INTERNATIONAL LEGAL PROTECTION FOR HOMOSEXUAL SEXUAL CONDUCT*

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INTRODUCTION

Sexuality is fundamental to the lives and relationships of all people, gay and non-gay, married and unmarried. In both gay and non-gay couples, sex functions as a complex bond between the partners, an opportunity to express and satisfy many human needs, desires, and even aspects of one's identity in this world. Many have extolled "the majesty of true sexuality... its earthiness, its mystical and exalted power of momentary union between two humans; its capability of ameliorating the natural aloneness of the human condition, and its ability to replenish the human soul."[1]

Throughout history, homosexuals[2] have been the object of much discrimination as well as much controversy. The discrimination

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[1] Amicus Curiae Brief, The Lambda Legal Defense and Education Fund, filed before the Louisiana Supreme Court in Louisiana v. Baxley, 633 So. 2d 142 (La 1994), reprinted in E. Wolfson & R. S. Mower, *When the Police are In Our Bedrooms, Shouldn't the Courts Go In After Them? An Update on the Fight Against Sodomy Laws*, 21 FORDHAM URB. L. J. 997, 1028-1029 (1994).

[2] Defining the "homosexual" is a thesis in itself. For purposes of this paper, homosexuals will be defined as individuals of age sexually attracted to members of their own sex. For an interesting discussion on the various definitions of homosexuality and the components of gender identity, see J. D. Weinrich, *Sexual Landscapes: Why We Are What We Are, Why We Love Whom We Love*, in LEONARD, note 24 *infra*. To the extent that bisexuals, transsexuals, and other persons of varied sexual orientation or identification engaging in particular sexual practices (regardless of self-identification) may fall within the scope of discriminatory laws

experienced by gay men and women[3] has not been limited to the usual concept of disparate treatment that the term "discrimination" brings to mind; homosexuals have in fact been treated unfairly to the extent of persecution and execution.[4] Discrimination is faced not only by homosexuals located in the underdeveloped and developing countries of the world,[5] but even in the first world.[6]

While significant progress has been made in the development and application of legal concepts designed to secure protection for gays and lesbians, as well as in the gradual change of laws and legal structures necessary to incorporate and institutionalize these concepts,[7]

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intended for homosexual sexual activity, then the framework of analysis offered here is made applicable.

[3] An author has suggested that analytical treatment in a parallel manner of the discrimination experienced by lesbian women with that of gay men may be defective. J. D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMPARATIVE L. REV. 1, 4 (1994). To the extent that this paper, and the viewpoint it offers, may be similarly subject to this constraint, the author acknowledges the possibility that the suggested constraint may indeed be applicable.

[4] To illustrate, reports have been made of the torture and execution of gays and lesbians in Iran. Vahme-Sabz, *Iran*, in INTERNATIONAL GAY AND LESBIAN RIGHTS COMMISSION, UNSPOKEN RULES, SEXUAL ORIENTATION AND HUMAN RIGHTS 92-93 (Rachel Rosenbloom ed., 1995) [hereinafter UNSPOKEN RULES].

[5] For example, Argentinean police authorities make use of "Police Edicts" to arrest and hold for 30 days, at their complete discretion and without need for resort to judicial authorities, "those who disturb with flirtatious remarks" (Article 2 Paragraph B of Edicto de Escandalo), or "persons wearing or disguised with clothes of the opposite gender" (Paragraph F). These edicts provide a convenient excuse for them to target homosexuals and transsexuals. INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION, ACTION ALERT August, 1995, p.2.

[6] The United States of America, commonly perceived as a vanguard of individual rights, has its own more than proportionate share of discriminatory practices. President William Clinton recently acknowledged that it is legal in 41 states to dismiss a person from his/her employment based on his/her sexual orientation. *Clinton Supports a Bill to Offer Job Protection for Homosexuals*, N. Y. Times, October 20, 1995, at A1.

[7] In Russia, the law against consensual gay male sex was repealed in 1993. M. Gessen, *Russia*, UNSPOKEN RULES, *supra* at 174.

In November 1994, the Israeli Supreme Court ruled that a flight attendant's same-sex partner was entitled to the benefits available to heterosexual partners of other attendants. The Israeli Ministry of the Interior has likewise approved the

formidable barriers are still faced by homosexuals the world over in the fight for acceptance, equality, and legal protection.

SCOPE

This paper will seek to discover the existence of international human rights norms that may provide protection for homosexuals. "(I)nternational human rights norms place the struggle for gay and lesbian rights in its proper context as a struggle for human rights."[8] For this purpose, a survey of the different international normative regimes will be undertaken, and several possible bases for which protection has been asserted will be explored.[9]

Since the life of a homosexual may be impinged upon by the law in various ways and concerning different aspects, such as not only the homosexual's right to exist and his right to engage in sexual conduct, but also in terms of his property, family, employment, association, and other relations, the examination of all these might lead to a study of unmanageable magnitude. Thus, the scope of this paper will be confined to an examination of the laws relating to homosexual conduct,[10] as opposed to homosexual status,[11] and the ability of

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usage of the same last name by same-sex couples. H. Shalom, *Israel*, in UNSPOKEN RULES, *supra* at 96.

The Interim Constitution of the Republic of South Africa expressly prohibits discrimination on the basis of sexual orientation in its Charter of Fundamental Rights. K. Koen and P. Terry, *South Africa*, UNSPOKEN RULES, *supra* at 187.

[8] M. E. Wojcik, *Using International Human Rights Law to Advance Queer Rights: A Case Study for the American Declaration of the Rights and Duties of Man*, 55 OHIO ST. L. J. 649 (1994).

[9] The research materials for this work has been heavily indebted to American literature. To the extent that this may reflect bias in favor of contemporary Western legal and analytical principles, the author acknowledges the possibility.

[10] Referring to actual sexual gratification achieved through various means, anal, oral, or otherwise, with a partner of the same sex.

[11] Status refers to the perception by the general public that a person is "homosexual". This approach of championing conduct is the opposite of that taken by advocates in the United States. In 1986, the United States Supreme Court rendered a decision in the case entitled Bowers v. Hardwick (478 U.S. 186) which held that a homosexual had no federal constitutional right of privacy entitling him/her to engage in sodomy (defined in that case by the Georgia legislature to mean "any sexual act involving the sex organs of one person and the mouth or anus

homosexuals to assert that the existence and/or application of these laws constitute breaches of international norms binding on international actors.

In the same vein, while no law prohibiting same-sex sexual behavior may exist in a state, inequity may be present in consent requirements that mandate higher ages for consensual sexual behavior for homosexuals than for heterosexuals.[12] For reasons of manageability, this issue is likewise beyond the scope of this paper.

THE LAW, SEX, AND THE HOMOSEXUAL

The Global Reach of Hate

In diverse geographical areas, and regardless of economic, intellectual, or political advancement, countries throughout the world have prohibited and penalized sexual relations between members of the same sex. The United States,[13] countries following the Moslem faith,[14]

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of another"). This decision allowed state criminalization of homosexual sodomy, which made homosexual conduct difficult to defend from both a strategic as well as a logical perspective. The result was a consequent shift by gay and lesbian activists in seeking legal protection not for homosexual conduct, but for homosexual status. (Prof. Paula Ettlebrick, Lambda Legal Defense and Education Fund, November 27, 1995).

[12] For example, in Austria, the age of consent for heterosexuals and lesbians is 14, whereas that for gay males is 19, B. Frohlich, *Austria*, UNSPOKEN RULES, *supra* at 10. In Hong Kong, the age of consent for heterosexuals is 18 whereas that for homosexuals is 21, A. Mak, *Hong Kong*, UNSPOKEN RULES, *supra* at 680. In Serbia, the age prescribed is 14 for homosexuals and 18 for heterosexuals, J. Todosijevic, *Serbia*, UNSPOKEN RULES, *supra* at 178.

[13] Twenty-four states and the District of Columbia prohibit sodomy in varying ways. HARVARD LAW REVIEW ASSOCIATION, *see* note 19, *infra* at 9.

[14] *See* J. D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L. & COMP. L. REV. 28 (1994) for a sampling of Islamic countries penalizing homosexual sexual conduct through strict interpretation of the Shari'a law. One noted example is Iran, which prescribes the death penalty for sodomy and varying numbers of lashes for other forms of sexual conduct between lesbians and gay men. *See* also Vahme-Sabz, *Iran*, in UNSPOKEN RULES, *supra* at 90-91.

India,[15] Nicaragua,[16] Romania,[17] Zimbabwe[18] — all proscribe in one way or another same-sex sexual behavior.

