelters, medical treatment programs, and systems of confinement.¹ An issue that remains invisible, however, is what that registration means for those whose gender identity does not match that which they were assigned at birth—beyond the sometimes prohibitive cost for the commonly associated legal name change (sometimes as much as \$500 for court fees alone in the United States)² and the

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¹ DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW 77* (Jade Brooks and Ken Wissoker eds., 2d ed. 2015).

² *How Much Does It Cost to Change Your Name?*, BLACK'S LAW DICTIONARY (9th ed. 2009).

somewhat lesser cost to receive a new birth certificate.³ The prerequisite process to qualify a person for a legal change of gender may require conditions such as counseling, surgery, or other qualifying medical interventions⁴ and constitutes a challenge that seems unnecessary and disproportionate to the harm inflicted in return. At best, transgender persons must submit themselves to systems of bureaucracy in order to be legally recognized in a way that matches their identity; at worst, they may be denied access to that identity or made vulnerable to violence by having their transgender status disclosed against their will in hostile environments.⁵

This Note will spend a significant amount of time discussing sexual orientation and gender identity. While these terms can be personal to those who use them and continue to evolve in both personal and State-sanctioned usage, the definitions of each for the purpose of this Note will be those defined in the Yogyakarta Principles and adopted globally by human rights advocates, including the UN High Commissioner for Refugees.⁶ Sexual orientation refers 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.”⁷ Gender identity is “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.”⁸ A transgender person, following from this definition, is someone whose gender identity does not correspond with the sex assigned at birth—whether said person identifies

³ *Birth Certificate Costs By State, 2018*, BALLOTPEDIA, https://ballotpedia.org/Birth_certificate_costs_by_state_2018#Birth_certificate_costs_by_state [<https://perma.cc/F18Q-ZNNC>] (last visited Oct. 22, 2021).

⁴ *ID Documents Center*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents> [<https://perma.cc/V4Y2-WB78>] (last updated Nov. 2021).

⁵ See SPADE, *supra* note 1, at 77.

⁶ *The Yogyakarta Principles Plus 10*, INT'L COMM'N OF JURISTS 10 (Nov. 10, 2017), <https://www.refworld.org/docid/5c5d4e2e4.html> [<https://perma.cc/6RJS-GVUF>]; U.N. High Commissioner for Refugees, Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/12/09 (Oct. 23, 2012), <https://www.unhcr.org/509136ca9.pdf> [<https://perma.cc/A4KR-N9QV>].

⁷ INT'L COMM'N OF JURISTS, *supra* note 6, at 8.

⁸ *Id.*

with another gender or none at all.⁹ While other definitions can and have been used by scholars, self-identified Lesbian, Gay, Bisexual, Trans/transgender, Intersex, Queer/questioning, and Asexual (“LGBTIQ+”) communities and persons, and government bodies, the definitions adopted by the Yogyakarta Principles have been compiled for and referenced by the international legal community and are therefore appropriate for the purpose of this examination.

With the intent of examining the impact of sex and gender registration on transgender persons, this Note asks: (1) how the current international human rights paradigm addresses the practice of sex or gender registration; (2) how this framework impacts transgender persons in particular; and (3) whether the findings of the first two issues indicate that this structure should change. In consideration of the future operation of sex or gender registration as a practice, it is also vital to consider the potential implications for either retaining or abolishing this practice. Either retaining or abolishing the practice of sex registration will have repercussions for transgender persons and other groups such as women and refugees; these groups may have distinct and possibly conflicting needs. This Note will primarily focus on the perspective and needs of transgender persons.¹⁰

I. LEGAL PARADIGMS OF GENDER

Understanding the impact of state registration of gender on transgender or nonbinary persons is not wholly possible without understanding the placement of LGBTIQ+ rights within the larger international human rights framework. To be certain, neither sexual orientation nor gender identity is mentioned explicitly within the treaties that make up the international bill of rights.¹¹ In developing our current international human rights regime, there has not been a treaty

⁹ While some people recognize nonbinary or agender identities within the transgender umbrella, some prefer to consider them separately. Identity is a personal process, and this Note cannot say whether either method of reference is “correct.” This Note will use “transgender” as an umbrella term encompassing these identities.

¹⁰ For the purpose of this Note, the interaction between identification documents in relation to a person’s self-determined gender will focus on how references to gender become problematic when said gender does not match between self- and state-determination. This occurs for both transgender and intersex persons, who belong to distinct yet overlapping groups. As distinct groups, their interests may be best represented in different ways and with different terminology.

¹¹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR]; G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) [hereinafter ICESCR].

explicitly holding States accountable for the rights of LGBTIQ+ persons, including the right to protection from discrimination or violence on the basis of sexual orientation or gender identity. However, the UN Human Rights Committee (“HRC”) has interpreted the International Covenant on Civil and Political Rights (“ICCPR”) to include protections on the basis of sexual orientation beneath the umbrella of “sex” as a category within Articles 2 and 26.¹² The Committee on Economic, Social and Cultural Rights (“CESCR”) considers sexual orientation and gender identity an “other status” upon which LGBTIQ+ persons are entitled to the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) enumerated rights on an equal basis to their heterosexual or cisgender counterparts.¹³ The Committee on the Elimination of Discrimination Against Women (“CEDAW”) interprets the Convention on the Elimination of Discrimination Against Women to protect both those biologically identified as women and those bearing “socially constructed identities, attributes and roles for women.”¹⁴ Each of these recognitions comes not from the explicit use of words that refer to LGBTIQ+ individuals but instead represents the interpretative strategy of multiple human rights bodies on an international scale.

While nonbinding, the Yogyakarta Principles is the principal comprehensive instrument on LGBTIQ+ rights in the context of an international human rights framework.¹⁵ The International Commission of Jurists adopted the Yogyakarta Principles in 2006 and updated it in 2017.¹⁶ In its current form, the Yogyakarta Principles constitute a set of thirty-eight principles and hundreds of recommended state obligations to protect individuals on the basis of their sexual orientation and gender identity.¹⁷ Although it is not a binding document endorsed by member States the way a treaty would be, the Yogyakarta

¹² *Toonen v. Australia*, U.N. Comm’n on Hum. Rts., U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994).

¹³ ICESCR, *supra* note 11; United Nations Economic and Social Council, General Comment No. 20: Non-discrimination in economic, social, and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), ¶ 32, U.N. Doc. E/C.12/GC/20 (July 2, 2009) (CESCR is the oversight committee created by the ICESCR).

¹⁴ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 5, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010).

¹⁵ INT’L COMM’N OF JURISTS, *supra* note 6.

