

Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence

Laurence R. Helfer*
Alice M. Miller**

The last decade has witnessed an important new trend in international law: legal advocacy to protect the fundamental rights of lesbians and gay men.¹ Although no international human rights treaties expressly mention homosexuality or sexual orientation, human rights monitoring institutions, both judicial and political, have recently begun to interpret these treaties to protect certain aspects of lesbian and gay identity and conduct. Similarly, legal scholars and human rights activists have argued with increased frequency that governments may

* Associate, Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C.

I would like to thank Anne-Marie Slaughter, Robert Wintemute, Edwin Rekosh, Mona Nicoara, David Boyd, and Judi Addelston for their helpful comments on many of the ideas in this Article. I also wish to express my gratitude to Lyonette Louis-Jacques, foreign and international law librarian and lecturer in law at the University of Chicago Law School, who provided invaluable research support.

Many of the ideas in this Article crystallized during the summer of 1994 while I was teaching a seminar at the University of Puerto Rico School of Law entitled "The Rights of Lesbians and Gay Men: A Comparative Law and Human Rights Approach." My thanks to Dean Antonio Garcia Padilla for inviting me to teach the seminar.

** Staff attorney, Women in the Law Project, International Human Rights Law Group; Volunteer Leader, Amnesty International (AIUSA). Ms. Miller is a founding member of AIUSA's Task Force on Women's Human Rights and a policy coordinator for AIUSA's ongoing work to end human rights violations based on sexual orientation, and has collaborated on a study on human rights violations in the context of HIV/AIDS.

I would like to thank Sandy Coliver, Deborah Isser, Sofia Gruskin, Anjie Rosga, Meg Satterthwaite, and Donna Sullivan for their extensive and insightful commentary on many of the ideas in this Article, and Meghan Faux for her research support. Finally, appreciation must also go to the staff and activists at Amnesty International, AIUSA, the International Lesbian and Gay Association (ILGA), and the International Gay and Lesbian Human Rights Commission (IGLHRC), upon whose international work and documentation this Article depends.

1. We acknowledge the many cultural and political limitations inherent in the use of terms such as "gay," "bisexual," "queer," or "sexual minority." As noted by many critics, they are "predominantly Western . . . [and] may not adequately or accurately define individuals who are oriented affectionately toward others of their own sex, particularly in non-Western cultures. The native American *berdache* and the Ghanaian *obaa banyin* are examples of other culturally relevant terms." AMNESTY INTERNATIONAL USA, BREAKING THE SILENCE: HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION 44 (1994) [hereinafter BREAKING THE SILENCE].

not discriminate on the basis of sexual orientation when upholding individual rights and freedoms.²

The idea that lesbian and gay rights are an integral part of international human rights has been most widely accepted in Europe. In three important judgments,³ the European Court of Human Rights has held that laws criminalizing same-sex conduct between consenting adults violate the right to respect for private life enshrined in the European Convention on Human Rights.⁴ The Court's case law, together with the increasing visibility and power of lesbian and gay advocacy groups, has led to a widespread movement in Europe to decriminalize consensual homosexual conduct and to repeal laws that discriminate against sexual minorities.⁵

Within the last two years, the struggle for fundamental rights for lesbians and gay men has extended beyond Europe. In March 1994, the United Nations Human Rights Committee⁶ held in *Toonen v. Australia*⁷ that statutes criminalizing homosexual sodomy in Tasmania violate the rights of privacy and nondiscrimination protected by the International Covenant on Civil and Political Rights (the ICCPR or the Covenant). This groundbreaking unanimous decision, which the Australian Parliament recently incorporated into national law,⁸ adds

2. See, e.g., ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT* (1995); ROBERT WINTHEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER* (1995); INTERNATIONAL LESBIAN AND GAY HUMAN RIGHTS COMMISSION, *UNSPOKEN RULES: SEXUAL ORIENTATION AND WOMEN'S HUMAN RIGHTS* (Rachel Rosenbloom ed., 1995); *BREAKING THE SILENCE*, *supra* note 1; MASHA GESSEN, *THE RIGHTS OF LESBIANS AND GAY MEN IN THE RUSSIAN FEDERATION: AN INTERNATIONAL LESBIAN AND GAY HUMAN RIGHTS COMMISSION REPORT* (1994); *HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE* (Kees Waaldijk & Andrew Clapham eds., 1993); *Growing Up Lesbian in Zimbabwe*, *ILGA BULLETIN* (International Lesbian and Gay Association, Brussels, Belgium) Jan. 1993, at 20; *THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION* (Aart Hendriks et al. eds., 1993); Laurence R. Helfer, *Lesbian and Gay Rights as Human Rights: Strategies for a United Europe*, 32 VA. J. INT'L L. 157 (1991); James D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1 (1994).

3. See *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981).

4. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 222 [hereinafter *European Convention*].

5. See, e.g., Pieter van Dijk, *The Treatment of Homosexuals under the European Convention on Human Rights*, in *HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE*, *supra* note 2, at 179-202; Evert van der Veen et al., *Lesbian and Gay Rights in Europe: Homosexuality and the Law*, in *THE THIRD PINK BOOK*, *supra* note 2, at 225-42.

6. The United Nations Human Rights Committee is a panel of independent experts that reviews complaints filed by individuals alleging violations of the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights and First Optional Protocol, G.A. Res. 2200, U.N. GAOR, 21st sess., Supp. No. 16, at 52, 59, U.N. Doc. A/6316 (1967) (adopted Dec. 16, 1966, entered into force Mar. 23, 1976) [hereinafter *ICCPR and Optional Protocol*].

7. Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. II, at 226, U.N. Doc. A/49/40 (1994) [hereinafter *Toonen*].

8. See *infra* note 43 and accompanying text.

force to the claim that both criminalizing consensual homosexual conduct and discriminating on the basis of sexual orientation violate international human rights law.

As a result of the Committee's decision, litigation and advocacy concerning human rights violations based on sexual orientation have increased at both the domestic and the international levels. The scope of these activities is becoming global in nature and there is potential for even further expansion, given the rising number of States Parties that have ratified universal and regional human rights treaties.⁹ Although the potential for using human rights standards to advance the struggle for lesbian and gay equality has never been greater, in the wake of *Toonen*, advocates for lesbian and gay rights must assess the wide range of advocacy options available in international and domestic law and must tailor their strategies to the particular legal and social climate in which they act. They must also give careful consideration to incorporating the concept of sexual orientation into the existing human rights paradigm.

Part I of this Article begins with an analysis of the *Toonen* decision and its impact in Australia. Although the result in *Toonen* is a welcome victory for lesbian and gay rights advocates, the Committee's prior case law, as well as certain ambiguities in the reasoning of the decision itself, suggest that the Committee may not always be a sympathetic forum for litigating lesbian and gay human rights issues. In particular, advocates must consider whether the Committee's decisions will be influenced by how strenuously a State defends itself against an allegation that it has violated the ICCPR, and whether the Committee will adhere to its somewhat tentative conclusion in *Toonen* that the ICCPR's prohibition of sex discrimination encompasses discrimination on the basis of sexual orientation.

In Part II, we explore the effects of *Toonen* in national courts, using the United States as a case study. Although U.S. citizens cannot file individual complaints with the Committee, the Committee's jurisprudence may nonetheless be influential in the United States. First, we examine the legal status of the Covenant in domestic law, focusing on whether courts will construe the treaty to create a private right of action in U.S. courts despite the Senate's declaration that the ICCPR

9. For example, as of November 1995, 132 States (including the United States) had ratified the ICCPR and 85 States had ratified the First Optional Protocol to the ICCPR authorizing individuals to file complaints with the Committee alleging violations of the treaty. See U.N. INFORMATION SERVICE, PRESS RELEASE: HUMAN RIGHTS COMMITTEE CONCLUDES FIFTY-FIFTH SESSION AT GENEVA, 16 OCTOBER-3 NOVEMBER, U.N. Doc. HR/CT/448 (1995). The number of States Parties to the European Convention also is rising, as the nations of Eastern Europe and the former Soviet Union continue their transition to democracy. Thirty-eight European States have joined the Council of Europe. See *Two Nations Join Panel For Rights in Europe*, N.Y. TIMES, Nov. 10, 1995, at A10.

is not self-executing. Next, we set out alternative methods by which federal and state courts may invoke the treaty and the *Toonen* decision to invalidate state sodomy statutes.

In Part III, we discuss ways to frame sexual orientation and its associated practices and identity as human rights issues. After exploring the apparent tension between a universal understanding of human rights and a conception informed by culture and gender differences, we identify a range of strategies to increase awareness of lesbian and gay rights, and to achieve concrete legal reforms under the rubric of universal human rights. The strategies we present range from networking with mainstream human rights organizations, to using human rights standards to assist with national law reform strategies, to advocacy during the ICCPR reporting process, to monitoring by the United Nations of human rights abuses directed against lesbian and gay men, to choosing the next test case to bring before the U.N. Human Rights Committee.

I. THE UNITED NATIONS HUMAN RIGHTS COMMITTEE RECOGNIZES LESBIAN AND GAY RIGHTS AS HUMAN RIGHTS

A. *Toonen v. Australia*

On March 31, 1994, the United Nations Human Rights Committee¹⁰ adopted its "views"¹¹ in the case of *Toonen v. Australia*, holding

10. The Human Rights Committee is made up of 18 human rights experts who are elected by States Parties to the ICCPR for four-year terms and serve in their individual capacities. Under article 40 of the ICCPR, each State Party must submit regular written reports to the Committee detailing the measures it has adopted to give effect to the rights set forth in the treaty. In addition, States Parties periodically must send delegations to answer the Committee's written and oral questions at public hearings. The Committee develops its jurisprudence through specific comments on the States Parties' reports as well as by drafting general comments to all States on the scope of each right contained in the ICCPR, which often include recommendations for further action.

For those States Parties that have also ratified the Optional Protocol allowing their citizens to lodge complaints before the Committee, the Committee is authorized to consider communications from individuals alleged to be victims of a violation of any of the rights set forth in the ICCPR. For a communication to be declared admissible by the Committee four criteria must be met: it must be submitted by the victim him/herself; domestic remedies must be exhausted; the communication must not be under consideration by any other international monitoring body; and the individual must provide sufficient facts to substantiate his or her allegations. The Committee considers admissible complaints in closed session after receiving written submissions from both parties. Its "views" on the complaint are forwarded to the parties and published in the Committee's annual report to the General Assembly.

For a detailed discussion of the Committee's practice and procedure, see DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (1991).

11. The Committee issues non-binding "views" declaring whether a State Party has violated the ICCPR. Optional Protocol, *supra* note 6, art. 5, ¶ 4. See, e.g., MCGOLDRICK, *supra* note 10, at 151 (noting that the Committee's views are not legally binding on parties before it). That the

that sections 122 and 123 of the Tasmanian Criminal Code¹² violate the right of privacy¹³ and the right to nondiscrimination¹⁴ enshrined in the ICCPR.

The international challenge to the statutes was brought by Mr. Nicholas Toonen, a twenty-nine-year-old resident of Hobart, Tasmania and a leading member of the Tasmanian Gay Law Reform Group.¹⁵ He alleged that the laws, although not enforced against consenting adults for more than ten years, interfered with his private life by empowering police officials to investigate intimate aspects of his sexual behavior with other men, by chilling the public expression of his sexuality and his efforts to achieve legislative repeal of the statutes, and by "creating the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights."¹⁶ After documenting the campaign of "official and unofficial hatred" against gay men and lesbians in Tasmania,¹⁷ *Toonen* argued that the laws arbitrarily interfered with his private life and impermissibly distinguished between individuals on the basis of their sex and sexual orientation.¹⁸

Committee's decisions are not legally binding does not mean that States uniformly flout its rulings. Rather, its views have frequently convinced States to provide the relief it requests. *Id.* at 202-04.

12. Criminal Code Act, No. 69 (Tas.) (1924). Section 122(a) prohibits "carnal knowledge of any person against the order of nature," and section 122(c) prohibits any person from "consent[ing] to a male person having carnal knowledge of him or her against the order of nature." Section 123 outlaws "indecent assault" and "act[s] of gross indecency" between males, "whether in public or private."

13. See ICCPR, *supra* note 6, art. 17(1) ("No one shall be subjected to arbitrary or unlawful interference with his privacy . . .").

14. The ICCPR contains two articles that prohibit discrimination. Under article 2(1), a State Party to the ICCPR "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 . . ." ICCPR, *supra* note 6, art. 2(1) (emphasis added). Under this provision, only discrimination that relates to another ICCPR right or freedom is prohibited. By contrast, article 26 of the ICCPR creates an independent right to equality, stating that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 465-66 (1993) (explaining the history of this distinction).

In addition, both articles contain an identical list of prohibited grounds of discrimination, including race, color, sex, language, religion, political or other opinion, national or social origin, property, and birth. This list is not intended to be exhaustive and discrimination on the basis of "other status" is also prohibited under both articles. See ICCPR, *supra* note 6, art. 2(1), 26.

15. *Toonen*, *supra* note 7, at 226. For a discussion and analysis of the four communications submitted by the Tasmanian Lesbian and Gay Rights Group on behalf of Nicholas Toonen, see Wayne Morgan, *Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations*, 19 MELB. UNIV. L. REV. 740 (1994).

16. *Toonen*, *supra* note 7, at 227.

17. *Id.* For a discussion of the legal, social, and political situation of lesbians and gay men in Tasmania, see Rodney Croome, *Australian Gay Rights Case Goes to the United Nations*, 2 AUST. GAY & LESBIAN L.J. 55 (1992); Rodney Croome, "Out and About": *The Public Rights of Lesbians and Gays in Tasmania*, 2 AUST. GAY & LESBIAN L.J. 63 (1992).