The Impact of Sodomy Laws

Laws relating to homosexual conduct have a major impact on homosexuals. These laws, frequently in the form of penal statutes prohibiting consensual sodomy,[19] inhibit not only actual sexual behavior but also a wide variety of other conduct entirely unrelated to sex. Where homosexual acts are prohibited, few would dare court attention by publicly proclaiming themselves as homosexuals. Thus, other conduct such as speech, expression, and association are impeded.[20]

These are harms which are incalculable. For one, having prohibited sex between homosexuals, these penal laws deny the individual homosexual a basic component of his being.

> (S)exual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare, and

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[15] Section 377 of the Indian Penal Code prohibits "carnal intercourse against the order of nature with any man, woman, or animal" and imposes the penalty of "imprisonment for life or imprisonment of either description for a term which may extend for 10 years and shall be liable to fine". Reproduced in Cath, *India*, UNSPOKEN RULES, *supra* at 80.

[16] Article 204 of Nicaraguan Law No. 150, (Law of Penal Code Reforms) punishes with one to three years of imprisonment "anyone who induces ... or practices in scandalous form sexual intercourse between persons of the same sex," M. B. Gonzalez, *Nicaragua*, UNSPOKEN RULES, *supra* at 133.

[17] Article 200 of the Penal Code of Romania imposes imprisonment of one to five years for "same sex relations", I. Baciu, et. al , *Romania*, UNSPOKEN RULES, *supra* at 162.

[18] *See* B. Clark, *Zimbabwe*, UNSPOKEN RULES, *supra* at 237.

[19] Sodomy may be defined in various ways. For example, sodomy statutes in the United States vary as to the specific acts prohibited and the persons to whom they are applicable to. The usual edicts prohibit oral-genital or anal-genital gratification. Other state statutes have left to their respective judiciary bodies the task of defining vague phrases prohibiting "unnatural or lascivious acts" or "crimes against nature". While most are applicable to both heterosexuals and homosexuals, there are states which prohibit only homosexual sodomy. THE HARVARD LAW REVIEW ASSOCIATION, SEXUAL ORIENTATION AND THE LAW, 10, (1990).

[20] *See* RUBENSTEIN, note 149 *infra*.

> the development of human personality. *(citation omitted)* The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a (world) as diverse as ours, that there may be many right ways of conducting those relationships, and that much of the richness of a relationship may come from the freedoms an individual has to choose the form and nature of these intensely personal bonds.[21] *(author's revision in parenthesis)*

Other more insidious effects have been and are being produced as a result of these laws. Sodomy laws create not only stigma,[22] but are "invoked to justify a wide range of human rights violations against gays and lesbians, including violations of freedom of speech (advocating a criminal activity), non-discrimination and equal protection (society has an interest in discouraging criminal activity), [and] freedom of association (society is justified in limiting association of individuals engaged in criminal or immoral activity)."[23]

A marked example of the effects of these prohibitory laws is the United States case of *Shahar v. Bowers*.[24] Sodomy laws played a major role in determining the [lack of] employment of Ms. Shahar.

In this case, Ms. Shahar's offer of employment from the Office of the State Attorney General of Georgia was withdrawn when the Attorney General learned of Ms. Shahar's intention to marry. Having previously and successfully defended the State of Georgia's sodomy law

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[21] Bowers v. Hardwick, 478 U.S. 205 (1986) (Blackmun, J., dissenting).

[22] R. D. MOHR, GAYS/JUSTICE, A STUDY OF ETHICS, SOCIETY AND LAW, 107-109 (1988).

> (A)n admission of (sodomy) law breaking...casts one into a class that is stigmatized quite independently of legal sanctions. Legal sanctions...are not the origin of stigma against gays, but they help maintain and enhance that stigma.... Indeed where no attempt is made to enforce sodomy laws, the dubious "educational function of stigmatizing gays as a class seems to be their main purpose."

[23] J. D. Wilets, *Pressure from Abroad, U.N. Human Rights Ruling Strengthens Hope for U.S. Gays and Lesbians*, 21 FALL HUM. RTS. 22 (1994). *See* also HARVARD LAW REVIEW ASSOCIATION, note 19 *supra* at 11.

[24] Shahar v. Bowers, 836 F. Supp 859, 861-62 (N.D. Ga. 1993) in A. S. LEONARD, SEXUALITY AND THE LAW, NEW YORK LAW SCHOOL TEXT, CASES AND MATERIALS, 603 (Fall 1995).

in the United States Supreme Court which led to the shocking anti-gay decision in *Bowers v. Hardwick,*[25] defendant State Attorney General Michael Bowers claimed that to allow Ms. Shahar's employment in the Attorney General's Office, when she was an openly practicing lesbian soon to be "married" to another woman, would be to appear inconsistent before the Georgia constituency he was beholden to.

Attorney General Bowers emphatically denied that he was acting on the basis of Ms. Shahar's sexual orientation, leaving the implication that it was Ms. Shahar's presumed and unproven violation of the sodomy statute, inferred from the existence of her lesbian relationship, that was objectionable. Ms. Shahar's claim for redress of this patently discriminatory treatment was dismissed by the Georgia district court based in large measure on this ground. [26]

Sodomy laws have also impeded public health efforts in the quest to defeat the Human Immunodeficiency Virus (HIV) and its result, Acquired Immune Deficiency Syndrome (AIDS). Information dissemination, epidemiology efforts, and contact tracing become impossible in a society where homosexual conduct merit legally-sanctioned punitive treatment. Because AIDS became so identified in the eyes of the public as a gay disease, especially during the initial stages of its outbreak, possibly HIV-infected members of the population were at risk of being identified as gay once their HIV-status was diagnosed. Naturally, few responded to the medical efforts necessary to combat HIV-AIDS when to do so would have invited legal punishment.[27]

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[25] Bowers v. Hardwick, 478 U.S. 186 (1986), summarized in note 83.

[26] The case was appealed to the United States Court of Appeals (70 F. 3rd 1218 {9th circ.} Dec. 20, 1995) where the appellate court ruled that the lower court had erred in applying a balancing test. The court thereafter remanded the case to the district court for application of a higher standard, the strict scrutiny test, due to the burdens imposed on Ms. Shahar's freedom of religion, expression, and association (Id. at 1224-1225).

[27] In Hong Kong, criminal laws against homosexuality hindered medical attempts to contain HIV transmission. R. SHILTS, AND THE BAND PLAYED ON, POLITICS, PEOPLE AND THE AIDS EPIDEMIC, 565 (1987). These laws (prohibiting buggery as well as gross indecency) were successfully repealed in 1991, A. Mak, et al. *Hong Kong,* UNSPOKEN RULES, *supra* at 67.

More frightening is the discovery that suicide is the number one cause of death in the United States among gay teenagers, a result only slightly more unpalatable than the large percentage of gay-teen homelessness and prostitution.[28] The cause of both of these social phenomena is laid directly at the door of sodomy laws.[29] It would not be surprising to see this statistic replicated in other countries possessing similar laws.

Laws on homosexual conduct therefore do more than reach at sexual activity. They strike at myriad facets of the individual's life and impact in various unexpected ways.[30] This all the more underscores the necessity of eliminating these laws.

This is not, of course, to minimize the impact that laws on homosexual status have on homosexuals.[31] Laws on homosexual status may bring about similar, if not the same, effects as laws on conduct.[32]

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[28] K. K. Armstrong, *The Silent Minority within a Minority: Focusing on the Needs of Gay Youth in our Public Schools*, 24 GOLDEN GATE U. L. REV. 67, 75-76 (1994).

[29] E. Wolfson & R. S. Mower, *see* note 1 *supra* at 998-999.

[30] One author would even be willing to go as far as saying that "every facet of life is affected by discrimination". MOHR, *op. cit. supra* note 22 at 31.

[31] There may be difficulty distinguishing laws which prohibit homosexual conduct from laws relating to homosexual status, since statutes aimed at reaching homosexual status rely to a great degree on homosexual conduct in order to define the status. *See*, for instance, the proposed New Hampshire legislation which has already been opined to be valid by the New Hampshire Supreme Court in an advisory opinion issued even prior to the passage of the law. The statute proposes to prohibit homosexuals from becoming adoptive or foster parents and defines a homosexual as "any person who performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person of the same gender." *In re Opinion of the Justices*, 129 N.H. 290, 530 A. 2d 21 (1987) reprinted in LEONARD, *op. cit. supra* note 24 at 822.

[32] An example of a law on status was a bill passed by the Oklahoma state legislature which provided that local school boards could terminate a teacher for engaging in "public homosexual activity or conduct", which was defined, aside from the usual sexual relations attendant to homosexuality, as "advocating,... encouraging, or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees." 70 Okla. Stat. Section 6-103.15 (1978) reproduced in R. RICHTER, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., ANTI-GAY LEGISLATION: AN ATTEMPT TO SANCTION INEQUALITY?, REPORT OF THE LITIGATION PROJECT ON ANTI-GAY LEGISLATION, 22 (1982). Plainly implicated were not only the

Since some laws on status define the term "homosexual" by enumerating various sexual practices that could be possibly engaged in,[33] necessarily, these laws will inhibit sexual conduct. To the extent that a homosexual would wish to escape the parameters of the law (and therefore, its punitive aspects), the homosexual would have to refrain from engaging in the specified homosexual conduct.

