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THE HUMAN RIGHTS OF SEXUAL MINORITIES IN AFRICA

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I. INTRODUCTION

Human rights discussion relating to sexuality highlights several key tensions within the human rights movement, principally the debate over universality versus cultural relativism. Individuals who accept the universality of certain standards are then faced with the difficult task of implementing those standards within divergent societies. This article does not try to resolve these debates. Rather, it accepts the premise that there are basic rights belonging to all human beings. By recognizing the contexts within which these rights must work, this article will explore how emerging human rights norms can be articulated and implemented in the most effective way. Although this article focuses on Africa's regional human rights system, it includes extensive discussion of international and domestic mechanisms, recognizing all three regimes should work complementarily with one another to secure human rights of sexual minorities.

While recognizing the problems involved in adopting certain terms, this article uses the broad category of sexual minorities for its analysis. Certain terminology can be problematic in the African context since it reflects a view of sex and sexual roles constructed far from the realities of African society. This article uses terms meant to

* J.D., New York University 2003; Attorney, New York City Administration for Children's Services.

capture individuals whose expression of sexual desire falls outside the dominant heteronormative (biological male/biological female) model. A non-exhaustive list of terms that have emerged in the global North includes gay, lesbian, bisexual, transgender, queer, questioning, and intersex. To avoid confusion, this article uses the terms “sexual minority” or “LGBT”¹ to encompass these concepts. This approach should not be read as undermining alternative strategies that do not rely on restrictive labels, such as advocating for a right to sexual autonomy. Choosing certain terms is also not meant to exclude the large number of individuals who do not identify themselves as sexual minorities. The work around sexual rights is a reminder to LGBT activists to consider their impact beyond an identity politics framework. Due to the nature of existing human rights mechanisms, mobilization around certain rights requires the adoption of an identifiable point of reference.

Part II of this article examines the historical development of human rights law in relation to sexual minorities. In Parts III-V, this article describes the current legal mechanisms available at the domestic, regional, and international levels from various areas: the administration of justice, including torture, arbitrary detention and the right to life; equality, including equal protection and non-discrimination; and the right to privacy; these three categories are not exhaustive. Violations against sexual minorities implicate a host of other rights, including rights of thought and conscience, rights of speech and expression, and rights of association.² These rights are particularly relevant to strengthening protections of LGBT human rights defenders. Other strategies could link governmental responses to the HIV/AIDS epidemic to the violation of the human rights of sexual minorities. For example, homophobia and the hesitancy to confront issues dealing with sexuality, generally, negatively impact the fight against the disease.

II. HISTORICAL OVERVIEW

I find it extremely outrageous and repugnant to my human conscience that such immoral and repulsive organisations, like those of homosexuals who offend both against the law of nature and the morals of religious beliefs

1. Lesbian, Gay, Bisexual and Transgender.

2. ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT* 266-77 (1995). For a critique of the heteronormative assumptions upon which Heinze relies, see Wayne Morgan, *Queering International Human Rights Law*, in *LAW AND SEXUALITY: THE GLOBAL ARENA* 208, 212-17 (Carl F. Stychin & Didi Herman eds., 2001).

espoused by our society, should have any advocates in our midst and even elsewhere in the world.³

Despite achieving political independence, many African states still feel the impact of colonization as leaders attempt to impose foreign conceptions of sexuality on their societies. The most striking example of this phenomenon is seen in Anglophone countries, where leaders, such as Robert Mugabe of Zimbabwe, have spoken out against homosexuality. While these politicians might be correct in pointing out “homosexuality” is not native to Africa, they fail to recognize the history of same-sex relationships within societies that have long allowed for diverse social arrangements around sex and gender.⁴ The statements made by African leaders do not distinguish self-identified gays and lesbians from those citizens who are engaged in non-heteronormative practices, but who do not identify as homosexual. Homophobic rhetoric ignores the existence of these longstanding practices and instead adopts a narrow conception of what is acceptable: a family arranged around the sexual union of an opposite-sex couple. African leaders who espouse homophobic views actually reflect a way of thinking that originated outside of Africa.

The construction of and crackdown on dissident sexualities is rooted in the legal systems imposed on Africa during colonization.⁵ In their colonial legal systems, the Europeans included many of the same laws, including sodomy laws, found in the legal systems of the *metropole*.⁶ Newly independent African states chose not only to adopt the nation-state framework for their nascent polities, but also to retain many colonial-era laws.⁷ Although statistics are not readily available, it seems sodomy laws were rarely applied, or even mentioned, during the colonial era and first decades of independence. There are several

3. Robert Mugabe, Zimbabwe International Book Fair (Aug. 1, 1995), *quoted in* CHRIS DUNTON & MAI PALMBERG, *HUMAN RIGHTS AND HOMOSEXUALITY IN SOUTHERN AFRICA* 9 (2nd ed. 1996).

4. For an early report on the diversity of African practices written by a non-African, see E.E. Evans-Pritchard, *Sexual Inversion Among the Azande*, 72 *AM. ANTHROPOLOGIST* 1428 (1970). For more recent accounts of the diversity of African practices, see *BOY-WIVES AND FEMALE HUSBANDS: STUDIES IN AFRICAN HOMOSEXUALITIES* (Stephen O. Murray & Will Roscoe eds., 1998); *IFI AMADIUME, MALE DAUGHTERS, FEMALE HUSBANDS: GENDER AND SEX IN AN AFRICAN SOCIETY* (1987).

5. For a history of sex crimes in southern Africa, see Scott Long, *Before the Law: Criminalizing Sexual Conduct in Colonial and Post-Colonial Southern African Societies*, in *HUMAN RIGHTS WATCH & INT'L GAY AND LESBIAN HUMAN RIGHTS COMM'N, MORE THAN A NAME: STATE-SPONSORED HOMOPHOBIA AND ITS CONSEQUENCES IN SOUTHERN AFRICA* 256-97 (2003) [hereinafter *MORE THAN A NAME*].

6. *Id.* at 256.

7. *Id.* at 256-97.

possible explanations why governments have begun to pay attention to these laws and use them to bolster recent anti-gay campaigns. The vitriolic rhetoric may reflect leaders' personal views, formed through contact with foreign religious or educational institutions. However, this does not explain why widespread condemnation of homosexuality has emerged at this point in history. Leaders seem to be responding to the real or imagined appearance of individuals or groups identifying themselves as homosexual.⁸ As an unknown and largely invisible quantity, these "homosexuals" serve as a convenient scapegoat for the variety of social and economic ills largely caused or exacerbated by leaders and their ruling parties. Interestingly, the leadership of South Africa, the most politically and economically developed African state, has refrained from making statements like those heard in neighboring countries.

III. CURRENT LEGAL SITUATION

In many jurisdictions throughout the world, sexual minorities are considered a criminal class.⁹ Today most African states outlaw homosexuality through a variety of laws derived largely from European models.¹⁰ Sodomy laws, which ostensibly proscribe conduct, are also

8. A sensational, but false, report of a homosexual marriage in a Ugandan newspaper sparked the uproar that led to President Yoweri Museveni's homophobic diatribe. Anna Borzello, *Homophobia Strikes Uganda*, JOHANNESBURG MAIL & GUARDIAN, Oct. 26, 1999, available at <http://www.sodomylaws.org/world/uganda/ugnews01.htm>.

9.

The extensive list of countries with sodomy laws, and the massive deprivation of human rights which accompany such laws, makes it evident that the criminalization of consensual sex remains one of the most basic barriers to gay and lesbian human rights in many countries in the world, including the human right to be free from violence.

James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989, 1028 (1997).

10. The following African countries have laws that specifically mention sodomy or same-sex offenses: Algeria, Benin, Botswana, Cameroon, Ethiopia, Gambia, Guinea, Liberia, Libya, Mauritius, Morocco, Mozambique, Nigeria, Senegal, Somalia, Sudan, Swaziland, Tanzania, Tunisia, and Zimbabwe. Countries that rely on other terminology, without explicitly mentioning homosexuality are: Angola, Burundi, Cape Verde, Democratic Republic of Congo, Egypt, Ghana, Kenya, Malawi, Mali, Namibia, Niger, Sierra Leone, Togo, Uganda, and Zambia. Laws in Botswana, The Gambia, Kenya, Mozambique, Nigeria, Tanzania, Uganda, and Zambia specifically mention acts between men. Shari'a (Islamic) law in Mauritania effectively prohibits homosexuality. Burkina Faso prohibits underage same-sex contact. Both Gabon and South Africa have age of consent laws that discriminate against homosexuals. The criminal codes of Central African Republic, Chad, Congo, Guinea-Bissau, Cote d'Ivoire, Lesotho, and Madagascar do not mention same-sex offenses. It is unclear whether Comoros, Djibouti, Equatorial Guinea, Eritrea, São Tomé e Príncipe, and Seychelles outlaw same-sex behavior. Int'l Lesbian and Gay Ass'n, World Legal Survey, at

a powerful weapon for persecuting individuals based on actual or perceived sexual identity. The law serves as a justification for action against sexual minorities, both within and without the law. This is generally true whether the law is vague or gender-neutral, which means it is technically applicable to opposite-sex couples. Victorian-era British sodomy laws still in force describe the prohibited conduct as “carnal knowledge against the order of nature”¹¹ or “gross indecency.”¹² Interestingly, none of these laws provide a detailed definition of what exactly is forbidden, giving the state flexibility in their enforcement.

Sodomy laws are not the only legal tool available to states wanting to suppress unauthorized sexualities. Laws against public immorality are often used for the same effect. Several Francophone legal codes contain laws against public immorality.¹³ Influenced by Soviet views of social crimes, Mozambique’s law provides for the “re-education” of those guilty of “aberrant behaviour.”¹⁴ The Egyptian government, which has a record of persecuting people based on their perceived sexual orientation, does not expressly prohibit homosexuality, but instead uses a law against “debauchery” and “contempt for religion” to persecute suspected homosexuals.¹⁵ These laws are more vague than the British-inspired laws, providing even greater flexibility in controlling dissidents, sexual or otherwise.

The impact of these laws extends beyond their direct applicability to the criminal justice system. Their presence gives legitimacy to the anti-homosexual campaigns African leaders have launched in the past decade, thus encouraging violence perpetrated by both state and private actors such as community and family members. As previously evidenced, condemnation of gays and lesbians has figured promi-

http://www.ilga.info/Information/Legal_survey/Africa/1world_legal_survey__africa.htm (last updated July 31, 2000) [hereinafter World Legal Survey].

11. PENAL CODE [PEN. C.] § 140 (Uganda), at http://www.ilga.info/Information/Legal_survey/africa/uganda.htm (last updated July 31, 2000).

12. *Id.* § 143.

13. These laws refer to “*outrage public à la pudeur*” (“acts of public indecency”) or use a similar term. CODE PÉNAL para. III (Guinea), <http://www.ilga.info/Information/Legalsurvey/africa/guinea.htm> (last updated July 31, 2000).

14. CÓDIGO PENAL §§ 70-71 (Mozam.), http://www.ilga.info/Information/Legal_survey/africa/mozambique.htm (last updated July 31, 2000).

15. For a detailed chronicle of persecution at the hands of Egyptian authorities, see Int’l Gay and Lesbian Human Rights Comm’n, Regional Information, Egypt, at <http://www.ighrc.org/php/section.php?&Area=Africa&DocType=&Issues=&term=debauchery&sort=&id=5&pos=0> (last visited Nov. 1, 2004). In the most recent development, twenty-one men were sentenced on re-trial after being arrested in 2001 at a Cairo nightclub; twenty-nine others were acquitted. BBC News, Middle East, *Egypt Jails Men in Gay Sex Trial* (Mar. 15, 2003), at http://news.bbc.co.uk/2/hi/middle_east/2852927.stm.

nently in the speeches of Zimbabwe's President Robert Mugabe.¹⁶ Former Kenyan President Daniel arap Moi condemned homosexuality as against Christian and African traditions.¹⁷ In 1999, President Yoweri Museveni of Uganda went further by ordering the arrest of suspected homosexuals.¹⁸ Leaders in other countries, including Zambia,¹⁹ Namibia,²⁰ and The Gambia,²¹ have received attention for expressing similar sentiments regarding homosexuals. Unlike their Anglophone colleagues, Francophone leaders have yet to realize the political mileage to be gained by targeting sexual minorities. One possible explanation is the British-inspired laws are more readily translated into homophobic rhetoric.

Sodomy laws are closely related to these anti-gay campaigns. Although there are high profile cases where sodomy laws have been used to prosecute violations of the law *per se*, the laws are not primarily used for this purpose.²² Rather, the broadly drafted language has been used against two groups: those who challenge the state through LGBT activism or through their identification as a sexual minority, and those who are perceived as violating gender norms. Homophobic rhetoric has introduced a "gay" identity into many communities where there previously was none. On the one hand, communities start seeing previously innocuous practices in a different light, leading to the per-

16. Grant Ferrett, BBC News, *Fighting for Gay Rights in Zimbabwe* (Oct. 23, 1999), at http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/482471.stm.

17. Religious and animal imagery figures prominently in African leaders' speeches on homosexuality. BBC News, Africa, *Moi Condemns Gays* (Sept. 30, 1999), at <http://news.bbc.co.uk/2/hi/africa/461626.stm>.

18. Reuters, *Ugandan President Orders Arrest of Gays* (Sept. 28, 1999), at http://www.mask.org.za/SECTIONS/AfricaPerCountry/ABC/uganda/uganda_6.htm. A minister reiterated this imperative in 2002. Angel Lubowa, *Arrest and Prosecute Homosexuals*, NGOMA NEWSPAPER (Uganda), Aug. 30, 2002, (Gala Uganda trans.), http://www.mask.org.za/SECTIONS/AfricaPerCountry/ABC/uganda/uganda_31.htm.

19. In 1998, Francis Chisambisha revealed his sexual orientation to Zambian media and proposed the formation of a gay rights organization. Goodson Machona, *I'm 25, Gay with 33 Sex Partners*, THE POST (Zambia), July 14, 1998, http://www.ilga.info/Information/Legal_survey/africa/supporting%20files/zambia_the_birth_of_a_movement.htm. In response to Chisambisha's story and the formation of the Lesbian, Gay and Transgender Association (LEGATRA), the Zambian president and vice president publicly denounced homosexuality. NewsPlanet, *The Zambian President, Ex-President on Gays*, (Oct. 23, 1998), at http://www.ilga.info/Information/Legal_survey/Africa/supporting%20files/zambia_the_birth_of_a_movement.htm.

20. BBC News, Africa, *Namibia Gay Rights Now* (Oct. 2, 2000), at <http://news.bbc.co.uk/2/hi/africa/953657.stm>.

21. BBC Focus on Africa, *The Gambia* (Nov. 1999), at <http://www.mask.org.za/SECTIONS/AfricaPerCountry/gambia/gambia.html>.

22. Former Zimbabwean president Canaan Banana was convicted of sodomy and indecent assault in 1999. BBC News, Africa, *Banana Sentenced for Gay Assault* (Jan. 18, 1999), at <http://news.bbc.co.uk/1/hi/world/africa/257189.stm>.

secution of individuals whom the community now identifies as homosexual. On the other hand, the introduction of gay identity is sowing the seeds of resistance. Persecuted individuals take shelter under the label of “gay” or “lesbian” as they face an environment they view as increasingly hostile to non-heteronormative behaviors. LGBT identity, therefore, provides a basis for persecution²³ while simultaneously providing a framework to fight that persecution.

IV. DOMESTIC LEGAL SYSTEMS

The diverse cultures and histories of African states make generalizing about domestic legal systems difficult. The legal system in a particular country largely depends on which colonizing power ruled that territory. Anglophone legal systems, based on the British common law, differ from Francophone and Lusophone systems, which have adopted a civil law model. In addition, Islamic law exerts a strong influence on North African states and some sub-Saharan communities. Given the multi-ethnic nature of most African states, customary law varies greatly even within borders. This section focuses on Anglophone states, particularly in southern Africa because homophobia is taking shape in Anglophone countries in a way that is more easily approached through the violations model of human rights advocacy, i.e., using human rights law to challenge particular instances of discrimination and violence.²⁴ This is due to differences in the law and also to the fact that homosexuality has become part of the public discourse in certain countries, a phenomenon due largely to the anti-gay statements of Anglophone leaders. As a result, identifying sexual orientation as a basis for persecution is easier than in other countries, where there is almost complete public silence on the issue. The complexity of the situation in North African states, which are influenced by Islam among other factors, deserves detailed analysis beyond the scope of this paper.

In contrast to the numerous countries that openly violate the human rights of sexual minorities, South Africa has become the first country in the world to enshrine equality for lesbians and gay men in its constitution.²⁵ Section 9(3) states that “[t]he state may not unfairly

23. Zambia's vice president has wielded the sodomy law not only to punish conduct, but also to suppress the expression of gay and lesbian identity. NewsPlanet, *supra* note 19.

