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# Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations

Emma Mittelstaedt\*

## I. INTRODUCTION

The stark contrast between the aspirational, lofty language of international human rights treaties and the domestic laws of their signatories—not to mention official statements made by those signatory nations’ leaders—is truly astounding. To note just one example of this disparity, Zimbabwe signed the International Covenant on Civil and Political Rights (“ICCPR”), pledging that its own “law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination.”<sup>1</sup> But in 2006, Zimbabwe passed legislation that makes it a crime for two people of the same sex to kiss, hug, or hold hands<sup>2</sup>—and Zimbabwe’s current leader, President Robert Mugabe, has publicly stated that gays are “worse than dogs and pigs”<sup>3</sup> and has urged members of his party to tie up homosexuals and bring them to the police to be arrested.<sup>4</sup>

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<sup>1</sup> International Covenant on Civil and Political Rights, art 26, General Assembly Res No 2200A (XXI), UN Doc A/6316 (1966) (“ICCPR”).

<sup>2</sup> Larry Buhl, *New Laws in Africa Further Restrict Gays*, PlanetOut Network (July 20, 2006), available online at <<http://www.gay.com/news/election/article.html?2006/07/20/3>> (visited Apr 5, 2008).

<sup>3</sup> *Gay Zimbabweans Win Fight for Book-Fair Booth*, NY Times A4 (Aug 2, 1996); Buhl, *New Laws in Africa Further Restrict Gays* (cited in note 2).

<sup>4</sup> Donald G. McNeil Jr., *For Gay Zimbabweans, a Difficult Political Climate*, NY Times A3 (Sept 10, 1995). These are just a few examples of President Mugabe’s views toward the lesbian, gay, bisexual, and transgendered (“LGBT”) community. For a United States court’s description of Mugabe’s attitudes, see *Kimumwe v Gonzales*, 431 F3d 319, 324–25 (8th Cir 2005) (Heaney dissenting); see also *Zimbabwe Leader Condemns Homosexuality*, NY Times A7 (Aug 2, 1995) (“‘If the nation accepts homosexuality as a right,’ Mr. Mugabe asked, ‘what moral fiber shall our society ever have to deny organized drug addicts or even those given to bestiality the rights they might claim under the rubrics of individual freedom and human rights?’”).

Even in nations where both international treaties and domestic laws protect the rights of sexual minorities,<sup>5</sup> violent hate crimes and other forms of discrimination still occur with shocking regularity. South Africa provides a particularly graphic example; it was the first African nation to adopt a constitution providing for, among other things, sexual minority rights<sup>6</sup> and the first African nation to legalize same-sex marriage.<sup>7</sup> Despite these measures—or perhaps, as this Comment will suggest, as a result of these measures—violent attacks against openly lesbian, gay, bisexual, and transgender (“LGBT”) South Africans continue, with “corrective rape” occurring with some frequency.<sup>8</sup> Certainly, antigay laws and state-supported discrimination can, and do, increase violence toward gays by legitimizing homophobia and by inciting the public, which previously might not have paid much attention to the LGBT community.<sup>9</sup>

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<sup>5</sup> The term “sexual minorities” includes “all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behavior, or gender identity.” James D. Willets, *International Human Rights Law and Sexual Orientation*, 18 *Hastings Intl & Comp L Rev* 1, 4 (1994).

<sup>6</sup> For a historical overview of South Africa’s constitution, see Eric C. Christiansen, Note, *Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process*, 32 *NYU J Intl L & Pol* 997 (2000).

<sup>7</sup> *Minister of Home Affairs v Fourie*, 2005 (1) SA 1 (CC) at ¶¶ 114–19 (S Afr) (concluding that the failure of the common law and the Marriage Act to provide for same-sex marriage was unconstitutional and ordering the legislature to enact a statute in conformity with its ruling).

<sup>8</sup> “Corrective rape” is the term used to describe the practice of raping African women and girls thought to be lesbians with the claimed purpose of turning them into “real African women”—the underlying belief being that homosexuality is a “disease” imported by the white colonial empire. Yolanda Mufweba, *Corrective Rape Makes You an African Woman*, *Saturday Star* (S Afr) (Nov 8, 2003); see also Chris McGreal, *Traumatized South African Children Play ‘Rape Me’ Games*, *The Guardian* (London) (Mar 13, 2008) (noting that corrective rape is occurring in South African schools with increased frequency); *South Africa: Black Gays the Target of Hate Crimes*, *Africa News* (Dec 7, 2006) (quoting Professor Vasu Reddy, chief research specialist at the Gender and Development Unit of South African’s Human Sciences Research Council, describing recent violence against black gays and lesbians in South Africa and explaining that “‘corrective rape’ has become a common practice for young men apposing [sic] homosexuality, and who are set on ‘curing’ gay women of sexual deviance and an ‘un-African’ way of life”).