Aside from inhibiting sexual conduct, other dire consequences may also result from the existence of laws affecting status.[34] Since criminal laws on sexual behavior have greater stigmatizing effect on homosexuals,[35] this paper will focus more on asserting protection against these laws.

TREATY PROTECTION

The United Nations

The international regime for the protection of human rights arose from the ashes of World War II. As a direct result of the atrocities experienced in this holocaust, and despite the recent failure of the League of Nations to prevent the Second World War,[36] the nations of the world came together in the name of peace and gave birth to the United Nations Charter.[37]

To this end, the U. N. Charter embodied explicit provisions enshrining the concept of human rights.

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right to sexual relations, but also the right to employment and the freedoms of speech and expression.

[33] A concrete example would be that provided by the New Hampshire legislation quoted above in note 31.

[34] *See*, for example, the effects of the Oklahoma statute in note 32.

[35] While it has been posited that "(s)odomy laws are...the bedrock of discrimination against gays," it has also been put forward that the damage to homosexuals arise chiefly from the "general toxic antigay social climate, to which sodomy laws may or may not be a concomitant." MOHR, *op. cit. supra* note 22 at 53-54. Mr. Mohr acknowledges however that sodomy laws do produce indirect deleterious effects meriting their elimination. *Id.* at 55-57.

[36] A. VANDENBOSCH & W. HOGAN, THE UNITED NATIONS, BACKGROUND, ORGANIZATION, FUNCTION, ACTIVITIES 77 (1st ed., 1952).

[37] U.N. CHARTER.

> The specific inclusion of promotion and encouragement of respect for human rights and for fundamental freedoms for all among the purposes of the United Nations was due above all to the events which occurred during and immediately before the Second World War. The human rights provisions of the Charter reflect the reaction of the international community to the horrors of that war and of the regimes which unleashed it. The Second World War proved to many the close relationship that exists between outrageous behavior by a government towards its own citizens and aggression against other nations, between respect for human rights and the maintenance of peace. [38]

The emphasis by the U. N. Charter on human rights is evident in its preamble,[39] and this emphasis continues on through its body. These articulated rights, it must be stressed, are possessed by each and every individual and are binding on each and every Member-State of the United Nations.

> The Charter of the United Nations constitutes a landmark in the recognition of the status of the individual and his protection by international society. The provisions of the Charter in the matter of human rights and fundamental freedoms express legal obligations binding upon the Members of the United Nations.[40] They are a source of legal authority for the United Nations and its

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[38] United Nations Action In the Field of Human Rights, at 5, United Nations Publication, Sales No. E.74.XIV.2, (1974).

[39] "We the Peoples of The United Nations determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small..." Preamble, U.N. Charter.

[40] "A cursory reading of the (U.N. Charter) and of the preparatory work of the San Francisco Conference creates the impression that its provisions in the matter of human rights and fundamental freedoms are no more than a declaration of principles and an appeal to the conscience...However, while these considerations have a bearing upon the interpretation of the Charter, they must not be allowed to obviate the overriding fact that its provisions in the matter of human rights are a source of legal obligation...The authors of the Charter did not go to the length of agreeing that the United Nations shall ensure fully the respect of human rights and fundamental freedoms but they did agree that the members of the United Nations shall respect these rights and freedoms..." H. Lauterpacht, *Preliminary Report, Human Rights, The Charter of the United Nations and the International Bill of the Rights of Man*, Commission of Human Rights, Third Session, International Law Association, Brussels Conference, E/CN.4/89 (1948) at 3,5.

> organs charged with the task of ensuring the realization of the purposes of the Organization in one of its principal aspects...[T]he scope of the Charter is in this respect doubly universal. It is not confined to a particular group of states nor to limited categories of rights.[41]

While doubt may have been cast on the obligatory nature of the norms expressed in the U.N. Charter,[42] any such doubt has been time and again laid to rest by the affirmation and authoritative interpretation by the Member-States of the United Nations through different international instruments as well as other United Nations documents and resolutions on human rights.[43] Thus, the violation by a State of the human rights of its own citizens, which human rights are protected by the U.N. Charter, would lead to its (the U.N. Charter's) violation.

Legal protection may also be asserted on the basis of other instruments. Foremost among these instruments is the Universal Declaration of Human Rights.[44] On December 10, 1948, the United Nations General Assembly passed, in resolution form, the Universal Declaration. As the first part of the International Bill of Rights, (the other parts being the International Covenant on Civil and Political Rights[45] [and its Optional Protocol][46] and the International Covenant on Economic, Social, and Cultural Rights[47]),[48] the Universal Declaration has, through a gradual process, become not only a source of binding obligations on the Member-States of the United Nations but also "the

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[41] *Id.* at 1.

[42] *See* for example Y. Rechetov, *International Responsibility for Violations of Human Rights* in UN LAW, FUNDAMENTAL RIGHTS. TWO TOPICS IN INTERNATIONAL LAW, 237 (Antonio Cassese, ed. 1979).

[43] This interpretation has in fact led to the assertion that customary international law has been created and become binding on both member and non-member-states. *See* discussion below on customary international law, pp. 19-21.

[44] UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948) [hereinafter Universal Declaration] U.N. Doc. A/811 reproduced in IAN BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS 21 (3rd ed., 1992).

[45] *See* note 55, *infra.*

[46] 16 Dec. 1966, 999 U.N.T.S. 302.

[47] 16 Dec. 1966, 999 U.N.T.S. 3.

[48] United Nations Action in the Field of Human Rights, note 38 *supra* at 9.

most authoritative yardstick in the field of human rights."[49] Although passed as a mere resolution, the Universal Declaration "carries legal weight far beyond an ordinary resolution or even other declarations coming from the General Assembly,"[50] and in fact has been argued to constitute "binding law as international custom."[51]

The view that the Universal Declaration has become binding is made visible with the examination of previous United Nations General Assembly resolutions.[52] Through the passage of time, Member-States have come to recognize the binding character of the Universal Declaration.[53]

Again, violation of the principles contained in this integral part of the international bill of rights will lead to a finding of a violation by the Member-States of the United Nations of its international obligations. Hence, a basis for protection of homosexuals is available.

Conventional Protection

An important instrument in the field of human rights, especially with the advent of the decision of its enforcement body,[54] is the

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[49] T. C. Van Boven, *United Nations and Human Rights, A Critical Appraisal* 119 in UN LAW, FUNDAMENTAL RIGHTS, note 42 *supra* at 122.

[50] A. EIDE, ET. AL., THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 7 (1992).

[51] *Id.* at 7.

[52] For example, Resolution 290 (IV), December 1, 1949 of the General Assembly entitled "Essentials of Peace" calls upon every nation "(t)o promote...full respect for all the ... fundamental rights expressed in the Universal Declaration" whereas in Resolution 1514 (XV), December 14, 1960, entitled "Declaration in the Granting of Independence to Colonial Countries and Peoples," passed 11 years later, states that "All States **shall** observe faithfully and **strictly** the provisions of the Charter of the United Nations, The Universal Declaration of Human Rights, and the present Declaration." Reproduced in United Nations Action in the Field of Human Rights, note 38 *supra* at 9-10.(*emphasis supplied*).

[53] *See* Meron's discussion below of Prof. Sohn's thesis which posits that the Universal Declaration is binding even on non-members of the United Nations. (MERON, note 62, *infra* at 82).

[54] *See* discussion below on the application of Nicholas Toonen in the section entitled The Right to Privacy, *infra* at pp. 26-30.

International Covenant on Civil and Political Rights.[55] The Covenant is a treaty embodying the basic civil and political rights enunciated in the Universal Declaration, but is more beneficial in that it is drafted with more precision. Its provisions are also less circumscribed by considerations of morality than the Universal Declaration, since the Universal Declaration contains a general restriction on the rights provided therein.[56] In the Covenant, morality considerations only serve to curb identified clauses.[57]

The human rights protected by the Covenant may also be another means by which states may be held accountable for their treatment of homosexual citizens.

In addition, regional conventions have provided a not insubstantial amount of protection for nationals of their Member-States. These instruments are the European Convention for the Protection of Human Rights and Fundamental Freedoms,[58] the African Charter on Human and Peoples' Rights,[59] and the American Convention on Human Rights.[60] These regional conventions, while opening the possibility of conflict with the global instruments textually and as interpreted by their enforcement bodies, do contain the potential to support the continuing development of international legal protection for homosexuals.[61]

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[55] 16 Dec. 1966, 999 U.N.T.S. 171 (hereinafter, the "Covenant").

[56] The general restriction reads: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society" Art. 29(2), Covenant.