24. See Alice M. Miller, *Sexual But Not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights*, 4 HEALTH & HUM. RTS. 68, 82 (2000), for a critique of the violations model for advancing sexual rights.

25. See Eric C. Christiansen, Note, *Ending the Apartheid of the Closet: Sexual Orienta-*

discriminate directly or indirectly against anyone on one or more grounds, including . . . sexual orientation.”²⁶ South African courts rely on this provision in overturning discriminatory laws in several areas, including adoption,²⁷ criminal law,²⁸ employee benefits,²⁹ and immigration.³⁰ In many ways, this reliance has transformed the position of gays and lesbians in the public realm and propelled the fight for full equality in society.

The most obvious effect of South Africa’s decision is to inspire other countries to incorporate similar provisions into their constitutions.³¹ In other African states, where explicit legal protection is unlikely anytime soon, the frequent amendment, revision, and redrafting of constitutions provides an opportunity for policymakers to review the status of sexual minorities in law and society. Despite a hostile political climate, members of Zimbabwe’s Constitutional

tion in the South African Constitutional Process, 32 N.Y.U. J. INT’L L. & POL. 997 (2000), for an account of the process leading to this groundbreaking development.

26. S. AFR. CONST. (Act 108 of 1996) ch. 2, § 9(3) (amended 1996), *available at* <http://www.gov.za/constitution/1996/96cons.htm>. The Constitutional Court of South Africa has read “sexual orientation” as applying “equally to the orientation of persons who are bisexual, or transsexual and it also applies to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex.” *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (CC), para. 21, at 53, *available at* <http://www.concourt.gov.za/files/gayles/gayles.pdf> (last visited Nov. 1, 2004).

27. *Du Toit v. Minister for Welfare and Population Dev.*, 2002 (10) BCLR 1006 (CC), para. 25, at 25 & para. 44, at 34-35 (holding that sections 17(a) and (c) of the Child Care Act were unconstitutional because the provisions unfairly discriminate between applicants that are married and same-sex couples), *available at* <http://www.concourt.gov.za/files/dutoit/dutoit.pdf> (last visited Nov. 1, 2004).

28. *Minister of Justice*, (12) BCLR 1517 (CC), para. 106, at 131 (holding that both the statutory and common law offense of sodomy were unconstitutional because they violated the constitutional equality principle, right to privacy and right to dignity).

29. *Satchwell v. President of the Republic of S. Afr.*, 2002 (9) BCLR 986 (CC), paras. 21 & 37 (holding that sections 8 and 9 of the Judge’s Remuneration and Conditions of Employment Act 88 of 1989 were unconstitutional because the provisions afforded benefits to spouses but not to same-sex partners with substantially similar relationships), *available at* <http://www.concourt.gov.za/files/satchwell/satchwell.pdf> (last visited Nov. 1, 2004).

30. *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Home Affairs*, 2000 (2) SALR 1, 47 (CC), para. 98, at 74-75 (holding that section 25(5) of the Aliens Control Act of 1991 was unconstitutional because it facilitated the immigration of spouses of permanent South African residents, but did not afford the same benefits to same-sex life partners), *available at* <http://www.concourt.gov.za/files/natcoal/natcoal.pdf> (last visited Nov. 1, 2004).

31. Recently enacted constitutions in Fiji and Ecuador include explicit protections for sexual orientation, while the Swiss constitution’s inclusion of “*Lebensform*” is viewed as covering gays and lesbians. *Fiji CONST. (Constitution Amendment Act 1997 (Act No. 13 of 1997))* § 38, cl. 2(a), *amended by Act No. 5 of 1998*, *available at* http://www.oefre.unibe.ch/law/icl/fj00000_.html (last visited Nov. 1, 2004); *ECUADOR CONST. art. 23, § 3 (1998)*; *BUNDESVERFASSUNG [BV] [Constitution] art. 8, § 2 (Switz.) (amended 2002)*, *available at* <http://www.admin.ch/ch/itl/rs/1/c101ENG.pdf> (last visited Nov. 1, 2004).

Commission considered the voices of gay and lesbian citizens.³² This process gave human rights advocates the opportunity to air their concerns in an official forum. Furthermore, it introduced the idea to many officials that sexual minorities are entitled to the same protections as other citizens.

The effectiveness of legal protections depends on the willingness and ability of lawmakers and judges to help affected groups realize their rights. In many African states, the lack of democratic processes and an independent and trained judiciary are major impediments. In South Africa, courts repeatedly affirm their commitment to a non-discriminatory post-apartheid country, but these progressive decisions should not obscure the realities the vast majority of South African sexual minorities continue to face. Some activists point out judicial decisions directly benefit certain segments of the population, while the concerns of those who are poor, black, or female remain unaddressed.³³ Discrimination and violence most sexual minorities face within their daily lives continue.³⁴ The South African Parliament has not moved to pass measures addressing violence against sexual minorities. Despite constitutional protections, influential political forces, such as certain religious organizations,³⁵ have attempted to rollback the progress already achieved. Fortunately, many of these groups lost credibility after the fall of apartheid, which they either tacitly or actively supported. The process of changing entrenched attitudes depends on cooperation between the government and those segments of civil society, including religious organizations, that support equality.

Elsewhere in Africa, existing rights protections have served as the basis for legal arguments, despite the lack of explicit constitutional protection in those countries. In Botswana for example, activists have initiated challenges to discriminatory laws in addition to establishing LGBT organizations in the region.³⁶ After his arrest for “unnatural”³⁷

32. BBC News, Africa, *Zimbabwe Gay Rights Face Dim Future* (Nov. 17, 1999), at <http://news.bbc.co.uk/2/hi/africa/523162.stm>.

33. MORE THAN A NAME, *supra* note 5, at 179-230.

34. *Id.* at 187-96.

35. In a radio show on homosexuality and spirituality, Catholic, Jewish, and Muslim clerics staunchly opposed the rights of gays and lesbians. Graeme C. Reid, *It Takes Faith to Make a Church: Gay and Lesbian Christian Proselytizing in South Africa*, 14 EMORY INT'L L. REV. 613, 641-44 (2000).

36. Southern African organizations outside of South Africa include Gays and Lesbians of Zimbabwe (GALZ); The Rainbow Project in Namibia; and Lesbians, Gays and Bisexuals of Botswana (LeGaBiBo). MORE THAN A NAME, *supra* note 5, at 12, 30, 49.

37. The Botswanan was arrested along with a foreigner who “pleaded guilty without evidence being led in court.” He was then fined and deported. Panafrican News Agency, *Alleged Gay Challenges Homosexual Law* (May 3, 2001), at <http://www.sodomylaws.org/>

offenses, a Botswanan sought the assistance of Ditshwanelo³⁸ in challenging the constitutionality of the law. Lawyers for the case relied on the right of freedom of association in the Botswana Constitution to challenge the sodomy law.³⁹ Outside of southern Africa, Sylvia Tamale, a prominent human rights activist, has called for the protection of gays as a marginalized group under Uganda's proposed Equal Opportunities Commission.⁴⁰

V. LEGAL ARGUMENTS IN DOMESTIC COURTS

While constitutional protections can hasten the process by which sexual minorities realize their rights, they are not the only means available to challenge discriminatory laws.⁴¹ Even without explicit constitutional provisions dealing with sexual orientation, the constitutions and laws of other African states contain provisions that can be invoked to promote the human rights of sexual minorities.⁴² However, with few exceptions,⁴³ African courts have avoided criticizing discriminatory practices that implicate religion, custom, family, or sexuality even when those practices conflict with domestic laws or international human rights treaty obligations.⁴⁴ With their well-developed reasoning, South African decisions could provide guidance for other African legal systems.

world/botswana/bonews03.htm.

38. Ditshwanelo—The Botswana Centre for Human Rights is a prominent human rights organization in Botswana, at <http://www.ditshwanelo.org.bw> (last visited Nov. 1, 2004).

39. The challenge alleges that Sections 164, 165 and 167 of the Penal Code violate §§ 3(b) and (c) (freedom of association) of the Botswana Constitution. Panafrikan News Agency, *supra* note 37.

40. New Vision, *MUK Don Fights for Gay Rights*, Feb. 5, 2003 (Uganda), available at <http://allafrica.com/search.html?string=MUK+Don+Fights+for+gay+rights>.

41. Compare this to the pace of progress at the national level in the United States. See ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER* (1995).

42. Zambian courts have not reconciled the constitution's fundamental rights and freedoms with the preambulatory declaration that Zambia is a Christian nation. ZAMBIA CONST., pt. III (Protection of Fundamental Rights and Freedom of the Individual), arts. 11-32 (1996), at http://www.oefre.unibe.ch/law/icl/za00t____.html (last visited Nov. 1, 2004).

43. Two instances of domestic courts overturning laws that discriminate against women are *Unity Dow v. Att'y Gen.* [1991] L.R.C. (Const.) 574, reprinted in 13 HUM. RTS. Q. 614-26 (1991) and *Ephraim v. Pastory*, 87 I.L.R. 106 (Tanz. High Ct. 1990), reprinted in HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 429-31 (2d ed. 2000).

44. For an example of how courts have upheld discriminatory laws, see *Magaya v. Magaya*, [1999] 3 L.R.C. 35 (Zimb.) (upholding sex-based discrimination in inheritance law), reprinted in STEINER & ALSTON, *supra* note 43, at 432-35.

A. Equality

1. Discrimination on the Basis of Sexual Orientation

The equality clause in the South African Constitution has been the basis of challenges to discriminatory laws still in place after the demise of the apartheid government. Unlike the United States judiciary,⁴⁵ South African courts apply the same level of protection to all recognized categories.⁴⁶ Another distinction is that South African jurisprudence, along with international human rights law, is concerned with substantive, not merely formal, equality. To ensure its enforceability, the equality clause provides for “the right to equal protection *and* benefit of the law” (emphasis added).⁴⁷ The clause then prohibits direct or indirect discrimination by any person.⁴⁸ This provision makes no distinction between provincial and national governments or state and private actors. The clause guides decision makers by establishing a fairness analysis, which is used to evaluate the constitutionality of discrimination.⁴⁹ Another important distinction is the Court’s consideration of dignity in its equality decisions.⁵⁰ For the South Af-

45. In its equal protection jurisprudence, U.S. courts apply the most stringent level of judicial scrutiny to classifications based on race. *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (upholding the internment of an American citizen of Japanese descent during World War II under a strict scrutiny analysis). Gender-based classifications receive heightened scrutiny. *United States v. Virginia*, 518 U.S. 515, 555, (1996) (holding that a publicly funded university’s policy of denying women admission failed under equal protection analysis). Sexual orientation classifications receive rational basis review, the lowest level of scrutiny. *Romer v. Evans*, 517 U.S. 620, 631-32 (1996) (applying rational basis review to strike an anti-gay amendment to Colorado’s constitution).

46. For equal protection purposes, the South African Constitution makes no distinction among the several categories listed in the equality clause. S. AFR. CONST. (Act 108 of 1996) ch. 2, § 9(3) (amended 1996). The Constitutional Court distinguished itself from the U.S. Supreme Court in this regard. *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (CC), para. 55, at 84-85.

47. S. AFR. CONST. (Act 108 of 1996) ch. 2, § 9(1) (amended 1996).

48. *Id.* § 9(4), “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.” *Id.*

49. *Id.* § 9(5), “Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.” *Id.*

50. Dignity is a fundamental concept in human rights. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., at pmbl., arts. 1, 22 & 23, U.N. Doc. A/810 (1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200 Annex (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at pmbl. & art 10(1), U.N. Doc. A/6316 (1966), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200 Annex (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at pmbl. & art. 13, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The preambles of all three documents stress the “inherent dignity” of human beings.

rican Constitutional Court, equality guarantees in section 9 of the Constitution are tied closely to the right to dignity in section 10.⁵¹

In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, the Constitutional Court relied heavily, but not exclusively,⁵² on the principle of equality to invalidate statutory sodomy provisions and, although not required to do so, the common law offense of sodomy.⁵³ After noting how its previous decisions dealt with unfairness,⁵⁴ the Court determined the sodomy law constituted unfair discrimination.⁵⁵ The law was found to be “a severe limitation of a gay man’s

51. In striking down laws that discriminated on the basis of sexual orientation, the Constitutional Court viewed the laws and their impact on gay and lesbian lives as a violation of the right to dignity. *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (CC), para. 28, at 59-60. *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Home Affairs*, 2000 (2) SALR 1, 47 (CC), para. 57.

52. In his separate decision, Justice Sachs emphasized the interrelated nature of equality and the rights to privacy and dignity. *Minister of Justice*, 1998 (12) BCLR 1517 (CC), paras. 106, 114, 120 & 125, at 131, 143, 150, 156-157.

53. *Id.* para. 106, at 131. In addition to striking the discriminatory provisions in Schedule 1 of the Criminal Procedure Act (1977) and the Security Officers Act (1987), the Court found unconstitutional § 20A of the Sexual Offenses Act (1957) which read:

(1) A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of the offence.

(2) For the purposes of subsection (1) “a party” means any occasion where more than two persons are present.

(3) The provisions of subsection (1) do not derogate from the common law, any other provision of this Act or a provision of any other law.

Id. para. 74, at 101-02.

54. The Court examined three factors in determining unfairness:

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. [...];

(c) with due regard to (a) and (b) above, and any relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

Minister of Justice, 1998 (12) BCLR 1517 (CC), para. 19, at 49-52 (quoting Justice Goldstone in *Harksen v. Lane* NO, 1997 (11) BCLR 1489 (CC), paras. 50-51, at 63-66.

55. Using the factors in determining unfairness, the Court found:

(a) The discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate.

(b) The nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral and religious

right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation.”⁵⁶ To support its position on decriminalizing consensual sodomy, the Court cited decisions from several foreign jurisdictions.⁵⁷ Finally, the Court considered the Constitution’s limitations clause⁵⁸ but found no legitimate purpose for a limitation premised on “the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice.”⁵⁹ Most significant was the decision’s attention to the effects of the sodomy law on the lives of gay men in South Africa.⁶⁰ Moving far beyond the question of individual conduct, the Court recognized that, due to their status as a “political minority,” gays and lesbians are “almost exclusively reliant on the Bill of Rights for their protection.”⁶¹

South African jurisprudence dealing with the rights of gays and lesbians is not limited to criminal law. In *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*,⁶² the Constitutional

views of a section of society.

(c) The discrimination has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity.

Id. para. 26, at 58.

56. *Id.* para. 36, at 68-69.

57. The Court favorably cited several decisions from domestic legal systems in Europe, Australia, New Zealand, and Canada as well as three decisions from the European Court of Human Rights: *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), 4 Eur. H.R. Rep. 149 (1982); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988), 13 Eur. H.R. Rep. 186 (1991); and *Modinos v. Cyprus*, 259 Eur. Ct. H. R. (ser. A) (1993), 16 Eur. H.R. Rep. 485 (1993). *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (CC), paras. 40 & 42 n.58, at 71-74. Contrasting the South African and American constitutions, the Court rejected the relevancy of the judgment of the United States Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the sodomy law of the state of Georgia). *Id.* para. 55, at 84-85. Furthermore, in paragraphs 46 and 47, the Court noted the effects of a decision of the U.N. Human Rights Committee, which monitors state party compliance with the ICCPR. *See Toonen v. Austl.*, U.N. GAOR Hum. Rts. Comm., 50th Sess., Annex, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994). The Human Rights Committee had the power to decide *Toonen*, an individual communication, under the First Optional Protocol to the ICCPR. First Optional Protocol to the ICCPR, *opened for signature*, Dec. 19, 1966, 999 U.N.T.S. 302, U.N. Doc. CCPR/C/OP/2 (1966), available at http://www.unhchr.ch/html/menu3/b/a_opt.htm (last visited Nov. 1, 2004) [hereinafter First Optional Protocol].

58. S. AFR. CONST. (Act 108 of 1996) ch. 2, § 36 (amended 1996).

59. *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (CC), para. 37, at 69.

60. The Court relied heavily on an article authored by Edwin Cameron who later served as Acting Justice on the Constitutional Court from 1999 to 2000. *See Edwin Cameron, Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 S. AFR. L.J. 450 (1993); *Minister of Justice*, (12) BCLR 1517 (CC), paras. 20, 23, 24, 25 & 128, at 52-58 (Sachs, J., concurring).

61. *Minister of Justice*, (12) BCLR 1517 (CC), para. 25, at 58 (Sachs, J., concurring).