18. *Toonen*, *supra* note 7, at 227-28. Specifically, Toonen argued that "the Tasmanian Criminal Code does not outlaw any form of homosexual activity between consenting homosexual women

In response to these allegations, the federal government of Australia adopted an exceptionally rights-protective stance. It forthrightly "concede[d] that Toonen has been a victim of arbitrary interference with his privacy, and that the legislative provisions challenged by him cannot be justified on public health or moral grounds."¹⁹ Its only opposition consisted of forwarding the views of the Tasmanian government, which argued that the statutes were a necessary and proportional means of preventing the spread of HIV and AIDS and of preserving the "moral standards of Tasmanian society."²⁰

In its examination of the merits of the petition, the Committee essentially adopted the federal government's position. After establishing a two-part test for measuring violations of article 17,²¹ the Committee considered and summarily rejected each of the arguments put forth by the Tasmanian authorities. Specifically, it reasoned that "the criminalization of homosexual practices cannot be considered a reasonable or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV" because the statutes "drive[] underground many of the people at risk of infection" and impede public health programs.²² The Committee also rejected Tasmania's claim that "moral issues are exclusively a matter of domestic concern," since this would withdraw from the Committee's scrutiny "a potentially large number of statutes interfering with privacy."²³ Noting that every other Australian state had repealed its sodomy laws, that Tasmanian public opinion was divided over the need to maintain the laws, and that state authorities had refrained from enforcing the laws in the last decade, the Committee

in private and only some forms of consenting heterosexual activity between adult men and women in private." *Id.* at 228. Accordingly, he alleged that the laws "distinguish[ed] between individuals in the exercise of their right to privacy on the basis of sexual activity, sexual orientation and sexual identity." *Id.*

19. *Id.* at 229.

20. *Id.* at 229–30. In several instances, the federal government expressly disagreed with the arguments made by Tasmania. *See id.* at 229 (arguing that sodomy laws inhibited the Australian Government's "National HIV/AIDS Strategy"); *id.* at 230 (stating that sodomy laws are not a "proportional response to the perceived threat to the moral standards of Tasmanian society"); *id.* at 231 (challenging argument that laws do not discriminate between classes of people but merely "identify acts which are unacceptable to the Tasmanian community").

21. The Committee first concluded that the term "arbitrary" in article 17 required that "even interference[s] provided by the law should be . . . reasonable in the circumstances." *Id.* at 234 (citation omitted). It then interpreted the requirement of reasonableness "to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case." *Id.* The Committee's standard for determining a violation of privacy is similar to that applied by the European Court of Human Rights. *See, e.g.,* *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 21–22 (1981) (stating that interferences with privacy must be "necessary in a democratic society," satisfy a "pressing social need," and be "proportionate to the legitimate aim pursued").

22. *Toonen, supra* note 7, at 234.

23. *Id.*

concluded that the laws were an unreasonable and arbitrary interference with Toonen's privacy.²⁴

With respect to Toonen's allegation that the statutes violated the ICCPR's nondiscrimination guarantees,²⁵ the federal government requested the Committee's "guidance" on whether sexual orientation could be subsumed under the term "or other status" in articles 2 and 26. The government conceded that if the Committee were to conclude that the "other status" clauses covered sexual orientation, then the laws should be viewed as discriminatory under the ICCPR.²⁶ Although the Committee did not resolve this issue, it stated without explanation that "the reference to 'sex' in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation."²⁷

In light of these findings, the Committee declared that the Tasmanian sodomy statutes violated article 17 and article 2 of the ICCPR.²⁸ Concluding that a remedy for these violations would be the repeal of sections 122 and 123, it urged the Australian government to inform it within 90 days of the measures taken to comply with its views.²⁹

B. Toonen's Impact in Australia

Interpreting the impact of the *Toonen* decision in Australia requires a brief examination of the legal effect of international treaties in that country's federal constitutional scheme.³⁰ Like the U.S. Constitution, the Australian Constitution grants legislative power to the federal Parliament only in a limited number of areas and reserves plenary legislative authority over all other matters to the six states.³¹ Among Parliament's enumerated powers is the power to make laws with re-

24. *Id.*

25. Although Toonen had alleged violations of both of the ICCPR's nondiscrimination provisions, the Committee limited its findings to article 17 and article 2(1), stating that it was unnecessary to consider whether article 26 had also been breached. *See id.* at 235.

26. *Id.* at 230, 231. The federal government suggested that the phrase should not be interpreted narrowly and supports "an inclusive rather than exhaustive interpretation." *Id.* at 231. Surprisingly, the Tasmanian government conceded that sexual orientation was an "other status" for purposes of the ICCPR. *Id.*

27. *Id.* at 235.

28. *Id.* Having found a violation of articles 2 and 17, the Committee stated that it was unnecessary to consider whether the statutes also violated article 26. *Id.* In a separate opinion, Committee member Bertil Wennergren concluded that the sodomy statutes violated article 26, as well as articles 2 and 17. *See id.* at 236-37. Mr. Wennergren also stated that the term "sex" encompasses sexual orientation on the ground that "the common denominator for the grounds 'race, colour and sex' are biological or genetic factors." *Id.* at 236.

29. *Id.* at 235.

30. For a thorough discussion of this topic, see LESLIE ZINES, *THE HIGH COURT AND THE CONSTITUTION* 235-75 (3d ed. 1992); Brian R. Opeskin & Donald R. Rothwell, *The Impact of Treaties on Australian Federalism*, 27 CASE W. RES. J. INT'L L. 1 (1995).

31. AUSTL. CONST. ch. I, § 51 (specifying areas of federal legislative power); ch. V, § 107 (reserving to states plenary power enjoyed as colonies prior to federation).

spect to "external affairs,"³² which includes the authority to incorporate treaties into domestic law.³³ Australia's international treaty obligations do not have the force of law within the national legal system in the absence of such implementing legislation.³⁴ Within this framework, a constitutional debate has arisen over whether Parliament has the authority to implement a treaty or other international obligation into domestic law where the subject matter of the treaty falls solely within the "external affairs" power and not within any of the other enumerated federal powers.³⁵

This dispute has become particularly pronounced in the context of the *Toonen* decision for three reasons. First, individual liberties and criminal law are subjects that fall unquestionably within the states' residual powers.³⁶ Thus, absent a treaty, the Parliament could not have repealed Tasmania's sodomy statute by means of federal legislation.

Second, although Australia has ratified the ICCPR and the Optional Protocol, it has not incorporated the treaty into domestic law.³⁷ As a result, authority for federal legislation implementing the *Toonen* decision must be based on the non-binding "view" of the Human Rights Committee, rather than on the text of the ICCPR itself. The Australian High Court has upheld the constitutionality of the federal Parliament's authority to implement treaties based solely on the "external affairs" power. However, Parliament's power to implement a non-binding recommendation of an international tribunal remains an unsettled constitutional question.³⁸

Third, there is a growing tendency for Australian courts to consult the legal norms enshrined in international human rights treaties when deciding cases in which domestic law, whether constitutional, statutory or common law, is ambiguous or incomplete.³⁹ Thus, the Committee's decision in *Toonen* raises the possibility that lesbian and gay rights

32. AUSTL. CONST. ch. I, § 51 (xxix).

33. See Opeskin & Rothwell, *supra* note 30, at 6–12.

34. *Id.* at 6–7. States may also pass laws to implement treaties, provided that such legislation is not inconsistent with federal law. *Id.* at 16 n.69 (citing AUSTL. CONST. ch. V, § 109).

35. *Id.* at 9, 29–44.

36. *Id.* at 47.

37. *Id.* at 49.

38. *Id.* at 52–55.

39. *Id.* at 26. As the High Court stated in *Mabo v. Queensland*, 175 C.L.R. 1, 42 (1992) (Brennan, J.):

The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the [ICCPR] brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.

advocates can rely on the Covenant or the decision as persuasive authority when challenging discriminatory practices under domestic law.⁴⁰

After receiving notice of the Committee's views in *Toonen*, the Tasmanian government condemned the decision as a violation of its sovereignty and declared that it would not alter its criminal code.⁴¹ Lesbian and gay rights activists in Australia immediately began to pressure the federal government to overturn the law, relying on the external affairs power in the Australian Federal Constitution. Initially, the federal government attempted to persuade the state legislature to repeal the statute. It made clear its position that Tasmania was required to comply with Australia's international obligations and that if it failed to do so, the federal Parliament would intervene under its external affairs power and repeal the statute.⁴²

When the Tasmanian government refused to cooperate, Parliament enacted the Human Rights (Sexual Conduct) Act of 1994, which provides that "[s]exual conduct involving only consenting adults in private is not to be subject . . . to any arbitrary interference with privacy within the meaning of Article 17 [of the Covenant]."⁴³ Under the Constitution's federal supremacy clause, the Act prohibits the prosecution of consensual homosexual conduct in private and overrides the Tasmanian sodomy statute.⁴⁴ The Tasmanian government has considered challenging the legislation before the High Court.⁴⁵ However, few commentators expect such a constitutional challenge to succeed given the High Court's broad reading of the external affairs power.⁴⁶

C. *Toonen's Impact on Lesbian and Gay Human Rights Litigation*

Within and beyond the borders of Australia, the *Toonen* decision is a significant victory for lesbian and gay rights advocates. It marks the first time any United Nations body has stated unequivocally that fundamental human rights protections extend to lesbians and gay men.

40. See Morgan, *supra* note 15, at 745.

41. See Michael Perry, *Tasmanian Anti-Gay Laws Said to Breach Rights*, Reuters World Service, Apr. 11, 1994, available in LEXIS, Nexis Library, REUWLD file; Opeskin & Rothwell, *supra* note 30, at 52.

42. See Anne Twomey, *Strange Bedfellows: The UN Human Rights Committee and the Tasmanian Parliament*, CURRENT ISSUES BRIEF (Australian Gov't Publication Service, Canberra, Austl.), Apr. 19, 1994.

43. Human Rights (Sexual Conduct) Act, 1994 AUSTL. ACTS P., § 4(1).

44. Opeskin & Rothwell, *supra* note 30, at 53 n.235.

45. See *Tasmania Vows To Keep Anti-Gay Laws*, INDEPENDENT, Aug. 24, 1994, at 6. Not satisfied with the federal statute, Tasmanian lesbian and gay activists have now challenged Tasmania's refusal to change its sodomy laws before the High Court. See *Tasmanian Gays Step Up Fight*, ILGA BULLETIN (International Lesbian and Gay Association, Brussels, Belgium), Oct.-Dec. 1995, at 13.

46. See Morgan, *supra* note 15, at 745 n.16; Opeskin & Rothwell, *supra* note 30, at 53; Twomey, *supra* note 42, at 18-19.

The Committee's decision represents an advance over the rulings of the European Court of Human Rights, both because it extends the protection of international human rights norms from the regional to the global plane and because it contains a decidedly rights-protective interpretation of the ICCPR. The Committee's decision acknowledges that it is anomalous to use criminal sanctions to prevent the spread of HIV infection and to rely on morality to support a law that no prosecutor is willing to enforce.⁴⁷ And by accepting that even unenforced criminal sanctions against consensual homosexual conduct harm lesbians and gay men in their public and their private lives, the Committee recognizes that one of the most pernicious consequences of sodomy laws is their threat to the dignity of individuals.⁴⁸

Similarly, the impact of the Committee's decision may extend far beyond the strengthening of challenges to national sodomy laws.⁴⁹ By recognizing that sexual orientation discrimination may violate international human rights obligations, the Committee has opened the door to a wide range of challenges to laws and policies that disadvantage sexual minorities, including disparate treatment in employment and housing, benefits for same sex partners, limiting marriage exclusively to heterosexuals, and denying custody of children to parents on the basis of sexual orientation.

Yet a closer analysis of the Committee's case law discloses concerns regarding whether the *Toonen* decision provides the foundation for further legal protections for lesbians and gay men. In particular, advocates must consider the extent to which the Committee's analysis of an aggrieved individual's human rights allegations will be influenced by how stridently a State Party defends against those allegations. In addition, advocates must take into account the demands on the Committee to produce well-reasoned decisions that will be broadly acceptable to States Parties with widely different cultures and legal systems. This concern is highlighted by the Committee's endorsement of the principle that discrimination on the basis of sexual orientation falls

47. After the Committee's ruling and as a form of protest, several gay men turned themselves in to the Tasmanian police and confessed to having consensual sex with other men in private. The Tasmanian authorities declined to prosecute them. See *Tasmania Vows To Keep Anti-Gay Laws*, *supra* note 45, at 6.

48. See generally RICHARD MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY AND LAW* (1988).

49. See Rob Tielman & Hans Hammelburg, *World Survey on the Social and Legal Position of Gays and Lesbians*, in *THE THIRD PINK BOOK*, *supra* note 2, at 250-51, 252-342 (noting that as of 1993, same sex conduct between consenting adults is illegal in 74 of 202 countries surveyed); Morgan, *supra* note 15, at 745 (stating that *Toonen* "allows gay men and lesbians from other countries which have similar sex laws and which are parties to the Optional Protocol to immediately challenge them"). For consideration of whether such challenges will be successful, see discussion *infra* parts II.B, III.C.5.

within the prohibition of discrimination on the basis of sex, an unprecedented position that is arguably in tension with existing international human rights norms.

1. The Importance of a State's Defense and the Committee's Willingness to Scrutinize Human Rights Abuses

Unlike Australia, other States Parties to the ICCPR have in the past responded with hostility to the human rights claims of lesbian and gay citizens. In *Hertzberg v. Finland*,⁵⁰ several journalists challenged restrictions on broadcasts depicting favorable images of homosexuality in the Finnish news media as a violation of freedom of expression.⁵¹ The plaintiffs alleged that the state-controlled Finnish Broadcasting Company had censored stories about gay men and lesbians from radio and television.⁵² They asserted that because of a provision in the Finnish Penal Code criminalizing public violations of sexual morality,⁵³ it was "impossible[] for a journalist to . . . prepar[e] a programme in which homosexuals are portrayed as anything else than sick, disturbed, criminal or wanting to change their sex."⁵⁴ The Finnish government denied that there had been a violation of the ICCPR, arguing that any restriction on expression was necessary to protect public morals.⁵⁵

50. Comm. No. 14/61, U.N. GAOR Hum. Rts. Comm., 37th Sess., Supp. No. 40, at 161, U.N. Doc. A/37/40 (1982) [hereinafter *Hertzberg*].

51. Article 19, paragraph 2 of the ICCPR enshrines the right to freedom of expression. Paragraph 3 provides that:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

ICCPR, *supra* note 6, art. 19, ¶ 3.

52. One program concerned a review of a book and an interview "with a homosexual about the identity of a young homosexual and about life as a homosexual in Finland." *Hertzberg, supra* note 50, at 162. A second concerned a "TV series on different marginal groups of society such as Jews, gypsies and homosexuals" that was intended "to provide factual information and thereby to remove prejudices against those groups." *Id.*

53. Paragraph 9 of article 20 of the Finnish Penal Code provides:

If someone publicly engages in an act violating sexual morality, thereby giving offense, he shall be sentenced for publicly violating sexual morality to imprisonment for at most six months or to a fine.