[57] These are the clauses on freedom of movement (art. 12), public hearing (art. 14), religion (art. 18), speech (art. 19), assembly (art. 21), and association (art. 22).

[58] 213 U.N.T.S. 222, [hereinafter European Convention].

[59] 17 June 1981, [hereinafter the African Charter] reprinted in I. BROWNLIE, BASIC DOCUMENTS, *op. cit. supra* note 44, at 551.

[60] 22 Nov. 1969, (hereinafter the American Convention) reprinted in I. BROWNLIE, BASIC DOCUMENTS, *id.* at 495.

[61] *See* Weston, Lukes, & Hnatt, *Regional Human Rights Regimes: A Comparison and Appraisal*, reprinted in LILLICH, INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY AND PRACTICE 640-641 (2d. ed. 1991).

CUSTOMARY INTERNATIONAL LAW

The Value of Custom

Support may also be asserted on the basis of customary law. This is especially important in several possible scenarios, such as in the case of those countries not party to the international treaty instruments referred to above,[62] or those which still require internal legislation in the implementation of their treaty obligations,[63] or those which, by some unwise decision, decide to terminate their membership in a treaty instrument by withdrawal.[64]

Customary law is a recognized source of international obligations,[65] and may be gleaned from numerous sources.[66] Human rights, and state obligations pertinent to the respect to human rights, have become part of international customary law.[67]

In particular, since general ratification of a multilateral treaty may give rise to a new rule of customary law,[68] the codification of the international obligations of states to respect human rights in the U.N. Charter, and their further elaboration and amplification in the Universal Declaration, the Covenants, and other United Nations instruments and resolutions on international human rights, have led to the particular provisions of these instruments becoming customary obligations of states.[69] This is assuming, of course, that they were not

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[62] T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 80 (1989).
[63] *Id.* at 4-5.
[64] Article 43 of the Vienna Convention of the Law of Treaties clarifies the rule that denunciation by a state of its treaty obligations cannot impair its duty to fulfill its international obligations which are independently imposed on it by customary international law.
[65] ICJ STATUTE, art. 38 (1)(b).
[66] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (2d ed., 1973).
[67] South West Africa Cases (Second Phase), Tanaka, J., Dissenting, reprinted in BROWNLIE, BASIC DOCUMENTS, note 44 *supra* at 583.
[68] H.W.A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 59 (1972).
[69] *See* MERON, *op.cit. supra* note 62 at 82-88 for a discussion of the different theories forwarded for the transformation of these treaty obligations to customary law.

already customary norms when they were acceded to in these instruments by the states.

These obligations retain their separate existence as customary international law obligations independent of specific treaty provisions of similar content.[70] As such, insofar as these obligations are extended in favor of homosexuals, whether in their capacity as members of the human race or in belated recognition of their traditionally disadvantaged positions, a state is bound to respect and protect the rights of homosexuals, and homosexuals may therefore assert the protection of these customary norms regardless of their state's membership in the United Nations or the different treaty regimes.

Protection Via Other Vehicles

Other factors which confirm the obligations of states to protect the rights of homosexuals may be seen in the general principles of law recognized by civilized nations, judicial decisions, and teachings of the most highly qualified publicists.[71]

However, such materials are dealt with only incidentally during the course of this material and no attempts to locate and identify a comprehensive compilation to support this assertion have been made, although their presence indicates a growing consensus as to the obligations by states to respect the sexual freedoms of homosexuals.[72]

THE RIGHT TO PRIVACY

> The general right to control one's body has as its core a cluster of specific bodily based liberties: one has a strong presumptive right to feed one's body, to manipulate it... to inject foreign bodies to it, to permit others to do so, to touch it, to have others touch it, to

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[70] Vienna Convention, note 64 *supra* "The (Covenant) may well be of significance even for States which are not party to it... (A)t least some of the provisions in the (Covenant) reflect norms of customary international law and are, therefore, binding on States on that basis." L. F. ZWAAK, INTERNATIONAL HUMAN RIGHTS PROCEDURES 80-81, (1991).

[71] ICJ STATUTE, art. 38 (1)(c,d).

[72] *See* for example the different judicial decisions of the European Court of Human Rights cited in support of the right to privacy, notes 105-107.

> allow others to present their bodies to it, and to be the chief governor and guarantor of one's own feelings, emotions, and sensation — compatible with a like ability on the part of others and with other requirements for civil society. Consensual sex engages and nearly exhausts the core protection of the general right to bodily-based privacy.[73]

Textual Protection for Privacy

The right to privacy may provide a convenient starting point for the framework of legal analysis. While the different international instruments do not contain any specific provision with respect to the right to sexuality, the right to a sexual life, or the right to a fulfilled sexual life, it has been generally acknowledged that these rights may be encompassed by the broad scope of the right to privacy.

The right to privacy is recognized as worthy of protection in the instruments earlier discussed. Thus, the Universal Declaration states that:

> No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks on his honour and reputation. Everyone has the right to the protection of law against such interference or attacks.[74]

This right was again espoused and further elaborated in the Covenant adopted subsequently.[75] Thus, the Covenant dictates that:

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[73] MOHR, *op. cit. supra* note 22 at 120-122.

[74] UNIVERSAL DECLARATION, art. 12. Another conception of "private" appears in the context of Article 18, on freedom of thought, conscience and religion.

[75] In addition, the regional conventions (with the exception of the African Charter) also recognize the right to privacy.

Article 11 of the American Convention states:

(1) Everyone has the right to have his honor respected and his dignity recognized.

(2) No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour and reputation.

(3) Everyone has the right to the protection of the law against such interference or attacks.

Article 8 of the European Convention, in turn, provides:

> 1. No 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.
>
> 2. Everyone has the right to protection of law against such interference or attacks.[76]

Ascertaining Privacy's Content

However, while the right to privacy is recognized explicitly, there remains the problem of, first, reconciling the extension of the right of privacy to the individual with the corresponding extension to the state of the right to limit the individual's privacy right, and second, which is partly related to the first, defining the content of the said right to privacy.

It is obvious from the text of the two instruments that non-arbitrary and lawful interference with this right by the state is sanctioned. Further, as mentioned earlier, the Universal Declaration's grant of the right is expressly checked by "limitations determined by law" in order to secure "due recognition and respect for the rights and freedom of others" and to meet "the just requirements of morality, public order, and the general welfare."[77]

However, what is arbitrary and what is not, and what is lawful, and what is not, are all concepts whose contents have much left to be defined.[78] Their boundaries have yet to be fully expounded and

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

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[76] Covenant, art. 17. Again, privacy appears in the context of religious freedom in Article 18 of the Covenant.

[77] UNIVERSAL DECLARATION, art. 29(2).

[78] The drafting sessions of the Covenant make clear that the article on privacy was to be couched in a general manner, "leaving each State free to decide how those principles were to be put into effect." M.J. BOSSUYT, GUIDE TO THE "TRAVAU

delineated, as are the concepts of "morality," "public order," and the "general welfare." Furthermore, the problem presented by this difficult task is compounded by the fact that "privacy" as a concept is itself undefined. These are weaknesses easily exploited by governments desiring to avoid international legal responsibility.

Interpreting these instruments and the concepts they espouse may pose some problems; therefore, although as an initial reflection, the Covenant's failure to impose a morality limitation on the right to privacy it had recognized may reasonably be theorized to supersede the general morality limitation entertained in the earlier Universal Declaration.

Legal scholars have ascribed different contents to these concepts.[79] This is true not only in the international but also in the domestic spheres.[80] What is important to keep in mind however is that "(h)uman rights obligations to respect the privacy of the individual have far-reaching application"[81] and is thus an important legal tool for homosexuals.

> The scope of the right to privacy in these instruments is critical for gay people. If the right to privacy is interpreted broadly to provide a realm of personal autonomy free from unjustified state intrusion, decisions about personal and sexual relationships could arguably fall within that realm. Such a broad interpretation of the

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PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 341 (1987).

[79] *See*, for example, the discussion by Lars Adam Rehof (Lars Adam Rehof, *Article 12* in EIDE, note 50 *supra* at 187) where discussion is made of the pertinent debates during the drafting sessions of the Universal Declaration, as well as of contemporary applications of the concept of privacy, *e.g.* as developed in regional European human rights case law, restrictions on prisoners, psychiatric investigations, and computerized filing systems.

[80] For example, in the United States, the United States Constitution "does not articulate an explicit right to privacy. Instead, the right to privacy under the Constitution is a judicially constructed doctrine with a limited scope", D. A. Catania, *The Universal Declaration of Human Rights and Sodomy Laws: A Federal Common Law Right For Homosexuals Based on Customary International Law*, 31 A. CRIM. L. REV. 289, 290 (1994) which "has proven recalcitrant to conceptual analysis and to attempts to reduce it to a univocal or even focal sense", MOHR, *op. cit. supra* note 22 at 95.