62. *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Home Affairs*, 2000 (2)

Court considered the constitutionality of section 25(5) of the Aliens Control Act 96 of 1991, which excluded same-sex life partners from immigration benefits afforded spouses.⁶³ Adopting the analysis applied in the sodomy law case,⁶⁴ the Court found the provision amounted to unfair discrimination on the bases of sexual orientation and marital status.⁶⁵ The Court rectified the denial of the benefit to “gays and lesbians engaged in the only form of conjugal relationship open to them in harmony with their sexual orientation”⁶⁶ by inserting appropriate language into the statute.⁶⁷ The Court believed “the family and family life which gays and lesbians are capable of establishing . . . are in all significant respects indistinguishable from those of [different-sex] spouses.”⁶⁸ Currently, the Lesbian and Gay Equality Project⁶⁹ is examining ways to use these decisions to challenge marriage laws that exclude same-sex couples.⁷⁰

Equality arguments around sexual identity are unlikely to succeed in other African states at this point. First, the analysis adopted by the Constitutional Court depended on its willingness to extend rights to a distinct group within society. Few African politicians and judges outside of South Africa would publicly admit that sexual minorities exist in any significant number in their countries. Even if sexual minorities are recognized as a group, it is hard to imagine officials recognizing their equality when the basic humanity of sexual minorities is so blatantly ignored. Using equality arguments to overturn laws criminalizing homosexuality is quite difficult without acknowledging this basic premise.

SALR 1, 47 (CC).

63. § 25(5) of the Aliens Control Act 96 of 1991 reads:

“Notwithstanding the provisions of subsection (4), but subject to the provisions of subsections (3) and (6), a regional committee may, upon application by the spouse or the dependent child of a person permanently and lawfully resident in the Republic, authorize the issue of an immigration permit.”

64. *Minister of Home Affairs*, 2000 (2) SALR 1, 47 (CC), para. 41, at 33-35.

65. *Id.* para. 40, at 32-33.

66. *Id.*

67. *Id.* para. 97, at 72-73.

68. *Id.* para. 53(b), at 45-46.

69. The Lesbian and Gay Equality Project is the successor organization of the National Coalition for Lesbian and Gay Equality. See The Lesbian and Gay Equality Project website, <http://www.equality.org.za> (last updated Oct. 27, 2004).

70. The Pretoria High Court dismissed a case brought by a lesbian couple seeking legal recognition of their relationship. The Equality Project, which did not bring the case, noted that the decision did not address the merits of the case, leaving open the possibility to pursue “this legal principle in due course.” Behind the Mask, *Judgment in Same Sex Marriage Case, A Statement From the Equality Project*, (Oct. 21, 2002), at http://www.mask.org.za/SECTIONS/AfricaPerCountry/ABC/south%20africa/south%20africa_9a.htm.

2. *Discrimination on the Basis of Sex*

Since other African states lack specific protections for sexual minorities, advocates must use existing laws to build their arguments. One tactic is to argue sexual orientation discrimination is sex discrimination, which is an area of law where some African courts have been willing to tread.⁷¹ African constitutions typically prohibit discrimination based on sex.⁷² However, many constitutions often dampen their own provisions by carving out exceptions for family, personal, customary, or religious law.⁷³ The exemption of these categories negatively impacts women, who bear the brunt of discriminatory laws in these areas. Even without explicit exceptions, African courts will defer to customary law in contravention of domestic and international obligations.⁷⁴ As a result, the application of prohibitions on sex discrimination is uneven across the continent. While a Zimbabwean court upheld a discriminatory inheritance law,⁷⁵ a Tanzanian court found under its Bill of Rights that men and women have equal rights to dispose of clan landholdings.⁷⁶ A number of factors influence the success of challenges to sex discrimination. One major consideration is the treatment of the issue in national constitutions. The most useful constitutions either omit exceptions to nondiscrimination

71. See generally *Unity Dow v. Att'y Gen.* [1991] L.R.C. (Const.) 574; [1992] L.R.C. (Const.) in 13 HUM. RTS. Q. 614-26 (1991) (using international standards to find that a law allowing only a father or an unmarried mother to pass Botswana citizenship to their children born in Botswana was unconstitutional on grounds of sex discrimination).

72. See, e.g., S. AFR. CONST. (Act 108 of 1996) ch. 2, § 9(3) (amended 1996); NAMIB. CONST. art. 10, § 2 (1990), available at http://www.oefre.unibe.ch/law/icl/wa00000_.html (last visited Nov. 1, 2004); ZAMBIA CONST. pt. III (Protection of Fundamental Rights and Freedom of the Individual), art. 11 (1996); MADAG. CONST. art. 8, § 2 (1992).

73. ZAMBIA CONST. pt. III (Protection of Fundamental Rights and Freedom of the Individual), art. 23, §§ 4(c) and (d) exempt "adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law" and customary law.

74. The Preamble of the UDHR calls for the "equal rights of men and women." Articles 2 of the ICCPR and of the ICESCR prohibits sex discrimination, among other forms, in the application of rights. Article 3 of the ICCPR and the ICESCR calls on State Parties to "ensure the equal right of men and women" in the enjoyment of rights in each covenant. Article 7(a)(i) of the ICESCR provides for equal working conditions and equal pay. Article 26 of the ICCPR prohibits discrimination and guarantees "equal and effective protection against discrimination" based on sex. Nearly all African states have ratified the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, opened for signature Dec. 18, 1979, U.N. Doc. A/RES/34/180 (1979), available at <http://193.194.138.190/html/menu3/b/e1cedaw.htm> (last visited Nov. 1, 2004) [hereinafter CEDAW].

75. *Magaya v. Magaya* [1999] 3 L.R.C. 35 (Zimb.), reprinted in STEINER & ALSTON, *supra* note 43, at 432-35.

76. *Ephrahim v. Pastory*, 87 I.L.R. 106 (Tanz. High Ct. 1990), reprinted in STEINER & ALSTON, *supra* note 43, at 429-31.

clauses or affirmatively prohibit laws that contravene constitutional provisions, including nondiscrimination clauses.⁷⁷

Linking sex discrimination with sexual orientation discrimination in the African context will help illuminate the underlying causes of both. The discomfort many Africans feel about sexual minorities stems from anxiety over the disruption of gender roles.⁷⁸ In this way, the human rights of women and sexual minorities are closely linked. Patriarchy, manifested in the persistence of gendered roles that preserve male power, is the source of oppression for both.⁷⁹ “[T]he prohibition of homosexuality preserves the polarities of gender on which rests the subordination of women.”⁸⁰ Discrimination against sexual minorities reinforces this hierarchy of men subordinating women.

Despite the benefits of thinking about the rights of women and sexual minorities together, an approach that considers gender must be careful not to reinforce societal notions limiting the expression of individuals who do not fit any stereotyped pattern. In many African communities, gender and sexuality are linked in such a way so deviating from one necessarily means deviating from the other. For example, it is inconceivable a “real man” would have sex with another man, especially if he adopts the passive role. One who does so is seen as transgressing gender boundaries. Society often expects these individuals to exhibit feminine characteristics. In Somalia, one same-sex male couple faced discrimination from both mainstream society and the sexual minority subculture for refusing to wear feminine dress and exhibit feminine behavior.⁸¹

On a practical level, sexual minorities face the same challenges women face when fighting discriminatory laws. Despite the rights accorded to women in African constitutions, only a few countries have seriously addressed the inequities women face in everyday life. It is unlikely legal systems with poorly developed jurisprudence in this area will be receptive to arguments that encompass sexual minorities.

77. S. AFR. CONST. (Act 108 of 1996) ch. 2, § 15(3)(b) (amended 1996); NAMIB. CONST. art. 66 (1990).

78. American scholars have noted a similar phenomenon. See, e.g., Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

79. *Id.* at 221.

80. Andrew Koppelman, *Why Discrimination Against Lesbian and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 202 (1994).

81. A gay Somali couple did not want to conform to the expectation of society and fellow gays that they dress as members of the opposite sex. Afdhere Jama, *afrol News, Soul Mates: The Price of Being Gay in Somalia*, http://www.afrol.com/printable_feature/10599 (last visited Nov. 1, 2004).

Although domestic litigation around the sex-discriminatory nature of homophobia is still a distant prospect, examining strategies in other legal systems is useful for bolstering advocacy at the domestic and international levels. Activists in the United States have relied upon sex discrimination arguments to fight laws that discriminate against gays and lesbians. These arguments have yielded results in the Supreme Court of Hawaii, which stated the marriage law discriminated based on sex in violation of the equal rights amendment in the state constitution.⁸² Voters then approved a constitutional amendment blocking implementation of the decision; however, the state legislature has been expanding benefits for same-sex couples.⁸³ Responding to a similar challenge in Vermont, a supreme court justice found the state's denial of the benefits of marriage to same-sex couples was a "straightforward case of sex discrimination."⁸⁴ The state legislature then approved the creation of "civil unions," a legal category granting all the state benefits of marriage.⁸⁵

Where sexual minorities are concerned, European Court of Justice decisions have been uneven in their treatment of sex discrimination. In *P v. S and Cornwall County Council*,⁸⁶ the Court found the dismissal of a transsexual individual contravened a European Council Directive prohibiting job discrimination based on sex. Two years later, the Court refused to apply that reasoning to a case involving the granting of employee benefits to married spouses and different-sex partners in a "meaningful relationship" but not to same-sex partners.⁸⁷ The

82. Baehr v. Lewin, 852 P.2d 44, 61, 63 (Haw. 1993).

83. On November 3, 1998, 69% of Hawaii voters voted "yes" to the following question: "Shall the constitution of the State of Hawaii be amended to specify that the legislature shall have the power to reserve marriage to opposite-sex couples?" Ontario Consultants on Religious Tolerance, *Same-Sex Marriages in Hawaii, Activity from 1997 to 1999*, at http://www.religioustolerance.org/hom_mar5c.htm (last updated Dec. 2, 2001). The amendment permits the legislature to restrict marriage to opposite-sex couples, but the legislature has yet to do this. In fact, since 1997, the legislature has been incrementally granting certain rights to same-sex couples as "reciprocal beneficiaries." For a detailed list of laws in this field, see MARRIAGE PROJECT-HAWAII, RIGHTS AND BENEFITS AVAILABLE TO SAME-GENDER COUPLES IN THE STATE OF HAWAII AS "RECIPROCAL BENEFICIARIES," <http://members.tripod.com/~MPHAWAII/RBlaws/RBFullText.PDF> (last updated Sept. 3, 2001).

84. Baker v. Vermont, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

85. An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 (H. 847), § 3, ch. 28, available at www.leg.state.vt.us/docs/2000/acts/act091.htm (last visited Nov. 1, 2004).

86. Case C-13/94, *P v. S and Cornwall County Council*, 1996 E.C.R. I-02143, para. 23, available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61994J0013 (last visited Nov. 1, 2004).

87. Case C-249/96, *Grant v. S.W. Trains Ltd.*, 1998 E.C.R. I-00621, para. 42, available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61996J0249 (last visited Nov. 1, 2004).

Court found that “[s]ince the condition . . . applies in the same way to female and male workers, it cannot be regarded as constituting discrimination directly based on sex.”⁸⁸ In other words, the law was not discriminatory because both same-sex female couples and same-sex male couples were denied benefits. The Court then determined same-sex partners were not in the same position as those granted benefits, interpreting decisions from the European human rights system that distinguished between same-sex and different-sex relationships.⁸⁹

B. Right to Privacy

The National Coalition for Lesbian and Gay Equality avoided privacy arguments in its challenge to South Africa’s sodomy law. The organization feared relying on the right could reinforce the stigmatization of homosexuals by strengthening the proverbial closet doors.⁹⁰ Despite these concerns, the Constitutional Court included privacy in its analysis,⁹¹ concluding the sodomy laws violated the right to privacy.⁹² While the National Coalition was rightfully concerned with the effect of relying on the right to privacy, it underestimated the mitigating impact of the explicit constitutional protection of gays and lesbians. The Court did not emphasize privacy rights, but merely seemed concerned with fully articulating its views on why exactly the sodomy laws were unconstitutional. In other African legal systems, which lack an inclusive equality clause, the concerns over privacy rights seem better founded.

Although lawyers in the United States have relied heavily on privacy arguments, especially in challenging sodomy laws, this approach may not work in the African context. The argument formed part of the basis for the United States Supreme Court overturning the sodomy

88. *Id.* para. 28. The European Court of Justice adopted the “equal application” approach rejected in the Hawaii same-sex marriage case. *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993) (quoting *Loving v. Virginia*, 388 U.S. 1, 8 (1967)).

89. The Court cited the European Commission of Human Rights findings that Article 8 of the European Convention did not extend the right to respect for family life to stable homosexual relationships, and that favorable national treatment of different-sex couples did not violate Article 14’s prohibition on discrimination based on sex. *S.W. Trains Ltd.*, 1998 E.C.R. I-00621, para. 33. The Court then cited European Court of Human Rights finding Article 12 of the European Convention applied only to marriage between two persons of the opposite biological sex. *Id.* para. 34.

90. *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (CC), para. 29, at 62 (quoting Cameron, *supra* note 60, at 464.)

91. *Id.* para. 114, at 143; para. 120, at 150; & para. 125, at 156 (Sachs, J., concurring).

92. *Id.* para. 32, at 65-66. The Court relied on the right to privacy found in the Constitution. S. AFR. CONST. (Act 108 of 1996) ch. 2, § 14 (amended 1996).

law of Texas in 2003,⁹³ and it had been quite successful in state courts before the federal decision.⁹⁴ Although several African constitutions recognize the right to privacy,⁹⁵ there is a lack of jurisprudence defining the boundaries of the right. Privacy provisions in African constitutions tend to focus on the state's intrusion into the home, but this indicates nothing about the right of individuals within families or vis-à-vis other individuals. Privacy rights (zonal, personal, and familial) may have a different meaning in African societies⁹⁶ than they do in the United States.⁹⁷

Taken alone, the privacy approach is problematic for its disparate impact on different groups within the general category of sexual minority. Economic realities and social regulations shape the boundaries of privacy in a particular community. Thus, poorer or more marginalized individuals may be left unprotected. Moreover, the right to privacy often focuses on familial and zonal aspects of the right, i.e., protecting the sanctity of the home and familial structure to the detriment of protecting privacy in personal relations.⁹⁸ Together, these factors exacerbate a situation where men can move more easily between the public sphere and the private (domestic, familial) sphere than women. Men can more readily retreat from oppressive conditions at home and venture out into other social spaces. While the right to privacy will

93. In overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting privacy arguments against Georgia's sodomy law and finding no "fundamental right to engage in homosexual sodomy"), the majority in *Lawrence v. Texas*, "conclude[d that] the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." 539 U.S. 558, 564 (2003).

94. Most state sodomy laws had been repealed or overturned, at least in part, on privacy grounds. In some cases, privacy provisions in state constitutions were used to support abolishing sodomy laws. The U.S. Constitution contains no such provision. For more information about the sodomy laws before *Lawrence*, see Sodomy Laws, *Sodomy Laws in the United States*, at <http://www.sodomylaws.org/usa/usa.htm> (last edited Aug. 5, 2004).

95. Some constitutions that explicitly recognize the right to privacy are ZAMBIA CONST. pt. III (Protection of Fundamental Rights and Freedom of the Individual), art. 17 (1996); S. AFR. CONST. (Act 108 of 1996) ch. 2, § 14 (amended 1996); ETH. CONST. art. 26 (1994), available at http://www.oefre.unibe.ch/law/icl/et00000_.html (last visited Nov. 1, 2004); and NAMIB. CONST. (1990) art. 13, available at http://www.oefre.unibe.ch/law/icl/wa00000_.html (last visited Nov. 1, 2004).

96. See CTR. FOR REPRODUCTIVE LAW AND POLICY & INT'L FEDERATION OF WOMEN LAWYERS (KENYA CHAPTER) F.I.D.A.-K, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, ANGLOPHONE AFRICA (1997), available at www.reproductiverights.org/pub_bo_wowafrika.html (last visited Nov. 1, 2004).

97. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding that a state statute prohibiting the distribution of contraceptives to married couples violated the implicit right to privacy in the U.S. Constitution).

98. The focus on the home in the privacy provisions of constitutions highlights this concern. See, e.g., NAMIB. CONST. art. 13 (1990).

protect gay men, lesbians, who do not enjoy the level of mobility granted men, may actually be harmed by any move that reinforces the private sphere.⁹⁹ Lesbians may be at greater risk of domestic violence if their sexual orientation becomes known. Asserting zonal and familial privacy rights can prevent these individuals from reaching safety and obtaining assistance.