¹⁶ *Id.*

¹⁷ *Id.*

Principles acts similarly to the interpretative strategy of the HCR, CESC, and CEDAW to enumerate existing rights in the current paradigm as applied to LGBTIQ+ persons.¹⁸ The Yogyakarta Principles provide guidance to judges, attorneys, and other interested parties who may have little practical knowledge about LGBTIQ+ issues in an evolving cultural and legal landscape.¹⁹ The Yogyakarta Principles expressly acknowledge the registration of sex by the State in topics such as access to healthcare, right to education and employment, and guidelines surrounding detention procedures.²⁰ Principle 31, which concerns the right to legal recognition, reads:

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.²¹

Further, the state obligations associated with Principle 31 include that States must ensure that:

[I]dentity documents only include personal information that is relevant, reasonable and necessary as required by law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licenses, and as part of their legal personality.²²

While the registration of sex and gender continues, according to the Yogyakarta Principles, States must ensure that such registration includes “a quick, transparent, and accessible mechanism that legally recognises and affirms each person’s self-defined gender identity,” as well as “no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion” as a prerequisite to legally changing name, sex, or gender.²³

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ INT’L COMM’N OF JURISTS, *supra* note 6, at 9.

²² *Id.*

²³ *Id.*

In the United States, such practices are not followed; the requirements as laid out by legal gender change processes vary between states, some do not allow a change of gender marker at all,²⁴ and others may include psychological evaluations,²⁵ therapeutic interventions,²⁶ surgical procedures,²⁷ medical treatment (e.g. hormone replacement therapy).²⁸ Some states, such as New York²⁹ and Oregon,³⁰ allow for the use of X as a gender marker. Many, however, do not, instead only recognizing male and female as genders to be validated by the State.³¹ Federally, the Social Security Administration (“SSA”) only stopped sending “no match” letters—letters informing a person’s employer that their employment information did not match the records of the SSA—in relation to gender discrepancies that might occur as a result of differing state and federal requirements for legal gender changes in 2011.³² Even in the ten years since, it is still possible for discrepancies to be discovered if accessed through certain systems varying state-by-state, continuing to expose transgender employees to potential outing via administrative systems.³³ However, this dire situation is not the case in many other countries.

In Germany, individuals seeking to change their legal gender previously had to both undergo sex reassignment surgery and be infertile.³⁴ Following a 2011 case before the Federal Constitutional Court, those requirements were declared unconstitutional and no longer stand.³⁵ As of 2017, Germany also recognizes that male and female alone are not adequate categories for sex registration on birth certificates after the Federal Constitutional Court ruled that a third gender

²⁴ See, e.g., TENN. CODE ANN. § 68-3-203 (2021) (LexisNexis).

²⁵ See, e.g., New York, N.Y., Health Code, art. 207, § 207.05(a)(5) (2018).

²⁶ *Id.*

²⁷ See, e.g., CONN. GEN. STAT. ANN. § 19a-42b (West 2021).

²⁸ See, e.g., D.C. CODE § 7-231.22(a)(2)(A).

²⁹ Gender Recognition Act, S.B. 4402, 2021 Leg., 244th Sess. (N.Y. 2021).

³⁰ *In re Hollister*, 470 P.3d 436, 441, 443 (Or. Ct. App. 2020).

³¹ See NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 4.

³² *Know Your Rights: Social Security*, NAT'L CTR. FOR TRANSGENDER EQUAL, <https://transequality.org/know-your-rights/social-security> [<https://perma.cc/6BK7-YG25>] (last visited Oct. 17, 2022).

³³ *Id.*

³⁴ Press Release, Bundesverfassungsgericht [Federal Constitutional Court], The Requirements for the Legal Recognition of a Transsexual’s Felt Gender Set by § 8(1) nos. 3 and 4 of the Transsexuals Act are Unconstitutional (Jan. 11, 2011) (Ger.).

³⁵ *Id.*

option must be recognized.³⁶ In this ruling, the court pointed out that the legislature's registration of sex is a choice, and that in the face of that choice individuals must be allowed their civil rights to self-determination of gender; the restriction of gender to only the two categories of "male" and "female" fails to respect that right.³⁷

In Argentina, the Gender Identity Law (*Ley de identidad de género*) is an exemplar in the realm of self-determination for transgender persons.³⁸ The law decrees that a person can change their registered name and sex via a free process that does not require a lawyer or other professional's prior approval.³⁹ Further, it provides that gender-affirming treatments such as hormones or surgery must be covered by hospitals and insurers without a gender dysphoria diagnosis or referral letter.⁴⁰ Earlier this year, Argentina has made it possible for a person to designate their gender as 'X' on a national ID card, joining several other states in this sanction of nonbinary gender identities.⁴¹

The Netherlands was an early pioneer in allowing transgender persons to legally change their gender, with a law dictating the process enacted in 1985.⁴² However, the requirements for this change under the initial law included hormone replacement therapy and surgery, which included sterilization.⁴³ It was not until 2014 that these requirements were amended to allow anyone over the age of sixteen to change their legal gender with an expert statement affirming the person's intentions.⁴⁴ The Netherlands, recognizing the extent of the harm done during the nearly thirty years in which the outdated law was in effect, has recently apologized for the "dreams [that] have been lost as a result

³⁶ Press Release, Bundesverfassungsgericht [Federal Constitutional Court], Civil Status Law Must Allow a Third Gender Option (Oct. 10, 2017) (Ger.).

³⁷ *Id.*

³⁸ *Ley de identidad de género* [Gender Identity Law], (May 8, 2012) (Arg.), translated in *Argentina Gender Identity Law*, TGEU (Sept. 12, 2013), <https://tgeu.org/argentina-gender-identity-law/> [<https://perma.cc/5ZCK-HUH3>].

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Sammy Westfall, *Argentina Rolls out Gender-Neutral ID*, THE WASH. POST (July 22, 2021), <https://www.washingtonpost.com/world/2021/07/22/argentina-nonbinary-id/> [<https://perma.cc/P2QE-ATZS>].

⁴² *The Netherlands: Victory for Transgender Rights*, HUM. RTS. WATCH (Dec. 19, 2013, 11:00 PM), <https://www.hrw.org/news/2013/12/19/netherlands-victory-transgender-rights> [<https://perma.cc/V4CC-DQN4>].

⁴³ *Id.*

⁴⁴ *Id.*

of the irreversible sterilization.”⁴⁵ For those outside of the gender binary, the Netherlands has become one of the most recent states to recognize an X gender marker on birth certificates.⁴⁶ Though a few individuals have previously been able to mark an X on their birth certificates,⁴⁷ a court case in July 2021 affirmed the right for all non-binary people to use an X on their birth certificates in the Netherlands.⁴⁸ However, the Netherlands seeks to even go a step further; by 2025, national Dutch IDs will not indicate the holder’s gender.⁴⁹ Despite this progress, passports will continue to maintain a gender category due to global regulations.⁵⁰

In multiple States in South Asia, activists have pursued recognition of a third gender.⁵¹ In 2007, Nepal provided an early validation of this pursuit when the Supreme Court ordered the government to recognize a third gender based on self-determination, largely relying on

⁴⁵ Kyle Knight, *Netherlands Apologizes for Transgender Sterilizations*, HUM. RTS. WATCH (Dec. 1, 2020, 1:04 PM), <https://www.hrw.org/news/2020/12/01/netherlands-apologizes-transgender-sterilizations> [<https://perma.cc/3C6X-7JVE>].