Reliable statistics on the prevalence of corrective rape are basically nonexistent, largely because the South Africa Police Service does not collect rape statistics based on sexual orientation and in part because it is often impossible to determine which factors lead to rape in particular cases. Scott Long, A. Widney Brown, and Gail Cooper, *More Than a Name: State-Sponsored Homophobia and Its Consequences in Southern Africa 193–94* (Human Rights Watch 2003) (“In the absence of adequate statistical investigation, the evidence is anecdotal; the fear, though, is palpable.”). But anecdotal evidence does suggest that “corrective rape” occurs frequently. Mufweba, *Corrective Rape*, *Saturday Star* (S Afr) (noting that in a ten-month period “33 black lesbians have come forward with their stories of rape, assault, sexual assault and verbal abuse to organizations fighting hate crimes in Johannesburg townships,” and that a reporter had documented twelve rapes in that time period).

<sup>9</sup> See, for example, *Toonen v Australia*, Commun No 488/1992, UN Doc CCPR/C/50/D/488/1992 ¶ 7.8 (1994), available in ICCPR, *Selected Decisions of the Human Rights Committee under the Optional*

Laws that protect sexual minorities are clearly a necessary condition—but not necessarily a sufficient one. The presence of domestic and international laws protecting gay rights is not enough to change a population’s attitudes and actions toward the LGBT community.<sup>10</sup>

The international human rights community, though, generally sees changing laws as the necessary first step toward changing attitudes. Where treatment of, and attitudes toward, sexual minorities violate international human rights obligations, international human rights organizations have moved aggressively to advocate for change in domestic laws, with an eye to ultimately transforming attitudes and beliefs toward the LGBT community.<sup>11</sup> Given the atrocities that have occurred in recent years,<sup>12</sup> it would be unreasonable to expect that human rights organizations would refrain from taking immediate action. But why do international human rights organizations focus their efforts on changing laws, rather than changing attitudes, which could in turn lead to changing laws?

First, this “changing laws” approach has, on the surface, wrought many successes. Over the past two decades, international recognition of LGBT rights

*Protocol*, Vol 5, UN Doc CCPR/C/OP/5/133 (2005) (describing Toonen’s argument regarding “the link between the existence of anti-gay criminal legislation . . . and harassment and violence against homosexuals”); Charlotte Bunch, *Opening Remarks*, in James C. Hormel and Urvashi Vaid, eds, *The International Tribunal on Human Rights Violations against Sexual Minorities 2* (IGLHRC 1995):

[W]hen these rights are violated because of a person’s sexual orientation, the world bodies and most governments remain silent or even declare that sexual minorities do not deserve human rights and protections and that we can be treated as less than human. This implication that we are not fully human is then an invitation to more violence and abuse.

For one commentator’s perspective, see Sebastian Maguire, *The Human Rights of Sexual Minorities in Africa*, 35 Cal W Intl L J 1, 5–6 (2004) (“[The] presence [of antigay laws] 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.”).

<sup>10</sup> For one explanation for South Africa’s dichotomy, see James Kirchick, *South Africa’s Gay Betrayal*, *Guardian* (Aug 21, 2007), available online at <[http://commentisfree.guardian.co.uk/james\\_kirchick/2007/08/southafricas\\_gay\\_betrayal.html](http://commentisfree.guardian.co.uk/james_kirchick/2007/08/southafricas_gay_betrayal.html)> (visited Apr 5, 2008) (blaming recent failures to protect LGBT rights on South Africa’s increasingly anti-West agenda).