[81] Rehof, note 79 *supra* at 194.

> right to privacy could provide a legal basis for protecting gay people from state intrusion.[82]

It is fortunate that this has been the case in the international regime. Unlike in some domestic regimes (such as the United States), this right has indeed been interpreted broadly and with a view to the provision "of a legal basis for protecting gay people from state intrusion."[83] This is due to the existence of the ruling of the United Nations Human Rights Committee in the case of *Toonen v. Australia*.[84]

A Turning Point?

The case involved an Australian national, Mr. Nicholas Toonen, who claimed a violation by Australia of its international obligations under the Covenant. Tasmania, a state within the federal government of Australia, retained as part of its criminal laws a proscription on sexual conduct done in private between consenting adult homosexuals.[85] Mr. Toonen, a Tasmanian resident, claimed that his rights to privacy as granted by Article 17 of the Covenant were being violated by the existence of the proscriptions, and contended that Australia was responsible for Tasmania's laws. Mr. Toonen thus brought the matter to the attention of the Human Rights Committee.

Australia, in an unusual move, decided to side with Mr. Toonen, and submitted observations highly critical of Tasmania's laws, as well as Tasmania's justifications for these laws. Aside from purporting to

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[82] R. A. Ermanski, Comment, *A Right to Privacy for Gay People Under International Human Rights Law*, 15 B.C. INT'L & COMP. L. REV. 141, 150 (1992).

[83] The United States Supreme Court did not so interpret this right. While acknowledging in the case of Griswold v. Connecticut, 381 U.S. 479, 484 (1965) that a right of privacy existed and was recognized by the United States Constitution based on the "penumbras" of certain constitutional provisions, the Supreme Court limited this right to those matters integral to procreation and family relationships, and hence, as earlier mentioned, did not extend to a homosexual's right to engage in sodomy, Bowers v. Hardwick, 478 U.S. at 190-191.

[84] Nicholas Toonen v. Australia, Communication No. 488/1992, United Nations Human Rights Committee, (views adopted on 31 March 1994, fiftieth session) [hereinafter Toonen].

[85] Sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code, referring to "unnatural sexual intercourse," "intercourse against nature," and "indecent practice between male persons," Toonen, note 84 *supra* at par. 2.1-2.3.

legitimize its laws on the tenuous ground of public health (preventing the spread of HIV/AIDS), Tasmania predictably relied on moral grounds to support the validity of its laws.[86] Australia disagreed with this position, and while acknowledging that the right to privacy may be interfered with to some degree on the basis of upholding "domestic social mores,"[87] Australia also conceded that a complete prohibition on sexual activity between men was "unnecessary to sustain the moral fabric of Australian society."[88]

The Committee resolved the matter in Mr. Toonen's favor, and in so doing, explicitly ruled that it was "undisputed" that "adult consensual sexual activity in private (was) covered by the concept of 'privacy'."[89] As such, by criminalizing this conduct, Australia had violated its conventional obligation provided by Article 17 of the Covenant.[90]

The Committee's ruling also made explicit the applicability to private homosexual behavior of its previously released General Comments with respect to Article 17.[91] This included General Comment 16(32) which sought to define, in some ways, the limitations permissible with respect to the concept of privacy.

The inclusion in the Covenant of the term "arbitrary" as a limitation on permissible interference with the concept of privacy was, according to the Committee, intended to guarantee that even interference through the employment of laws and regulations should not only "be in accordance with the provisions, aims, and objectives of the Covenant," but also, "in any event, reasonable in the circumstances."

Furthermore, the Committee stated that it was unacceptable for purposes of Article 17 of the Covenant that moral issues, and its relevance as a pure matter for domestic concern, be raised as a defense

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[86] *Id.* at par. 6.5.
[87] *Id.* at par. 6.6.
[88] *Id.* at par. 6.7.
[89] *Id.* at par. 8.2.
[90] *Id.* at par. 9.
[91] *Id.* at par. 8.3.

for impermissible restrictions on privacy.[92] This would, it noted, "open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy."[93]

Sex is, and will always be, inherently private.[94] To engage in sex is to exclude the world, and to observe without participating is to intrude: "there can be no neutral observer."

The decision of the Committee is thus consistent with sex's inherently private nature, for what right does Australia (or for that matter, any nation) have in intruding into the sexual acts of its own citizens? What right does a state have in order to determine who a person will allow to touch his or her body?

The decision makes clear that a state cannot and should not interfere with the privacy of homosexuals, dictate their choice of sexual partners, and force their sexual preferences into a "desired" choice. A State Party to the Covenant which interferes with their citizen's sexual lives would violate its terms and, if a party to its Optional Protocol, could therefore be held accountable before the Committee.[95]

Stumbling Blocks

Even with the clear terms of the decision, however, it is still necessary to keep in mind its limitations.

Foremost is that while the Committee was able to conclude that private homosexual conduct was included within privacy's scope, and that the particular restrictions in question which prohibited conduct were impermissible, the Committee's ruling was weakened in some ways by its somewhat unique bases for holding that Tasmania's restrictions were arbitrary and unreasonable. In other words, the finding as to the arbitrariness and unreasonableness of Tasmania's

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[92] *Id.* at par. 8.6.
[93] *Id.*
[94] MOHR, *op. cit. supra* note 22 at 100.
[95] B. S. Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-on Collision with Bowers v. Hardwick*, 58 ALB. L. REV. 725, 759 (1995).

laws rested to an unquantifiable extent on several facts peculiar to Australia's situation.

First, the Committee noted that it was only Tasmania, out of all of Australia's component states, that still had criminal laws penalizing homosexual conduct.[96] All the other states had repealed their own similar laws. Second, within Tasmania, there was no consensus as to whether the State of Tasmania should retain or reject the said criminal laws.[97] Third, Tasmania had not been in the habit of enforcing the pertinent criminal statutes, implying, according to the Committee, that they were "not deemed essential to the protection of morals in Tasmania."[98]

The precedential force of the ruling of the Committee was thus to some extent weakened by these circumstances. Another state charged with violation of its Article 17 obligations would be able to utilize these particularly Tasmanian circumstances, with unpredictable consequences.

Furthermore, Mr. Toonen was alleging a violation of a right to privacy as guaranteed by Article 17. However, the Tasmanian Government submitted that Article 17 did not create a right to privacy but only "a right to freedom from arbitrary or unlawful interference with privacy."[99] Since the challenged statutes were enacted by democratic processes, Tasmania believed they could not have been "unlawful" interferences.[100]

It is curious to note that the Committee did not specifically rule on whether Mr. Toonen had a right to privacy or a right to freedom from interference with his privacy. In its discussion of the Australian Government's position, the phrase "the right to privacy" appears,[101] but the appearance of this phrase is perhaps attributable only to Australia and not necessarily to an adoption by the Committee of the same view.

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[96] Toonen, note 84 *supra* at par. 8.6.
[97] *Id.*
[98] *Id.*
[99] *Id.* at par. 6.2.
[100] *Id.*
[101] *Id.* at par. 6.6.

The Committee limited itself to a discussion of whether private homosexual behavior was encompassed within the concept of "privacy," and not within "the concept of the right to privacy." In fact, an individual opinion, submitted by Mr. Bertil Wennergren for the same proceeding, explicitly states that Article 17 does not establish a right to privacy.[102]

Whether the distinction exists, and if it does, whether such distinction is material in any way to the assertion of protection on the basis of the Convention, is unknown. It is also unknown what impact this may have on future cases presented before the Committee (as well as other human rights bodies), especially if a state hostile to homosexuality perceives the distinction to be real.

Third, the Committee's stance was softened with its use of "reasonableness" in order to determine whether arbitrary interference with Mr. Toonen's life, "in the circumstances," existed. This is the standard which the Committee will probably use in future applications filed before it,[103] and this is a standard which states will use to further delay compliance with their obligations. "Reasonableness in the circumstances," as a test, gives states a wide latitude to claim that under *their* particular circumstances, criminalization of homosexual sexual activity are lawful interferences in the lives of their homosexual citizens.

Using Custom as a Buttress

Nonetheless, this ruling may still be bolstered by the consistently favorable decisions of the European Court of Human Rights.[104] The European Court, tasked with the enforcement of the European Convention, has rendered heartening decisions specifically with respect to homosexual behavior in relation to the right of privacy.

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[102] Individual Opinion submitted by Mr. Bertil Wennergren under Rule 94, Appendix, Toonen, note 84 *supra*.

[103] Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-on Collision with Bowers v. Hardwick*, note 95 *supra* at 761.

[104] Hereinafter "European Court."

In cases filed before it against the countries of Northern Ireland,[105] Ireland,[106] and Cyprus,[107] the European Court held that the right to privacy granted by the European Convention protected nationals of these countries from existing sodomy laws.