⁴⁶ *2021 Country Reports on Human Rights Practices: Netherlands*, U.S. DEP’T OF STATE (2021), <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/netherlands/> [<https://perma.cc/8LKY-WRWP>].

⁴⁷ *Geen M of V, maar X: voor het eerst paspoort veranderd in genderneutraal* [*No M or V, but X: Passport Changed to Gender Neutral for the First Time*], NOS (Oct. 19, 2018), <https://nos.nl/artikel/2255409-geen-m-of-v-maar-x-voor-het-eerst-paspoort-veranderd-in-genderneutraal> [<https://perma.cc/V98L-DDSE>] (Dutch).

⁴⁸ U.S. DEP’T OF STATE, *supra* note 46; *Non-binaire personen mogen X als geslachtsaanduiding op geboorteakte* [*Non-binary Persons are Allowed to use X as a Gender on Birth Certificate*], NU.NL (July 22, 2021, 11:12 AM), <https://www.nu.nl/binnenland/6146942/non-binaire-personen-mogen-x-als-geslachtsaanduiding-op-geboorteakte.html> [<https://perma.cc/Y275-EEBV>] (Dutch).

⁴⁹ Jamie Wareham, *Dutch ID Cards To Become Gender Free – Could More Of Europe Follow?*, FORBES (July 7, 2020, 11:09 AM), <https://www.forbes.com/sites/jamiewareham/2020/07/07/dutch-id-cards-to-become-gender-free—could-more-of-europe-follow/#3cef2ee93207>

[<https://perma.cc/ULL5-26W8>]; Neela Ghoshal & Kyle Knight, *Netherlands Sees No Role for Gender Marker on ID Documents*, HUM. RTS. WATCH (July 8, 2020, 1:53 PM), <https://www.hrw.org/news/2020/07/08/netherlands-sees-no-role-gender-marker-id-documents> [<https://perma.cc/RC9R-BLU6>]; Rachel Savage, *M, F, Nothing? Netherlands Mulls Erasing Gender from ID Cards*, REUTERS (July 9, 2020, 8:43 AM), <https://www.reuters.com/article/us-netherlands-lgbt-lawmaking-idUSKBN24A1UN> [<https://perma.cc/WVN4-QQZ2>].

⁵⁰ See Wareham, *supra* note 49.

⁵¹ *Pant v. Nepal*, [2007] Writ No. 917 (Yadav Pokharel and Shree Prasad Pandit trans.) (Nepal); *Khaki v. Rawalpindi*, (2009) 2013 PLD (SC) 188 (Pak.); Senior Correspondent, *Third Gender’ Gets State Recognition*, BDNEWS24.COM <https://bdnews24.com/bangladesh/2013/11/11/third-gender-gets-state-recognition> [<https://perma.cc/MBE4-UEFA>] (last updated Nov. 11, 2013, 8:15 AM); *National Legal Services Authority v. Union of India*, (2014) 3 MLJ 595 (India).

the Yogyakarta Principles.⁵² This third gender category became recognized in voter registrations, the national census, citizenship documents, and passports in the years following the initial ruling.⁵³ Pakistan established a third legal gender in a case at the Supreme Court in 2009,⁵⁴ and Bangladesh recognized a third category via decree in 2013.⁵⁵ In 2014, India's Supreme Court recognized a third gender and broadly affirmed the right for every person to choose their gender, leading to transgender recognition in state welfare programs.⁵⁶ India also passed the Transgender Persons (Protection of Rights) Law in 2019—however, this law has been criticized as regressive even compared to the 2014 ruling.⁵⁷ Although the law declares a “right to a self-perceived identity,” it also requires a transgender person to register with the government (by submitting proof of gender confirmation surgery) in order to receive recognition as such.⁵⁸

Representatives on behalf of African States, Caribbean States, Arab States, and the Russian Federation warned that the Yogyakarta Principles is a controversial document not representative of agreed-upon international norms.⁵⁹ Yet, the report has been cited in the development of many of the laws and cases recognizing the rights of transgender and intersex persons to self-determination within this context, influencing international jurisprudence.⁶⁰ However, one place where this development has not been recognized is the International Civil Aviation Organization (“ICAO”).⁶¹ The ICAO publishes a set of

⁵² *See Pant*, [2007] Writ No. .917.

⁵³ *Nepal Lawmakers Approve First LGBTI Protections in New Constitution*, PAHICHAN (Sept. 15, 2015), <https://pahichan.com/nepal-lawmakers-approve-first-lgbti-protections-in-new-constitution/> [<https://perma.cc/FW5X-4TMD>] (Nepal).

⁵⁴ *Khaki*, (2009) 2013 PLD (SC) 188, at 3.

⁵⁵ *See Senior Correspondent*, *supra* note 51.

⁵⁶ *See Nat'l Legal Services Auth.*, (2014) 3 MLJ 595.

⁵⁷ Transgender Persons (Protection of Rights) Act, 2019 (India); Sushmita Pathak, *India Just Passed A Trans Rights Bill. Why Are Trans Activists Protesting It?*, NPR (Dec. 4, 2019, 11:42 AM), <https://www.npr.org/sections/goatsandsoda/2019/12/04/784398783/india-just-passed-a-trans-rights-bill-why-are-trans-activists-protesting-it> [<https://perma.cc/4B3D-93N5>].

⁵⁸ Pathak, *supra* note 57.

⁵⁹ U.N. GAOR, 65th Sess., 29th mtg., U.N. Doc. A/C.3/65/SR.29 (Dec. 13, 2010).

⁶⁰ *See Ley de identidad de género*, *supra* note 38; *Pant*, [2007] Writ No. 917; *Nat'l Legal Services Auth.*, [2014] 3 MLJ 595 (India).

⁶¹ MACHINE READABLE TRAVEL DOCUMENTS, INT'L CIV. AVIATION ORG. 14 (8th ed. 2021), https://www.icao.int/publications/Documents/9303_p4_cons_en.pdf [<https://perma.cc/FQ55-UJ66>] [hereinafter MACHINE READABLE TRAVEL DOCUMENTS].

recommended parameters for travel passports for the promotion of the standardization of passport information and ease of international travel.⁶² One hundred ninety-three member states of the ICAO currently issue passports using these standards, which include a traveler's name, date of birth, nationality, and sex.⁶³ The ICAO recognizes F, M, or X as valid gender markers within these standards.⁶⁴ However, member states that issue passports with X markers warn persons that they may have difficulty when traveling internationally due to the gender marker on their passport.⁶⁵ Transgender or intersex persons with an X on their passports remain vulnerable to discrimination and other harm as a result of the inclusion of a non-binary designation on their passports, as admitted by the ICAO itself.⁶⁶

The ICAO began to recommend sex as a category on passports in 1980, more than thirty years after its inception as a regulatory agency.⁶⁷ In 2012, the New Zealand Passport Office submitted a report helping the ICAO reexamine the requirement for sex registration on member States' passports.⁶⁸ The ICAO determined that, at the time, the costs of removal would outweigh the benefits.⁶⁹ One major point of concern expressed by the report was that sex designation on travel documents facilitates the operation of border authorities, who use the field to identify passengers and as part of risk assessment.⁷⁰ However, the ICAO also made a point of stating that there is a "significant opportunity" for the ICAO to change the requirement in the future.⁷¹ In 2022, ten years after the initial report, it may be time to examine whether that opportunity should be realized. This is particularly

⁶² *Id.*

⁶³ MEMBER STATES, INT'L CIV. AVIATION ORG. (Jan. 6, 2022), <https://www.icao.int/memberstates/member%20states.english.pdf> [<https://perma.cc/USY3-T2Q5>].