Anyone who publicly encourages indecent behaviour between persons of the same sex shall be sentenced for encouragement to indecent behavior between members of the same sex as decreed in subsection 1.

Id. at 162 (quoting statute).

54. *Id.*

55. *Id.* at 163. The government reasoned that the prohibitions in the criminal code "reflect the prevailing moral conceptions in Finland as interpreted by the Parliament and by large groups of the population." *Id.* It also stressed that the challenged broadcasting decisions were not a form of censorship but rather were based on "general considerations of programme policy in accordance with the internal rules of the [Finnish Broadcasting] Company." *Id.* at 164.

The Committee considered whether "it should invite the Parties to submit the full text of the censored programs," noting that "only on the basis of these texts could it be possible to determine whether the[y] were mainly or exclusively made up of factual information about issues related to homosexuality."⁵⁶ However, the Committee then stated that the information before it was "sufficient to formulate its views" that

public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.

The Committee finds that *it cannot question the decision of the responsible organs of the Finnish Broadcasting Corporation that radio and TV are not the appropriate forums to discuss issues related to homosexuality*, as far as a programme could be judged as encouraging homosexual behavior As far as radio and TV programmes are concerned, the audience cannot be controlled. In particular, harmful effects on minors cannot be excluded.⁵⁷

Accordingly, the Committee concluded that the refusal to air the programs did not violate the ICCPR.

Several features of the Committee's reasoning in *Hertzberg* are troubling. First, the Committee deferred to Finland's judgment about the need for censorship without screening the contested broadcasts, though it candidly acknowledged that only by viewing them could it determine the validity of the restrictions. Second, the Committee's deferential approach to public morals is one that typifies an international jurisprudence that is restrictive of lesbian and gay rights.⁵⁸ Even if

56. *Id.* at 165.

57. *Id.* (emphasis added). In a concurring opinion, three Committee members emphasized that "restrictions on freedom of expression . . . should not be applied so as to perpetuate prejudice or promote intolerance." *Id.* at 166 (Opinion of Torkel Opsahl). Although acknowledging the need to "protect freedom of expression as regards minority views, including those that offend, shock or disturb the majority," the concurring members agreed that there had been no violation of article 19 in this case. *Id.*

58. A similar deferential approach has inhibited the European Court and Commission of Human Rights from recognizing treaty violations with respect to laws disadvantaging lesbians and gay men other than those that prohibit adults from engaging in consensual homosexual conduct in private. *See, e.g., S. v. United Kingdom*, App. No. 11716/85, 47 Eur. Comm'n H.R. Dec. & Rep. 274 (1986) (upholding refusal to allow partner in lesbian relationship to renew public housing lease, although similar renewals granted to married heterosexual couples); *B. v. United Kingdom*, App. No. 9237/81, 34 Eur. Comm'n H.R. Dec. & Rep. 68 (1983) (upholding ban on homosexuals in the military); *X. & Y. v. United Kingdom*, App. No. 9369/81, 32 Eur. Comm'n H.R. Dec. & Rep. 220 (1983) (upholding denial of permanent residence permit to foreign partner in same-sex couple and denying that that couple could be considered a family); *X. v. United Kingdom*, App. No. 7215/75, 3 Eur. Hum. Rts. Rep. 63 (1978) Commission Report (upholding 21-year age of consent for gay men as compared to 16-year age of consent for lesbians

some discretion is appropriate, the Committee should have determined whether the censorship was "necessary" to protect the State's morality interest and was a proportional means of achieving that goal.⁵⁹ Third, the Committee assumed that radio and television broadcasts about homosexuality might injure minors, though this argument was raised by neither party.⁶⁰ This suggests that in future cases the Committee may acquiesce to government restrictions on the dissemination of positive information about homosexuality on the grounds that such material will be accessible to minors.⁶¹

The Committee's deferential approach in the 1982 *Hertzberg* case seems to contradict its willingness in *Toonen* to scrutinize carefully the practices of States Parties that harm lesbians and gay men. Although the decisions may be reconciled doctrinally by positing a distinction between public and private expressions of homosexuality (which itself is troubling),⁶² a more nuanced understanding of the Committee's reasoning can be gained by exploring the distinct political and historical contexts in which the cases were decided.

One variable that may account for the divergent results is the State Party's response to the alleged human rights violation. In *Hertzberg*, the Finnish government expressly invoked the morality clause in paragraph 3 of article 19 to justify its actions. By contrast, Australia provided no justification for the laws in *Toonen*; indeed, it attacked the public health and moral rationales put forth by the Tasmanian government.

The significance of Australia's sympathetic response should not be underestimated. By conceding the merits of Toonen's privacy claim, Australia conveyed to the Committee its willingness to comply with the ICCPR, even at the risk of upsetting the federal-state balance of power. Australia's criticism of Tasmania's laws may have encouraged the Committee to find a violation of the treaty. If this theory is correct, human rights advocates face the troubling prospect that the outcome of future cases will vary with the degree of resistance mounted by a State Party.⁶³

and heterosexuals). See generally van Dijk, *supra* note 5, at 189-92, 195-98 (discussing other unpublished cases).

59. See generally NOWAK, *supra* note 14, at 351 ("The requirement of necessity implies that the restriction must be *proportional* in severity and intensity to the purpose being sought and may not become the rule.").

60. See Anne F. Bayefsky, *Human Rights: The 1966 Covenants Twenty Years Later*, 80 AM. SOC'Y INT'L L. PROC. 408, 412 (1986).

61. See MCGOLDRICK, *supra* note 10, at 468.

62. Such a distinction seems contrary to the text of the ICCPR, which protects "the right to freedom of expression" subject only to narrowly defined limitations but prohibits only "unlawful and arbitrary interferences with . . . privacy." Compare ICCPR, *supra* note 6, art. 19 with *id.* art. 17. The Committee's articulation of a strict test for infringements with privacy, see *Toonen*, *supra* note 7, at 234, thus seems that much more incongruous with its deferential review of the censorship in *Hertzberg*.

63. Of course, if deference in matters of public morality is proper, then a State Party's response

A more probable explanation of the two decisions, however, centers on the Committee's maturation as a human rights institution. In recent years, the Committee's docket has become increasingly populated by complex cases requiring it to resolve difficult and often controversial legal questions. With the demise of the Cold War and the rapid rise in the number of States Parties from all regions of the globe, the Committee has become more adept at interpreting the ICCPR in these hard cases and, more important, in issuing decisions that reject the arguments espoused by States.⁶⁴ According to this view, the more searching analysis in *Toonen* accurately reflects the current perspective of the Committee and suggests that *Hertzberg* might have been decided differently today. This theory of reconciling the cases holds out the promise of a Committee that will not avoid adjudicating contentious questions of interpretation under the ICCPR, including those that affect the public and private lives of lesbians and gay men.

2. Sexual Orientation Discrimination as Sex Discrimination

A second difficulty with the *Toonen* decision concerns the Committee's unexplained inclusion of sexual orientation within the term "sex" in articles 2 and 26 rather than within the phrase "or other status" in the same provisions. The argument that distinctions based on sexual orientation discriminate on the basis of sex has been advanced by legal scholars in Western industrialized countries for several years.⁶⁵ The

should be a relevant factor, albeit not a dispositive one, in determining whether a restriction upholding majoritarian morals is necessary. The crucial question, however, is whether the Committee will decide that it alone is the final arbiter of whether such a restriction is compatible with the ICCPR. Cf. *Norris v. Ireland*, 142 Eur. Ct. H.R.(ser. A) at 20 (1988) (stating that although national authorities enjoy wide discretion in matters of morals, it is for the Court to determine in the final analysis whether restrictions are compatible with the European Convention).

64. See, e.g., *Ng v. Canada*, No. 469/1991, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, at 189, U.N. Doc. A/49/40 (1994) (finding that extradition of defendant to United States to face death by gas asphyxiation is cruel and inhuman treatment); *Brinkhof v. The Netherlands*, Comm. No. 402/1990, U.N. GAOR Hum. Rts. Comm., 48th Sess., Supp. No. 40, at 124, U.N. Doc. A/48/40 (1993) (deciding that exemption from military service for Jehovah's Witnesses but not other conscientious objectors is incompatible with right to nondiscrimination); *Ballantyne v. Canada*, Comm. No. 359/1989, U.N. GAOR Hum. Rts. Comm., 48th Sess., Supp. No. 40, at 91, U.N. Doc. A/48/40 (1993) (finding that Quebec's French-only commercial sign law violates freedom of expression). See also Markus G. Schmidt, *Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform*, 41 INT'L & COMP. L.Q. 645, 648 (1992) (noting increasing complexity of Committee's docket).

65. See, e.g., Robert Wintemute, *Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the Charter in Mossop, Egan and Layland*, 39 MCGILL L.J. 429 (1994) [hereinafter Wintemute, *Same-Sex Couples*]; I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Laws as Sex Discrimination*, 98 YALE L.J. 145 (1988).

Essentially, the sex discrimination theory asserts that whether a law "restricts a person's choice of the direction of their emotional-sexual conduct depends entirely on that person's sex." Robert

theory has some appeal, both because it incorporates sexual orientation discrimination into the well-developed jurisprudence of sex discrimination and because it eliminates the need to determine whether sexual orientation is immutable.

The theory has met with serious opposition in the courts, however,⁶⁶ and has created controversy among commentators and activists. For example, some human rights advocates are concerned that conflating discrimination on the basis of sex and sexual orientation may obscure the pervasive and continuing nature of oppression against women, whereas others see that possibility as an acceptable cost of elevating sexual orientation to a protected status not otherwise recognized under national constitutions or laws.⁶⁷

The Committee could have avoided the debate over the equation of discrimination on the basis of sexual orientation with sex discrimination by looking to other provisions of international human rights law as sources of protection for lesbian and gay men. Both the ICCPR and the European Convention enumerate long lists of traits that confer entitlement to protection against discrimination, but the lists are not exhaustive and include references to "or other status." Although the Committee has never defined this phrase,⁶⁸ the European Court has interpreted it broadly to "prohibit[] . . . discriminatory treatment having as its basis or reason a personal characteristic . . . by which persons or groups are distinguishable from each other."⁶⁹ The European Commission, although concluding that all distinctions between homosexuals and heterosexuals do not violate the European Convention, nonetheless has reasoned that lesbians and gay men are similarly situ-

Wintemute, *Sexual Orientation Discrimination*, in *INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN* 491, 497 (Christopher McCrudden & Gerald Chambers eds., 1994) [hereinafter Wintemute, *Sexual Orientation Discrimination*]. The theory further posits that homosexuality, by calling into question socially differentiated sex roles, threatens the traditional ideology of the family. It follows that classifications that restrict homosexuality "preserve[] the polarity of gender on which rests the subordination of women" in precisely the same manner that sex-based classifications do. Koppelman, *supra*, at 158.

66. The most frequent reasons given for rejecting it are the equal treatment of men and women (i.e., a man may not marry a man, but neither may a woman marry a woman) and the absence of a legislative intent to expand the notion of sex to encompass sexual orientation. *See* Wintemute, *Same-Sex Couples*, *supra* note 65, at 459-75. Proponents of the sex discrimination theory have responded by stressing the illusion of equal treatment, which "justif[ies] one case of discrimination by invoking the existence of another related case," *id.* at 465, and by arguing that viewing sexual orientation discrimination as a form of sex discrimination furthers the legislative goal of "eliminating the enforcement of traditional sex roles . . ." *Id.* at 471.

67. *See, e.g.,* Morgan, *supra* note 15, at 749.

68. The Committee has taken a broad view of the clause in its case law, applying it to the status of attending a private school, *Blom v. Sweden*, No. 191/1985, U.N. GAOR Hum. Rts. Comm., 43d Sess., Supp. No. 40, at 211, U.N. Doc. A/43/40 (1988), and the status of nationality, *Gueye v. France*, Comm. No. 196/1985, U.N. GAOR Hum. Rts. Comm., 44th Sess., Supp. No. 40, at 189, U.N. Doc. A/44/40 (1989).

69. *Kjeldsen v. Denmark*, 23 Eur. Ct. H.R. (ser. A) at 29 (1976).

ated to heterosexuals for the purposes of the Convention's discrimination clause.⁷⁰

Given these precedents, the Committee had ample precedent in *Toonen* to conclude that sexual orientation constituted an "other status" for purposes of the ICCPR, and then to tackle the more difficult question whether the distinction in Tasmanian law was objectively and reasonably justifiable, or whether it was discriminatory and violated the Convention.⁷¹ Indeed, both the Australian federal government and Toonen himself provided powerful reasons why the "other status" clause should encompass sexual orientation, and even Tasmania conceded that the clause should be so interpreted. However, the Committee, without addressing these issues, "confined itself to noting" that the word sex "is to be taken as including sexual orientation."⁷²

This interpretive choice is remarkable. No party to the case had raised the sex discrimination argument,⁷³ and the "other status" clause was the obvious textual choice under both the ICCPR and analogous European precedents.⁷⁴ For the Committee to eschew the compelling "other status" arguments and to adopt instead a sex discrimination theory was controversial. But to do so without explaining why the word "sex" should include sexual orientation demonstrates the Committee's continuing struggle to articulate a reasoned interpretation of the ICCPR that is consistent with evolving human rights norms.

As the sex discrimination theory requires a paradigm shift in thinking away from widely accepted notions concerning the nature of sex discrimination, the Committee should have explained the rationale

70. See, e.g., *S. v. United Kingdom*, App. No. 11716/85, 47 Eur. Comm'n H.R. Dec. & Rep. 274, 279 (1986) ("The Commission accepts that the treatment accorded to the applicant [and her partner] was different from the treatment she would have received if the partners had been of different sexes."); see also *van Dijk*, *supra* note 5, at 203 ("[I]t is in principle recognized by the Commission and the Court that [the European Convention] prohibits discrimination on the basis of sexual orientation—otherwise an investigation of the justification of such discrimination would have been unnecessary").