While other decisions of the European Court relating to homosexuals but involving issues different from sexual conduct have not been as positive,[108] these three decisions provide solid support for the assertion that the international obligation of states to protect and respect the privacy of their citizens provides a defense against the criminalization of homosexual conduct. With this array of decisions, a strong argument may be made that international customary law with respect to the right to privacy, has crystallized sufficiently to indisputably include homosexual sexuality.

Limitations

Be that as it may, it is useful to remember that conceptually, the right to privacy has its limitations.

> The limitations on the right to privacy as a tool for obtaining full human rights for sexual minorities lies in the right to privacy's characteristic as a "negative" right (i.e., it only gives sexual minorities the right to be left alone in the privacy of their own domicile). It in no way recognizes the full panoply of expressions of a sexual minority's identity. The limitations of the right to privacy can be seen in those European countries which recognize the privacy rights of sexual minorities, but insist on harassing them when they attempt to exercise their fundamental rights to free expression, assembly and association.[109]

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[105] Dudgeon v. United Kingdom, 4 Eur. H. R. Rep. 149 (1981).
[106] Norris v. Ireland, 13 Eur. H. R. Rep. 186 (1991).
[107] Modinos v. Cyprus, 16 Eur. H. R. Rep. 485 (1993).
[108] *See*, for example, the decision of Rees v. United Kingdom, 9 Eur. H. R. Rep. 56 (1987) which declined to extend the right to marry, granted in Article 12 of the European Convention, to homosexuals.
[109] J. D. WILETS, *International Human Rights Law and Sexual Orientation*, note 3 *supra* at 61. *Accord*, C. B. Rabinowitz, Note, *Proposals for Progress : Sodomy Laws and the European Convention on Human Rights*, 21 BROOK. J. INT'L L. 425 (1995).

While the right to privacy may not be quite as narrow as so grimly described in the quoted passage, it is quite obvious that this right might not provide the complete relief homosexuals deserve to achieve equality in all aspects of life. As a start, however, this might achieve some measure of alleviation.

Lastly, while not a legal concern, reliance on the right to privacy has been criticized as keeping homosexuals where they have always been: in the closet. Publicity, not privacy, confrontation, and not silence, are deemed essential to furthering the homosexual cause.[110]

PROTECTION ON THE BASIS OF EQUALITY AND NON-DISCRIMINATION

> In the huge diversity of people who make up the human race, there are a number of universal constants which have always been part of the human condition. One is that people who are different inspire fear which often leads to prejudice; another is that a proportion of the human race is homosexual.[111]

Homosexuals *vis-à-vis* Heterosexuals

Equality principles may also afford protection for homosexual conduct. In short, when heterosexuals engage in sexual conduct, the fact that they are able to do so without hindrance from the state should evidently furnish a basis for homosexuals to assert that they, as well, can equally, without hindrance, engage in sexual conduct. When they do assert this equality, it follows as well that they should not be discriminated against.

A homosexual should have the right to do to his body as he pleases to the same extent that heterosexuals have the same right.[112] A

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[110] MOHR, *op. cit supra* note 22 at 98. Mohr proposes though that gay privacy and gay publicity are not mutually exclusive concepts, since privacy is not secrecy.

[111] HOMOSEXUALITY, A EUROPEAN COMMUNITY ISSUE: ESSAYS ON LESBIAN AND GAY RIGHTS IN EUROPEAN LAW AND POLICY 3 (K. Waaldjik and A. Clapham ed., 1993).

[112] MOHR, *op. cit. supra* note 22 at 117. This assertion was made by the author though in the context of a privacy, and not an equality right. Further, Mohr distinguishes from this assertion the right of a person to do with his own body as he

homosexual should be free to consciously, of his own volition, direct his sexual acts, in the same way heterosexuals are free to do, and not be forced to accept society's strictures or the majority's dictates.[113]

Equality/Non-Discrimination in International Perspective

International law has sought to safeguard equality and non-discrimination. "(T)he principle of equality before the law occupies the most important part (of) the promotion and encouragement of respect for (fundamental human rights)."[114] In fact, "(n)o international human rights norm is more clearly established by the U.N. Charter than the one against discrimination."[115] Thus, the U.N. Charter specifies that the United Nations undertake,[116] as one of its purposes, the promotion of:

> (c.) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[117]

The Universal Declaration, in turn, unambiguously states that:

> *All* human beings are born free and equal in dignity and rights.[118] Everyone is entitled to all the rights and freedoms set forth in this Declaration *without distinction of any kind*, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[119] (emphasis supplied).

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pleases, an assertion subject to the criticism that one does not have the right to hit another person with his fist.

[113] *Id.* at 118.

[114] Southwest Africa, Tanaka, J., Dissenting, note 67 *supra* at 571.

[115] LILLICH, *op. cit. supra* note 61 at 229.

[116] With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.

[117] U.N. CHARTER, Chap. IX, art. 55. Other provisions containing substantially the same language can be located at chap. I, art. 1 (3), chap. IV, art. 13 (1)(b) with respect to the General Assembly, and chap. XII art. 76(c) with respect to the trusteeship system. The preamble, of course, "reaffirms faith in fundamental human rights" and "in the equal rights of men and women."

[118] UNIVERSAL DECLARATION, art. 1.

[119] UNIVERSAL DECLARATION, art. 2.

The Universal Declaration also provides that:

> All are equal before the law, and are *entitled without any discrimination to equal protection of the law.* All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.[120] (emphasis supplied).

As earlier discussed, however, the Universal Declaration supplies morality limitations on the rights it recognizes.[121]

The Covenant, in turn, explicitly states that recognition of the "inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of the freedom, justice, and peace in the world." Thus, it distinctly mandates two provisions on equality and non-discrimination — Articles 2(1) and 26, providing:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, *without distinction of any kind,* such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.[122] (emphasis supplied)

> All persons are equal before the law and are entitled w*ithout any discrimination* to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[123] (emphasis supplied)

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[120] UNIVERSAL DECLARATION, art. 7.

[121] Article 29(2), which subjects the rights and freedoms granted "to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

[122] Covenant, art. 2(1).

[123] Covenant, art. 26.

The Content of Equality and Non-Discrimination

All these instruments lay down the basic obligation of states to observe the mandate on equality. Textually, however, the initial observation easily made from the Charter's language as well as the language of the other instruments is that the prohibition on the creation of distinctions is limited to, among others, "sex." Thus, it is easy to argue, as in fact it has been argued,[124] that distinctions based on sexual orientation (as opposed to sex) is permitted by these instruments.[125]

Some authors directly contradict the assertion that sexual orientation discrimination is not discrimination based on sex, and posit that the word sex should include sexual orientation.[126]

Others admit that a difference between sex and sexual orientation exists, but rely on an examination of the continually

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[124] The New Haven Supreme Court, in a legal opinion it issued, refused to accord homosexuals the protection offered by heightened scrutiny treatment ordinarily accorded to legal distinctions created on the basis of sex, saying: "(S)exual preference is not a matter tied to gender but rather to inclination, whatever the source thereof." *In re Opinion of the Justices* in LEONARD, *op. cit supra* note 24 at 823.

The U.S. Court of Appeals for the Ninth Circuit has also opined that "(h)omosexuality is not an immutable characteristic, it is behavioral and hence it is fundamentally different from traits such as ...gender..." (High Tech Gays v. Defense Industrial Security Clearance Office 895 F. 2d 563 (1990) in LEONARD, note 24 *supra* at 424-425).

[125] Deliberations during the drafting sessions of the Covenant seemingly do not explicate the meaning of the word "sex". *See* BOSSUYT, *op. cit. supra* note 78 at 479-492.

[126] In construing Hawaii's state constitution, Justice Burns in his concurring opinion in Baehr v. Lewin, 852 P. 2d 44 (Hawaii S. Ct. 1993) interpreted its equal protection clause (Article I section 5) which read:

> "No person shall ... be denied the equal protection of the law nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of ... sex..."

to include all aspects of a person's sexuality that was "biologically fated". Thus, if homosexuality was biologically fated, then homosexuals had the right to insist on relief based on the equal protection clause and discrimination based on sex. (*Id.* at 69-70).

developing principles contained in the existing normative instruments for human rights protection for sexual orientation.[127]

Another line of thinking advocates the inclusion of homosexuality within the phrase "other status" and in fact, in the previously discussed case of *Toonen*,[128] Australia followed this line when it sought to clarify whether sexual orientation would fall into the category of "other status" found in Articles 2(1) and 26 of the Covenant.[129] Impliedly for Australia, sexual orientation did not fall within the term "sex" and was therefore located elsewhere. The Committee, in an indirect negative, took the first tack and viewed the word "sex" as including sexual orientation.[130] This decision may very well be the final word on the debate, although the decision pivoted not on the right to equality and non-discrimination, but only on the right to privacy.