⁶⁴ MACHINE READABLE TRAVEL DOCUMENTS, *supra* note 61.

⁶⁵ A REVIEW OF THE REQUIREMENT TO DISPLAY THE HOLDER'S GENDER ON TRAVEL DOCUMENTS, INT'L CIV. AVIATION ORG. 9 (2012), https://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-21/Tag-Mrtd21_IP04.pdf [<https://perma.cc/ZD33-XQJ9>] [hereinafter NEW ZEALAND REPORT].

⁶⁶ *Id.*

⁶⁷ *Id.* at 4.

⁶⁸ *Id.* at 1.

⁶⁹ *Id.* at 2.

⁷⁰ *Id.* at 7 (Border authorities contend that the removal of sex registration on travel documents would hamper their ability to contextualize a passenger's travel and thus determine whether someone may be a person of interest, increasing the need for individual screening.)

⁷¹ NEW ZEALAND REPORT, *supra* note 65, at 2.

prudent in the face of evolving jurisprudence regarding national identity documents that now may result in disparate documentation for domestic and international identification documents.⁷² Several States are now contemplating or pursuing the removal of sex registration from national identification documents.⁷³ Nevertheless, the requirement to specify one's sex on passports in member states of the ICAO presently remains.⁷⁴

II. CONCERNS UNDER THE CURRENT GENDER PARADIGM

Access to accurate identity documents can become an invisible issue because for many it is so taken for granted; identity documents are frequently a vital part of daily life that can enable access to voting, travel, work, and interactions with government institutions and services.⁷⁵ Gender classification specifically can overtly and on its face determine access to restrooms, homeless or domestic violence shelters and services, drug and mental health treatment programs, psychiatric hospitals, and prisons.⁷⁶ Conversely, gender's place as an organizing principle in administrative systems frequently exposes transgender people to police profiling or brutality, false arrest, sexual harassment and assault, beatings and rapes, firings and evictions, denials and rejections in social service and welfare agencies, and avoidance of day-to-day situations in which gendered identification might be necessary to participate.⁷⁷

For transgender people, problems can be classified into the categories of identity documentation, sex-segregated facilities, and access to health care.⁷⁸ Some experts express concerns that “[p]ractices of sex/gender registration (and especially mandatory and binary ones) turn a particular cultural gender regime into a legal one and thereby [legalize] and [legitimize] the inequalities and harmful effects that

⁷² *Id.* at 9.

⁷³ *See* Wareham, *supra*, note 49.

⁷⁴ MACHINE READABLE TRAVEL DOCUMENTS, *supra* note 61, at 14.

⁷⁵ *See* SPADE, *supra* note 1, at 76-77; Andrew Cray & Jack Harrison, *ID Accurately Reflecting One's Gender Identity Is a Human Right*, THE CTR. FOR AM. PROGRESS (Dec. 18, 2012), <https://americanprogress.org/article/id-accurately-reflecting-ones-gender-identity-is-a-human-right/> [<https://perma.cc/4ZUZ-TUAZ>].

⁷⁶ *See* SPADE, *supra* note 1, at 77.

⁷⁷ *Id.* at 15.

⁷⁸ *Id.* at 77.

come with that gender regime.”⁷⁹ Although classifications and the decision to collect data can appear to be neutral and apolitical frameworks, “[t]he terms and categories used in the classification of data gathered by the State do not merely collect information about pre-existing types of things, but rather shape the world into those categories that, ultimately, are taken for granted by most and thus appear ahistorical and apolitical.”⁸⁰ Recall that the ICAO only began to recommend the registry of sex on passports in 1980—barely forty years ago when this Note was written.⁸¹

Nondiscrimination and equality frameworks are not sufficient to rectify the disparate impact of gender registration on transgender people. In the United States, fifteen states and the District of Columbia have laws that recognize gender identity and/or expression as a protected category against discrimination; an estimated 44% of people in the United States live in these jurisdictions.⁸² Fifteen states have hate crime laws that make a crime committed due to the victim’s gender identity or expression a hate crime, as does federal law.⁸³ Even in these jurisdictions, transgender people face continued struggles with police profiling, harassment, and violence.⁸⁴ Further, transgender populations are disproportionately poor due to employment discrimination and difficulty accessing school, medical care, and social services.⁸⁵ This leads to an increased rate of participation in criminalized work for survival, resulting again in a high degree of criminalization.⁸⁶

These community harms have a measurable impact on individual people’s lives. For example, “Bianca” is a nineteen-year-old transgender woman living in one jurisdiction with both antidiscrimination and hate crime laws that protect transgender persons.⁸⁷ She is homeless, unemployed, and trying to escape an abusive relationship; all forms of identification she has list her gender as “male.”⁸⁸ She is too afraid to report her partner to the police for fear of abuse or

⁷⁹ Pieter Cannoot & Mattias Decoster, *The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary Queer, Feminist and Human Rights Analysis*, 1 INT’L J. GENDER, SEXUALITY & L. 26, 28 (2020).

⁸⁰ See SPADE, *supra* note 1, at 76.

⁸¹ See NEW ZEALAND REPORT, *supra* note 65.

⁸² See SPADE, *supra* note 1, at 38.

⁸³ See Hate Crime Acts, 13 U.S.C. § 249(a)(2); see e.g., NEW YORK PENAL CODE § 485.05 (LEXIS through 2022 legislation); see SPADE, *supra* note 1, at 39.

⁸⁴ See SPADE, *supra* note 1, at 39.

⁸⁵ *Id.*

⁸⁶ *Id.* at 46.

⁸⁷ *Id.* at xi.