71. Although the "other status" clause is broad enough to encompass classifications of virtually any group similarly situated to those in the enumerated list, the European tribunals and the Committee have developed carefully drawn standards to determine when such classifications rise to the level of invidious discrimination. Compare *Broeks v. The Netherlands*, Comm. No. 182/1984, U.N. GAOR Hum. Rts. Comm., 42d Sess., Supp. No. 40, at 150, U.N. Doc. A/42/37 (1987) ("[A] differentiation based on reasonable and objective criteria does not amount to prohibited discrimination.") with *The Belgian Linguistics Case*, 6 Eur. Ct. H.R. (ser. A) at 34 (1968) (finding no discrimination where classification has "objective and reasonable justification" and a "reasonable relationship of proportionality [exists] between the means employed and the aim[s] sought to be realised").

72. *Toonen*, *supra* note 7, at 235.

73. *Twomey*, *supra* note 42, at 13.

74. In addition, the recent debates on discrimination against lesbians at the Fourth World Conference on Women demonstrate that many governments and nongovernmental organizations have begun to interpret the "other status" clause in other international legal documents to encompass sexual orientation. See *infra* note 135.

behind its reinterpretation.⁷⁵ The Committee's failure to do so may weaken the force of *Toonen's* holding that sodomy statutes impermissibly discriminate against lesbians and gay men. It certainly augurs future litigation in which the Committee will be asked to clarify its position and to extend it to other forms of unequal treatment of lesbians and gay men.⁷⁶

II. THE EFFECT OF *TOONEN* IN NATIONAL COURTS: A CASE STUDY OF THE UNITED STATES

The *Toonen* decision raises the question of whether the Committee's views can be used as a persuasive precedent in litigation before national courts.⁷⁷ This is a specific application of the larger question of whether, and to what extent, an international treaty or the decisions of an international tribunal are directly applicable in the legal system of a particular State.⁷⁸ Some nations have expressly incorporated international legal norms into their constitutions, making it possible to challenge legislation or administrative rulings in their national courts as violations of an international treaty.⁷⁹ Other States view international law as persuasive but not necessarily binding as a matter of domestic law, and still others—including the United States—have adopted the position that the legislature or the executive may displace international law as a rule of decision enforceable in national courts.⁸⁰

Although a comprehensive review of this topic is beyond the scope of this Article, we present here a case study of ways in which the *Toonen*

75. As a *Current Issues Brief* submitted to the Australian Parliament explains:

One of the criticisms which has been made of the Human Rights Committee is that because it is not a court of law, it does not give reasoned legal opinions. The Committee's view on the *Toonen* complaint is a good example. *The Committee stated its view that "sex" includes "sexual orientation" without giving any reason. It is extremely difficult for countries to interpret a treaty, if they are not aware of the reasoning by which a conclusion is reached.* The reasoning, if revealed, may be relevant to the interpretation of other terms and provisions in the treaty, but unless it is made clear by the Committee, the Committee's reasons can only be a matter of speculation.

Twomey, *supra* note 42, at 15 (emphasis added).

76. For our view of the factors lesbian and gay rights advocates should consider before deciding which cases to bring before the Committee, see *infra* part III.C.5.

77. As explained above, see *supra* note 11, the Committee's "views" are not legally binding but rather are a strongly persuasive interpretation of the ICCPR, which is binding on States Parties. Accordingly, a national court is most likely to treat the Committee's decision as a persuasive rather than a binding precedent.

78. See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AMER. J. INT'L L. 310 (1992).

79. The incorporation of international law into national constitutions is particularly prevalent in Central and Eastern Europe. See Eric Stein, *International Law in Internal Law: Toward an Internationalization of Central-Eastern European Constitutions?*, 88 AMER. J. INT'L L. 427 (1994).

80. See, e.g., *Barrera-Echavarría v. Rison*, 44 F3d 1441, 1450 (9th Cir. 1995) (en banc) (finding that a controlling statute displaces customary international law as a rule of decision in United States courts, even if statute violates international law), *cert. denied*, 116 S. Ct. 479 (1995).

decision may influence litigation in federal and state courts in the United States. This question is particularly important in light of the apparent conflict between the Federal Constitution, which has been held not to protect same-sex conduct between consenting adults,⁸¹ and the ICCPR, which after the *Toonen* decision, arguably does provide such protection. As we explain below, the effect of *Toonen* in state and federal litigation in the United States will depend in large part on whether courts in this country construe the ICCPR as a self-executing treaty that imposes binding legal obligations enforceable by individuals.

A. Enforcement of the ICCPR in United States Courts

The possibility that individuals may enforce the rights guaranteed by the ICCPR in U.S. courts raises complex questions concerning the Covenant's status in domestic law.⁸² Although Article VI, Clause 2 of the U.S. Constitution provides that all duly ratified treaties "shall be the Supreme Law of the Land," equivalent to an act of Congress and superseding all inconsistent state laws,⁸³ not every treaty so ratified may be enforced by individuals. For more than 150 years, the Supreme Court has maintained a distinction between self-executing and non-self-executing treaties, holding that only a treaty that "operates of itself, without the aid of any legislative provision," creates rights and obligations that courts may enforce.⁸⁴ By contrast, where the treaty's terms "import a contract" (in the sense of an agreement to negotiate further or to seek legislative action), "the legislature must execute the contract [by legislative enactment], before it can become a rule for the Court."⁸⁵ Absent such legislation, a non-self-executing treaty may not be enforced by individuals in state or federal courts.

In determining whether a treaty or a particular clause thereof is self-executing, courts have looked to several factors, including the intent of the parties, the degree of specificity of the treaty's text, the circumstances surrounding the treaty's execution, and whether the agreement expressly confers a right on individuals.⁸⁶ Although some

81. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

82. The ICCPR entered into force for the United States on September 8, 1992. The United States did not, however, ratify the First Optional Protocol to the ICCPR, thereby precluding individuals from seeking redress for treaty violations directly before the Committee. For a discussion of the ICCPR's ratification history, see John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1288-91 (1993).

83. Joan Hartman, *Enforcement of International Human Rights Law in State and Federal Courts*, 7 WHITTIER L. REV. 741, 742 (1985).

84. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

85. *Id.*

86. See, e.g., *Cook v. United States*, 288 U.S. 102, 119 (1933); *Saipan v. United States Dep't of the Interior*, 502 F.2d 90, 97 (9th Cir. 1974); *Sei Fujii v. California*, 242 P.2d 617, 621-22 (Cal. 1952).

commentators have criticized the application of these criteria as confused and incoherent,⁸⁷ as a practical matter, individuals seeking to enforce a provision of the ICCPR in U.S. courts will have to convince a judge that the treaty creates directly enforceable rights.

The text of the ICCPR and the intent of its drafters supports the conclusion that the Covenant creates judicially enforceable rights without the need for implementing legislation. For example, under article 2, States Parties commit themselves to ensuring (1) "that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy;" (2) "that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities;" and (3) "that the competent authorities shall enforce such remedies when granted."⁸⁸ Although the phrasing of other articles suggests that States may have contemplated the need for further steps after ratification to implement the Covenant's provisions in domestic law,⁸⁹ commentators have relied on the practice of other States Parties, the Covenant's drafting history, and statements by the Committee to conclude that the rights and freedoms protected by the ICCPR are self-executing.⁹⁰

Although the language of the Covenant itself suggests that individuals should be able to enforce the ICCPR in U.S. courts, President George Bush and the U.S. Senate may have altered this result by the manner in which they ratified the treaty. Specifically, ratification of the ICCPR was conditioned upon a controversial package of reservations, understandings, and declarations through which the United States attempted to insulate its domestic laws from international scrutiny and to limit its treaty obligations to conform with existing constitutional standards.⁹¹ Regarding enforcement of the ICCPR in United States

87. See, e.g., Carlos M. Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1117-22 (1992).

88. ICCPR, *supra* note 6, art. 2, ¶ 3.

89. See *id.* art. 2, ¶ 2 ("Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."); *id.* art. 2, ¶ 3(b) (States Parties undertake "to develop the possibilities of judicial remedy."); *id.* art. 40, ¶ 1 ("The States Parties . . . undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights").

90. See Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL & POLITICAL RIGHTS* 311 (Louis Henkin ed., 1981); see also Hartman, *supra* note 83, at 743-44; Richard B. Lillich, *International Human Rights Law in Domestic Courts*, 2 J. TRANSNAT'L L. & POL'Y 1, 12 (1993); Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257, 1259-64 (1993); Quigley, *supra* note 82, at 1300-02.

91. See SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. Exec. Doc. No. 23, 102d Cong., 2d Sess. 6-20 (1992), reprinted in 138 CONG. REC. S4784 (daily ed. Apr. 2, 1992) [hereinafter ICCPR REPORT]. For a

courts, the most significant provision is a "declaration" that "Articles 1 through 27 of the Covenant are not self-executing."⁹² According to the Senate Foreign Relations Committee, the declaration "clarif[ies] that the Covenant will not create a private cause of action in U.S. courts [E]xisting U.S. law generally complies with the Covenant; hence implementing legislation is not contemplated."⁹³

Commentators have questioned both the legality and the wisdom of the non-self-executing declaration on numerous grounds. They have argued that the declaration violates specific ICCPR articles, is incompatible with the treaty's object and purpose,⁹⁴ lacks independent legal status in domestic law,⁹⁵ undermines the judiciary's traditional authority to determine the self-enforcing character of treaties,⁹⁶ violates separation of powers principles,⁹⁷ and deprives U.S. courts of the opportunity to influence the global development of human rights norms through domestic application of the ICCPR.⁹⁸ Notwithstanding these concerns, however, commentators are divided over whether courts will disregard the declaration, or will invoke it either out of deference to the political branches of government, or on the assumption that the declaration was a necessary condition of the Senate's ratification.⁹⁹

detailed analysis of the provisos adopted by the Senate as a condition of ratification, see John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59 (1993); David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993).

92. ICCPR REPORT, *supra* note 91, at 9.

93. *Id.* at 19.

94. Paust, *supra* note 90, at 1259-64. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 19(c), 1155 U.N.T.S. 331, 340.

95. See Quigley, *supra* note 82, at 1303 ("The declaration is not part of the treaty. What is 'law' under the Supremacy Clause is the 'treaty.' A treaty includes the text of the treaty, as qualified by any reservations. Additional statements are not part of the treaty and thus are not 'law' under the Supremacy Clause").

96. See Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 531 (1991).

97. Stefan A. Reisenfeld & Frederick M. Abbott, *Forward: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI.-KENT L. REV. 293, 296-97 (1991).

98. Damrosch, *supra* note 96, at 532.

99. Compare RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. d (1987) ("The Senate may also give its consent on conditions that do not require change in the treaty but relate to its domestic application, e.g., that the treaty shall not be self-executing") and Lillich, *supra* note 90 at 12 ("While [the] legal effect of [non-self-executing] declarations has been questioned, in all likelihood they will be given effect by U.S. courts.") with Paust, *supra* note 90, at 1269 ("[T]he declaration appears to be void *ab initio* as a matter of law.") and Reisenfeld & Abbott, *supra* note 97, at 296 ("[T]he Senate lacks the constitutional authority to declare the non-self-executing character of a treaty with binding effect on U.S. courts.").

At the time this Article went to press, the only reported judicial decision on this issue concluded, without extensive analysis, that the non-self-executing declaration prevents litigants from enforcing their rights in United States courts. See *Igartua de la Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam) (rejecting, in a cursory footnote without reference to scholarly commentary, a Covenant-based challenge to the conventional prohibition on citizens of Puerto Rico voting in presidential elections), *cert. denied*, 115 S. Ct. 1426 (1995).

B. Using the ICCPR to Challenge State Sodomy Statutes in United States Courts

Resolution of the self-executing debate will have implications for a wide range of human rights issues in the United States, including the recognition of lesbian and gay rights. For example, the strategies used by advocates to challenge the legality of state sodomy statutes will vary considerably depending upon whether the ICCPR creates a private cause of action.¹⁰⁰ Pending authoritative judicial resolution of the treaty's self-executing status, therefore, it is necessary to consider in greater detail how U.S. courts might view the ICCPR and the Committee's decisions.

1. Strategies Available if the ICCPR Is Self-Executing

If the ICCPR is construed to be self-executing, it will create an additional set of rights that individuals can invoke in state and federal courts. That the U.S. Constitution does not encompass all of these rights to the same degree as the ICCPR should not affect this result. Although no treaty may infringe existing constitutional rights,¹⁰¹ it may create additional guarantees beyond those that the Supreme Court has already recognized.¹⁰² Thus, the fact that the Court in *Bowers v. Hardwick*¹⁰³ refused to extend the constitutional right of privacy to

100. Although we focus here on using *Toonen* to challenge state sodomy laws, the Committee's ruling that sexual orientation discrimination is a form of sex discrimination provides an avenue for advocates to question more generally the application of the rational basis standard to sexual orientation classifications under the U.S. Constitution. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 570-74 (9th Cir. 1990). However, the impact of the Committee's approach may be weakened by its sparse reasoning and by a U.S. "understanding" of the Covenant's nondiscrimination clauses that accepts distinctions that are "at a minimum, rationally related to a legitimate governmental objective." ICCPR REPORT, *supra* note 91, at 14. As a result, it is premature at best to assert, as have some commentators, that after *Toonen* "the United States cannot discriminate against individuals on the basis of their sexual orientation in ensuring the realization of all of the rights in the ICCPR, not just the right to privacy." Brenda S. Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-On Collision with Bowers v. Hardwick*, 58 ALB. L. REV. 725, 770 (1995). See also James D. Wilets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts*, 27 COLUM. HUM. RTS. L. REV. 33, 45 (1995) ("*Toonen* provides persuasive authority for the proposition that statutes which discriminate against gays and lesbians should be invalidated under the federal Equal Protection Clause . . .").

101. See *Reid v. Covert*, 354 U.S. 1, 15-19 (1957).

102. See *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981); M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States*, 42 DEPAUL L. REV. 1169, 1178 (1993). The principle that the Federal Constitution provides a floor but not a ceiling for the recognition of individual liberties applies to state constitutions as well as human rights treaties. State legislatures and state courts may not limit federal rights but may interpret state constitutions to provide greater protection of individual rights. See, e.g., *Moore v. Ganim*, 660 A.2d 742, 754 (Conn. 1995). So too may international treaties guarantee rights in addition to (but not inconsistent with) those protected by the Federal Constitution.