The theory that discrimination against homosexuals is discrimination based on "sex" may still hold water however even if "sex" is construed to mean solely "man" as opposed to "woman". Because a criminal statute allows a man to engage in a sexual act with a woman, but prohibits the same man from engaging in the same sexual act with another man, the identification of the act as criminal has been "determined solely by the actor's gender," and is hence a discrimination based on sex.[131]

The counter-argument frequently given is that a woman is prohibited from having sex with another woman just as a man is prohibited from having sex with another man. Thus, the law treats the two sexes equally.[132] However, this is met with the argument that this

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[127] For a discussion of sex and sexual orientation within the context of the European Convention, *see* A. Byre, *Equality and Non-Discrimination* in WAALDJIK, *op. cit. supra* note 111 at 213.

[128] Toonen, note 84 *supra*.

[129] *Id.* at par. 8.7.

[130] *Id.*

[131] HARVARD LAW REVIEW ASSOCIATION, note 19 su*pra* at 17.

[132] This concept was applied in the context of a challenge to a marriage statute in the case of Singer v. Hara 522 P. 2d 1187 (1974). The court in this case denied the application for a marriage license by a male couple partly on the ground that there

"equal" treatment actually violates equal protection guarantees since this treatment punishes an individual with respect to a particular characteristic possessed (gender) and hence is not neutral with respect to that characteristic.[133]

Even assuming that this issue is met satisfactorily by the above discussion, a reliance on equality principles may still be troublesome for while they are simple and easy for rhetorical purposes, they are also demanding and problematical in application. While equality is a right in itself, it is also used in conjunction with other rights, and thus the entire spectrum of human rights may be involved whenever equality is sought to be utilized. Further, "in the context of (homosexuals), each substantive right tends to be treated with reference to the unique rights or benefits in question."[134] These characteristics have led to a dearth of case law interpreting equality specifically in favor of homosexuals in the context of their sexual conduct.

While the case of *Toonen v. Australia* was able to present before the Committee the opportunity of applying the equality and discrimination principles found in the Covenant, the Committee confined itself to a recognition that Article 2(1) in conjunction with Article 17 was violated, but expressly did not discuss the anti-discrimination protection offered by Article 26.[135] Thus, its only substantive contribution to the legal discourse is its declaration that sexual orientation is encompassed within "sex."

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was no showing that applicants were being treated differently by the government than if they were a female couple.

[133] *See* the discussion in HARVARD LAW REVIEW ASSOCIATION, note 19 *supra* at 17, applying cases striking down miscegenation statutes on the basis of separation based on race to same-sex sodomy statutes. This equality anti-miscegenation principle was indeed explicitly extended in the U.S. case of Baehr v. Lewin, 852 P. 2d at 44, where the Hawaii Supreme Court held that a marriage law denying same-sex couples the right to marry violated the equal protection clause of the Hawaii Constitution (*Id.* at 61-62, quoted at note 126) unless the State could proffer a compelling reason.

[134] WILETS, *International Human Rights Law and Sexual Orientation,* note 3 *supra* at 49.

[135] Toonen, note 84 *supra* at Para. 11.

Even while the Committee in *Toonen* may have sidestepped the issue, the individual opinion of Mr. Wennergren squarely addresses the applicability of Articles 2(1) and 26 to homosexual equality.[136] Mr. Wennergren viewed the provisions of the Tasmanian Criminal Code prohibiting sexual intercourse between men and sexual intercourse between women as making an impermissible distinction between heterosexuals and homosexuals.[137] Further, the criminalization of "other sexual contacts" between consenting adult men without the concurrent criminalization of "other sexual contacts" between consenting adult women also set aside the principle of equality.[138] Discrimination was therefore present, and a violation of Article 26, the result.

Application of Principles

This is not to say that arguments with respect to homosexuality, equality, and non-discrimination have not been made. Various legal scholars have utilized these principles and have asserted protection on these grounds.

Equality, or equal protection by the law, has been asserted to be a legal norm not only by virtue of these instruments, but also by virtue of customary law and the general principles of law.[139] Equality means all human beings have "equal opportunities without regard to ... sex. As persons they have the dignity to be treated as such. This is the principle of equality which constitutes one of the fundamental human rights and freedoms which are universal to all mankind."[140]

The observation has also been made by one scholar[141] that international human rights instruments[142] have been worded so that

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[136] *See* note 102 *supra*.
[137] *Id.* at par. 3.
[138] *Id.*
[139] Southwest Africa, Tanaka, J., Dissenting, note 67 *supra* at 583.
[140] *Id.* at 591.
[141] WILETS, *International Human Rights Law and Sexual Orientation*, note 3 *supra* at 50.
[142] Referring to the U.N. Charter, the Universal Declaration, the Covenant, the International Covenant on Economic, Social, and Cultural Rights, the Optional

"almost every right explicitly applies to 'every person' or 'all people.' Similarly, prohibitory provisions are worded so that 'no one' shall be subject to the relevant human rights violations. In addition, (these instruments) contain provisions explicitly granting equal protection and the right to non-discrimination to 'all people'."[143] Since homosexuals are persons and are people, at least in theory, they enjoy the benefits of these instruments.

The scholar also asserts the fairly obvious proposition that these instruments' terminology indicate that the categories expressed as protected (such as religion, race, and political opinion) are not exclusive and hence are capable of being added to. Further, these instruments' protection "pertain to all individuals, regardless of social status or condition." On this basis, he therefore argues that "sexual minorities"[144] should not be discriminated against and should be given the equal protection of the law.[145]

Applied consistently, it is easy to argue that whatever rights and privileges that are without question, much less necessity for assertion, enjoyed by heterosexuals should, without any difficult logical exercise, be extended to homosexuals. Arbitrary distinctions, including those made on the basis of the choice of sexual partners, cannot be made among the different peoples of the world. Such distinctions, if so made, will be violative of these instruments.

Indeed, the fact that these rights have over and over again been incorporated in other treaties,[146] whether global or regional in scope, is

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Protocol to the Covenant, the European Convention, the African Charter, and the American Convention.

[143] WILETS, *International Human Rights Law and Sexual Orientation,* note 3 *supra* at 50.

[144] He defines this term to mean "all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behavior, or gender identity" and does not include "individuals whose sexual identity is based upon non-consensual sexual behavior." (*Id.* at 4).

[145] *Id.* at 59.

[146] For example, Article 24 of the American Convention states that:

> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

conclusive proof that equality plays a central role in the concept of the international human rights regime.

It therefore stands to reason that nations and states pursuing an active policy of discrimination or, even while not explicitly pursuing such policy, but failing to act in providing protection to homosexuals in the face of discrimination by other state actors, would surely have violated their obligations under international law.

The reality, however, is that religion and the "morality" it breeds will always play a role in the slow, piece-meal concessions given to homosexuals by a heterosexist world. The Universal Declaration's general morality limitations attest to this fact,[147] although as earlier discussed, the elimination in the later Covenant of this limitation may have blunted the pernicious operative effect of morality considerations.[148]

FREEDOM OF EXPRESSION

> Free expression plays a central role in the lives of lesbian and gay men because virtually all the milestones of lesbian and gay life — coming out, meeting other gay people, finding a lover, participating in a gay rights rally — depend upon the public identification of oneself as homosexual...Until lesbians and gay

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Likewise, Article 28 of the African Charter states that:

> Every individual shall have the duty to respect and consider his fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding, and reinforcing mutual respect and tolerance.

The European Convention, in turn, states:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[147] Art. 29(2), note 56 *supra*.

[148] *See* discussion found on the right to privacy. This discussion is also adopted to the extent that it is applicable to freedom of expression, tackled in subsequent portions of this paper, as a legal tool.

men can identify themselves without fear...many will not be able to fulfill a central aspect of their personhood.[149]

Textual Support for Expression

Freedom of expression is sheltered by both global and regional instruments.[150] Thus, the Universal Declaration, in Article 19, states:

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[149] W. B. Rubenstein, *The Regulation of Lesbian and Gay Identity : Coming Out - Speaking Out - Joining In*, Gay Men and the Law at 155 reproduced in WILETS, *International Human Rights Law and Sexual Orientation*, note 3 *supra* at 73.

[150] The regional instruments of the African Charter, the American Convention, and the European Convention pay due respect to this right. Thus, Article 9 of the African Charter states:

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.

Article 13 of the American Convention provides:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a. respect for the rights or reputation of others;

b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

Article 10, in turn, of the European Convention states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from

> Everyone has the right to freedom of opinion and expression: this right includes the freedom to hold opinions without interference and to seek receive and impart information and ideas through any media and regardless of frontiers.

The Covenant similarly provides :

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression:...[151]

Sex as Expression

Sex, among other facets of a homosexual's life, has been posited to be included within the protection afforded by the guarantee of freedom of expression.[152] This view has as yet found no support in the international regime,[153] and has been mainly confined to American legal circles.