⁸⁸ *Id.*

retaliation.⁸⁹ Every homeless shelter she has contacted will only place her according to her birth-identified gender, placing her at risk of violence from others at the shelters; women's shelters for domestic violence survivors refuse to recognize her as a woman and will not take her in.⁹⁰ When she applied for welfare, she reported to a job center for work where she was harassed and is now unable to continue.⁹¹ Bianca is not an outlier for the transgender experience within the current gendered paradigm.⁹² To use law reform as a tool, only extraordinary vigilance can evaluate whether reforms will perpetuate or even increase systems' capacity for harm rather than accomplish goals of harm reduction or elimination. Changing what the law says about a given group—particularly in a way that visibilizes⁹³ the group in relation to others—“does not address the ways that legal, policy, and institutional practices create conditions that severely disadvantage certain populations through the mobilization of racism, sexism, ableism, transphobia, xenophobia, and homophobia, but without explicitly and/or individually addressing subjects through those lenses.”⁹⁴

The problems associated with state registration of sex and gender are only exacerbated in an increasingly surveilled and connected world. Even without intentional or overt bias as a cited cause, a discrepancy between two forms of identification (not uncommon when standards for changing gender markers differ between state offices) or a perceived discrepancy between an individual and information contained within identification triggers heightened scrutiny and potentially bars individuals from access to services or spaces.⁹⁵ While the exact number is difficult to estimate, particularly due to reluctance to disclose for fear of violence or retaliation, as many as tens of thousands of transgender voters are at risk of disenfranchisement because of identification discrepancies.⁹⁶ Further, as state surveillance and data sharing between institutions increases, transgender people risk being outed to their employers, losing driver's licenses, facing additional barriers to access for government services or benefits, and generally

⁸⁹ See SPADE, *supra* note 1, at xi.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Here the word “visibilizes” refers to the phenomenon by which an attempt to alleviate harm to a community instead draws attention to the group and potentially invites further harm.

⁹⁴ SPADE, *supra* note 1, at 67.

⁹⁵ Cray & Harrison, *supra* note 75; SPADE, *supra* note 1, at 84-85.

⁹⁶ Cray & Harrison, *supra* note 75.

facing exaggerated difficulty with supposedly simple administrative systems.⁹⁷

III. FALLING SHORT OF INTERNATIONAL HUMAN RIGHTS STANDARDS

Yogyakarta Principles, in their capacity as “soft law,” recognize the unrestricted right of individuals to self-determine gender identity without being unduly burdened by states seeking to limit such determinations based on medical interventions or approvals.⁹⁸ However, there are two ways in which multiple human rights instruments—treaties signed and ratified by states around the world—also recognize that right. These are: (1) the rights to self-determination, unqualified by self-determination as to *what* aspect of identity⁹⁹ and (2) the right to be free from arbitrary interference with private life.¹⁰⁰ Both of these rights, elaborated on below, are connected to personal autonomy—a generally accepted standard of international human rights law.¹⁰¹

The International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) are, along with the nonbinding Universal Declaration on Human Rights (“UDHR”), considered to be the International Bill of Rights.¹⁰² Each of them begins by declaring, “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁰³ These declarations are echoed in the African Charter on Human and Peoples’ Rights, reading similarly that, “[a]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their

⁹⁷ See SPADE, *supra* note 1, at 85.

⁹⁸ INT’L COMM’N OF JURISTS, *supra* note 6, at 4. Soft law refers to legally recognizable principles such as policy declarations by oversight bodies or codes of conduct that are not directly enforceable. This is in contrast to hard laws such as treaties or international agreements.

⁹⁹ ICCPR, *supra* note 11; ICESCR, *supra* note 11; African Charter on Human and Peoples’ Rights art. 20, Oct. 21, 1986, 1520 U.N.T.S. 217.

¹⁰⁰ ICCPR, *supra* note 11, at art. 17; Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, ¶ 1, Aug. 11, 1955, 213 U.N.T.S. 221; American Convention on Human Rights art. 11, Nov. 22, 1969, 1144 U.N.T.S. 123.

¹⁰¹ See Cannoot & Decoster, *supra* note 79, at 32.

¹⁰² *International Bill of Human Rights*, UNITED NATIONS OFF. OF THE HIGH COMMISSIONER (Jan. 18, 2023, 12:17 AM), <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights> [https://perma.cc/LUA5-6QWL].

¹⁰³ ICCPR, *supra* note 11; ICESCR, *supra* note 11; G.A. Res. 217 (III) A, *supra* note 11.

economic and social development according to the policy they have freely chosen.”¹⁰⁴

The right to private life, and to be free from the state’s arbitrary interference with it, is similarly protected. The ICCPR states that, “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation” and “[e]veryone has the right to the protection of the law against such interference or attacks.”¹⁰⁵ The European Convention on Human Rights and the American Convention on Human Rights each offer similar protections.¹⁰⁶ The European Court of Human Rights (“ECHR”) is the monitoring body that has presided over the largest number of international human rights cases as related to the legal recognition of gender identity.¹⁰⁷ In that capacity, the ECHR has declared that “rights to gender identity and to personal development are a fundamental aspect of the right to respect for private life.”¹⁰⁸ However, the Court’s recognitions are limited; compulsory sterility is a violation of Article 8 of the European Convention on Human Rights,¹⁰⁹ but not all medical requirements are, and states may determine what medical requirements must be met to achieve gender recognition.¹¹⁰ The recognition itself has been enshrined in several cases in which the Court held that a state may not determine whether to recognize a self-determined gender identity at all, but a state can identify appropriate means of legalizing said recognition.¹¹¹

¹⁰⁴ 1520 U.N.T.S. 217, at art. 20 ¶¶ 1-2.

¹⁰⁵ ICCPR, *supra* note 11.

¹⁰⁶ 213 U.N.T.S. 221; Organization of American States, American Convention on Human Rights art. 11, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

¹⁰⁷ *See* Cannoot & Decoster, *supra* note 79, at 34.

¹⁰⁸ *Id.* at 33.

¹⁰⁹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Sept. 3 1953, C.E.T.S. No. 005. Article 8 affirms the right to respect for private and family life free from the interference of a public authority, with some few exceptions.

¹¹⁰ *Id.* at 34.

¹¹¹ *Goodwin v. United Kingdom*, 38 Eur. Ct. H.R. (2002); *Y.Y. v. Turkey*, App. No. 14793/08 (Mar. 10, 2015), <https://hudoc.echr.coe.int/eng?i=001-153134> [<https://perma.cc/3GFE-36P5>]; *Garçon v. France*, App. No. 79885/12, ¶ 74 (Apr. 6, 2017), <https://hudoc.echr.coe.int/eng?i=001-172913> [<https://perma.cc/TK57-6KSS>]; *X v. Former Yugoslav Republic of Macedonia*, App. No.29683/16 (Jan. 17, 2019), <https://hudoc.echr.coe.int/eng?i=001-195233> [<https://perma.cc/X6CK-NGJB>]; *Y.T. v. Bulgaria*, App. No. 41701/16 (July 9, 2020), <https://hudoc.echr.coe.int/eng?i=001-203493> [<https://perma.cc/V2YL-ZAJ8>].

Additionally, the means of legalization devised by a state must be based on quick, transparent, and accessible procedures.¹¹²

The Inter-American Court of Human Rights issued an advisory opinion at the request of Costa Rica indicating that all individuals have (1) the right to have identification documents amended to suit their gender identity on the basis of self-determination, (2) the right to private life, and (3) the right to freedom of expression, calling this a recognition of dignity that is “an essential characteristic of the individual.”¹¹³ The Court connected the validation of gender identity to numerous other protected rights, and it advised that gender identity is:

[I]ntegral and a determining component of the personal identity of the individual; consequently, its recognition by the State is critical to ensuring that transgender persons can fully enjoy *all* human rights, including protection from violence, torture, ill-treatment, the right to health, education, employment, housing, access to social security, and freedom of expression and association.¹¹⁴

The refusal to validate gender identity as self-determined in legally endorsed documentation implicates all of these rights, and as such a failure to adhere to the right to self-determination on the basis of gender identity is also a failure to honor other promises made in international human rights treaties.