103. 478 U.S. 186 (1986).

consensual homosexual conduct does not resolve the question of whether the ICCPR protects such conduct under its express privacy guarantee.¹⁰⁴ It will fall to U.S. courts to construe the treaty and determine how its protections apply to same-sex intimacy.

As the supreme law of the land, a self-executing Covenant and the cases interpreting it would supersede inconsistent state laws. Thus, if the federal courts construe the Covenant's privacy clause to protect consensual sodomy, then all state sodomy statutes will be in violation of the treaty. In this way, a self-executing Covenant may ultimately achieve the same uniform national result as would have a more rights-protective Supreme Court decision in *Hardwick*.

Advocates litigating cases under the ICCPR's privacy clause must remember that it is the text of the Covenant, rather than the decisions of the Human Rights Committee, to which the United States is bound as a State Party.¹⁰⁵ Therefore, even if the treaty is self-executing, a U.S. court considering a Covenant-based challenge to state sodomy statutes is not compelled to follow the Committee's views and can advance a different interpretation of the treaty. Given the practice of other States in respecting the Committee's decisions, however, a court in the United States should view the Committee's opinion in the *Toonen* case as "highly persuasive evidence" that sodomy laws violate our nation's binding treaty obligations.¹⁰⁶

2. Strategies Available if the ICCPR Is Not Self-Executing

If courts construe the ICCPR to be non-self-executing, the Covenant may still alter the domestic legal landscape. Courts in the United States have regularly used human rights treaties to inform state and federal constitutional standards even where the treaties do not create an independent cause of action. That these international human rights instruments may not have been ratified by the United States or may be non-self-executing need not dissuade courts from using their rights-protective principles to infuse federal and state constitutional guarantees with meaning.¹⁰⁷

104. See also Quigley, *supra* note 82, at 1291-92; Quigley *supra* note 91, at 70.

105. McGOLDRICK, *supra* note 10, at 151; NOWAK, *supra* note 14, at 710.

106. Twomey, *supra* note 42, at 7.

107. For a discussion of state and federal cases that have relied on international human rights treaties for support in construing constitutional norms, see Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 72-80 (1992); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 831-36 & n.142 (1990). For a list of cases that have relied on the Covenant, see Paust, *supra* note 94, at 1277 n.87.

But this "indirect incorporation"¹⁰⁸ approach to domestic enforcement of the Covenant cannot be applied on a clean slate, at least as far as federal constitutional protection of lesbian and gay rights is concerned. There is little cause to believe that the Supreme Court will reconsider its holding in *Hardwick* merely because the United States has undertaken a non-self-executing obligation to comply with international human rights standards. Moreover, several recent cases decided by the Court seem to reflect disdain for international law generally and for human rights in particular as a means of resolving close cases of constitutional interpretation or statutory construction.¹⁰⁹

Prospects for using the ICCPR to inform state constitutional provisions appear more promising. As the Supreme Court has limited federal constitutional rights doctrines, state constitutions have become a vanguard of civil liberties protection in many areas, including gay and lesbian rights. In the more than eight years since *Hardwick*, courts in three states have struck down sodomy statutes on state constitutional law grounds.¹¹⁰ And in a recent and highly celebrated decision, the Supreme Court of Hawaii ruled that the express prohibitions against sex discrimination in that state's constitution required strict scrutiny and a presumption of unconstitutionality for laws restricting marriage to opposite sex couples.¹¹¹

The ICCPR may be particularly useful where state constitutions contain provisions, such as a privacy clause, that have no federal analog or where a state supreme court has already construed a "mirror image" constitutional text to provide greater protections than its federal counterpart.¹¹² In such cases, the Covenant and the decisions of the Com-

108. Lillich, *supra* note 90, at 19. For a discussion of this approach in Australia, see Oakes & Rothwell, *supra* note 30, at 24-29.

109. See *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549, 2565 (1993) (finding that statute and treaty prohibiting repatriation of aliens does not apply to individuals intercepted outside U.S. territorial waters, although such actions may "violate the spirit" of the treaty); *United States v. Alvarez-Machain*, 504 U.S. 655, 666-69 (1992) (refusing to interpret U.S.-Mexico extradition treaty "against the backdrop of customary international law" as informed by U.N. Charter and Charter of the Organization of American States); *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (plurality opinion) (rejecting reliance on foreign or international human rights law in construing "evolving standards of decency" for purposes of Eighth Amendment).

110. *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1993); *State v. Morales*, 826 S.W.2d 201 (Tex. Ct. App. 1992), *rev'd on other grounds*, 869 S.W.2d 941 (Tex. 1994); *City of Dallas v. England*, 846 S.W.2d 957 (Tex. Ct. App. 1993); see also *County Judge Strikes Down Michigan Sodomy Law*, UPI, July 10, 1990, available in LEXIS, NEWS Library, UPSTAT File (discussing Michigan Organization for Human Rights v. Kelley, No. 88-815820 (Wayne County Cir. Ct. July 9, 1990)).

111. *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993).

112. For a recent example of a state supreme court justice relying on international human rights law to inform her analysis of constitutional provisions unique to the state constitution, see *Moore v. Ganim*, 660 A.2d 742, 780-82 (Conn. 1995) (Peters, C.J., concurring) (relying on international treaties' guarantees of a right to a minimum standard of subsistence to interpret Connecticut Constitution's preamble and "social compact" clause).

mittee and other human rights tribunals can provide guidance to state supreme courts wrestling with the question of whether the right of privacy or to equal protection should extend to consensual homosexual conduct.¹¹³ Of course, as in the self-executing scenario described above, the Committee's views interpreting the ICCPR are merely persuasive rather than binding authority.

A final advantage of urging state courts to give effect to the *Toonen* decision is the consistency of this approach with the United States' understanding on federalism adopted by the Senate when ratifying the Covenant.¹¹⁴ To preserve the balance of power in federal-state relations, the United States explained that the treaty "shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by state and local governments."¹¹⁵ Inasmuch as legal issues of concern to lesbians and gay men, such as criminal and family law, are matters traditionally within the competence of the states, looking to state courts as the primary agents to give effect to the treaty is congruent with the Senate's interpretation of the United States' legal obligations.¹¹⁶

Of course, a state supreme court is less likely to rely on international law to interpret a provision of a state constitution in a manner favorable to lesbians and gay men where the electorate has adopted a constitutional provision, such as Colorado's Amendment 2, designed expressly to restrict lesbian and gay rights. Whether such amendments can withstand federal constitutional scrutiny will soon be decided by the United States Supreme Court, *see Romer v. Evans*, No. 94-1039, 64 U.S.L.W. 3279 (Oct. 17, 1995) (reviewing oral argument), unfortunately without the benefit of any briefing by the United States on the effects of the ICCPR or *Toonen*.

113. As Justice Linde of the Supreme Court of Oregon has explained:

[I]f you are to succeed with your argument that a provision of human rights law is law in a domestic court, you must be able to show that the national lawmakers, by treaty or otherwise, intended this effect But often there is no need to take on that burden.

If instead, you argue that a court should look to international instruments to assist it in interpreting a domestic statute or constitution, then you are asking the court to do what it is empowered to do and using international law in the process. Moreover, an advocate wishing to invoke international human rights norms reasonably could argue that an applicable domestic law already contains the protections that the claimant contends, but that, if the court were not to accept this view, then the court might well find itself running afoul of national policy as expressed by the United States government through its participation in international human rights activities and declarations.

Hans A. Linde, *Comments*, 18 INT'L LAW. 77, 80-81 (1984).

114. The United States based its understanding on the language of article 50 of the treaty that extends its provisions "to all parts of federal States without any limitations or exceptions." ICCPR, *supra* note 6, art. 50.

115. ICCPR REPORT, *supra* note 91, at 18. The federal government did agree to "take measures appropriate to the Federal system to the end that competent authorities of state or local governments may take appropriate measures for the fulfillment of the Covenant." *Id.*

116. The same reasoning applies with equal force to ICCPR-based arguments directed to state legislatures considering whether to repeal sodomy statutes.

III. DEVELOPING A GLOBAL CAMPAIGN TO ADVANCE HUMAN RIGHTS PROTECTIONS FOR LESBIANS AND GAY MEN

Given the uncertainties of relying on *Toonen* in litigation before national courts, advocates for lesbian and gay human rights must consider other opportunities for legal reform at both the national and international levels. Prior to undertaking such efforts, however, advocates should develop a clear understanding of how sexual orientation issues fit within the existing international human rights paradigm. In this Part, we first consider the benefits that flow from framing sexual orientation as a human rights issue and then identify a range of advocacy options to be considered.

A. *Sexual Orientation as a Human Rights Issue*

The value of human rights law to lesbians and gay men lies principally in its ability to transform awareness about sexual practices, intimate relationships, and homosexual identity into claims against governments for recognition and protection. By locating sexual orientation within a set of rights claims, lesbians and gay men can link their struggle to a tradition that has transformed a panoply of basic human needs into rights respected under domestic and international law.

Although conceiving of sexual orientation as a human rights issue has been a popular advocacy tactic in recent years, there has been little attention devoted to how sexuality fits into the existing human rights paradigm.¹¹⁷ It is possible, however, to envision sexual conduct, intimate relationships, and homosexual identity as part of the basic catalogue of human needs worthy of protection and respect by States. As Pieter van Dijk has noted, "[t]he human-rights aspect of homosexuality in reality comes down to the issue of the recognition of the right to self-determination of homosexuals: the right to express and practice their sexual orientation and have homosexuality legally recognized as a way of life of equal legitimacy and value as heterosexuality."¹¹⁸ Seen in this way, the freedom to establish intimate relationships, to enjoy sexual practices, and to develop a sexual identity takes on the quality

117. A recent significant contribution in this field is Eric Heinze's book, *Sexual Orientation: A Human Right*, which contains a comprehensive review of existing human rights theory and practice as applied to sexual orientation issues and concludes with a proposal for a "Model Declaration of Rights Against Discrimination on the Basis of Sexual Orientation" (hereinafter "Model Declaration") for consideration in the United Nations. See HEINZE, *supra* note 2, at 291-303.

For an equally thorough and scholarly analysis of lesbian and gay rights from a comparative constitutional law perspective, see WINTERMUTE, *supra* note 2.

118. Van Dijk, *supra* note 5, at 183.

of other fundamental and universally recognized rights.¹¹⁹ Every human being has a sexual orientation¹²⁰ and every individual should have the ability to develop and to manifest the sexual activities and identity that reflect that orientation in harmony with his or her own desires, and to receive the respect and protection of the State.¹²¹ Whether we refer to this basic human experience as a "right to sexual self-determination," as some international authorities have done,¹²² or whether we continue to invoke established rights to assist its protection,¹²³ the

119. One author has suggested criteria that a claim would need to satisfy to be considered a human right. The claim would have to

reflect a fundamentally important social value; be relevant, inevitably to varying degrees, throughout a world of diverse value systems; be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations, a reflection of customary law rules or a formulation that is declaratory of general principles of law; be consistent with, but not merely repetitive of, the existing body of international human rights law; be capable of achieving a very high degree of international consensus; be compatible or at least not clearly incompatible with the general practice of states; and be sufficiently precise as to give rise to identifiable rights and obligations.

Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 615 (1984).

As described by Heinze, many of the rights claimed by "sexual minorities" meet the characteristics of fundamental human rights:

Sexual orientation is basic. It counts among the most determinative forces of human personality and social organization. Those facing the entire range of human rights violations due to their actual or imputed sexual orientation rank on par with those facing racism, sexism, and all other internationally recognized forms of persecution. The rights involved are equally fundamental and equally urgent. Indeed, the rights sought—rights of personhood, liberty, equality, conscience, expression, and association—are largely identical.

HEINZE, *supra* note 2, at 21.

120. As defined by Heinze, "for purposes of human rights law, [s]exual orientation denotes real or imputed acts, preferences, lifestyles, or identities, of a sexual or affective nature, in so far as these conform to or derogate from a dominant normative-heterosexual paradigm." HEINZE, *supra* note 2, at 60.

121. See Wintemute, *Sexual Orientation Discrimination*, *supra* note 65, at 498 (emphasizing "the importance of thinking of sexual orientation as a neutral, universal characteristic, with several different manifestations, rather than a phenomenon unique to gay, lesbian, and bisexual persons."). Applying the universal principle of sexual self-determination to heterosexuals would result, for example, in the condemnation of such practices as governmentally approved compulsory virginity exams as a human rights violation. See HUMAN RIGHTS WATCH, *A MATTER OF POWER: STATE CONTROL OF WOMEN'S VIRGINITY IN TURKEY* (1994).

122. This phrase first appeared in a 1981 recommendation by the Parliamentary Assembly of the Council of Europe urging European States to address the problem of discrimination against homosexuals. See Recommendation 924, Eur. Parl. Ass., 33d Sess. (1981). More recently, in *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) (1990), several dissenting judges on the European Court of Human Rights analyzed the right of transsexuals to have their surgically acquired gender recognized by the State in similar terms. As Judge Martens stated:

There is an ever-growing awareness of the essential importance of everyone's identity and of recognizing the manifold differences between individuals that flow therefrom. With that goes a growing tolerance for, and even comprehension of modes of existence which differ from what is considered "normal." With that also goes a markedly increased recognition of the importance of privacy, in the sense of being left alone and having the possibility of living one's own life as one chooses.

Id. at 35 (Martens, J., dissenting).

123. See HEINZE, *supra* note 2, at 22–23 ("[A] core of fundamental rights of sexual orientation

human rights dimension of sexual identity and behavior can be firmly grounded in respect for each individual's personality and dignity.¹²⁴

B. Tensions Between Universality and Difference Based on Culture and Gender

Human rights theory and practice must contend with the idea that international human rights are universal, and with the competing view that human rights are shaped by and only exist within particular cultural contexts.¹²⁵ By viewing sexual orientation, whatever its manifestation, as a common characteristic that all human beings possess, lesbians and gay human rights groups can argue effectively that all nations, regardless of their legal and cultural circumstances, must respect and ensure the right to sexual self-development.¹²⁶ But even as they demand universal respect for sexual orientation, advocates should acknowledge that culture and gender inform the way sexual orientation is understood and experienced.