VI. INTERNATIONAL HUMAN RIGHTS MECHANISMS

The human rights movement's growing attention to lesbian and gay issues is part of the larger process of the globalization of gay identity.¹⁰⁰ Despite this trend, many sexual minorities, especially in Africa, do not view their identity in terms of the hetero/homo dichotomy. Still, political organizing is difficult without categories around which activists can rally. Identity-based movements mobilize because existing structures in society do not address the concerns of a segment of the population. Considering the lack of political will to guarantee sexual minorities their human rights, political mobilization around a collective identity is an important strategy. A key question is whether to find a place within the international human rights movement or model a response after domestic LGBT movements outside of Africa. A hybrid approach could build upon the successes of both movements while avoiding the pitfalls an exclusive concentration on one would encounter. Most important, local understandings of sexuality should be considered in this process.

While gay identity is quickly spreading across the globe, many political activists remain isolated from their colleagues in other parts of the world. Several organizations based in the global North have resources and access to the centers of international power. With their understanding of local conditions, organizations in the South are in many ways more equipped to implement human rights. Opportunities for solidarity and exchange of information, however, remain largely untapped. The human rights framework provides an important basis

99. Willets, *supra* note 9, at 994.

100. Dennis Altman argues that this trend exhibits a strong American influence. See Dennis Altman, *On Global Queering*, *AUSTL. HUMAN. REV.* 2 (July-August 1996), at <http://www.lib.latrobe.edu.au/AHR/archive/Issue-July-1996/altman.html> (last visited Nov. 1, 2004). Many activists from outside the West are working to create a space for local ways of thinking about sexuality. For most, this means situating themselves between asserting local identities and joining the global gay movement, whose center of power lies far outside their culture. A Response to Dennis Altman from Michael Tan in the Philippines, *AUSTL. HUMAN. REV.* 2 (July-August 1996), at <http://www.lib.latrobe.edu.au/AHR/emuse/Globalqueering/tan.html> (last visited Nov. 1, 2004).

for opening up a dialogue between northern LGBT organizations, African LGBT organizations, international human rights organizations, and African human rights organizations. In addition, human rights discourse brings sexual orientation-based discrimination and persecution, which exists across cultures in varying degrees, into the global arena. This draws in the international community, which brings in power to exert influence on governments. This occurs not only through sanction and shaming, but also through more subtle processes around the evolution and dissemination of norms. International attention also encourages civil society actors within countries to address novel issues and to link them to their existing goals.

Human rights provide a framework on which ideas can interact and influence each other in a democratic fashion.¹⁰¹ Since governments and organizations are hesitant to follow the dictates of international bureaucrats where issues of sexuality are concerned, dialogue, both within and across cultures, plays a crucial role in the development and implementation of norms.¹⁰² This process will help those groups supporting human rights consider the diverse ways sexuality is lived throughout the world. Standardizing sexual norms or essentializing categories of people are two concerns, especially if control of the debate is centered outside of Africa. A discourse conducted under these conditions can threaten sexual diversity as much as government-led persecution of non-conforming individuals.

Whenever LGBT rights have been raised in international fora, opposition has emerged from religious and socially conservative corners.¹⁰³ As of 2004, the United Nations' treatment of sexual minorities has been sporadic. While the Security Council and General

101. Due to their flexible nature, human rights have been able to overcome many cultural relativist criticisms. Diana Ayton-Shenker, *The Challenge of Human Rights and Cultural Diversity*, United Nations Background Note (Mar. 1995), at <http://www.un.org/rights/dpi1627e.htm> (last visited Nov. 1, 2004).

102. For a discussion of the role of cross-cultural dialogue, see Abdullahi Ahmed An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* 19-43 (Abdullahi Ahmed An-Na'im ed., 1992).

103. LGBT issues encountered resistance when they were raised at the 1993 World Conference on Human Rights. Douglas Sanders, Kurt Krickler & Rodney Croome, ILGA, *Finding a Place in International Law* (July 20, 1997), at http://www.ilga.info/Information/international/finding_a_place_in_international.htm. At the Fourth World Conference on Women's, held in Beijing in 1995, lesbians tried to voice their concerns, including an unsuccessful attempt to include "sexual orientation" in the Platform for Action. IGLHRC & CTR. FOR WOMEN'S GLOBAL LEADERSHIP, *WRITTEN OUT: HOW SEXUALITY IS USED TO ATTACK WOMEN'S ORGANIZING* 53-70 (2000) [hereinafter IGLHRC & CTR. FOR WOMEN'S GLOBAL LEADERSHIP].

Assembly have not given the issue much attention,¹⁰⁴ other bodies within the U.N. system have occasionally mentioned the problems facing sexual minorities. When reviewing periodic reports state parties are required to submit, treaty-monitoring bodies have dealt with certain issues facing sexual minorities in Africa.¹⁰⁵ The Committee against Torture, which monitors state party compliance with the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention), expressed concern over “ill-treatment inflicted on men because of their real or alleged homosexual inclinations, apparently encouraged by the lack of adequate clarity in [Egyptian] penal legislation.”¹⁰⁶ The Human Rights Committee (HRC), which monitors compliance with the International Covenant on Civil and Political Rights (ICCPR), discussed a Sudanese law stipulating the death penalty for committing a third homosexual act.¹⁰⁷ The HRC also noted discrimination in Zimbabwe against homosexuals in immigration regulations.¹⁰⁸

Before examining how international human rights treaties protect sexual minorities, it is worth noting the status of these instruments in domestic law.¹⁰⁹ Although legally binding, obligations in human

104. Many groups, including IGLHRC, were marginalized at the General Assembly’s special session on HIV/AIDS in 2001. Marwaan Macan-Markar, Inter Press Service, *RIGHTS: Treatment of Sexual Minorities a Global Shame—Experts* (June 24, 2001), at <http://www.aegis.com/news/ips/2001/IP010631.html>.

105. The authority to review state reports is found in Article 40 of the ICCPR, *supra* note 50; Article 16 of the ICESCR, *supra* note 50; Article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR 3d Comm., Supp. No. 51, 93rd plen. mtg., opened for signature Dec. 10, 1984, U.N. Doc. A/RES/39/46 (1984), reprinted in 23 I.L.M. 1027 (1984), modified, 24 I.L.M. 535 (1985) [hereinafter Torture Convention], available at http://193.194.138.190/html/menu3/b/h_cat39.htm (last visited Nov. 7, 2004); and Article 18 of CEDAW, *supra* note 74.

106. Press Release, United Nations, Committee Against Torture Issues Conclusions and Recommendations on Report of Egypt, 29th Sess. (Nov. 29, 2002), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/DC0415E44A8EECC0C1256C77005A7255?opendocument>.

107. *Concluding Observations of the Human Rights Committee: Sudan* (Nov. 19, 1997), U.N. GAOR Hum. Rts. Comm., 61st Sess., 1642nd mtg. ¶ 8, U.N. Doc. CCPR/C/79/Add.85 (1997), available at [http://193.194.138.190/tbs/doc.nsf/\(Symbol\)/bc310a747155dff88025655300537fae?Opendocument](http://193.194.138.190/tbs/doc.nsf/(Symbol)/bc310a747155dff88025655300537fae?Opendocument) (last visited Nov. 6, 2004).

108. *Concluding Observations of the Human Rights Committee: Zimbabwe* (Apr. 6, 1998), U.N. GAOR Hum. Rts. Comm., 62nd Sess., 1664th mtg. ¶ 24, U.N. Doc. CCPR/C/79/Add.89 (1998), available at [http://193.194.138.190/tbs/doc.nsf/\(Symbol\)/05c535a1e953a18880256656003671a7?Opendocument](http://193.194.138.190/tbs/doc.nsf/(Symbol)/05c535a1e953a18880256656003671a7?Opendocument) (last visited Nov. 6, 2004).

109. Nearly all African states have ratified or acceded to the ICCPR. As of December 9, 2002, only Comoros, Mauritania, and Swaziland have neither signed nor ratified the ICCPR. Guinea-Bissau, Liberia, and São Tomé e Príncipe have signed but not ratified the ICCPR. Office of the U.N. High Comm’r for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, available at <http://www.unhcr.ch/pdf/report.pdf> (last visited Nov. 6, 2004) [hereinafter Status of Ratifications].

rights treaties do not necessarily translate into guarantees for populations within states.¹¹⁰ The implementation of international treaty obligations depends on not only the legal status of international treaties in domestic law, but also the political will to conform domestic law to international standards. Senegal and Egypt are two states that have taken a monist approach, meaning treaties become part of domestic law upon ratification.¹¹¹ Other African states have taken a dualist approach, requiring implementing legislation before treaties are incorporated into domestic law.¹¹² In South Africa, “any international agreement becomes law in the Republic when it is enacted into law by national legislation” unless it contains a self-executing provision that Parliament approved.¹¹³ Zambia similarly requires the incorporation of treaties before they become domestic law.¹¹⁴ Although it has ratified human rights treaties, neither South Africa nor Zambia has incorporated them into domestic law.¹¹⁵ In South Africa, this is not as problematic as it seems. South African courts are constitutionally required to interpret domestic law in conformity with international treaty obligations whenever possible.¹¹⁶ In addition, South Africa’s constitution prohibits discrimination based on sexual orientation, guaranteeing more than international agreements do in this area.

Despite the strengthening of international norms around sexual orientation, no African state, besides South Africa, has reformed its laws to reflect this trend. Developments in international law are, however, still important for creating tools activists can use. Drawing

110. *Toonen v. Austl.*, U.N. GAOR Hum. Rts. Comm., 50th Sess., Annex, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994) (ruling that Tasmania’s sodomy law violated the ICCPR’s protection of privacy rights). *Toonen* reached the HRC because the ICCPR is not incorporated into Australian law, making it difficult for the federal government to assert international human rights standards throughout the country. Only with the Australian Parliament’s passage of the Human Rights (Sexual Conduct) Act of 1994 § 4.1 did the HRC’s decision become part of domestic law. Without implementing legislation, international treaties have no effect on domestic law and are therefore not directly enforceable in Australian courts. Kristen L. Walker, *International Human Rights Law and Sexuality: Strategies for Domestic Litigation*, 3 N.Y. CITY L. REV. 115, 117 (1998) (detailing the relationships between international and domestic law in Australia). In this instance, the incorporation problem did not ultimately impede implementation of the international standards since the Australian legislature agreed on the need to abolish sodomy laws. *Toonen*, Comm. No. 488/1992, para. 11.

111. CHRISTOF HEYNS & FRANS VILJOEN, *THE IMPACT OF THE UNITED NATIONS HUMAN RIGHTS TREATIES ON THE DOMESTIC LEVEL* 229, 520-21 (2002).

112. This only applies to non-self-executing treaties, but it is often a matter of interpretation as to whether a treaty is self-executing or not.

113. S. AFR. CONST. (Act 108 of 1996) ch. 14, § 231(4) (amended 1996).

114. Heyns & Viljoen, *supra* note 111, at 613.

115. *Id.*

116. S. AFR. CONST. (Act 108 of 1996) ch. 14, § 233 (amended 1996).

upon international norms is one way to bolster the fight against discriminatory laws and practices. For instance, a challenge to Botswana's sex-discriminatory citizenship law successfully used international law.¹¹⁷ However, statistics indicate this is the exception rather than the rule. Even in countries that incorporate treaties upon ratification, the use of international law in court decisions is sparse.¹¹⁸ South African courts are the most likely to use the international human rights treaties as an interpretive tool.¹¹⁹ Possible explanations for why international law has not played a more prominent role are the ignorance or resistance of adjudicators and the simple fact parties do not present international law arguments.

International relations may have a more immediate impact than international law. Despite the potential of bilateral diplomacy to successfully address human rights violations against sexual minorities, many states have decided to show cross-cultural "sensitivity," creating a notable discrepancy between the global reaction to the persecution of sexual minorities and other issues.¹²⁰ Although some governments have raised LGBT concerns in their interactions with African states,¹²¹ criticism from outside of Africa may support charges of cultural imperialism. After receiving a letter from members of the United States Congress about his anti-gay rhetoric, Mugabe responded, "[I]et the Americans keep their sodomy, bestiality, stupid and foolish ways to themselves, out of Zimbabwe Let them be gay in the US, Europe and elsewhere They shall be sad people here."¹²² With economic power and political clout, South Africa is in the best position to pressure other African states. South African organizations were the most vocal in the region when the Zimbabwean government prevented Gays and Lesbians of Zimbabwe (GALZ) from participating in the 1995 Zimbabwe International Book Fair.¹²³ Contrarily, the South Afri-

117. The arguments drew upon both the African Charter on Human and Peoples' Rights and CEDAW. At the time, Botswana had not yet ratified CEDAW. *Unity Dow v. Att'y Gen.* [1991] L.R.C. (Const.) 574; [1992] L.R.C. (Const.) in 13 HUMAN RIGHTS Q. 614-26 (1991).

118. The Heyns & Viljoen study found at least one case in Egypt, one in Zambia, and none in Senegal. Heyns & Viljoen, *supra* note 111, at 234, 524-25, 622.

119. Heyns & Viljoen found at least 28 references in South African decisions to the following treaties: ICESCR, ICCPR, CEDAW, Torture Convention, the Convention on the Elimination of Racial Discrimination, and the Convention on the Rights of the Child. *Id.*

120. HEINZE, *supra* note 2, at 311-53.

121. Norway has funded a gay organization in Zambia. Dispatch Online (S. Afr.), *Norway Admits Funding Gays* (Nov. 20, 1998), at <http://www.dispatch.co.za/1998/11/20/foreign/NORWAY.HTM>.

122. DUNTON & PALMBERG, *supra* note 3, at 13.

123. *Id.* at 11.

can government remained silent, as it has with other human rights violations perpetrated by its neighbors.¹²⁴

In recent years, the international community has become increasingly involved in the evolution of international norms that deal with sexuality and human rights. The International Lesbian and Gay Association (ILGA)¹²⁵ and the International Gay and Lesbian Human Rights Commission (IGLHRC)¹²⁶ have pioneered the inclusion of LGBT concerns within the human rights framework.¹²⁷ Over the past decade, Human Rights Watch¹²⁸ and Amnesty International¹²⁹ have begun addressing violations against sexual minorities. African contributions to the development of LGBT rights remain limited. Outside of South Africa, there are few public organizations in Africa that focus on LGBT issues.¹³⁰ The response of domestic human rights organiza-

124. Carolyn Dempster, BBC News, *South Africa's 'Silent' Diplomacy* (Mar. 5, 2003), at <http://news.bbc.co.uk/2/hi/africa/2818297.stm>.

125. ILGA is a Brussels-based organization founded in 1978. See generally ILGA, at <http://www.ilga.org> (last visited Nov. 1, 2004).

126. IGLHRC is a New York based organization founded in 1990. See generally IGLHRC, at <http://www.iglhrc.org> (last visited Nov. 1, 2004).

127. ILGA gained consultative status with the U.N. Economic and Social Council in 1991 but was voted out in 1994 after a dispute over ILGA's inclusion of the North American Man/Boy Love Association. Recent efforts to regain status have failed. GayLawNews, *Homophobic States Defeat ILGA's Bid for UN Consultative Status* (Apr. 2002), at <http://www.gaylawnet.com/news/2002/ilga02.htm>.

128. Since 1998, Human Rights Watch has reported on violations against LGBT individuals. See generally, Human Rights Watch, at <http://www.hrw.org/lgbt> (last visited Nov. 6, 2004). Human Rights Watch reported on American LGBT youth in HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS (2001). The organization has collaborated with IGLHRC on two reports: PUBLIC SCANDALS, SEXUAL ORIENTATION AND CRIMINAL LAW IN ROMANIA (1998) and MORE THAN A NAME: STATE-SPONSORED HOMOPHOBIA IN SOUTHERN AFRICA (2003). Human Rights Watch also pressured the U.N. Human Rights Commission to consider the situation of homosexuals. Press Release, United Nations, Hum. Rts. Comm., Issues of Civil and Political Freedoms and Protections Reviewed (Apr. 5, 2000), available at <http://www.unhchr.ch/huricane/hurricane.nsf/view01/39A8001ECD22F3F2802568B9002FE5BC?opendocument>.

129. LGBT issues became a part of Amnesty International's mandate in 1991 after contentious debate among members. Amnesty International focuses on protecting LGBT "prisoners of conscience." Symposium, *Recent Developments in International Law*, 26 N.Y.U. REV. L. & SOC. CHANGE 169, 171 (2000-2001). This approach encompasses those whom the state has jailed or persecuted but fails to address other forms of discrimination within society. Two programs within Amnesty International specifically address LGBT issues: the International LGBT Network, at <http://www.ai-lgbt.org> (last visited Nov. 6, 2004), and OUTFRONT, Amnesty International USA, at <http://www.amnestyusa.org/outfront> (last visited Nov. 6, 2004). Amnesty International has published two significant reports that include discussions of Africa: BREAKING THE SILENCE: HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION (1997) and CRIMES OF HATE, CONSPIRACY OF SILENCE—TORTURE AND ILL-TREATMENT BASED ON SEXUAL IDENTITY (2001) [hereinafter CRIMES OF HATE].