<sup>11</sup> See, for example, International Gay and Lesbian Human Rights Commission, *What We Do and Why*, available online at <<http://www.iglhrc.org/site/iglhrc/section.php?id=25>> (visited Apr 5, 2008) (describing the Commission’s ultimate goal as “secur[ing] the full enjoyment of the human rights of all people and communities subject to discrimination or abuse on the basis of sexual orientation . . .” and its method as, among other things, “mobiliz[ing] communities to bring to bear pressure and scrutiny in order to end discriminatory and abusive laws, policies, and practices, as well as advocate for progressive changes in laws, policies, and practices . . .”); Amnesty International USA, *OUTFront! Lesbian, Gay, Bisexual, and Transgender Rights*, available online at <[http://www.amnestyusa.org/Our\\_Issues/LGBT\\_Human\\_Rights/page.do?id=1011002&n1=3&n2=36](http://www.amnestyusa.org/Our_Issues/LGBT_Human_Rights/page.do?id=1011002&n1=3&n2=36)> (visited Apr 5, 2008) (listing its goals as “[r]epeal[ing] sodomy laws and all other laws criminalizing homosexuality, including discriminatory age of consent legislations,” and “[e]nact[ing] non-discrimination laws that are inclusive of LGBT people”).

<sup>12</sup> Nene Samanhyia, Op-Ed, *No Way for Lesbians, Gays*, *Accra Mail* (Ghana) (Sept 4, 2006).

has improved dramatically under consistent pressure from human rights activists. The United Nations has, beginning with the ICCPR and the UN Human Rights Committee's ("UNHRC") decision in *Toonen v Australia*,<sup>13</sup> taken a number of affirmative steps to advance the rights of sexual minorities. In the wake of those UN landmarks, LGBT rights organizations have generally agreed that the best way to advance their cause in domestic contexts is to pressure nations to adopt legislation or to alter their constitutions in favor of compliance with international treaties that promote privacy and equality.<sup>14</sup>

Second, were it equally difficult to change laws and attitudes, there is a strong argument that changing laws would be preferable. Laws that criminalize handholding or prevent human rights groups from organizing<sup>15</sup> are detrimental not only to the LGBT movement, but also directly threaten individual privacy and autonomy norms. Most human rights organizations do not address this disparity, possibly due to the dearth of empirical data on the topic. Also, this hypothetical choice between changing laws and changing attitudes might not reflect an actual decision facing organizations, as most international human rights groups have broad scopes and thus attempt to use both strategies simultaneously.<sup>16</sup> Whatever the reason, attacking laws certainly garners more attention.<sup>17</sup> As a result, most commentators have agreed that at least this much

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<sup>13</sup> *Toonen v Australia*, Commun No 488/1992, UN Doc CCPR/C/50/D/488/1992 ¶¶ 8.6, 8.7 (cited in note 9) (holding that Tasmania's law criminalizing same-sex sexual relations violated international privacy norms under ICCPR Article 17(1), and noting that references to "sex" in the ICCPR should be understood to include "sexual orientation"). The UNHRC recommended that the Tasmanian law should be repealed, but the Tasmanian legislature refused. The federal Australian government responded by passing the Human Rights (Sexual Conduct) Act, which prohibited laws that interfered with sexual rights implicating privacy. The High Court of Australia thus had the power and opportunity to strike down the Tasmanian laws in *Croome v Tasmania*, 191 CLR 119 (Austl 1997), available online at <<http://www.austlii.edu.au/au/cases/cth/HCA/1997/5.html>> (visited Apr 5, 2008).

<sup>14</sup> For the strategies of human rights organizations, see, for example, Howard J. Tolley, *Popular Sovereignty and International Law: ICJ Strategies for Human Rights Standard Setting*, 11 Hum Rts Q 561, 563 (1989):

Nonstate actors such as multinational corporations and terrorist groups have acquired power in global politics, but human rights NGOs do not employ the economic assets and paramilitary methods of those groups. Publicity that exposes and denounces oppressive governments has had some effect, but public revulsion has minimal influence on the worst offenders. NGOs have thus campaigned for substantive international laws.

<sup>15</sup> For example, Nigeria's proposed legislation would ban LGBT rights groups from organizing. See Section III.B.1.a.

<sup>16</sup> Human Rights Watch, *About HRW*, available online at <<http://www.hrw.org/about/>> (visited Apr 5, 2008) (describing its mission, in part, as "challeng[ing] governments and those who hold power to end abusive practices and respect international human rights law" and "enlist[ing] the public and the international community to support the cause of human rights for all").