First, individuals do not attach equal political significance to homosexual behavior. In the West, many lesbians and gay men have developed self-defined political communities in which sexual orientation is central to individual and group identity.¹²⁷ In other regions, however, individuals who engage in same-sex conduct often do not define themselves as part of a community whose members share a common bond

derives from the extant corpus of international human rights."); van der Veen et al., *supra* note 5, at 229 ("Lesbian and gay rights are not a deviation from 'general' human rights law; the core of lesbian and gay rights is that they demand a broader, less heterosexually biased interpretation of recognized human rights standards.").

124. See Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 22, U.N. Doc. A/810 (1948) ("Everyone . . . is entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."); WORLD CONFERENCE ON HUMAN RIGHTS, THE VIENNA DECLARATION AND PROGRAMME OF ACTION, JUNE 1993 at 25 (1993) ("[A]ll human rights derive from the dignity and worth inherent in the human person"); see also HEINZE, *supra* note 2, at 295 (Article II.2 of the Model Declaration affirms that "[s]exual orientation is fundamental to human personhood and dignity.").

125. For comprehensive discussions of the competing ideologies of cultural relativism and universalism, see Douglas L. Donoho, *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*, 27 STAN. J. INT'L L. 345 (1991); Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (1985).

126. In response to the charge that the human right of sexual orientation is an exclusively Western phenomenon that threatens traditional beliefs and practices in non-Western societies, Heinze asserts:

[T]he threat . . . posed by rights of sexual orientation is not in principle different . . . from that posed by rights of women or, for that matter, the most classical of all human rights—rights of creed, of conscience, and of free speech, which have long been used to dissent from prevailing moral and religious values.

HEINZE, *supra* note 2, at 72 (footnotes omitted).

127. See, e.g., Gregory M. Herek, *The Social Context of Hate Crimes: Notes on Cultural Heterosexism*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 89, 98 (Gregory M. Herek & Kevin T. Berrill eds., 1992); JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983).

of homosexual desire.¹²⁸ For those regions of the world where the concept of a lesbian or gay identity does not exist or lacks an overtly political dimension, but where the official response to homosexuality is one of persecution, the international human rights paradigm can provide an umbrella of protection to allow diverse sexual identities to develop. It can also call attention to the norms of other societies where state control of sexuality is limited. By integrating this information with the principle that human rights norms are universally applicable, lesbians and gay men in all societies can generate rights-claiming strategies based on their cultural, political, and economic circumstances. That individuals in disparate societies may view their sexual practices and identity differently should not alter the shared conviction that each person should be free to determine these aspects of personhood free from arbitrary government interference.¹²⁹

In addition, advocates should not obscure gender differences between lesbians and gay men.¹³⁰ Attention to human rights abuses against lesbians was, until recently, all but absent from the discourse, law reform campaigns, and litigation strategies of nongovernmental organizations focused on homosexual rights.¹³¹ Focusing on the acts of governments rather than those of private parties, human rights advocates had tended to exclude numerous aspects of women's lives—and lesbians' lives in particular—from international scrutiny. However, a significant lesson to be drawn from the international movement on behalf of women's human rights is the recognition that gender differences may require a rethinking of such established legal principles.¹³²

128. See, e.g., Evelyn Blackwood, *Breaking the Mirror: The Construction of Lesbianism and the Anthropological Discourse on Homosexuality*, in *PSYCHOLOGICAL PERSPECTIVES ON LESBIAN AND GAY MALE EXPERIENCES* 297, 303–10 (Linda D. Garnets & Douglas C. Kimmel eds., 1993); Gerben Potman & Huub Ruijgrok, *Male Homosexuality in West Africa*, in *THE THIRD PINK BOOK*, *supra* note 2, at 165–69; Stephen O. Murray, *Latin America* in 1 *ENCYCLOPEDIA OF HOMOSEXUALITY* 678–81 (Wayne R. Dynes ed., 1990).

129. See Julie Dorf, *Gay Activists: Think Globally, Act Globally*, *NEWSDAY*, June 26, 1994, at A33; see also JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS: MEANINGS, MYTHS AND MODERN SEXUALITIES* 193 (1985).

130. See WEEKS, *supra* note 129, at 203 ("Lesbians and gay men are not two genders within one sexual category. They have different histories, which are differentiated because of the complex organisation of male and female identities, precisely along lines of gender.").

131. See Anna M. Smith, *Resisting the Erasure of Lesbian Sexuality: A Challenge for Queer Activism*, in *MODERN HOMOSEXUALITIES: FRAGMENTS OF LESBIAN AND GAY EXPERIENCE* 200 (Ken Plummer ed., 1992); Morgan, *supra* note 15, at 749.

132. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 *AM. J. INT'L L.* 613 (1991); Gladys A. Vargas, *Principales Problemas para Entender las Demandas de las Mujeres en el Campo de los Derechos Humanos*, in *Seminar of the Instituto Latinoamericano de Servicios Legales Alternativos (ILSA)* (Dec. 1993) (on file with authors). The feminist critique of international human rights law in particular has focused on the "state-centered nature of international law, the dominance of civil and political rights discourse, and deference to the institution of the family," and has argued for new strategies to document violations, reconceptualize existing rights, and develop new rights and standards. Donna Sullivan, *The Public/Private Distinction in*

Within the last year, lesbian-specific scholarship and activism building on the women's human rights movement has become increasingly visible internationally.¹³³ In particular, the Fourth World Conference on Women held in Beijing, China in September 1995 (Beijing Conference) brought lesbian human rights to new global prominence.¹³⁴ Although the final Declaration and Platform for Action adopted at the Beijing Conference does not explicitly address sexual orientation, these documents do reflect the influence of lesbian advocacy efforts at the conference and may point the way for more significant advances in the future.¹³⁵

International Human Rights Law, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 126, 127 (Julie Peters & Andrea Wolper eds., 1995) [hereinafter WOMEN'S RIGHTS].

133. See, e.g., Julie Dorf & Gloria C. Perez, *Discrimination and the Tolerance of Difference: International Lesbian Human Rights*, in WOMEN'S RIGHTS, *supra* note 132, at 324-34; INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION, UNSPOKEN RULES: SEXUAL ORIENTATION AND WOMEN'S HUMAN RIGHTS (1995); Alice M. Miller et al., *Health, Human Rights and Lesbian Existence*, 1 HEALTH & HUM. RTS. J. 428 (1995).

134. During the Beijing Conference and its NGO parallel event, the NGO Forum, lesbian organizing was highly visible, following an ambitious international networking effort during the conference's preparatory process facilitated in part by the International Gay and Lesbian Human Rights Commission (IGLHRC). See, e.g., IGLHRC, *Petition: Put Sexuality on the Agenda* (1995) (on file with authors).

135. The sections of the Platform for Action that can be construed to protect significant aspects of lesbian human rights read as follows:

The Platform for Action recognizes that women face barriers to full equality and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability because they are indigenous women or *because of other status*.

The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.

Report of the Fourth World Conference On Women: Beijing 4-15 September 1995, United Nations, Fourth World Conference on Women, Annex 2, ¶¶ 46, 96, U.N. Doc. A/CONE.177/20 (1995) (preliminary version) (emphasis added).

Although earlier versions of the Platform for Action, drafted at regional preparatory meetings, contained express references to sexual orientation, in Beijing, the Chair of the Working Group entrusted with drafting the relevant sections of the Platform ruled that the reference to sexual orientation would be removed. Over 25 countries registered objection to the removal of the words "sexual orientation," and many stated that they would interpret the phrase "other status" to include sexual orientation or would interpret a woman's right to control her sexuality as encompassing sexual orientation issues. Countries noting their objections and interpretations of the Platform for Action included Canada, the Cook Islands, Jamaica, Latvia, New Zealand, Norway, Slovenia, and South Africa. See *Summary of the Fourth World Conference On Women: 4-15 September 1995*, EARTH NEGOTIATIONS BULLETIN (International Institute for Sustainable Development (IISD), Winnipeg, Man., Can.), Sept. 18, 1995, at 5; see also Patrick E. Tyler, *Forum on Women Agrees on Goals*, N.Y. TIMES, Sept. 15, 1995, at A1, A3. The United States stated that omission of the reference to sexual orientation could not justify discrimination on that ground in any country. See United States Interpretive Statements and Reservations Submitted for the Record in the Main Committee, Sept. 15, 1995 (on file with authors).

C. Identifying Strategies to Advance Lesbian and Gay Human Rights

To be effective, strategies for legal and social change that invoke human rights norms must be developed at all levels of transnational society—locally, nationally, regionally, and globally. Although the *Toonen* decision suggests that international litigation can be an effective tool for achieving reform, advocates must generate a sufficient degree of national and international consensus about the human rights dimension of sexual orientation in order to create a climate in which international tribunals and monitoring bodies can mobilize the political will to protect lesbians and gay men. Moreover, in many areas of the world, because individuals cannot access international tribunals to redress human rights abuses, domestic advocacy and international monitoring efforts are of central importance.

This section will focus on five strategies that, used together or individually, may assist in heightening awareness and understanding of human rights violations based on sexual orientation and in achieving concrete legal reforms at the national and international levels.

1. Enlisting the Support of Mainstream Human Rights Organizations

One effective way for lesbians and gay men to achieve recognition of their basic rights and freedoms is to enlist the support of respected, mainstream human rights organizations. As recently as 1990, however, none of these organizations had recognized that imprisonment for private consensual same-sex conduct or for simply being a homosexual implicated human rights concerns. The organizations asserted instead that sodomy laws did not violate universally accepted human rights norms and that advocacy of homosexual rights would impose a Western standard of morality on other areas of the world. Rather than jeopardize their hard-won authority with certain national governments, these groups remained silent.¹³⁶

In the last few years, however, this situation has changed dramatically. In 1991, Amnesty International interpreted its mandate to consider as prisoners of conscience persons arrested for their homosexual identity or for engaging in consensual homosexual activity in private.¹³⁷ Other human rights organizations have since followed suit.¹³⁸

136. See Darrell Y. Rist, *Global Gay Bashing: Homosexuals and Human Rights*, NATION, Apr. 9, 1990, at 482.

137. BREAKING THE SILENCE, *supra* note 1, at 5.

138. In 1991, the Lawyers' Committee for Human Rights critiqued the Country Reports drafted by the U.S. Department of State for failing to include information on persecution of homosexuals. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRITIQUE: REVIEW OF THE DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990 (1991). In 1993, the International Human Rights Law Group and the International Commission of Jurists

This new base of support may provide opportunities for information gathering, public education, media outreach, and coalition building by established lesbian and gay organizations.¹³⁹ Mainstream human rights organizations may also provide support to nascent lesbian and gay groups around the world who face hostile responses from government actors and from private parties such as employers and trade unions. However, lesbian and gay activists should bear in mind that these issues can never be the sole focus of such organizations' efforts.

2. Using Human Rights Standards to Inform National Law Reform Strategies

Coalition-building between mainstream human rights advocates and local lesbian and gay organizations creates new possibilities for using human rights norms to change domestic law. International organizations can assist local groups to develop successful strategies and examine issues such as whether national laws allow gay and lesbian groups to organize, and the degree to which national legislatures and courts are knowledgeable about issues concerning homosexuality. Although the specific legal, cultural, and social features of each country will generate a wide range of responses, the success of this type of networking has already been demonstrated by the efforts of the International Human Rights Law Group (the Law Group) in Romania.

In 1993 the Law Group began to secure the human rights of lesbians and gay men. Romania is one of the only nations in Europe that continues to impose criminal restrictions on private homosexual conduct between consenting adults. Under Article 200 of the Romanian Penal Code, lesbians and gay men convicted of engaging in consensual sodomy face a maximum five-year prison sentence.¹⁴⁰ This statute has been enforced by local prosecutors even in recent years.¹⁴¹

incorporated decriminalization of consensual homosexual conduct into their advocacy efforts in Romania. See International Human Rights Law Group, *Fight to Decriminalize Homosexual Acts*, DOCKET, June 1994, at 9; International Human Rights Law Group, *Romania: Gay Rights Out of the Closet*, DOCKET, Nov. 1993, at 5; Letter from Michael Kirby, International Commission of Jurists to President of Romanian Constitutional Court (Mar. 16 1994) (on file with authors). In 1994, Human Rights Watch announced its decision to work for the rights of those persecuted on the basis of their sexual identity. See Letter from Human Rights Watch to the authors (June 7, 1994) (on file with authors). Furthermore, the Center for Women's Global Leadership has publicized human rights violations against lesbians in its campaigns, most recently in its day-long tribunal on Accountability for Women's Human Rights at the Beijing Conference. See, e.g., Testimony of Daphne Scholinski given at the International Tribunal on Human Rights Violations Against Sexual Minorities, 18-21 (Oct. 17, 1995) (on file with authors).

139. See, e.g., the International Lesbian and Gay Association (ILGA) and the International Gay and Lesbian Human Rights Commission (IGLHRC).

140. *Romania Upholds Article 200*, AIMLGC NEWSLETTER (Amnesty International Members for Lesbian & Gay Concerns, Chicago, IL), at 1 (1995) (reprinting English translation of Article 200).

141. See Deborah Claymon, *Eastern Europe: Gays in Romania Still Living in Fear*, S.F. CHRON., July 11, 1994, at A9.

As part of a larger effort organized by Romanian human rights groups, including the Romanian Helsinki Committee, Law Group attorneys launched a legal challenge to Article 200 in early 1994. The attorneys prepared a legal memorandum to be used by groups in lobbying the Romanian Parliament to repeal the sodomy statute. The memorandum outlined Romania's human rights obligations under universal and regional treaties¹⁴² and under the Romanian Constitution, which incorporates treaties into national law and requires that all individual rights be construed in conformity with international human rights standards.¹⁴³

While the legislature was debating amendments to Article 200, six individuals being prosecuted for homosexual offenses appealed to the Romanian Constitutional Court arguing that the statute was unconstitutional. The Law Group filed an *amicus curiae* brief with the court, highlighting the need to interpret the Romanian Constitution in harmony with the European Convention on Human Rights and the ICCPR.¹⁴⁴ On July 15, 1994, the Constitutional Court ruled that Article 200 violated the Romanian Constitution as applied to private homosexual conduct between consenting adults. It refused, however, to strike down the statute as applied to consensual same-sex conduct that is "perpetrated in public" or that produces "a public scandal." In addition, the court refused to quash the prosecutions of defendants charged with violating Romania's 18-year age of consent.¹⁴⁵

In the wake of the Constitutional Court's decision, the Romanian Parliament has continued to debate, albeit slowly, various proposals to modify or repeal Article 200. As of early 1996, however, the statute remains in force, notwithstanding continuing pressure by lesbian and gay advocacy groups to repeal it.¹⁴⁶

142. International Human Rights Law Group, *Legislative Memorandum Submitted to Chamber of Deputies* (Mar. 1994) (on file with authors).