> requiring the licensing of broadcasting, television, or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[151] Covenant, art. 19(1).

[152] RABINOWITZ, *Proposals for Progress: Sodomy Laws and the European Convention on Human Rights*, note 109 *supra* at 461.

[153] The deliberations during the drafting sessions of the Covenant seem not to have addressed the issue of whether sexual expression was included within Article 19 on freedom of expression, *see* M.J. BOSSUYT, *op. cit. supra* note 78 at 373. For example, *see* also L. Hannikainen & K. Myntti, *Article 19*, in EIDE, *op. cit. supra* note 50 at 275, where discussion of freedom of expression was undertaken primarily in the traditional context of freedom of information and of the press without reference to sexual expression. *See* also COUNCIL OF EUROPE, HUMAN RIGHTS TERMINOLOGY IN INTERNATIONAL LAW: A THESAURUS 59 (1987).

In fact, the European Commission has rejected the assertion that freedom of expression encompasses sexual expression. In the case of *X v. the United Kingdom*,[154] the applicant argued that his freedom to express his love for other men within a sexual relationship was infringed by his prosecution and indictment for violation of Britain's sodomy laws.[155] In particular, he argued that the concept of freedom of expression as guaranteed by Article 10 of the European Convention included the sexual act.[156]

The Commission rejected the extension of this right to homosexual sexual relations and noted that "expression" referred to "expression of opinion and receiving and imparting information and ideas."[157] Thus, it did not "encompass any notion of the physical expression of feelings."[158]

However, certain factors militate against the treatment of this ruling as indicative of good law. First, it should be noted that Mr. X was convicted of sodomy with two men who could not legally consent to sexual relations.[159] Second, this decision was rendered nearly two decades ago, at a time when sodomy had not yet been ruled to be violative of the right to privacy embodied in the European Convention.[160] Thus, the decision's existence does not rule out a future successful claim as to the usage of freedom of expression to void sodomy laws, both within the European Convention[161] and without.

Even in the United States, however, not much reliance has been placed on this principle, as freedom of expression is largely recognized as protecting not conduct, but rather "status, speech, and other forms of

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[154] App'n No. 7215/75, 19 Eur. Comm'n H. R. Dec. & Rep. 66.
[155] *Id.* at 80.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] They were both 18 years of age, and the age of consent at that time in the U.K. was 21.
[160] The decision of the European Court in Dudgeon v. U.K., note 105 *supra* was handed down in 1981, or three years subsequent to this decision.
[161] Rabinowitz, *Proposals for Progress: Sodomy Laws and the European Convention on Human Rights*, note 109 *supra* at 461.

expression."[162] American courts have in fact made a distinction between conduct and speech,[163] allowing homosexual speech, advocacy, and association without allowing sexual activity.[164]

Conceptually, freedom of expression has its own limitations as well. It has been said that the protection it affords is the "mirror image" of the privacy doctrine, in that it "shelters only public activities" and not "private gay conduct".[165] Considering that sexual relations have traditionally been and is expected to largely remain within the confines of a bedroom, the protection afforded by the freedom of expression may not suffice to reach individuals engaged in sexual conduct within a private sphere, unless a re-thinking of the scope of this principle is undertaken.

If the interpretation of these instruments may be broadened to include within its coverage freedom of sexual expression, then another tool for the assertion of international legal protection may be wielded.

POSSIBLE LEGAL REMEDIES

The avenues available to those whose rights have been transgressed and who seek redress are severely limited in the international sphere. The potential for relief, while presently inadequate, exists however, and this potential must be tapped if any temporary alleviation is to be obtained.

Under international law, responsibility entails reparation,[166] and reparation may include a declaration that the state has acted

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[162] *See* S. K. Kozuma, Note, *Baehr v. Lewin and Same-Sex Marriage: The Continued Struggle for Social, Political, and Human Legitimacy* 30 WILLAMETTE L. REV. 891, 906 (1994).

[163] Note, *The Constitutional Status of Sexual Orientation : Homosexuality as a Suspect Classification* 98 HARVARD L. REV. 1285, 1254 (1985).

[164] *Id.*

[165] *Id.* at 1293.

[166] *See* IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 34 (1983).

unlawfully,[167] a duty to annul the act which constitutes the international tort[168] (including annulment of judgments of courts and the legislative acts of the state), and, perhaps, the payment of pecuniary damages.[169]

The obtention of relief would necessitate the invocation, first and foremost, of the protection available from the different international human rights instruments. The interpretation of the Covenant by the Committee leaves no doubt for the present parties to the Covenant that criminalization of same-sex behavior is a violation of their obligations under the said Covenant. Compliance with their obligations would therefore necessitate repeal of any criminal laws penalizing sexual relations. Should these laws be allowed to remain in statute books, individual citizens may seek relief from the Committee under the Optional Protocol. Other instruments with similar protective language may also be interpreted in the same way, and to this extent, States Parties to these instruments may also be held accountable for violations.

Second, relief may be sought from other institutions provided by the existing United Nations framework. The U.N. High Commissioner for Human Rights,[170] the U.N. Human Rights Commission of the U.N. Economic and Social Council,[171] and the U.N. Centre for Human Rights[172] have mandated roles in human rights enforcement and

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[167] A. Tanzi, *Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?* in MARINA SPINEDI AND BRUNO SIMMA, UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 1, 22 (1987).

[168] *Id.* at 23.

[169] *Id.* at 24.

[170] A post created with the mandate to coordinate human rights promotion and protection activities. *See* WILETS, *International Human Rights Law and Sexual Orientation*, note 3 *supra* footnote 82.

[171] A body authorized to examine information relevant to gross violations of human rights and fundamental freedoms under ECOSOC Resolution 1235 (XLII)(1967) and situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights under ECOSOC Resolution 1503 (XLVIII)(1970). *See* LILLICH, *When Do Individuals and Non-governmental Organizations Have the Right to Petition the United Nations and What Happens?* note 61 *supra* at 373.

[172] WILETS, *International Human Rights Law and Sexual Orientation*, note 3 *supra* at 20.

protection that may provide important international protection.[173] The encouraging decision provided by the Committee in the *Toonen* case may provide a definite guide for future application by these international agencies in cases presented before them which involve similar situations.

Of course, states have in varying degrees incorporated within their own municipal systems the language, if not the spirit, of these international human rights norms. Appeal may also be sought from existing national judicial tribunals for any relief that may be available on the basis of domestic constitutions or statutes.

Should there be no relief available or forthcoming from these sources, it is necessary that relief from the United Nations be secured under the U.N. Charter's provisions. If the United Nations Security Council can be convinced that a threat to the peace or breach of the peace exists and is continuing, then it is possible that that the United Nations machinery may be set in motion to intervene for humanitarian reasons.[174] The continued persecution of homosexuals by states, even to the extent of taking their lives, surely do much to threaten the peace and stability of a nation.

Should this be not possible, then as a last resort, another state's protection must be sought.[175] Surely, the escalating costs in terms of lives and liberties and the continued disregard for "fundamental human rights," the "dignity and worth of the human person" and the "equal rights of men and women"[176] should suffice to move a third state to intervene.

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[173] *Id.*

[174] LILLICH, *op. cit. supra* note 61 at 577.

[175] (W)hen neither the United Nations nor the competent regional organization can or wants to assume its responsibilities, a State may be temporarily relieved of its obligations of restraint under article 2(4) (of the United Nations Charter) so as to provide a form of "substitute or functional enforcement of human rights"...Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the United Nations Charter* reprinted in LILLICH, *op. cit. supra* note 61 at 587.

[176] U. N. CHARTER, Preamble.

CONCLUSION

The struggle for homosexual rights is far from over. Gains made in one country or in one forum cannot and should not obscure the pitiful losses suffered each and every day by inhabitants of other countries. The need to be vigilant is necessary, and the need for action, paramount.

Laws on homosexual conduct need to be addressed now.

> In addition to their specific impact on individuals, laws serve a symbolic function by codifying the values — or at least the preached values — of the society. Thus, laws that penalize specific forms of sexual expression, or that come to be used or understood as branding a particular group as outlaws, convey a message of social disapproval to all citizens.... Ironically, there are (other) values that the law should be conveying instead. In a democratic society, the laws should reinforce the importance of, and respect for, individual choice and freedom. Laws should encourage tolerance and celebrate diversity rather than foster ignorance and instill prejudice. They should not become the vehicle for hypocrisy regarding the personal or sexual conduct of some, while serving as the engine for attacks on others.[177]

International law should fill the human rights void unaddressed, if not created, by domestic law. Only then may the vision of the framers of the international regime for the protection of human rights, the unceasing efforts of countless activists and volunteers in the world, and the lives of the victims of human rights violations, be spared from waste.

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[177] Lambda Legal Defense and Education Fund Amicus Curiae brief, *supra* note 1 at 1038.