130. Twenty-two LGBT organizations representing sixteen African countries met in 2004 and released a statement in which they explained, "If we do not sign the names of our organi-

tions to the blatant persecution of sexual minorities within their countries has varied. In some cases, these organizations have refused to advocate for sexual minorities despite highly publicized violations.¹³¹ In contrast, national human rights organizations in Botswana and Namibia have spearheaded efforts to bring attention to LGBT issues.¹³²

VII. INTERNATIONAL LAW ARGUMENTS

A. Administration of Justice

1. Torture and Ill-Treatment

At the international level, most of the attention to lesbian and gay human rights has focused on violations dealing with administration of justice issues such as torture and ill-treatment and arbitrary detention. These types of violations are usually the most visible forms of state-sponsored persecution and, hence, the easiest to document and address. Several human rights mechanisms already report and comment on the torture and ill-treatment of sexual minorities. In addition, the perception of violations against physical integrity makes them a powerful starting point for advocacy. Despite its usefulness in bringing attention to the plight of sexual minorities, this approach should not be the only way of framing violations. An exclusive focus on the administration of justice may address certain state-perpetrated violations, while ignoring other forms of discrimination and violence in communities.

The prohibition against torture is contained in two relevant international instruments: the ICCPR and the Torture Convention. First, Article 7 of the ICCPR prohibits torture and “cruel, inhuman or degrading treatment or punishment” but does not define what these terms mean.¹³³ Second, the Torture Convention provides a definition;

zations to this document, it is because of the climate of repression and fear that we face every day.” Human Rights Watch, *The Johannesburg Statement on Sexual Orientation, Gender Identity, and Human Rights* (Feb. 13, 2004), http://hrw.org/lgbt/pdf/joburg_statement_021304.htm.

131. Behind the Mask, *Egypt: Another International Black Eye*, at <http://www.mask.org.za/sections/AfricaPerCountry/egypt/egypt19.html> (last visited Nov. 6, 2004).

132. For example, IGLHRC has commended Ditshwanelo-the Botswana Centre for Human Rights for their work raising awareness of the problems faced by sexual minorities. IGLHRC, *Felipa Awards, Previous Awardees, 2000-2003*, at <http://www.iglhrc.org/php/content.php?type=1&id=27> (last visited Nov. 6, 2004).

133. The Human Rights Committee did not define the terms in Article 7 but instead provided guidance by stating state parties have a duty to protect against acts committed in a “private capacity.” *General Comments Adopted by the Human Rights Committee under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights*, General Com-

however, a claim must show the torturer acted “with the consent or acquiescence of a public official or other person acting in an official capacity.”¹³⁴ The official action requirement should not impede claims under the Torture Convention because ample evidence of torture and ill-treatment at the hands of state agents is readily available. In cases dealing with sexual minorities, many states do not attempt to conceal their persecution. Collecting information should not be difficult since organizations dedicated to documenting cases of torture and ill treatment work throughout Africa.¹³⁵ One problem in collecting evidence is that victims and witnesses who report violations face retaliation. Gathering first-hand accounts may be easier outside of Africa. One potential source is the testimony of victims who are granted asylum in Europe and North America.¹³⁶

The prohibition on torture also applies to countries that have not signed the ICCPR or the Torture Convention because torture is a peremptory, or *jus cogens*, norm within customary international law “from which no derogation is permitted.”¹³⁷ Once an act is identified as an act of torture, the state can offer no justification for subjecting an individual to torture on any basis.¹³⁸ States also have a duty to exercise due diligence in preventing and responding to cases of torture perpetrated by private actors.¹³⁹ Cultural relativists would not succeed

ment 20, Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7), U.N. GAOR Hum. Rts. Comm., 44th Sess., Addendum, para. 9, U.N. Doc. No. CCPR/C/21/Rev.1/Add.3 (1992), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument) (last visited Nov. 6, 2004). *Id.* ¶ 2.

134. Torture Convention, *supra* note 105, art. 1, para. 1. Article 16, paragraph 1 reiterates this requirement for “acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article I.” *Id.*

135. International organizations heavily involved in Africa include the World Organisation Against Torture. The accepted name for this French organization is Organisation Mondiale Contre la Torture, at <http://www.omct.org> (last visited Oct. 31, 2004) [hereinafter OMCT], and the Association for the Prevention of Torture, at <http://www.ap.t.ch> (last visited Nov. 6, 2004).

136. ILGA provides a list of countries that have granted, or could grant, asylum to LGBT refugees. See World Legal Survey, Asylum, *supra* note 10.

137. The definition of *jus cogens* is found in Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 334. General Comment 24 (52), Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. GAOR Hum. Rts. Comm., 50th Sess., Supp. No. 40, para. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/69c55b086f72957ec12563ed004ecf7a?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/69c55b086f72957ec12563ed004ecf7a?Opendocument) (last visited Nov. 6, 2004).

138. The International Criminal Tribunal for the Former Yugoslavia has described the peremptory nature (*jus cogens*) of the prohibition against torture. Prosecutor v. Furundzija, Judgment, Case No. IT-95-17/1, paras. 153-54 (ICTY Trial Chamber Dec. 10, 1998).

139. States may incur responsibility when they fail to exercise due diligence in

in arguing for torture. Instead, they must explain how a particular act does not fall within the bounds of torture and ill-treatment. The severity of many violations makes this a difficult task. In addition, the numerous instances of torture present a relatively easy case to decision makers, who may be generally hesitant about recognizing the human rights of sexual minorities. Despite its usefulness in getting decision makers to recognize the humanity of sexual minorities, torture is only a starting point for addressing the myriad of violations against sexual minorities. Given its status in international law, torture paves a relatively non-contentious inroad into the potentially contentious area of sexuality. Other approaches, such as advocating for a right to sexual autonomy, while a worthy long-term goal, would encounter many more obstacles. Presently, international mechanisms are better equipped to address claims of torture.

Within the human rights movement, organizations that focus on torture and ill-treatment have been the most willing to deal with violations against sexual minorities. Amnesty International¹⁴⁰ and the World Organization Against Torture (OMCT)¹⁴¹ have increasingly advocated against torture directed at sexual minorities. The United Nations has acknowledged cases of torture and ill-treatment of detainees based on their real or perceived sexual orientation. In his report to the General Assembly, Nigel Rodley, Special Rapporteur on Torture, devoted a section to the torture of and discrimination against sexual minorities.¹⁴² Rodley posited the underlying cause of the violations was the failure of victims to “conform to socially constructed gender expectations.”¹⁴³ The report found that discriminatory laws and attitudes precipitated violence and obstructed police and medical responses.¹⁴⁴ Rodley also noted corporal punishment for consensual same-sex relationships and transgendered behavior ““can amount to cruel, inhuman or degrading punishment or even to torture.””¹⁴⁵ At least one African

preventing, investigating, and punishing violations. See e.g., Velasquez Rodriguez Case, Inter-Am. C.H.R. (ser. C) No. 4, para. 79 (1988), available at http://www1.umn.edu/humanrts/iachr/b_11_12d.htm.

140. CRIMES OF HATE, *supra* note 129.

141. The World Organisation Against Torture website contains several reports and appeals dealing with violence against sexual minorities. See OMCT, *supra* note 135.

142. *Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report of the Special Rapporteur*, U.N. GAOR Hum. Rts. Comm., 56th Sess., Item 132(a), at 6-7, U.N. Doc. A/56/156 (2001), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/a10fc68f4899ebe0c1256ace004b6207/\\$FILE/N0144579.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/a10fc68f4899ebe0c1256ace004b6207/$FILE/N0144579.pdf) (last visited Nov. 6, 2004) [hereinafter *Report of the Special Rapporteur*].

143. *Id.* at 6.

144. *Id.*

145. *Id.* (quoting C.H.R. Res. 2001/62, U.N. ESCOR, 57th Sess., ¶ 5, U.N. Doc.

government has taken notice. Responding to a representative of the Senegalese government, the Special Rapporteur reiterated his desire to stop the abuses homosexuals and transvestites face.¹⁴⁶

2. *Arbitrary Detention*

International human rights instruments protect against the arbitrary deprivation of liberty.¹⁴⁷ The U.N. Working Group on Arbitrary Detention (Working Group) broadly defines detention and other deprivations of liberty at the hands of the state, including pretrial detention, administrative detention, detention in times of emergency, post-conviction imprisonment, and certain forms of house arrest and rehabilitation through labor.¹⁴⁸ The Working Group then points to three situations when deprivations of liberty are considered arbitrary. Violations fall into Category I “[w]hen it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him).”¹⁴⁹ This applies to instances when there is no legal justification for the detention. Category II applies “[w]hen the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by Articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by Articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights.”¹⁵⁰ This means governments cannot detain individuals for exercising certain rights. Category III includes instances “[w]hen the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbi-

E/CN.4/RES/2001/62 (2001)).

146. Press Release, United Nations, Participation of Afghan People Must Be Central to Political Restructuring There, Third Committee Told, As Human Rights Deliberations Continue (Nov. 8, 2001), available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/81B10FBD776A7664C1256AFF002BA6E6?opendocument>.

147. UDHR, *supra* note 50, art. 9; ICCPR, *supra* note 50, art. 9, para. 1.

148. U.N. Office of the High Comm'r for Human Rights, Fact Sheet No. 26, The Working Group on Arbitrary Detention, § IV.A, available at <http://193.194.138.190/html/menu6/2/fs26.htm#IV> (last visited Nov. 1, 2004) [hereinafter Working Group].

149. *Id.* § IV.B.

150. *Id.*

trary character.”¹⁵¹ This category protects individuals in legal systems that do not guarantee procedural rights.

Most deprivations of the rights of sexual minorities fall under Categories II and III. Examples of Category II violations are when Zambian Vice-President Christian Tembo threatened with imprisonment those calling for the decriminalization of homosexuality¹⁵² or when Ugandan police arrested and detained lesbian and gay individuals who gathered in a private home to discuss their rights.¹⁵³ The detention of LGBT human rights defenders in these circumstances violates Articles 19 (freedom of expression), 21 (freedom of assembly), and 22 (freedom of association) of the ICCPR. Category II also prohibits detentions resulting from the exercise of Article 26 of the ICCPR, which prohibits and protects against “discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁵⁴

The deprivation of liberty can be arbitrary even when officials act in accordance with sodomy or morality laws since those laws usually violate Article 26 and other articles. In a recent opinion dealing with the mass detention of suspected homosexuals in Egypt, the Working Group explicitly recognized imprisonment of suspected homosexuals amounts to an arbitrary deprivation of liberty.¹⁵⁵ After examining how other U.N. bodies dealt with sexual orientation in various contexts, the Working Group concluded detention in this case contravened the non-discrimination provisions of the UDHR and the ICCPR and was therefore arbitrary.¹⁵⁶ This opinion had two effects. First, it expanded Category II to encompass Articles 2 of the UDHR and the ICCPR. Second, it reinforced the notion sexual orientation is included in the non-discrimination provisions of international instruments although it did not explain under which category sexual orientation falls. Since parties to a treaty cannot invoke their domestic laws to

151. *Id.*

152. Amos Malupenga, *Gay Activists to be Arrested*, THE POST (Zambia), Sept. 23, 1998, http://www.ilga.info/Information/Legal_Survey/africa/supporting%20files/zambia_the_birth_of_a_movement.htm#The%20Zambian%20President,%20Ex-President%20on%20Gays.

153. CRIMES OF HATE, *supra* note 129, at 1-3.

154. ICCPR, *supra* note 50, art. 26.

155. *Working Group on Arbitrary Detention Opinion No. 7/2002*, U.N. ESCOR, Hum. Rts. Comm., 59th Sess., Provisional Agenda Item 11(b), at 68, U.N. Doc. E/CN.4/2003/8/Add.1 (2003), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/c514f021009a2b05c1256cf50036f89d/\\$FILE/G0310553.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/c514f021009a2b05c1256cf50036f89d/$FILE/G0310553.pdf) (last visited Nov. 6, 2004) [hereinafter *Working Group on Arbitrary Detention*].

156. *Id.* at 73.

evade international obligations,¹⁵⁷ state parties are effectively barred from enforcing sodomy laws against sexual minorities.

Category III relates to violations of procedural rights and may overlap with Category II violations. Sexual minorities are especially vulnerable to this type of violation. The highly stigmatized nature of homosexuality may lead to procedural irregularities such as police misconduct, blackmail, or other actions that result in an unfair trial. Category III is also helpful in jurisdictions without sodomy laws. There, police may resort to arbitrary detention to harass those who are perceived as sexually deviant or who merely do not conform to gender norms.

3. Right to Life

In extreme instances, African states violate the right to life of sexual minorities.¹⁵⁸ The right to life is considered fundamental and is part of customary international law.¹⁵⁹ States most directly infringe upon this right when they impose or allow the death penalty for homosexual conduct.¹⁶⁰ Mauritania and parts of Nigeria and Sudan, where a particular version of Shari'a dominates, have laws that punish homosexuality with death.¹⁶¹ Although international law does not unequivocally condemn the death penalty,¹⁶² it sharply limits its application. The ICCPR does not prohibit the death penalty, but retentionist states may use it only "for the most serious crimes . . . and not contrary to the provisions of the [ICCPR]."¹⁶³ Most states would not consider homosexuality or any other non-violent crime as one of the most serious crimes, yet many areas under Islamic law apply the

157. Vienna Convention on the Law of Treaties, *supra* note 137, art. 27.

158. UDHR, *supra* note 50, art. 3 states: "Everyone has the right to life, liberty and security of person." ICCPR, *supra* note 50, art. 6, para. 1 states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

159. See THE RIGHT TO LIFE IN INTERNATIONAL LAW (B.G. Ramcharan ed., 1985).

160. Other violations of the right to life may occur while an individual is in police custody. The state may also fail to adequately protect against and prosecute hate-motivated killings. This is a serious problem in Latin America. See, e.g., LUIZ MOTT ET AL., O CRIME ANTI-HOMOSSEXUAL NO BRASIL (2002), available at <http://www.ggb.org.br/crime.html> (last visited Nov. 6, 2004).

161. Sodomy Laws: *Laws Around the World*, at <http://www.sodomylaws.org/world/world.htm> (last edited Sept. 19, 2004).

162. Only forty-nine state parties to the ICCPR have ratified or acceded to the Second Optional Protocol, which commits states to abolish the death penalty. Cape Verde, Djibouti, Mozambique, Namibia, Seychelles, and South Africa are the African states that have acceded. Status of Ratifications, *supra* note 109.

163. ICCPR, *supra* note 50, art. 6, para. 2.

death penalty to a variety of non-violent crimes. Applying the death penalty to homosexuality is also contrary to the ICCPR since it penalizes an individual for exercising rights under Articles 17 (right to privacy) and 26 (non-discrimination) of the ICCPR.

Violations in the realm of administration of justice are closely related to the wider context in which sexual minorities find themselves. At the root of many of these violations are sodomy laws, which legitimize the social stigma and persecution sexual minorities encounter. Criminalization sends a chilling message to sexual minorities even where sodomy laws are rarely enforced.¹⁶⁴ The hostile climate is not the only product of sodomy laws. Governments fail to confront the hatred and violence non-state actors, such as fundamentalist religious organizations, incite.¹⁶⁵ Some politicians create and feed the hostile climate themselves by espousing homophobic rhetoric and displaying hostility toward LGBT visibility. Their words encourage individuals to harass, injure, and, in some instances, kill sexual minorities in violation of the right to life.¹⁶⁶

B. Equality

1. Discrimination on the Basis of Sexual Orientation

Sexual orientation is not included in the categories of prohibited bases of discrimination in international law. The United Nations Charter lists only race, sex, language, and religion.¹⁶⁷ However, subsequent human rights instruments include "other status," indicating the drafters anticipated the emergence of new categories.¹⁶⁸ The use

164. Christopher R. Leslie has described the effects of "inflicting the taint of criminality on homosexuals" in the United States as:

(1) creating a social hierarchy that diminishes the value of the lives of gay men and lesbians, imposing severe psychological injury on many gay men and lesbians; (2) encouraging physical violence and police harassment against gay men and lesbians; (3) justifying employment discrimination against gay and lesbian employees and job applicants; (4) separating children from their gay or lesbian parent; (5) stifling the development of gay organizations; (6) squelching speech rights of gay citizens; and (7) facilitating immigration discrimination against homosexuals.

Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 116 (2000) [footnotes omitted].

165. Willets, *supra* note 9, at 1003-06.

166. President Sam Nujoma of Namibia has called for the arrest, imprisonment, and deportation of homosexuals and lesbians. afrol News, *Nujoma's "Gay Purges" Cause International Outrage* (Mar. 22, 2001), at http://www.afrol.com/News2001/nam009_gay_purges2.htm.