143. ROM. CONST. art. XI, cl. 2 ("Treaties ratified by Parliament, according to the law, are part of national law."); art. XX ("Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.") (English translation on file with authors).

144. See *Legal Memorandum for the International Human Rights Law Group*, submitted to the Romanian Constitutional Court on the Application of International Human Rights Standards to the Constitutionality of Article 200 of the Romanian Criminal Code (Apr. 15, 1994) (on file with authors).

145. Translation of Romanian Constitutional Court decision of July 15, 1994 (on file with authors).

146. *Romanian Penal Code Reform Rejected*, EMERGENCY RESPONSE NETWORK OF THE INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION (IGLHRC, San Francisco, Cal.), Jan. 1996, at 3.

3. State Party Reporting Obligations Under the ICCPR

In addition to invoking human rights treaties in national courts, lesbian and gay human rights activists can encourage their governments to conform with international standards through the reporting obligations created by the International Covenant on Civil and Political Rights. Article 40 of the ICCPR requires all States Parties (including those that have not ratified the Optional Protocol)¹⁴⁷ to report regularly "on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights."¹⁴⁸

The Committee reviews each report in a public session held in New York or Geneva. Government representatives are invited to attend, make brief oral presentations, and respond to the Committee's substantive questions. Shortly thereafter, the Committee publishes written comments on the State's submission in its annual report to the General Assembly.¹⁴⁹

Recent U.S. efforts to comply with the ICCPR's reporting obligations illustrate how lesbian and gay rights advocates can capitalize on the reporting process to gain greater visibility for their cause. The State Department submitted the United States' Initial Report to the Human Rights Committee in July 1994.¹⁵⁰ The Report's only reference to lesbian and gay issues appears in a discussion of the right of privacy under article 17 of the ICCPR. The Report first notes that "the United States has long recognized the right of families to privacy" and that "the scope of this privacy right has changed considerably over time and remains a source of significant controversy."¹⁵¹ It then states that this right "is not unconditional . . . and may be limited to traditional American concepts of family," citing *Hardwick* for support.¹⁵² Finally,

147. See *supra* note 9 (noting the difference between the number of States Parties that have ratified the ICCPR but not the Optional Protocol).

148. ICCPR, *supra* note 6, art. 40. Initial reports are due within one year of the treaty's entry into force with subsequent reports due at five year intervals thereafter. NOWAK, *supra* note 14, at 548-49. In practice, the Committee has treated initial reports as an opportunity to establish a constructive dialogue with State representatives and has devoted more detailed attention to specific human rights practices in subsequent reports. *Id.* at 562-63.

149. See Fausto Pocar, *The International Covenant on Civil and Political Rights*, in U.N. CENTRE FOR HUMAN RIGHTS & U.N. INSTITUTE FOR TRAINING AND RESEARCH, MANUAL ON HUMAN RIGHTS REPORTING UNDER SIX MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, at 79, 121-22, U.N. Doc. HR/Pub/91/1, U.N. Sales No. E.91.xiv.1 (1991).

150. United States Department of State, *Civil and Political Rights in the United States: Initial Report of the United States of America to the U.N. Human Rights Committee under the International Covenant on Civil and Political Rights* (July 1994), reprinted in UNITED NATIONS, HUMAN RIGHTS COMMITTEE; REPORT OF THE HUMAN RIGHTS COMMITTEE, U.N. Doc. CCPR/C/81/Add.4, HRI/CORE/1/Add.49 (1995).

151. *Id.* at 142.

152. *Id.*

the Report refers to the Little Tyler case, in which a state court refused to allow a natural mother to retain custody of her child because the mother was a lesbian.¹⁵³ The State Department made no attempt to reconcile these decisions with the *Toonen* case or the Committee's other decisions on the right of privacy.

During the preparation and review of the United States' report, a broad spectrum of nongovernmental organizations submitted materials to the Human Rights Committee on issues that they believed the State Department had not adequately addressed.¹⁵⁴ The American Bar Association's International Human Rights Committee submitted a report entitled "Discrimination Based on Sexual Orientation" as part of a larger submission presented by a joint working group of nongovernmental organizations in the United States.¹⁵⁵ The report analyzed the United States' submission in light of the *Toonen* case and identified the following issues requiring the Committee's particular attention: privacy rights, family rights, anti-gay ballot initiatives, and employment discrimination.¹⁵⁶

Representatives of the joint working group met with five members of the Committee in late March 1995 to summarize their findings and to urge the Committee to question State Department representatives about the human rights issues omitted from the United States report.¹⁵⁷ When considering the report several days later, the Committee expressed the view that "state laws against homosexual acts in private . . . represented a matter of serious concern in guaranteeing the rights under the Covenant."¹⁵⁸ More significantly, the Committee's formal comments on the report expressly criticized the United States on this point:

153. *Id.*

154. Since the Committee does not sit in a quasi-judicial capacity when considering these reports, it is free to use any information available to it, including documents submitted by human rights advocacy groups. In the past, individual Committee members have cited these materials when questioning government officials. See DAVID WEISSBRODT & PENNY PARKER, *THE U.N. COMMISSION ON HUMAN RIGHTS, ITS SUB-COMMISSION, AND RELATED PROCEDURES: AN ORIENTATION MANUAL* 4 (1993).

155. See Kathy M. Togni & D. Lea Browning, *Discrimination Based on Sexual Orientation, in THE STATUS OF HUMAN RIGHTS IN THE UNITED STATES: AN ANALYSIS OF THE INITIAL U.S. GOVERNMENT REPORT TO THE HUMAN RIGHTS COMMITTEE OF THE UNITED NATIONS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 63-73 (Morton Sklar ed., 1995) (on file with authors).

156. *Id.* at 65-69, 70-73.

157. Laurence Helfer made the oral presentation on sexual orientation issues to the Committee members.

158. See UNITED NATIONS, HUMAN RIGHTS COMMITTEE; PRESS RELEASE: HUMAN RIGHTS COMMITTEE CONTINUES CONSIDERATION OF UNITED STATES' INITIAL REPORT, U.N. Doc. HR/CT/401 (1995) (statement of Andreas V. Mavrommatis, Committee member from Cyprus).

The Committee is concerned at the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without discrimination.¹⁵⁹

It remains to be seen how the United States will respond to the Committee's comments.

4. Advocacy of Lesbian and Gay Human Rights at the United Nations

National strategies for achieving legal and social change are a vital aspect of human rights advocacy. Where governments fail to act, however, advocates should consider directing their efforts at the United Nations. The opportunities for advocacy at the international level range from fact-finding and monitoring, to the submission of country reports, to international litigation before quasi-judicial tribunals such as the Human Rights Committee. We suggest here some of the more fruitful avenues for developing lesbian and gay advocacy at the United Nations.¹⁶⁰

Work to promote and protect human rights in the United Nations takes place primarily through political structures and through independent expert bodies. The U.N.'s political bodies, which are composed of official government representatives, include the Economic and Social Council (ECOSOC), the Commission on Human Rights (CHR), and the Commission on the Status of Women (CSW).¹⁶¹ Although the mandate of each entity differs, all of them are involved broadly in

159. *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee*, U.N. GAOR Hum. Rts. Comm., 50th Sess., Supp. No. 40, at 55, U.N. Doc. A/40/50 (1995).

160. Although we focus on the United Nations, advocates should give equal consideration to regional systems of human rights protection, which, at least in Europe, have been the most active in addressing issues relating to sexual orientation. For a discussion of the work of these regional mechanisms, see THOMAS BUERGENTHAL ET AL., *PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS* (3d ed. 1990); Cees Flinterman & Evelyn Ankumah, *The Africa Charter on Human Rights and Peoples' Rights*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 159 (Hurst Hannum ed., 2d ed., 1992) [hereinafter *GUIDE*]; Burns H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585 (1987). For a discussion of the advances related to sexual orientation achieved in Europe, see Helfer, *supra* note 2, at 183-86.

161. Although the CSW was created as the equivalent of the CHR, it has not developed the same level of human rights monitoring mechanisms as the CHR. Nonetheless, because of the CSW's role in standard setting and organizing conferences, lesbian rights activists may wish to follow its work. See generally Sandra Coliver, *United Nations Mechanisms on Women's Rights: How Might They Better Help Women Whose Rights Are Being Violated?*, in *NEW DIRECTIONS IN HUMAN RIGHTS* 25 (Ellen L. Lutz et al. eds., 1989).

monitoring compliance with international standards, investigating alleged human rights violations, submitting programs and proposals related to human rights, and providing advisory and technical services to countries requiring assistance in protecting human rights.¹⁶²

Equally influential are a series of U.N. expert bodies responsible for investigating economic, social, and cultural rights, as well as civil and political rights. These expert groups include treaty bodies such as the Human Rights Committee, the Committee on the Elimination of Race Discrimination, and the Committee Against Torture, all of which monitor violations of particular international instruments,¹⁶³ and expert bodies created under the auspices of the CHR, such as the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (the Sub-Commission).¹⁶⁴

Among the most important procedures for lesbians and gay men to focus on are the mechanisms for human rights monitoring established within the CHR. Composed of 53 government representatives elected in regional groupings by ECOSOC, the CHR has created a number of important procedures to promote a wide range of civil, political, economic, social, and cultural rights. These include confidential investigations of consistent patterns of gross human rights violations under the so-called "1503 procedure,"¹⁶⁵ the creation of working groups to investigate particular kinds of human rights problems,¹⁶⁶ and the appointment of independent experts (generally known as Special Rapporteurs)¹⁶⁷ to investigate human rights abuses on a thematic or country-specific basis.

162. For a more detailed discussion of the activities of these organizations, see WEISSBRODT & PARKER, *supra* note 154, at 2; Nigel S. Rodley, *United Nations Non-Treaty Procedures for Dealing with Human Rights Violations*, in GUIDE, *supra* note 160, at 60.

163. The Committee on the Elimination of All Forms of Discrimination Against Women cannot as yet receive communications from individuals but has recommended that an optional protocol to the Convention on the Elimination of All Forms of Discrimination Against Women be drafted. See Andrew Byrnes & Jane Connors, *The Adoption of a Petition Procedure Under the Convention On the Elimination of All Forms of Discrimination Against Women*, 21 BROOK. J. INT'L L. 679 (1996).

164. See WEISSBRODT & PARKER, *supra* note 154, at 16-20.

165. Under resolution 1503 (XLVIII) adopted by ECOSOC in 1970, nongovernmental organizations can alert the CHR to gross violations of human rights in a particular country or countries. The Commission then considers the information in a series of private meetings in which it communicates with the State concerned. Public access to the results of the CHR's investigations is limited, although its efforts have resulted in an improvement in the human rights situation in several countries. For a more detailed discussion of the "1503 procedure," see Rodley, *supra* note 162, at 64-70.

166. The two existing groups are the Working Group on Enforced or Involuntary Disappearances and the Working Group on Arbitrary Detention. See WEISSBRODT & PARKER, *supra* note 154, at 8-9.

167. The Commission has established Special Rapporteurs on Summary or Arbitrary Executions, Torture, Religious Intolerance, Mercenaries, the Rights of the Child, and Violence Against Women. See Rodley, *supra* note 162, at 71-73; Sullivan, *supra* note 132, at 153-56.

To our knowledge, none of the rapporteurs or working groups appointed to date have investigated human rights violations based upon sexual orientation. There can be little doubt, however, that their mandates are broad enough to encompass such violations. For example, the Working Group on Arbitrary Detention could consider persons detained, as in Romania, on the basis of their homosexual identity or because of the commission of homosexual acts in private between consenting adults. The Special Rapporteur on Violence Against Women could gather information on state-sponsored and private violence directed against lesbians and on the failure of domestic law to provide adequate protection or redress against such abuses. The Working Group on Enforced and Involuntary Disappearances could investigate the numerous reports of "disappeared" gay men and transvestites in Brazil, Colombia, and Peru. The Special Rapporteur on Summary and Arbitrary Executions could inquire into the reports of executions of gay men in Iran, and the Special Rapporteur on Torture could consider torture and other inhuman practices, including rape, directed at individuals held in custody, where such abuses are based on the individuals' sexual orientation.¹⁶⁸

Lesbian and gay human rights advocates should also focus their attention on the Sub-Commission, which is composed of 26 experts nominated by national governments and elected by the Commission.¹⁶⁹ The Sub-Commission, which has developed a reputation for functioning independently of governments, initiates substantive studies of human rights problems, identifies violations throughout the world, makes recommendations to the CHR concerning the prevention of discrimination, and acts as a laboratory for developing new approaches to human rights.¹⁷⁰ In addition, it is the only U.N. body to have formally considered the question of human rights protection for homosexuals.

In 1988, the Sub-Commission produced a report in response to an ECOSOC resolution requesting further study of "the legal and social problems of sexual minorities."¹⁷¹ The report, which addresses issues of homosexuality, transsexualism, and male prostitution, attempts to explain the evolution of society's understanding of these issues.¹⁷² Unfortunately, the report is weak in human rights analysis, devoid of infor-

168. These abuses of lesbians and gay men are documented in *BREAKING THE SILENCE*, *supra* note 1.

169. See WEISSBRODT & PARKER, *supra* note 154, at 16.

170. *Id.* at 3; Rodley, *supra* note 162, at 61.

171. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, JEAN FERNAND-LAURENT; *STUDY ON THE LEGAL AND SOCIAL PROBLEMS OF SEXUAL MINORITIES*, U.N. Doc. E/CN.4/Sub.2/1988/31 (1988).