International human rights authorities worldwide have recognized the rights to self-determination and equality/non-discrimination based on gender identity in treaties signed by hundreds of countries.¹¹⁵ However, when States attempt to define and arbitrate categories within which individuals can self-identify, there is a persistent lack of both consistency and suitable flexibility with those categories. Attempts to survey gender identity have resulted in as many as 13.4% of respondents responding that their gender identity is not listed among options such as male/man, female/woman, or a neutral option—one such survey recorded over fifty response categories, a number that

¹¹² *Id.*

¹¹³ State Obligations Concerning Change of Name, Gender Identity, and Rights Derived From A Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in Relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. 42 (ser. A) No. 24, ¶ 85 (Nov. 24, 2017).

¹¹⁴ *Id.* ¶ 98 (emphasis added).

¹¹⁵ *See supra* note 13.

governments are understandably reluctant to match.¹¹⁶ Consequently, states' approaches to gender identity and documentation appear to be nearly as varied. The Russian Federation openly disparages the notion of gender identity as a recognized protected class.¹¹⁷ In contrast, the Brazilian Supreme Federal Court boasts the first supreme court case to equalize the rights granted by same-sex civil unions and heterosexual counterparts with its early recognition of the Yogyakarta Principles.¹¹⁸ In the past ten years, countries including Argentina, Belgium, Chile, Denmark, Iceland, Ireland, Luxembourg, Malta, Norway, Portugal, and Uruguay have adopted progressive policies of legal gender recognition based on self-determination.¹¹⁹

Some claim that this progress indicates a trend, but that remains unclear.¹²⁰ France continues to take the position that mandatory binary gender registration is proportionate to the aim pursued of the social and legal organization of society and thus constitutes a lawful interference with private life.¹²¹ The United Kingdom ("U.K.") presently takes a similar position and goes further by emphasizing the small number of countries that provide neutral gender marker options on passports or other identity documents—to say nothing of the (lack of) prevalence of the removal of gender markers entirely.¹²² In cases such as these, the very failure to adhere to international human rights standards becomes self-perpetuating, with judges using the fact that a right is widely disrespected to validate the continued repression of nonbinary identities. The U.K. remains a striking example of this: branches of the government, including Her Majesty's Passport Office and the Government Equalities Office conducted reviews of gender marking in passports in 2014, 2016, 2017, 2018, 2019 and 2021, admitted that two groups (those transitioning between genders and those who do not

¹¹⁶ Jaime M. Grant, Lisa Mottet, Justin Edward Tanis, Jack Harrison, Jody Herman & Mara Keisling, *National Transgender Discrimination Survey, [United States], 2008-2009*, INTER-UNIV. CONSORTIUM FOR POL. & SOC. RSCH. [DISTRIB.] (Nov. 19, 2020), <https://www.icpsr.umich.edu/web/RCMD/studies/37888#> [<https://perma.cc/N52U-KC6K>].

¹¹⁷ U.N. GAOR, *supra* note 59.

¹¹⁸ *Human Rights and Gender Identity*, COMM'R FOR HUM. RTS. 6, 18 (July 29, 2009), <https://rm.coe.int/16806da753> [<https://perma.cc/YK6N-DFJW>]; S.T.F.J. Arguição De Descumprimento De Preceito Fundamental 132, Relator: Min. Ayres Britto, 05.05.2011, Diário da Justiça Eletrônico [D.J.e], 05/05/2011 (Braz.).

¹¹⁹ See Cannoot & Decoster, *supra* note 79, at 35.

¹²⁰ *Id.*

¹²¹ *Id.* at 36-37.

¹²² See *R (on the application of Elan-Cane) v. Sec'y of State for the Home Dep't* [2021] UKSC 56, ¶ 16-17 (appeal taken from Eng.).

identify with a gender) were likely to be negatively affected by current policy.¹²³ Even so, the U.K. government repeatedly expressed concern that it would be counterproductive to recognize a third gender in passports in isolation from other parts of government.¹²⁴ In contemplating this issue, the U.K. Supreme Court concluded that there is no positive requirement that the government recognize nonbinary options on passports, and it may consider a holistic policy regarding gender markers in official documents generally informed by the policies of other government departments and other countries.¹²⁵

This is an example of how the current direct failure to meet human rights obligations has become gridlocked. Countries (and indeed the ICAO itself) that reference the lack of coordination between internal departments and between nations as a reason for the continued lack of change do not hold themselves responsible for contributing to necessary systematic changes and repeat the view that while they will not expand their gender options or cease to register gender on identity documents, they may need to at some nebulous point in the future. This cyclical argument, in what capacity it can stand, rests upon the assumption that the proportionality of blanket registration accomplishes appropriate, legitimate aims compared to committed harms—an assumption that does not remain unquestioned.¹²⁶ The administration of classification systems—particularly decisions about what data elements to collect and the manner of their classification—is commonly thought to be neutral and apolitical at the same time as it has a profound effect on the world.¹²⁷ Data continues to be collected out of habit and familiarity while providing little value to the purpose for which it is originally collected, while characteristics used as such data create “vectors of vulnerability and security.”¹²⁸ Terminology and categories used to classify data—classify people, in the case of government use—“do not merely collect information about pre-existing types of things, but rather shape the world into those categories that, ultimately, are taken for granted by most and thus appear ahistorical and apolitical.”¹²⁹ By this argument, the current scattered and inconsistent state of gender registration by governments and intergovernmental bodies

¹²³ *Id.* ¶¶ 12-15.

¹²⁴ *Id.* ¶ 14.

¹²⁵ *Id.*

¹²⁶ See SPADE, *supra* note 1, at 74; Cannoot & Decoster, *supra* note 79, at 41.

¹²⁷ See SPADE, *supra* note 1, at 76; MITCHELL DEAN, GOVERNMENTALITY: POWER AND RULE IN MODERN SOCIETY 50 (2d ed. 2020).

¹²⁸ See SPADE, *supra* note 1, at 74.

¹²⁹ *Id.* at 76.

worldwide is not a *result* of continued uncertainty regarding how to treat transgender, nonbinary, and intersex individuals; it is the cause.