167. U.N. CHARTER art. 1, para. 3, at <http://193.194.138.190/html/menu3/b/ch-cont.htm> (last visited Nov. 6, 2004).

168. The three instruments constituting the International Bill of Rights have expanded the

of “such as” further suggests the enumerated categories are examples in a non-exhaustive list. In recent years, U.N. bodies have been willing to consider HIV/AIDS status as a new category.¹⁶⁹

Despite the possibilities for the expansion of human rights norms, explicit protections at the international level evade sexual minorities.¹⁷⁰ Some bodies have attempted to include sexual orientation as a prohibited category.¹⁷¹ However, it is unclear whether they are fitting sexual orientation under “sex,” as the Human Rights Committee did in *Toonen*, or “other status.” Developments in this area encounter the opposition of states that ultimately control international mechanisms. Several states with predominantly Muslim populations have attempted to dilute references to sexual minorities, even in the context of the fight against HIV/AIDS.¹⁷² These states argue the international com-

categories covered. The UDHR, *supra* note 50, art. 2 states: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The ICCPR, *supra* note 50, art. 2, para. 1 and the ICESCR, *supra* note 50, art. 2, para. 2 contain analogous provisions.

169. C.H.R. Res. 1995/44, U.N. ESCOR, U.N. Doc. E/CN.4/RES/1995/44 (1995); Sub-Comm’n Res. 1995/21, U.N. Doc. E/CN.4/Sub.2/RES/1995/21 (1995), available at http://ap.ohchr.org/documents/E/SUBCOM/resolutions/E-CN_4-SUB_2-RES-1995-21.doc (last visited Nov. 6, 2004); C.H.R. Res. 1999/49, U.N. ESCOR, U.N. Doc. E/CN.4/RES/1999/49 (1999); C.H.R. Res. 2001/51, U.N. ESCOR, U.N. Doc. E/CN.4/RES/2001/51 (2001), available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2001-51.doc (last visited Nov. 6, 2004).

170. Since 1981, the Parliamentary Assembly of the Council of Europe has addressed the issue of discrimination against homosexuals in member states. Council of Europe Parliamentary Assembly, Recommendation 924 (1981), 33rd Sess., available at <http://assembly.coe.int/Mainf.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta81/BREC924.pdf> (last visited Nov. 6, 2004). In 2000, Romania decriminalized homosexuality due in large part to Council pressure. Karen Popescu, Reuters, *Romanian MPs Vote to Decriminalize Homosexuality* (Jun. 28, 2000), http://www.ilga.info/Information/Legal_Survey/europe/supporting%20files/romanian_mps_vote_to_decriminali.htm (last visited Nov. 6, 2004). Despite these developments, the Council’s Committee of Ministers has not yet followed the Parliamentary Assembly’s recommendation to amend the European Convention on Human Rights to include sexual orientation among the prohibited grounds for discrimination. Council of Europe Parliamentary Assembly, Recommendation 1474 (2000), para. 11(i), available at <http://assembly.coe.int/Documents/AdoptedText/TA00/EREC1474.htm> (last visited Nov. 6, 2004). Council of Europe Parliamentary Assembly, Opinion No. 216 (2000), para. 6, available at <http://assembly.coe.int/Documents/AdoptedText/ta00/eopi216.htm> (last visited Nov. 6, 2004).

171. E.g., General Comment 14, The Right to the Highest Attainable Standard of Health, U.N. ESCOR Comm. on Econ., Soc., and Cultural Rts., 22nd Sess., Agenda Item 3, para. 18, U.N. Doc. E/C.12/2000/4 (2000), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument) (last visited Nov. 6, 2004) (explaining that the Committee on Economic, Social and Cultural Rights, which oversees implementation of the ICESCR, included sexual orientation as a prohibited category for the purposes of providing health services).

172. Agence France-Presse, *Islamic Maneuver on Gay & Lesbians Plunges UN Conference on AIDS into Disarray* (June 25, 2001), available at <http://www.commondreams.org/headlines01/0625-03.htm>.

munity should avoid taking any step that might indicate approval for homosexuality since it is a practice they claim is antithetical to their culture.¹⁷³ This type of culture-based argument bears striking similarity to objections against women's rights.¹⁷⁴

Explicit textual support in international law is an important basis for advancing human rights. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Declaration on Violence against Women have greatly assisted efforts to advance women's rights. Advocates are able to approach their governments with an incontrovertible basis in international law.

One solution for sexual minorities is a comprehensive instrument that addresses discrimination on the basis of sexual orientation.¹⁷⁵ In 2003, Brazil became the first state in the U.N. to advance the idea of focusing on human rights violations based on sexual orientation.¹⁷⁶ Beside this nascent effort, sexual minorities have received sporadic attention at the international level. Although U.N. bodies have occasionally issued statements on torture and arbitrary detention,¹⁷⁷ they have skirted the issue of equality. As a first step, relevant international bodies must first recognize sexual orientation as a distinct form of discrimination.¹⁷⁸ The existence of the "other status" category makes it possible to fit sexual orientation within existing human rights documents. Given the history of discrimination and violence, sexual

173. See generally Human Rights Watch, *The Spread of Homophobic Rhetoric in Southern Africa*, <http://www.hrw.org/reports/2003/safrica/safrighlrc0303-02.htm> (last visited Nov. 16, 2004) (stating "[Zimbabwe] want[s] to protect the values of [its] culture . . . The essence of the [book] fair should be exhibiting what the country has achieved . . . and absolutely not homosexuality").

174. Although 170 states have ratified the CEDAW, many states have made declarations or reservations, often on fundamental provisions, such as Article 2. See generally CEDAW Declarations and Reservations, United Nations Treaty Collection, as of Feb. 5, 2002, available at http://193.194.138.190/html/menu3/b/treaty9_asp.htm (last visited Nov. 6, 2004) (outlining the declarations and reservations of United Nations countries to the CEDAW) [hereinafter CEDAW Declarations and Reservations].

175. Heinze has drafted a Model Declaration of Rights Against Discrimination on the Basis of Sexual Orientation. HEINZE, *supra* note 2, at 291-303.

176. C.H.R. Draft Res., U.N. ESCOR, U.N. Doc. E/CN.4/2003/L.92 (2003) (on file with author). The Commission on Human Rights has postponed a vote on the proposed resolution until 2005. Outspoken, *Brazil Resolution Vote Postponed to Next Year*, at http://www.ighrc.org/files/ighrc/IGLHRC_newsltr.pdf (last visited Nov. 6, 2004).

177. For a statement on torture and sexual orientation, see *Report of the Special Rapporteur*, *supra* note 142, at 6-7. For a statement on arbitrary detention, see *Working Group on Arbitrary Detention*, *supra* note 155, at 68.

178. This trend is slowly gaining momentum, but it is still in its infancy. Although some bodies have mentioned discrimination based on sexual orientation, they have not articulated any coherent reasoning. See, e.g., *id.*

orientation is a strong candidate for recognition as a distinctive category.

2. *Discrimination on the Basis of Sex*

The prohibition of sex discrimination has been present since the founding of the modern human rights movement. The preamble of the U.N. Charter calls for the “equal rights of men and women.”¹⁷⁹ The UDHR reiterates this point, adding everyone is entitled to enjoy its rights “without distinction of any kind, such as . . . sex.”¹⁸⁰ Articles 2, 3, 4, 24, and 26 of the ICCPR and Articles 2, paragraph 2; 3; and 7(a)(i) of the ICESCR deal with discrimination against women. Despite textual support in international instruments and the existence of the Commission on the Status of Women, which functions under the Economic and Social Council, women’s rights did not receive much attention during the first decades of the U.N. In the 1970’s, international attention focused on economic development. Recognizing the inadequacy of mechanisms to address the gross inequalities women face in their daily lives, the Commission on the Status of Women drafted the CEDAW. The General Assembly unanimously adopted the document in 1979; after the twentieth state ratified it, the CEDAW was entered into force in 1981. All of these documents reinforce the need to eliminate, with few exceptions,¹⁸¹ discrimination on the basis of sex.

Despite these developments, it was not until the 1990’s that women’s human rights began to receive significant attention.¹⁸² The 1993 World Conference on Human Rights, 1994 International Conference on Population on Development, and 1995 Fourth World Conference on Women were three international fora where women’s human rights figured prominently.¹⁸³ Efforts to strengthen the

179. U.N. CHARTER pmb1.

180. UDHR, *supra* note 50, pmb1.

181. Discrimination is permitted in the context of special measures that “accelerate de facto equality between men and women” and that protect maternity. CEDAW, *supra* note 74, art. 4.

182. The U.N. Division for the Advancement of Women website contains information, or links to information, about the recent history of the international human rights of women. See <http://www.un.org/womenwatch/daw/index.html> (last updated Oct. 25, 2004).

183. See Office of the High Comm’r for Human Rights, *World Conference on Human Rights*, June 1993, <http://www.unhchr.ch/html/menu5/wchr.htm> (last visited Nov. 16, 2004); *Report of the International Conference on Population and Development*, U.N. Population Division, Dep’t of Econ. and Soc. Affairs, ch. 4, U.N. Doc. A/CONF.171/13: Report of the ICPD (1994), available at <http://www.un.org/popin/icpd/conference/offeng/poa.html> (last visited Nov. 16, 2004); and United Nations, *The Fourth World Conference on Women: Action*

protections against violence led to the Declaration on the Elimination of Violence Against Women and the appointment of a Special Rapporteur on Violence Against Women. The Optional Protocol to the CEDAW, allowing for individual complaints, came into force in 2000. The U.N. has attempted to mainstream gender issues throughout its work.¹⁸⁴ In many ways, the growing attention to women's rights exemplifies the process by which the international community mobilizes around an issue.

Progress in the area of women's rights is encouraging for sexual minority rights advocates. Arguments against sex discrimination could apply to sexual minorities, especially in the realm of criminal law.¹⁸⁵ Many sodomy laws apply, textually or in practice, to conduct based on the sex of the partner. In other words, the law criminalizes conduct for same-sex couples that is legal for different-sex couples. This violates the non-discrimination provisions in international human rights treaties. Arguments based on sex also reach the underlying reason for discrimination and violence against sexual minorities, i.e., the disruption of gender norms. Since domestic developments in this field are not promising, international mechanisms may be able to articulate the linkages between patriarchy, sex discrimination, and violations against sexual minorities. Support for this approach is found in the CEDAW, which emphasizes the need to transform the traditional, stereotyped roles of men and women.¹⁸⁶ One of these stereotypes whose transformation would benefit sexual minorities is that men and women have clearly delineated gender roles governing their sexual conduct and expression.

Practical considerations caution against over-reliance on sex discrimination arguments. When used to advance the rights of sexual minorities, these arguments will encounter at least the same level of resistance they have faced when applied to women. Despite the repeated call for equality at the international level, most women in the world still struggle under various forms of oppression. For example,

for *Equality, Development and Peace*, Sept. 1995, <http://www.un.org/Conferences/Women/PubInfo/brochure.txt> (last visited Nov. 16, 2004).

184. See *Integrating the Human Rights of Women Throughout the United Nations System* (Apr. 24, 2001), C.H.R. Res. 2001/50, U.N. ESCOR, 57th Sess., 75th mtg., U.N. Doc. No. E/CN.4/RES/2001/50, available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2001-50.doc (last visited Nov. 6, 2004).

185. The U.N. Human Rights Committee found the sodomy laws of Tasmania constituted discrimination based on sex but did not further explain. See *Toonen v. Austl.*, U.N. GAOR Hum. Rts. Comm., 50th Sess., Annex, Comm. No. 488/1992, para. 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

186. CEDAW, *supra* note 74, pmb. para. 14; arts. 5(a), 10(c).

the CEDAW obligates states to ensure gender equality in family life, but African nations have made little progress in this area.¹⁸⁷ The ratification of international treaties remains, for many nations, a cosmetic gesture. Discriminatory laws and practices, cast as traditional or religious practices, continue. Not surprisingly, the CEDAW is one of the most reserved human rights instruments available.¹⁸⁸

Nonetheless, focusing on socially constructed gender roles will help patterns of patriarchal domination become clearer.¹⁸⁹ It will also increase opportunities for solidarity between women's and LGBT organizations. Alliances between these groups could strengthen the claims against male-dominated power structures.¹⁹⁰ In addition, working together could encourage advocacy around rights that benefit both organizations, such as the right to sexual autonomy. Each group will also become more aware of how its strategic choices impact the other group.

C. Right to Privacy

Despite its presence in the UDHR¹⁹¹ and the ICCPR,¹⁹² the right to privacy has not received much attention at the international level. Little guidance on the right's meaning or scope is available beyond the HRC's General Comment 16 on Article 17 of the ICCPR.¹⁹³ Until 1995, the HRC had taken only four decisions in communications concerning Article 17;¹⁹⁴ since then however, its jurisprudence has ex-

187. Wilets, *supra* note 9, at 1038 n.194.

188. See generally CEDAW Declarations and Reservations, *supra* note 174.

189. "The correlation between oppression of women by states, societies, and cultures, and oppression of sexual minorities is one of the most distinctive patterns emerging from cross-cultural and comparative legal evidence." Wilets, *supra* note 9, at 1008.

190. International fora such as world conferences facilitate the formation of such alliances. See IGLHRC & CTR. FOR WOMEN'S GLOBAL LEADERSHIP, *supra* note 103.

191. UDHR, *supra* note 50, art. 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

192. ICCPR, *supra* note 50, art. 17: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."

193. The Human Rights Committee can issue General Comments under art. 40, paragraph 4 of the ICCPR. Article 17 is dealt with in General Comment 16, The Right to Respect Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17), U.N. GAOR Hum. Rts. Comm., 32d Sess. (1988), U.N. Doc. CCPR/C/21/Rev.1 (1989), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/23378a8724595410c12563ed004aeecd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/23378a8724595410c12563ed004aeecd?Opendocument) (last visited Nov. 6, 2004) [hereinafter General Comment 16].

194. See Brenda Sue Thornton, *The New International Jurisprudence on the Right to Pri-*

panded. Article 17 does not apply to all state interferences with the right to privacy but only to those amounting to an “arbitrary or unlawful interference.”¹⁹⁵ In General Comment 16, the HRC defines “unlawful” as meaning “that no interference can take place except in cases envisaged by the law.”¹⁹⁶ The inclusion of the term “arbitrary” is aimed at “guarantee[ing] that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.”¹⁹⁷

The *Toonen* case presented the HRC with its first opportunity to decide whether Article 17 encompasses private sexual conduct. On this point, the HRC decided it was “undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy.’”¹⁹⁸ The HRC first noted Tasmania’s prohibition of consensual same-sex conduct was provided for by law,¹⁹⁹ and then adopted a two-prong reasonableness test in which the privacy interference must be “proportional to the end sought and be necessary in the circumstances of any given case.”²⁰⁰ Under this analysis, the HRC rejected Tasmania’s justifications its law helped prevent the spread of HIV/AIDS and protect morals.²⁰¹

The HRC could extend its analysis of Article 17 to African states that have both retained sodomy laws and signed the First Optional Protocol, which allows the HRC to hear individual complaints such as *Toonen*.²⁰² Particularly encouraging was the HRC’s willingness to consider that a rarely enforced sodomy law could still violate an individual’s rights. Even though Tasmania’s sodomy laws had not been enforced for ten years, the HRC found Nicholas Toonen, the com-

vacy: Head on Collision with Bowers v. Hardwick, 58 ALB. L. REV. 725, 747 n.170 (1995).

195. ICCPR, *supra* note 50, art. 17.

196. General Comment 16, *supra* note 193, para. 3.

197. *Id.* para. 4.

198. *Toonen v. Austl.*, U.N. GAOR Hum. Rts. Comm., 50th Sess., Annex, Comm. No. 488/1992, para. 8.2, U.N. Doc. CCPR/c/50/D/488/1992 (1994).

199. *Id.* para. 8.3.

200. *Id.*

201. *Id.* paras. 8.5 & 8.6.