172. *Id.* at 4-17.

mation about non-Western cultures, and overwhelmingly directed at gay men.¹⁷³ Nongovernmental organizations appear to have contributed little to the document, which concludes with a series of weak recommendations for protecting lesbians and gay men.¹⁷⁴

Recent references to discrimination against lesbians and gay men have been somewhat more favorable. The Sub-Commission's Special Rapporteur on Discrimination Against HIV-Infected People or People with AIDS stated in a 1991 report that "it can be argued that to discriminate against homosexuals in respect of their enjoyment of fundamental rights protected by international law, such as the right to work, access to health care, physical integrity and liberty would amount to a denial of a substantive right and thus be prohibited by international law."¹⁷⁵ In addition, in a 1992 report, the Special Rapporteur on the Realization of Economic, Social and Cultural Rights emphasized the need to "devote increased attention to areas of discriminatory behaviour generally ignored at the international level," including discrimination on the grounds of sexual orientation.¹⁷⁶ He also called on the Sub-Commission to strengthen its practice of appointing Special Rapporteurs on thematic aspects of economic, social, and cultural rights.¹⁷⁷ The report thus is particularly noteworthy for highlighting

173. Several of the rapporteur's statements are outrageous. *See, e.g., id.* at 27 ("It is more than likely that . . . there would be fewer lesbians if men were able to be more affectionate, more attentive and more tactful."); *id.* at 27-28 ("There would be less impotence and homosexuality if men did not feel called on by the social model to achieve with their female partners an exceptionally high level of sexual performance.").

174. *See, e.g., id.* at 29 ("All sexual practices [are] to be tolerated between consenting adults, provided that they are practised in private and do not offend public decency."); *id.* ("[I]n addition to protecting sexual minorities . . . against any kind of persecution, the State can and must protect society against the potential dangers which such practices represent for morality, public order and the general welfare.") (quotation omitted); *id.* at 30 ("With regard to homosexuals in positions of authority over children (teachers, etc.) . . . a choice must be made between the wish to avoid exposing children to the influence of a deviant model and the wish to eliminate any possible discrimination against a minority. Although no specific answer will be suggested here, attention is again drawn to the principle . . . of the special safeguards to be afforded to children by virtue of their vulnerability."); *see also id.* (approving of Human Rights Committee's decision in *Hertzberg* as necessary to restrict "propaganda for any abnormal sexual practices").

175. VARELA-QUIROS, UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUBCOMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, DISCRIMINATION AGAINST HIV-INFECTED PEOPLE OR PEOPLE WITH AIDS, ¶ 194, U.N. Doc. E/CN.4/Sub.2/1991/10. In the context of arguing that HIV infection should be considered an "other status" for purposes of human rights treaties, the rapporteur cited approvingly to questions posed by members of the Committee on Economic, Social and Cultural Rights to government representatives about discrimination against homosexuals. *Id.* ¶¶ 95-96 (citations omitted).

176. DANILO TURK, UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUBCOMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, at 48, U.N. Doc. E/CN.4/Sub.2/1992/16 (1992).

177. *Id.* at ¶¶ 170-201.

the importance of economic, social and cultural rights to the construction of a complete human rights paradigm for protecting lesbians and gay men.

Nongovernmental organizations play an influential role in human rights work at the United Nations, often taking the lead in providing information to government representatives and independent experts and in identifying areas for future action.¹⁷⁸ At present, however, no lesbian and gay advocacy organization enjoys official recognition from the relevant U.N. bodies.

In July 1993, the International Lesbian and Gay Association (ILGA), an umbrella organization of more than 500 lesbian and gay advocacy groups worldwide, successfully navigated the route to "roster status" with ECOSOC, a position from which it could officially present information in various U.N. fora on sexual orientation issues.¹⁷⁹ One year later, however, ECOSOC suspended ILGA's official status after the United States threatened to withhold its financial contributions to the United Nations if the group was not ousted from the roster.¹⁸⁰ The United States objected to ILGA's roster status because at least one of the umbrella group's member organizations supported pedophilia, a position the United States asserted was inconsistent with the United Nations Charter.¹⁸¹

Since that time, ILGA has taken some steps to regain its official position with ECOSOC. In 1994, it expelled two member organizations that condoned pedophilia, the North American Man-Boy Love Association and the Munich-based VSG.¹⁸² And at its annual world conference in Rio de Janeiro in June 1995, the organization passed a resolution reaffirming "that every child has the right to protection from exploitation and abuse," and "categorically stat[ing] that ILGA does not in any way seek to promote or seek the legalization of pedophilia."¹⁸³ Each member of the organization was to affirm this resolu-

178. See Rodley, *supra* note 162, at 76; WEISSBRODT & PARKER, *supra* note 154, at 21.

179. ILGA Press Release, Out at the UN: UN Accredits the International Lesbian and Gay Association (Aug. 31, 1993) (on file with authors).

180. See *U.N. Suspends Group in Dispute Over Pedophilia*, N.Y. TIMES, Sept. 18, 1994, § 1, at 16.

181. *Id.* The United States' financial threat resulted from an amendment authored by Senator Jesse Helms to a foreign relations authorization bill that makes financing of the United Nations contingent on a certification by the President "that no United Nations agency or United Nations affiliated agency grants any official status, accreditation, or recognition to any organization which promotes and condones or seeks the legalization of pedophilia, or which includes as a subsidiary or member any such organization." Act of April 30, 1994, Pub. L. No. 103-236, § 102(g), 108 Stat. 389, Apr. 30, 1994.

182. See *Summary of the Secretariats' Committee Meeting, Brussels, Oct. 28-31, 1994*, ILGA BULLETIN (International Lesbian and Gay Association, Brussels, Belgium), Oct.-Dec. 1994, at 4; Doug Sanders, *ILGA and the United Nations*, ILGA BULLETIN, July-Sept. 1995, at 6.

183. *Letter of Confirmation on Resolution at the 17th ILGA World Conference in Rio de Janeiro From*

tion in writing by January 1, 1996 or face suspension of membership, after which time ILGA will decide whether to meet with ECOSOC and seek to reactivate its roster status.¹⁸⁴

By working with a range of human rights organizations with consultative status and lobbying the relevant U.N. bodies directly, advocates for lesbian and gay human rights can influence the process of human rights monitoring and law-making.¹⁸⁵ However, these groups must bear in mind the near invisibility of lesbians and gay men as claimants within the U.N. system. The beginning stages of advocacy, therefore, should focus on developing widespread awareness of human rights violations based on sexual orientation.¹⁸⁶ Although this limited strategy may seem like a defeat after *Toonen*, in fact, this approach is necessary to shore up a global information deficit concerning sexual orientation. Advocates must carefully document the wide range of practices throughout the world to highlight the growing importance of treating lesbian and gay rights as a matter of fundamental human rights.

5. Forward from *Toonen*: Choosing the Next Test Case

The last advocacy strategy we discuss involves bringing new complaints before the U.N. Human Rights Committee in an effort to extend the legal principles set forth in the *Toonen* decision. Given the ambiguities with the Committee's current case law,¹⁸⁷ we believe that lesbian and gay rights advocates should proceed with caution when relying on *Toonen* as precedent for future favorable decisions from the Committee. The most effective and lasting legal advances will, in our view, be achieved not through groundbreaking new rulings but rather

June 18–25, 1995, ILGA BULLETIN (International Lesbian and Gay Association, Brussels, Belgium), July–Sept. 1995, supplement. The resolution also affirmed ILGA's desire to promote universal respect for and observance of "human rights and fundamental freedoms" (the language of the United Nations Charter), including the provisions of the major international human rights treaties. *Id.*

184. See Sanders, *supra* note 182, at 6.

185. The networks formed among the NGOs and government delegates at the Beijing Conference suggest the possibility of developing additional avenues for advocacy and organizing on lesbian human rights. In particular, advocates can rely on the interpretive statements to the Platform for Action filed by governmental delegations to seek a review of national practices and policies that discriminate on the basis of sexual orientation. The fact that more than two dozen governments from all regions of the world filed these statements signals the potential for an increasingly broad scope of international lesbian activism. See *supra* note 135.

186. See HEINZE, *supra* note 2, at 28 ("The mere courage to raise the issue of sexual orientation [at the United Nations] and to see it through sincere discussions would already represent an important first step. It would press countries that practice or tolerate discrimination to take a stand, and to justify that stand not only to the international community but also to sexual minorities at home.").

187. See discussion *supra* part I.C.

by adopting a modest litigation strategy that will allow the Committee to develop its analysis incrementally. Submitting communications analogous to the factual and legal situation in *Toonen* will give the Committee the opportunity to reaffirm its recent decision and to distinguish or narrowly construe its reasoning in *Hertzberg*. Stated more concretely, advocates should first focus their efforts on challenging laws that impose criminal sanctions on private, consensual homosexual conduct or on documenting grave violations of human rights, including abuses against lesbians.¹⁸⁸ Faced with such petitions, the Committee is likely to reaffirm that the ICCPR extends to lesbians and gay men.¹⁸⁹

Bringing complaints against States that already have a good record of compliance with the Committee's views is another way of ensuring that existing protections are strengthened rather than limited. Even States that are opposed to extending human rights protection to homosexuals will find it politically difficult to ignore a decision by the Committee when they have followed its rulings in the past. Inasmuch as these decisions are not legally binding, however, it would be foolhardy for lesbian and gay rights advocates to challenge immediately the human rights practices of those few States that have consistently refused to give any deference to the Committee's views.

A final factor that calls for caution is the Committee's willingness to scrutinize States Parties' reliance on public morals to restrict protected rights and freedoms. Although several articles of the ICCPR authorize restrictions on the enjoyment of rights where "necessary" or "necessary in a democratic society" to protect morals,¹⁹⁰ the Committee has never had an opportunity to interpret these morals clauses, other than in the *Toonen* and *Hertzberg* cases. Case law interpreting the European Convention on Human Rights may help to predict the Committee's future direction.¹⁹¹

188. For examples of some grave violations, see *supra* text accompanying note 168.

189. It is far from certain that the Committee will apply the reasoning in *Toonen* to a State where sodomy laws are actively enforced and widely supported by its citizens. See Twomey, *supra* note 42, at 20 ("If a similar complaint [to *Toonen*] was brought to the Committee from a country which had strong religious and cultural beliefs about homosexuality and where laws prohibiting homosexual acts were enforced throughout the country and were generally accepted and approved of by the population, it is possible that the Committee would consider laws criminalizing homosexual acts to be 'reasonable' in the circumstances.").

190. ICCPR, *supra* note 6, art. 14(1) (exclusion of press and public from a criminal trial); *id.* art. 18(3) (freedom of thought, conscience and religion); *id.* art. 19(3) (freedom of expression); *id.* art. 21 (freedom of assembly); *id.* art. 22(2) (freedom of association).

191. Because the ICCPR and the European Convention stem from a common source, the Universal Declaration of Human Rights, and "because the language of the European Convention is so often the same as the language of the [ICCPR], the considerable jurisprudence that already exists under the European Convention is persuasive authority for the interpretation of the . . . Covenant." John P. Humphrey, *Political and Related Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 171, 174 (Theodore Meron ed., 1984).

The European Court of Human Rights, which has adjudicated issues of obscenity and abortion as well as homosexuality, has emphasized that European States enjoy wide deference in matters of morals.¹⁹² However, it has also made clear that their discretion is not unfettered and that only the Court can determine in the final analysis whether a restriction is compatible with the European Convention.¹⁹³ Although it is unclear whether the Committee will follow the European Court's lead and arrogate for itself some measure of autonomy in reviewing morality-based restrictions on civil and political rights, it is significant that in *Toonen* the Committee rejected the argument that "moral issues are exclusively a matter of domestic concern."¹⁹⁴ Advocates must remember, however, that the Committee is interpreting a universal treaty for more than 130 States Parties with a wide variety of cultures, legal systems, and stages of development. This diversity makes it likely that the Committee will exercise even greater caution than the European Court, which oversees a regional human rights treaty for a smaller and relatively homogeneous group of nations.¹⁹⁵

CONCLUSION

The decision of the U.N. Human Rights Committee in *Toonen v. Australia* is an important step in advancing the global struggle for lesbian and gay rights. The Committee's unanimous conclusion that sodomy statutes are an arbitrary interference with privacy and a violation of the principle of nondiscrimination provides compelling evidence that issues of concern to lesbians and gay men are also matters of fundamental human rights.

192. See, e.g., *Mueller v. Switzerland*, 133 Eur. Ct. H.R. (ser. A) at 22 (1988).

193. See *Open Door Counseling v. Ireland*, 246-A Eur. Ct. H.R. (ser. A) (1992) (issuing a broad injunction preventing family planning clinics from providing information to pregnant women about abortion opportunities not necessary in a democratic society to protect morals); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988) (finding that criminal prohibition of same-sex conduct between consenting adults in private is not necessary in a democratic society to protect morals).

194. *Toonen*, *supra* note 7, at 234. An additional hopeful sign comes from the Committee's recent General Comment on the freedom of thought, conscience and religion, in which it suggested that pluralism would be an important factor in evaluating the legality of a restriction based on morals. *General Comments Adopted Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: General Comment No. 22(48) (art. 18)*, U.N. GAOR Hum. Rts. Comm., 48th Sess., Supp. No. 40, at 208, 209, U.N. Doc A/48/40 (1993) ("The concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition").

195. For an analysis of why advocates in Europe have thus far been unsuccessful in extending the protections of the European Convention on Human Rights to issues other than sodomy, see Helfer, *supra* note 2, at 162-66, 179; van Dijk, *supra* note 5, at 203-06.

The victory in *Toonen* also highlights new opportunities for promoting lesbian and gay rights worldwide. At the national level, *Toonen* may influence decision-making by domestic courts, particularly where those courts look to international human rights standards to determine the scope and content of national constitutions. In the United States, advocates should cite the decision when challenging state sodomy statutes and other discriminatory practices on state and federal constitutional grounds. Although *Toonen* is not binding on any United States court, it can be invoked to assist judges in applying the ICCPR in the United States (if courts determine that the treaty is self-executing) or in resolving unsettled questions of state and federal law (if courts conclude that the ICCPR does not create a private right of action in the United States).

At the international level, the *Toonen* decision helps to reinforce the emerging principle that abuses and discrimination directed against individuals based on their sexual orientation violates international human rights standards. Advocates from the industrialized West to the developing world have a panoply of options available to build on this emerging norm. These options include networking with other nongovernmental organizations, lobbying legislatures and arguing cases before national courts, bringing lesbian and gay concerns to the attention of the international community through fact-finding and monitoring at the United Nations, and litigating new cases before the Human Rights Committee. At each stage of this multi-faceted process, the individuals and groups working for legal and social change should consider the benefits of framing sexual orientation as a human rights issue. By linking their efforts to international human rights law, advocates can invoke a powerful rhetorical force in their struggle to achieve respect and equality for lesbians and gay men.