IV. HOW STATED BENEFITS OF GENDER REGISTRATION FALL SHORT

Currently, states that continue to require the registration of gender—whether restricted to male and female or including additional options—provide similar justifications for why it is necessary. These include security, efficiency, identification, and cost.¹³⁰ The ICAO continues to require gender as a category on international passports for the same reasons.¹³¹ The ICAO recognizes not only the benefits for the transgender community of the potential removal of gender registration on passports but also the weaknesses in the reasons why gender continues to be registered.¹³² In 2012, the ICAO declined to either make the inclusion of gender as a category on international passports optional or require countries to remove the category, but it indicated that it is possible, even likely, that the benefits of doing so would outweigh the risks.¹³³

The first, and most significant, justification cited for maintaining the registration of gender on travel documents is that the removal of the category would serve as a security risk and weaken the ability of border authorities to identify passengers.¹³⁴ There could be an increased risk of fraudulent documents if holders do not need to claim a gender matching the gender listed on the document to use it; however, the ICAO downplays the risk of this occurrence.¹³⁵ Currently, common methods for forgery include replacing an entire biodata page, gender included, to match the document holder, and professional forgers are already likely to possess a travel document with the desired gender included on it.¹³⁶ Removal of gender classification on travel documents would not impact this state of affairs.¹³⁷

States also claim that the removal of gender registration would limit the ability of border authorities to identify passengers; however, gender is already a poor method to identify passengers. Modern databases do not require gender as a reference to significantly narrow

¹³⁰ NEW ZEALAND REPORT, *supra* note 65.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 2-3.

¹³⁴ *Id.*

¹³⁵ *Id.* at 7.

¹³⁶ NEW ZEALAND REPORT, *supra* note 65, at 7.

¹³⁷ *Id.*

down search results, which are now based on full names rather than surnames and initials as they have been previously.¹³⁸ Facial recognition technology, e-travel technology, and optional biometrics such as fingerprints or iris biometrics are increasingly being incorporated into identification documents, including travel documents.¹³⁹ Each of these is a more successful method of identifying a passenger than gender, and comparatively the lack of gender as a category to identify a person is minuscule.¹⁴⁰ Additionally, the gender classification on documents sometimes serves to *confuse* rather than clarify the holder's gender; travel documents sometimes display a gender that does not appear to match the holder.¹⁴¹ In many countries, document holders can change the gender that appears on travel documents; the process for this, as explored above, is not consistent and sometimes varies wildly between countries.¹⁴² Further, the risk of inconsistencies in this manner increases as countries like Australia and New Zealand begin to use 'X' gender markers on their passports.¹⁴³ The ICAO defines the 'X' gender category as unspecified, so countries set their standards for who is eligible to use an 'X' marker, and those standards are not consistent internationally.¹⁴⁴ Gender is not an accurate methodology to identify a person, and the removal of it from travel documents would not significantly harm border authorities' ability to identify passengers.

Perhaps most significantly, countries such as the U.K. as well as the ICAO have expressed concerns about the cost of removing gender classification from identity documents. This cost is real and includes both an initial and an ongoing investment.¹⁴⁵ While it may be relatively straightforward for issuing agencies to change internal policies regarding the issuance of documents, the same cannot be said of border authorities who must be capable of handling the travel documents of numerous countries.¹⁴⁶ Systems must be able to handle documents both with and without a gender field and cannot simply switch to software that no longer recognizes such a field; documents without a gender field cannot be treated as an error.¹⁴⁷ The software would need to be

¹³⁸ *Id.* at 6-7.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 9.

¹⁴¹ *Id.*

¹⁴² NEW ZEALAND REPORT, *supra* note 65, at 9.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 2.

¹⁴⁶ *Id.* at 8.

¹⁴⁷ *Id.*

modified whenever a country removed the gender field from its travel documents.¹⁴⁸ Systems would need to bear this dual burden over some time. If the ICAO were to make it mandatory to remove gender from travel documents, that period would be ten years; if displaying a gender field on travel documents became optional, this period would last indefinitely.¹⁴⁹ However, regardless of such a cost, the usage of gender on identity documents is a transgression against the rights of transgender individuals to self-identify and be free from undue interference in their private lives. It is not permissible for States to erode the rights of individuals because it is expensive to do otherwise.

Some of the periphery concerns regarding the removal of gender from passports do not concern travel at all. One result of the removal could be that there may be less statistical information available for other agencies, as passport information is used for making population estimates to determine health and education needs; developing economic strategies; and estimating projected fertility, crime, and electoral enrollment rates.¹⁵⁰ In order to continue to receive this information, agencies may require passengers to confirm their gender in other ways. For example, airlines may collect gender details from their passengers to avoid the possibility of being held liable for not being able to provide that information for agencies when required.¹⁵¹ This concern is best addressed by the answer that underscores the entire process: broad and unqualified agreement internationally with a large number of countries using de-gendered travel documents is crucial to eliminate domestic agency burdens alongside international requirements.¹⁵² Comprehensive international acceptance of de-gendered travel documents would prevent passengers from the need to provide unnecessary information for their travel and would greatly diminish any burdens associated with updating the practice of creating identity documents to meet the requirements of international human rights law.¹⁵³

V. IMPLICATIONS RAISED BY REGISTRATION CHANGES

The practice of registration of gender on identification documents—and discussion on whether to continue it—raises implications

¹⁴⁸ NEW ZEALAND REPORT, *supra* note 65, at 8.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 9.

¹⁵³ *Id.*

beyond the burdens it places on the transgender and gender-diverse community and the state justifications for its adoption. It would be irresponsible to present arguments for ending this practice without acknowledging that further research and the mitigation of other potential risks will be a necessary part of the process of changing this kind of practice. This Note primarily considers the use of passports (and other identity documents) for everyday purposes such as travel, but passports also have evidentiary uses for refugees and asylum seekers. Additionally, the states' responses to changes in the information collected may raise concerns regarding the respect for and protection of privacy rights.

The 1951 Convention Relating to the Status of Refugees and subsequent U.N. documents define a refugee as someone who:

[O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁵⁴

Notably, gender (or sex, as it appears more frequently in international treaties) is not a protected class regarding refugee status.¹⁵⁵ However, the United Nations High Commissioner for Refugees ("UNHCR") has provided guidance for those claiming refugee status on the basis of sexual orientation or gender identity, and for women and girls, as members of a "particular social group" in need of special recognition and protection.¹⁵⁶ The process of applying for refugee status is determined by each State, as recognized by the UNHCR; decisions of the executive, parliament, or administrative authorities may all govern refugee status determinations depending on established legal authority within the State itself.¹⁵⁷ Therefore, it is difficult to

¹⁵⁴ Convention and Protocol Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

¹⁵⁵ *Id.*

¹⁵⁶ UNHCR Asylum Law. Project, UNHCR's Views on Gender Based Asylum Claims and Defining "Particular Social Group" to Encompass Gender (Nov. 2016), <https://www.unhcr.org/en-us/5822266c4.pdf> [<https://perma.cc/PUP7-37VK>]; ARI SHAW, WINSTON LUHUR, INGRID EAGLY & KERITH J. CONRON, LGBT ASYLUM CLAIMS IN THE UNITED STATES (UCLA School of Law eds., 2021).