202. First Optional Protocol to the ICCPR, *supra* note 57. All African state parties to the ICCPR have also ratified or acceded to the First Optional Protocol, except Botswana, Burundi, Egypt, Eritrea, Ethiopia, Gabon, Kenya, Morocco, Mozambique, Nigeria, Rwanda, Sudan, Tunisia, Tanzania, and Zimbabwe. Guinea-Bissau and São Tomé e Príncipe have signed but not ratified the Protocol. Status of Ratifications, *supra* note 109. African states with sodomy laws that have signed the Protocol are Algeria, Benin, Cameroon, Gambia, Guinea, Libya, Mauritius, Senegal, Somalia, and Uganda. Angola, Cape Verde, DRC, Ghana, Malawi, Mali, Namibia, Niger, Sierra Leone, Togo, and Zambia have signed the Protocol and use other regulations, besides sodomy laws, to prohibit homosexuality.

plainant, was “actually and currently affected by the continued existence of the Tasmanian laws.”²⁰³ It accepted his assertion that the threat of enforcement was sufficient to confer standing.²⁰⁴

As an advocacy tool, *Toonen* presents several problems. While the HRC discussed the right to privacy, it said little about the Article 26 claim alleging discrimination. In contrast to its detailed analysis of Article 17, the HRC found Tasmania’s sodomy law constituted discrimination on the basis of sex, without further explanation.²⁰⁵ All parties involved, however, conceded sexual orientation was included in “other status.”²⁰⁶ By focusing on the right to privacy, the HRC failed to address the wider patterns of discrimination in society that sodomy laws support.²⁰⁷ As an increasing amount of cases dealing with LGBT rights emerge, the HRC will have increased difficulty in avoiding the issue of whether “other status” encompasses sexual orientation.²⁰⁸ Another noteworthy feature of the case was the progressive stance of the responding state party. Australia did not challenge *Toonen*’s assertions. In fact, Australia rejected Tasmania’s arguments

203. *Toonen*, Comm. No. 488/1992, para. 8.2. *Toonen* was neither arrested nor charged under Tasmania’s sodomy law. Rather, he argued that the continuing existence of such laws threatened his private life and liberty as an “out” gay man. *Id.* para. 2.3. The law “created the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights.” *Id.* para. 2.4. *Toonen* then cited instances where public authorities espoused homophobia rhetoric. *Id.* para. 2.5.

204. Thornton, *supra* note 194, at 762.

205. *Toonen*, Comm. No. 488/1992, paras. 8.6 & 8.7.

206. Both Tasmanian and Australian authorities conceded that sexual orientation is included under “other status.” *Id.* para. 6.9.

207.

It should be noted, however, that the right to privacy is not sufficient for obtaining full human rights for sexual minorities. Privacy is a ‘negative’ right: it gives sexual minorities only the right to be left alone in the privacy of their own home. It in no way recognizes the full range of expressions of a sexual minority’s identity. The fact that European countries which recognize the privacy rights of sexual minorities nevertheless insist on harassing them when they attempt to exercise their fundamental rights to free expression, assembly, and association, is illustrative of this problem.

Wilets, *supra* note 9, at 1025 n.145.

208. In a decision against New Zealander lesbian couples seeking the right to marry, the Human Rights Committee interpreted Article 23, paragraph 2 of the ICCPR as guaranteeing only the right to opposite-sex relationships. *Joslin v. New Zealand*, U.N. GAOR Hum. Rts. Comm., 75th Sess., Comm. No. 902/1999, U.N. Doc. CCPR/C/75/D/902/1999 (2002), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/e44ccf85efc1669ac1256c37002b96c9?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/e44ccf85efc1669ac1256c37002b96c9?Opendocument) (last visited Nov. 6, 2004). A concurring opinion by two Committee members reiterated the view that “sex” in Article 26 of the ICCPR comprises discrimination based on sexual orientation. *Id.* Although unsatisfied with the complainants’ arguments, the concurring opinion left open the possibility that the “denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under Article 26, unless otherwise justified on reasonable and objective criteria.” *Id.*

for retaining the law.²⁰⁹ African states defending against a similar communication may not be as receptive to change as Australia was. It is not clear whether the HRC would be willing to take a similar decision if this were the case.

VIII. AFRICAN HUMAN RIGHTS MECHANISMS

Depending on the dynamic between international and domestic actors, legal developments emanating from the international level may encounter resistance. Gender and sexuality provide cultural relativists, who argue against the universality of human rights, with their strongest arguments. The fact that many of the individuals who advocate for the human rights of sexual minorities are based in Europe or North America fuels opposition. Therefore, the debate between universality and cultural relativism is best carried out in regional human rights systems that have a more nuanced understanding of and sensitivity to the concerns of constituent states. Developments at the regional level are then less likely to encounter resistance based on cultural relativist arguments.

Much of the progress in human rights has occurred at the regional level.²¹⁰ The European system has decided several cases concerning the rights of sexual minorities. Although the European Court of Human Rights has struck down sodomy laws in Northern Ireland,²¹¹ Ireland,²¹² and Cyprus,²¹³ the European human rights system has been more deferential to other forms of discrimination.²¹⁴ In recent years, the American human rights system has cautiously decided to address violations against gays and lesbians. Recognizing the human rights

209. *Toonen*, Comm. No. 488/1992, para. 6.1.

210. The founding instruments of the regional systems all contain language that can provide the basis for the rights of sexual minorities. See American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention]; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. 5 [hereinafter European Convention], available at <http://www.echr.coe.int/Convention/webConvenENG.pdf> (last visited Nov. 6, 2004); and the African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58, 59 (entered into force Oct. 21, 1986) [hereinafter African Charter].

211. *Dudgeon v. U.K.*, 45 Eur. Ct. H.R. (ser. A) (1981); 4 Eur. H.R. Rep. 149 (1982).

212. *Norris v. Ir.*, 142 Eur. Ct. H.R. (ser. A) (1988); 13 Eur. H.R. Rep. 186, 186 (1991).

213. *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993); 16 Eur. H.R. Rep. 485, 492 (1993).

214. The European Commission of Human Rights and the European Court of Human Rights have excluded homosexual relationships from the protections given opposite-sex couples. These decisions were cited with approval by the European Court of Justice in Case C-249/96, *Grant v. South-West Trains Ltd.*, 1998 E.C.R. I-00621, paras. 33-34 (finding that gay and lesbian families do not fit under the definition of "family" in the European Convention).

dimension to sexual orientation-based discrimination, the Inter-American Commission for Human Rights agreed to mediate between the Columbian government and a lesbian prisoner seeking conjugal visitation rights.²¹⁵ This small step has the potential to influence how domestic courts in Latin America deal with sexual minorities. Soon after the Inter-American Commission became involved, the Columbian Supreme Court granted conjugal rights to another lesbian prisoner.²¹⁶

Established by the African Charter on Human and Peoples' Rights, the African Commission came into effect in 1986 after the Charter's adoption in 1981 by the Organization of African Unity (now the African Union).²¹⁷ Although the Commission has received much criticism for its failure to protect human rights, it has made progress, especially in fulfilling its promotional mandate.²¹⁸ Before analyzing how the Charter rights can be used to build legal arguments, the next section will examine three primary areas of the Commission's mandate: working with human rights institutions, hearing communications, and evaluating state reports.

As part of its promotional mandate, the Commission "co-operate[s] with other African and international institutions concerned with the promotion and protection of human and peoples' rights."²¹⁹ This provision recognizes the strong role nongovernmental organizations (NGO's) have in shaping the Commission.²²⁰ The Commission has formalized its relationship with human rights organizations by granting affiliated status to governmental human rights institutions²²¹

215. IGLHRC, *Discrimination in Prison Must End* (June 10, 2002), at <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=56>.

216. *Id.*

217. African Commission on Human & Peoples' Rights, History, at http://www.achpr.org/english/_info/history_en.html (last visited Nov. 5, 2003) [hereinafter ACHPR].

218. Udemé Essien, *The African Commission on Human and Peoples' Rights: Eleven Years After*, 6 BUFF. HUM. RTS. L. REV. 93, 111 (2000). See generally *id.* (evaluating the work of the African Commission).

219. African Charter, *supra* note 210, art. 45, para. 1(c).

220. See Martin A. Olz, *Non-governmental Organizations in the Regional Human Rights Systems*, 28 COLUM. HUM. RTS. L. REV. 307, 362-70 (1997). See also CLAUDE WELCH, *PROTECTING HUMAN RIGHTS IN AFRICA: STRATEGIES AND ROLES OF NON-GOVERNMENTAL ORGANIZATIONS* (1995).

221. *Resolution on Granting Observer Status to National Human Rights Institutions in Africa* (Oct. 31, 1998), Twelfth Annual Activity Report of the ACHPR, 1998 -1999, A.U. Doc. AHG/215 (XXXV), Annex IV, at 32-35, available at http://www.achpr.org/english/_doc_target/documentation.html?..activity_reports/activity12_en.pdf (last visited Nov. 6, 2004) [hereinafter Twelfth Annual Activity Report].

and observer status to NGO's.²²² One important benefit for observer NGO's is they can propose agenda items they want the Commission to address at its sessions.²²³ This can be done before the session, at the session's NGO forum, or alternatively during discussions at the session.²²⁴ In this way, a host of issues ranging from the rights of the disabled to the rights of women have received the attention of the Commission and other attendees at the sessions.

No NGO specifically dealing with LGBT human rights enjoys observer status.²²⁵ International NGO's can help bring LGBT issues to the attention of the Commission, especially by linking violations against sexual minorities with other recognized human rights issues. Organizations that have worked closely with the Commission, for example, Interights and OMCT, could bring attention to violations against African sexual minorities that fall within their mandates. Although these organizations are based outside Africa, they should play a role; however, the focus must be on encouraging Africa-based groups to bring the concerns of sexual minorities before the Commission. Allowing non-African organizations to introduce the issue might increase resistance, especially considering some Commissioners' concerns over cultural imperialism.²²⁶ Organizations already enjoying observer status may be reluctant to address the issue for a variety of reasons, including fears of compromising their already precarious positions in many African states. Therefore, the best way to gain a foothold is to have LGBT organizations seek observer status. The mere presence of such organizations at the sessions would combat the perception there are virtually no African gays and lesbians. South African LGBT organizations are perhaps in the best position to do this since they are not likely to face governmental retribution for seeking to establish ties with the African Commission. Unlike the underground LGBT groups in other African states, South African LGBT

222. *Resolution on the Criteria for Granting and Enjoying Observer Status to Non-governmental Organisations Working in the Field of Human Rights with the ACHPR* (May 5, 1999), *id.* at 37-39.

223. Interview with Robert Kotchani, Jurist, ACHPR, in Banjul, Gam. (July 12, 2002).

224. *Id.*

225. See generally African Commission on Human and Peoples' Rights website, http://www.achpr.org/english/_info/directory_ngo_en.html (last visited Nov. 15, 2004).

226. See Rachel Murray, *Minorities within the African system*, available at <http://www.cjf.gov.br/Pages/Sen/eventos/minorias/Rachel%20Murray.doc> (last visited Oct. 15, 2004) (noting that "[m]embers of the Commission themselves have shown difficulties with [homosexuality,] and the concept of this being a 'white man's disease' and other comments heard from leading politicians in Africa, most notably Namibia and Zimbabwe, have sometimes been shared by members of the Commission themselves.") *Id.* § 3 (Sexual Minorities).

organizations will be able to fulfill the requirements of the application process, including providing member lists and proof of official registration.²²⁷

Hearing communications from states²²⁸ and others²²⁹ is the focus of the Commission's protective mandate. Nearly all admissible communications have been brought by individuals against state parties under Article 55.²³⁰ Before deciding a communication on the merits, the Commission takes a decision on admissibility. The communication must allege a state party has violated a provision of the Charter.²³¹ The Commission then considers whether "all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged."²³² If the conditions of admissibility are fulfilled, the Commission takes a decision on the merits, but only after first trying to reach an amicable settlement.²³³ The Commission can then release its findings and make recommendations on the issue.²³⁴ Although it has received much criticism,²³⁵ the communications procedure allows the Commission to address concrete human rights problems while articulating the meaning of these rights in the African context. Since its first communication in 1988, the Commission has addressed a wide range of issues, from military coups²³⁶ to the impact of oil drilling on indigenous communities.²³⁷

The Commission has yet to decide on a communication alleging violations against sexual minorities. Despite the temptation for non-Africans to bring communications, the process should remain in the

227. See Twelfth Annual Activity Report, *supra* note 222.

228. African Charter, *supra* note 210, art. 49.

229. *Id.* art. 55(1).

230. Essien, *supra* note 218, at 105-107.

231. African Charter, *supra* note 210, art. 47.

232. *Id.* art. 50.

233. *Id.* art. 52.

234. *Id.* art. 53.

235. For a constructive critique of the African system, see George William Mugwanya, *Realizing Universal Human Rights Norms Through Regional Human Rights Mechanisms: Reinvigorating the African System*, 10 *IND. INT'L & COMP. L. REV.* 35 (1999).

236. See e.g., Sir Dawda K. Jawara v. The Gambia, Comm. No. 147/95 & 149/96 (May 11, 2000), in Thirteenth Annual Activity Report of the ACHPR, 1999-2000, A.U. Doc. AHG/222 (XXXVI), Annex V, at 95-107, available at http://www.achpr.org/english/_doc_target/documentation.html?..activity_reports/activity13_en.pdf (last visited Oct. 20, 2004).

237. Soc. and Econ. Rts. Action Ctr. v. Nigeria, Comm. No. 155/96 (Oct. 2001), Fifteenth Annual Activity Report of the ACHPR, 2001-2002, at 31-44, available at http://www.achpr.org/english/_doc_target/documentation.html?..activity_reports/activity15_en.pdf (last visited Oct. 20, 2004) [hereinafter Fifteenth Annual Activity Report].

hands of Africans because they are in a better position to support and defend the communication. For example, in 1994, William A. Courson, an Irish national living in the United States, unsuccessfully attempted to initiate a communication against Zimbabwe.²³⁸ Courson quickly withdrew his submission before the Commission could make a decision on admissibility.²³⁹ Launched without either preparing the Commissioners or the support of African groups, the Courson communication promised to be a highly confrontational and unproductive introduction to LGBT human rights for the Commission. Even sympathetic Commissioners may have been hesitant to deal with the issue as it was presented. Those seeking to advance LGBT rights should first lay solid groundwork by using methods other than the communications procedure. Increasing the visibility of the issue, particularly by encouraging organizations to apply for observer status, is critical to initiating a dialogue among all parties. An educational campaign launched by NGO's would help Commissioners gain a better understanding of the issues before undertaking a decision in an adversarial proceeding.

The third area within the Commission's mandate is the review of state reports.²⁴⁰ One of the rare public discussions of LGBT issues occurred during the Commission's review of the report of Namibia.²⁴¹ In 2001, Commissioner Barney Pityana questioned the Namibian government's professed policy of arresting and detaining gay men and

238. William A. Courson v. Zimbabwe, Comm. No. 136/94, Eighth Annual Activity Report of the ACHPR, 1994-1995, in INSTITUTE FOR HUMAN RIGHTS AND DEVELOPMENT, COMPILATION OF DECISIONS ON COMMUNICATIONS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, EXTRACTED FROM THE COMMISSION'S ACTIVITY REPORTS 1994-2001, 397 (2002) [hereinafter Eighth Annual Activity Report]. Although the submission claimed to represent GALZ, GALZ never authorized the bringing of the communication. Courson alleged that Zimbabwe violated Articles 1, 6, 8, 11, 16, 20, 22, and 24 of the African Charter. His communication referred to Article 60 of the Charter to alert the Commission to draw inspiration from international law. Courson referred to Articles 2, 12, 19 and 20 of the UDHR, Articles 2(1), 12 and 17 of the ICCPR, and the *Toonen* decision. Courson asked that the Commission grant relief under Articles 45 and 46, emphasizing 45(2). Beyond these alleged violations and a few newspaper clippings, the complaint lacked any substantive content. Initial submission of William A. Courson, on file at the Secretariat of the African Commission on Human and Peoples' Rights, Banjul, Gam.

239. Eighth Annual Activity Report, *supra* note 238.

240. African Charter, *supra* note 210, art. 62.

241. One major problem is a great number of reports are overdue. Status on the Submission of State Periodic Reports to the ACHPR (as of May 2003), available at http://www.achpr.org/english/_info/status_submission_en.html (last visited Oct. 14, 2004). The African Commission has censured Seychelles for its refusal to present its initial report. Resolution Concerning the Republic of Seychelles' Refusal to Present its Initial Report, Twelfth Annual Activity Report, *supra* note 221, at 45.

lesbians.²⁴² Pityana characterized Namibia's actions as "an incitement to ordinary citizens to harass and victimise people for no reason but their sexual orientation"²⁴³ and then asked whether the "inflammatory statement[s] of Namibian officials] would incite unlawful arrests by [the] government."²⁴⁴ The Commission's critical review of state reports is especially valuable since LGBT organizations in countries such as Zimbabwe and Namibia would probably face retaliation if they publicly probed their leaders' human rights records.

IX. LEGAL ARGUMENTS IN THE AFRICAN HUMAN RIGHTS SYSTEM

Those states that drafted and signed the African Charter sought to stamp an African cultural fingerprint on their regional human rights instrument. The document that emerged contains several distinctive features that reflect this concern. Among these are provisions on peoples' rights²⁴⁵ and individual duties.²⁴⁶ These provisions reflect the idea "embodied in the African philosophy which sees men and women primarily as social beings embraced in the body of the community."²⁴⁷ The Charter's focus on family, morality, and tradition reinforces this concept and, as a result, is also potentially troubling for rights of individual autonomy and expression.

The African Charter contains three provisions dealing with the family. First, Article 18, paragraph 1 states the family is the "the natural unit and basis of society," but "family" is not defined. Second, Article 27, paragraph 1 spells out an individual's duties to family and society. Finally, Article 29, paragraph 1 requires individuals "[t]o preserve the harmonious development of the family and to work for the cohesion and respect of the family." Since these provisions are part of a human rights treaty, they cannot be read as supporting discrimination and violence against sexual minorities as condoned by the family and as a result of following the enumerated duties. Similar language in other human rights treaties supports this reading. For example, Articles 18 and 27 of the African Charter resemble Article 16,

242. Murray, *supra* note 226, § 3 (Sexual Minorities).

243. *Id.*

244. *Id.*

245. African Charter, *supra* note 210, arts. 19-24. For a list of sources that discuss and analyze the relationships between peoples' and human rights in the African Charter, see Makua wa Matua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L. L. 339, 340 n.5 (1995).

246. African Charter, *supra* note 210, arts. 25-29.

247. wa Matua, *supra* note 245, at 376.

paragraph 3 of the UDHR²⁴⁸ and Article 10, paragraph 1 of the ICESCR.²⁴⁹ Still, in its enumeration of duties imposed upon the individual, the African Charter goes much further.²⁵⁰ Some argue Article 29, paragraph 1 of the African Charter, which includes duties to parents and family, simply means individuals should take care of their fellow human beings, especially the elderly, who are accorded a special place in African culture.²⁵¹

In its treatment of morals and traditional values, the African Charter deals with both states and individuals. Paragraph 4 of the preamble calls upon states to consider the historical traditions and values of African civilization.²⁵² Article 17, paragraph 3 develops this into an affirmative duty on states to promote and protect “morals and traditional values recognized by the community.”²⁵³ Furthermore, the state has “the duty to assist the family which is the custodian of morals and traditional values recognized by the community.”²⁵⁴ Article 27, paragraph 2, which resembles Article 12, paragraph 3 of the ICCPR²⁵⁵ and Article 29, paragraph 2 of the UDHR states an individual’s rights and freedoms must be “exercised with due regard to . . . morality.”²⁵⁶ Article 29, paragraph 7 of the Charter also places on individuals the duty “[t]o preserve and strengthen positive African cultural values.”²⁵⁷

Despite the lack of jurisprudence defining these morals provisions, there is no indication the Commission will accord them much weight. Various international human rights instruments also contain language about morals, particularly, clauses requiring the protection of

248. “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” UDHR, *supra* note 50.

249. “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society . . .” ICESCR, *supra* note 50.

250. “Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.” African Charter, *supra* note 210, art. 27, para. 1.

251. CORINNE A.A. PACKER, USING HUMAN RIGHTS TO CHANGE TRADITION: TRADITIONAL PRACTICES HARMFUL TO WOMEN’S REPRODUCTIVE HEALTH IN SUB-SAHARAN AFRICA 119 (2002).

252. “Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize [the States’] reflection on the concept of human and peoples rights.” African Charter, *supra* note 210.

253. *Id.*

254. *Id.* art. 18, para. 2.

255. “[R]ights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others . . .” ICCPR, *supra* note 50.

256. “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations . . . [to meet] the just requirements of morality . . .” UDHR, *supra* note 50.

257. African Charter, *supra* note 210.

“public health and morals.”²⁵⁸ International documents that clarify these terms can provide guidance for the Commission.²⁵⁹ The drafters of the African Charter seemed to have been aware of the potential for misusing morality provisions. The Charter stresses “*positive African cultural values*” (emphasis added)²⁶⁰ and includes a duty to conduct relations with others “in the spirit of tolerance.”²⁶¹ However, this may not address the resistance sexual minorities face since societies that accord procreative sex ultimate primacy may view deviation from sexual and gender norms as negative. Article 28 of the African Charter, which concerns respect and tolerance, is placed among these provisions to stress the list of duties should not be read as contravening a fundamental principle of human rights, i.e., the dignity of the individual.²⁶² The right to dignity in Article 5 has appeared in several of the Commission’s decisions and may be a particularly useful argument in cases concerning the violation of the rights of sexual minorities.²⁶³

Indispensable for building legal arguments is the Charter’s recognition of the role of international human rights law. Article 60 of the Charter states the Commission should draw inspiration from international human rights instruments. This includes the ICCPR, which most African states have ratified. Article 61 provides for the use of international “legal precedents and doctrine” as “subsidiary measures to determine the principles of law.”²⁶⁴ This provision allows the

258. ICCPR, *supra* note 50, art. 19, para. 3; ICESCR, *supra* note 50, art. 13, para. 3; American Convention, *supra* note 210, art. 13, paras. 2 & 4; European Convention, *supra* note 210, art. 9, para. 2, & art. 10, para. 2.

259. The U.N. Human Rights Committee has attempted to clarify the meaning of “morals,” which is mentioned as a limiting factor in the exercise of the rights in Articles 12, 14, 18, 19, 21, and 22 of the ICCPR. See, e.g., General Comment 22, The Right to Freedom of Thought, Conscience and Religion (Art. 18), U.N. GAOR Hum. Rts. Comm., 48th Sess., para. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9a30112c27d1167cc12563ed004d8f15?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument) (last visited Nov. 6, 2004).

260. African Charter, *supra* note 210, art. 29, para. 7.

261. *Id.*

262. “Every individual shall have the duty to respect and consider his fellow beings without discrimination, and . . . reinforce mutual respect and tolerance.” *Id.*

263. See, e.g., Organisation Mondiale Contre La Torture, Association Internationale des juristes Democrates, Commission Internationale des Juristes (C.I.J.), Union Interfricaine des Droits de l’Homme v. Rwanda, Comm. Nos. 27/89, 46/91, 49/91, & 99/93 (Oct. 1996), in Tenth Annual Activity Report of the ACHPR, 1996-1997, at 49-52, available at http://www.achpr.org/english/_doc_target/documentation.html?.activity_reports/activity10_en.pdf (last visited Oct. 19, 2004).

264. Article 61 also includes “African practices consistent with international norms on Human and People’s Rights...” (emphasis added). African Charter, *supra* note 210. The *travaux préparatoires* of the Charter reveal a concern with the inclusion of “African practices” without mention of the international norms that certain practices might contravene. PACKER, *supra* note 251, at 110.

Commission to consider the work of U.N. bodies on violations against sexual minorities. Thus far, the Commission has seldom relied on non-Charter sources of law when deciding communications. This is because most communications brought before the Commission do not advance arguments based on sources beyond the Charter. Recent developments, however, point to the Commission's growing comfort with considering international norms. For example, a decision on the impact of oil drilling on the Ogoni people of Nigeria used provisions in the ICESCR to support claims for social and economic rights.²⁶⁵

A. Administration of Justice

The African Charter contains strong support for claims dealing with the administration of justice. Under Article 4, "[e]very human being shall be entitled to respect of his life and the integrity of his person." Article 5 asserts the dignity of human beings and prohibits "torture, cruel, inhuman or degrading punishment and treatment." Article 6 protects against arbitrary arrest and detention. Article 7 spells out the right to a fair trial. Although the Charter does not have a derogations or limitations clause, several articles contain claw-back clauses that could be used to curtail rights. In relation to the right to life, Article 4 states "[n]o one may be arbitrarily deprived of this right." This implies the right may be deprived if not done so in an arbitrary manner. Article 6 allows for the deprivation of liberty "for reasons and conditions previously laid down by law." This provision does not explicitly prohibit deprivations of liberty based on laws that contravene human rights standards. Unlike U.N. treaty-based bodies, the Commission has not issued general comments to help clarify these provisions.

Drawing attention to these types of violations is the best way to introduce the Commission to LGBT human rights. An approach starting with torture or arbitrary detention has several benefits. First, the Commission has a well-developed record in this area. The Commission's decisions on communications, evaluations of state reports, and reports from promotional missions have highlighted the prominent place administration of justice issues occupy. In addition, the Commission has appointed special rapporteurs on prisons and conditions of

265. Fifteenth Annual Activity Report, *supra* note 237, at 38-39, para. 52. For a discussion of this significant case, see Danwood Mzikenge Chirwa, *Toward Revitalizing Economic, Social, and Cultural Rights in Africa: Social and Economic Rights Action Centre and the Center for Economic and Social Rights v. Nigeria*, 10 HUM. RTS. BRIEF 14 (2002).

detention, and arbitrary and extrajudicial executions.²⁶⁶ In 2002, the Commission adopted the Robben Island Guidelines to combat torture.²⁶⁷ Given this record, and the universal condemnation of such violations, the Commission will seriously examine reports regardless of what justifications perpetrators offer. Second, the Commission will be more willing to consider violations against sexual minorities within a larger investigation rather than devote attention specifically to the issue. This should pose no problem since it seems states that persecute sexual minorities often exhibit wider patterns of human rights abuses. One additional benefit is this approach strengthens the argument LGBT rights are human rights. As the Commission becomes more comfortable with LGBT issues, activists can then start to address larger issues of discrimination and oppressive social practices.

B. Equality

Although challenging violations around the administration of justice is an important first step, relying solely on this approach does not reach pervasive societal and legal discrimination. Once the right of sexual minorities to be free from torture and related violations is firmly established, advocates can begin advancing equality arguments. Article 2 of the African Charter provides for the enjoyment of rights “without distinction of any kind such as . . . sex . . . or any other status.” Although the Commission has found Article 2 violations in several cases,²⁶⁸ it has not dealt with discrimination based on “sex” or “other status.” Article 3 provides for equality before the law and for equal protection;²⁶⁹ however, the Commission has not articulated the

266. See Julia Harrington, *Special Rapporteurs of the African Commission on Human and Peoples' Rights*, 1 AFR. HUM. RTS. L. J. 247 (2001).

267. *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment and Punishment in Africa*, ACHPR, 32nd Ordinary Sess. (Oct. 2002), available at http://www.apt.ch/africa/rig/Resolution_en.pdf (last visited Oct. 22, 2004).

268. Article 2 violations often arise in the context of discrimination on the basis of national or social origin. One of the clearest articulations of the meaning of the right to equality is found in *Legal Res. Found. v. Zambia*, Comm. No. 211/98, para. 63, Fourteenth Annual Activity Report of the ACHPR, at 86-97, available at http://www.achpr.org/english/_doc_target/documentation.html?..activity_reports/activity14_en.pdf (last visited Nov. 6, 2004). In this case concerning the nationality of presidential candidates, the Commission found equality important for two primary reasons. First, the right to equality “means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens.” Second, “[e]quality or lack of it affects the capacity of one to enjoy many other rights.” *Id.*

269. Article 3 reads: “1. Every individual shall be equal before the law; 2. Every individual shall be entitled to equal protection of the law.” African Charter, *supra* note 210.

meaning of these provisions. Article 28 reinforces the principle of non-discrimination by imposing duties on an individual "to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance." This provision could be used to reach discriminatory conduct in the private sphere, where most violations occur.

Since it is unlikely the Commission will soon recognize a distinct category for sexual orientation, developing arguments around sex discrimination becomes important. In recent years, the Commission has paid increasing attention to women's rights. In 1998, the Commission appointed a special rapporteur on the rights of women.²⁷⁰ In 1997, the Commission began drafting a Protocol on the Rights of Women in Africa.²⁷¹ Once in force, states and individuals will be able to use Protocol provisions to bring gender-based violations before the Commission. The communications process will give the Commission the opportunity to articulate its gender equality jurisprudence in light of both Article 2 of the African Charter and the provisions of the Protocol. Non-Charter sources of international law can also provide guidance in this process. Once the Commission develops its jurisprudence on gender equality and considers contributing factors to violations against women, it will perhaps be more amenable to expanding the scope of communications into the area of sexual orientation.

C. Right to Privacy

The right to privacy has not evolved in Africa as it has in other legal systems, where it has served as the centerpiece of much LGBT activism. In the United States, challenges to state sodomy laws rely heavily on the right to privacy.²⁷² The European Court of Human Rights used privacy rights²⁷³ to strike down sodomy laws in three ju-

270. Harrington, *supra* note 266, at 265-67.

271. Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *available at* http://www.achpr.org/english/_info/women_en.html (last visited Nov. 16, 2004).

272. There is no explicit right to privacy in the U.S. Constitution, although the Supreme Court has constructed a limited right to privacy. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding state statute restricting married couple's access to contraception unconstitutional); *Roe v. Wade* 410 U.S.113 (1973) (legalizing abortion on demand). *But see Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the sodomy law of the state of Georgia against a right to privacy challenge). Before the Supreme Court's ruling that sodomy laws are unconstitutional in *Lawrence v. Texas*, 539 U.S. 558 (2003), some state courts contravened *Hardwick* by using privacy provisions in state constitutions to strike down state sodomy laws. For a history of how sodomy laws in the United States have fallen, see *Sodomy Laws in the United States*, *supra* note 94.

273. The right to privacy is enshrined in the European Convention, *supra* note 210, art. 8,

risdictions.²⁷⁴ However, the same Court has been less willing to invalidate discriminatory laws premised on traditional conceptions of the family, especially when it finds privacy rights are not directly implicated.²⁷⁵ Several factors have prevented the development of privacy jurisprudence in Africa. Unlike the European Convention, the African Charter contains no explicit right to privacy. Although the lack of explicit provisions has not prevented the African Commission from reading other rights into the Charter,²⁷⁶ the Commission has not yet synthesized a right to privacy from existing rights.

Asking the Commission to articulate its approach to privacy rights in a case dealing with sexual minorities could prove problematic. Depending on how the right is framed, men may benefit at the expense of women. Those advocating for the right in Africa must consider how various forms of the right (zonal, familial, or personal) play out in the lives of individual Africans. The Commission's treatment of privacy may assuage these concerns. Since "the African system does not place, at least traditionally, much emphasis on the existence of a private sphere,"²⁷⁷ the private/public distinction has not significantly influenced the Commission's work. While other international human rights mechanisms have clung to the distinction, the African Commission has advocated state intervention to address violations perpetrated by private actors.²⁷⁸ In its examination of state reports, the Commission has been willing to deal with a variety of issues relating both to traditional practices and family life.²⁷⁹ The Commission's approach has mitigated concerns that Charter provisions on family life and morality could, taken together with the right to privacy, be used to cordon off the private sphere from scrutiny. This contrasts with European practice, which defers to states on issues of customary practices and

para. 1.

274. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), 4 Eur. H.R. Rep. 149 (1982); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988), 13 Eur. H.R. Rep. 186 (1991); and *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993), 16 Eur. H.R. Rep. 485 (1993).

275. Kristen L. Walker, *International Law Weekend Proceedings: Evolving Human Rights Norms Around Sexuality*, 6 ILSAJ. INT'L & COMP. L. 343, 345 (2000).

276. Fifteenth Annual Activity Report, *supra* note 237, at 31-44, para. 60.

277. RACHEL MURRAY, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND INTERNATIONAL LAW 43 (2000).

278. *Id.* at 39.

279. The Commission has not shied away from inquiring about the status of women. *Id.* at 44 nn.61 & 64-65. The guidelines for state periodic reports specifically requests information on the condition of women. U.O. Umozurike, *Guidelines to Periodic Reporting Under Article 62 of the African Charter on Human and Peoples' Rights*, available at http://www.achpr.org/english/info/state_procedure_en.html (last visited Sept. 15, 2004). Most striking has been one Commissioner's questioning of Sudan's strict interpretation of Shari'a. MURRAY, *supra* note 277, at 45 n.66.

public morality by observing a “margin of appreciation.”²⁸⁰ “The African Commission has in effect taken any margin of appreciation away from states” on these issues.²⁸¹

X. CONCLUSION

Despite its limitations, human rights provide a flexible framework within which African sexual minorities can work. Rights language is a powerful tool for organizations confronted with overwhelming hostility within their countries. By adopting terms such as gay or lesbian, Africans tap into a growing transnational network around LGBT rights, which can then facilitate access to international resources and policymakers. Unfortunately, the interaction between international and local activists is often one-directional. The potential African contribution to the evolving norms around sexuality has not garnered much attention. Europeans and North Americans must actively avoid the impulse to dominate the discourse and instead encourage African contributions. Such an approach not only helps human rights take hold in a certain setting, but it also illuminates, particularly for non-African LGBT activists, the problematic nature of the binary conceptualization of sexuality.²⁸² This realization may help all activists move beyond the identity-based violations model and toward realizing an expansive right to sexual autonomy.

280. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976), 1 Eur. H.R. Rep. 737 (1979-80); *Rees v. United Kingdom*, 9 Eur. H.R. Rep. 56 (1987).

281. MURRAY, *supra* note 277, at 45.

282. See Morgan, *supra* note 2.