¹⁵⁷ U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under*

determine what barriers may be created for refugees within these social groups by removing the registration of gender from international documents, which may be used as evidence in refugee status declarations.¹⁵⁸ However, it is necessary before committing to a change in this process to consider whether it may establish or heighten those barriers—or even eliminate them. The possession of identification documents that record a gender that does not match the applicant’s self-determined gender identity may be considered evidence either of the applicant’s transgender status, or that the applicant is not a member of a particular social group eligible for refugee status, depending on how the State assesses the credibility of the applicant and other submitted evidence.¹⁵⁹ Though the UNHCR recognizes that transitioning is an extended process involving personal, legal, and medical adjustment and that transgender people face the most risk when self-identification and physical appearance are disparate from legally registered sex,¹⁶⁰ individual states have an incredible amount of discretion regarding immigration procedures and their methods and degree of success in implementation of international standards may vary.¹⁶¹ In addition to the evaluation of the harms, risks, and justifications for the registration of gender on passports as a travel document, the decision of whether or not to continue to do so must be considered and evaluated from the perspective of other critical uses of identity documentation.

In addition, it is also imperative to contemplate the likely changes in behavior from States who currently claim to use that collected information for means of security; said behavior may legitimize infringements upon the right to privacy which is currently tenuously held in the emergence of the digital age. Numerous international and regional human rights instruments recognize a right to privacy, including foundational documents like the UDHR and ICCPR.¹⁶² Article 12

the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/1P/4/ENG/REV. 4 (Feb. 2019).

¹⁵⁸ U.N. High Commissioner for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012).

¹⁵⁹ U.N. High Commissioner for Refugees, *supra* note 158; *RRT Case No. 0903346* (2010) RRTA 41 (Austl. Refugee Review Tribunal).

¹⁶⁰ See U.N. High Commissioner for Refugees, *supra* note 158, at 4.

¹⁶¹ U.N. High Commissioner for Refugees, *supra* note 158.

¹⁶² G.A. Res. 217 (III) A, *supra* note 11, at art. 12, ¶¶ 1-2; ICCPR, *supra* note 11, at art. 17; G.A. Res. 44/25, Convention on the Rights of the Child art. 16 (Nov. 20,

of the UDHR reads, “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation” and “[e]veryone has the right to the protection of the law against such interference or attacks.”¹⁶³ Article 17 of the ICCPR echoes the words almost exactly, stating that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”¹⁶⁴

Though the right to privacy is well-established as an international legal principle, the interpretation of such a principle has been thoroughly debated since the time of its inception—and recently, questions of interpretation and effective implementation of such a right have arisen because of the emergence of new technologies that enable governments to surveil their citizens and the citizens of other states with relative ease.¹⁶⁵ More than seventy-five countries globally use artificial intelligence technologies in state surveillance, including facial recognition systems.¹⁶⁶ The United Nations and other intergovernmental bodies have recognized the implications that digital technologies have on privacy and on other human rights, with the mandate for the first United Nations Special Rapporteur on the right to privacy being issued in 2015.¹⁶⁷ The UN Office of the High Commissioner for Human Rights established a special web page collecting its work and information regarding the Office and privacy in the digital age,¹⁶⁸ and,

1989); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5.

¹⁶³ G.A. Res. 217 (III) A, *supra* note 11, at art. 12 ¶¶ 1-2.

¹⁶⁴ ICCPR, *supra* note 11, at art. 17 (internal list item notation omitted).

¹⁶⁵ Daragh Murray, Pete Fussey, Lorna McGregor & Maurice Sunkin QC, *Effective Oversight of Large-Scale Surveillance Activities: A Human Rights Perspective*, 11 J. NAT'L SEC. L. & POL'Y 743, 743-44 (2021); Rohan Talbot, *Automating Occupation: International Humanitarian and Human Rights Law Implications of the Deployment of Facial Recognition Technologies in the Occupied Palestinian Territory*, 102 INT'L REV. OF THE RED CROSS 823 (2020); Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, 56 HAV. INT'L L.J. 81, 86 (2015); Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT'L L. 291, 293 (2015).

¹⁶⁶ STEVEN FELDSTEIN, THE GLOBAL EXPANSION OF AI SURVEILLANCE 1 (2019) (working paper).

¹⁶⁷ G.A. Res. 28/16 at ¶ 3 (Apr. 1, 2015).

¹⁶⁸ U.N. Office of the High Comm'r for Hum. Rts., OHCHR and Privacy in the Digital Age (Feb. 27, 2022), <https://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx> [<https://perma.cc/3SVX-ZQ9R>].

most recently, a report published at the end of 2021 focusing on the impacts of the growing use of artificial intelligence.¹⁶⁹ Concerns have been raised that existing oversight mechanisms for large-scale government surveillance are inadequate.¹⁷⁰ Also, there is a question as to whether and in what manner oversight mechanisms can be established in order to meet requirements imposed by international human rights law.¹⁷¹ Facial recognition technology in particular—that which this Note recognizes could alleviate the need for additional identifying markers on individual identity documents—has been tied to discrimination on the basis of race, ethnicity, and national identity, not eliminating human biases but automating and entrenching them in facially neutral processes.¹⁷² Cases of abuse of facial recognition and other emerging digital technologies may occur in situations that range from the everyday to military occupation—such as in Israel-occupied Palestine, where 450,000 Palestinians have their facial data stored in databases by Israel to move between checkpoints.¹⁷³ Given the enormity in scale and legal uncertainty thus far surrounding the surveillance technologies that contribute to the mitigation of the need for gender markers on identity documents for security, these technologies cannot currently be endorsed as unilateral solutions.

VI. CONCLUSION

States do not have the ability to opt-out of international human rights standards simply because the obligations may be expensive or inconvenient. While some kinds of rights may be progressively rather than immediately realized, the progressive realization of rights requires consistent and active efforts toward improvement. As has been discussed, the inclusion of gender registration on international identification documents places a disproportionate burden on transgender and gender-diverse persons that is not justified by the rationales of states and the ICAO. Costs and risks associated with making the change to genderless identification documents can be mitigated with

¹⁶⁹ U.N. High Commissioner for Human Rights, *The Right to Privacy in the Digital Age*, U.N. Doc. A/HRC/48/31 (Sept. 13, 2021).

¹⁷⁰ See, e.g., Murray, Fussey, McGregor & Sunkin QC, *supra* note 165, at 749.

¹⁷¹ *Id.* at 745.

¹⁷² Rohan Talbot, *Automating Occupation: International Humanitarian and Human Rights Law Implications of the Deployment of Facial Recognition Technologies in the Occupied Palestinian Territory*, 102 INT'L REV. OF THE RED CROSS 823, 827 (2020).

¹⁷³ *Id.* at 829.

conscientious and appropriate planning for its implementation. At the same time, transgender and gender-diverse persons and the states that attempt to categorize them are not the only ones who stand to be affected by such a change. It is possible that changing the practice of state documentation of gender will have even broader unforeseen implications if the change is made on both a state and international level. The use of gender on identity documents needs to be reevaluated from a holistic human rights perspective that considers both domestic and international legal and policy needs, as well as how those needs can be met without inflicting harm on some of the most vulnerable members of the community. our communities. Current practices fail to meet—and actively work against—the standards set by international human rights law. Whatever form future changes take, current practices cannot continue as they are.