<sup>17</sup> See, for example, Section III.B.1.e.

action is required; some commentators go so far as to complain that not enough action is being taken to confront nations over laws that fail to conform to international human rights obligations.<sup>18</sup> Working to change law is the clearest and most dramatic way for international human rights groups to advance the goal of safeguarding the rights of sexual minorities.

Third, and perhaps most importantly, LGBT rights groups can devise much stronger arguments for challenging discriminatory domestic laws than they can for complaining about attitudes. In the former case, the groups can appeal to international legal principles and ground their complaints in plain terms—for example, by stating that a nation is violating the terms of the agreement it signed in a specified treaty. This approach appears to have the benefits of simplicity and rationality that the latter approach—attempting to change the deeply held sentiments of a nation and its people—lacks. Thus, it is easy to see why groups have chosen to advocate for changing laws, rather than changing people's attitudes.

As some observers have already noted, however, the international community's increased focus on this issue has not always had a wholly positive effect on ensuring LGBT rights.<sup>19</sup> Recent political events in countries such as Guatemala, Ghana, Nigeria, and South Korea<sup>20</sup> indicate that the approach of Human Rights Watch and other prominent human rights advocacy organizations may not be as effective as those groups hope and may actually be resulting in a net harm to the LGBT rights movement. In particular, this Comment proposes that international pressure on nations to acknowledge the rights of sexual minorities may push some nations to affirmatively address these rights in a negative way. Domestic political concerns, tensions with the West, and religious limitations (such as those presented to states governed in whole or in part by Islamic Shari'ah law) may create conflicts for some nations and make the

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<sup>18</sup> For this argument in a domestic United States context, see, for example, Nancy K. Ota, *Opening Remarks: Queer Recount*, 64 Albany L Rev 889 (2001) (for the symposium, "Family" and the Political Landscape for Lesbian, Gay, Bisexual and Transgender People). For this view in an international context, see *Tatchell Defends Mugabe "Arrest,"* BBC News (Mar 6, 2001), available online at <<http://news.bbc.co.uk/1/hi/uk/1204719.stm>> (visited Apr 5, 2008) (describing Peter Tatchell's first and second attempts to perform a citizen's arrest on Zimbabwean President Robert Mugabe).

<sup>19</sup> See generally Michael Thomas, Note, *Teetering on the Brink of Equality: Sexual Orientation and International Constitutional Protection*, 17 BC Third World L J 365, 372–87 (1997) (discussing how South Africa and Zimbabwe present opposing, polarized responses to the current development of international human rights law in respect to sexual minorities; while South Africa has expanded human rights protections for sexual orientation, Zimbabwe has refused to define sexual orientation as a human right).

<sup>20</sup> See Section III.

domestic consequences of complying with treaty obligations much more devastating than the international ramifications of noncompliance.

Two potential solutions to this problem suggest themselves: LGBT rights groups could (1) attempt to assert more forcefully, and to the exclusion of other strategies, legal arguments in support of following treaty obligations; or (2) decrease—or simply maintain a lower level of—international pressure on these conflicted nations, thus allowing incremental change toward human rights for sexual minorities. Option (2), the more subtle of the two, would arguably be more persuasive and thus effective in the long term;<sup>21</sup> leaders of developing nations have not been very amenable to blatant attempts, per option (1), to tell them how to govern their nations. Given, however, that nations have already signed international human rights treaties, option (1) might be preferable and would have the distinct benefit of giving force to or legitimizing the international treaties that have already been signed. This Comment assesses the comparative strengths and weaknesses of these strategies in achieving the goal of full compliance with international human rights treaties and argues that a combination of these two approaches is most likely to result in long-term success for the LGBT rights movement.

Section II provides a brief background on the sources of international law used to advocate for and enforce LGBT rights. Section III describes some examples of recent and current legal issues arising out of situations in which nations have decided not to follow their international treaty obligations and examines why these nations might have so chosen. Section III also distinguishes among three different types of situations—laws violating international human rights obligations that predate treaty obligations (III.A), laws predating treaty obligations that are now being reinforced to further violate those obligations (III.B), and laws proposed after treaties have already been signed (III.C)—and, for each, analyzes the legal arguments to be made on both sides of the debate and evaluates potential responses to the actions of these nations. Section IV concludes that combining an incremental approach and an increased emphasis on legal arguments would be the most effective way for international human rights organizations to effect change and to protect the rights of sexual minorities in many cases—but in situations where the offending legislation predates the treaty, legal arguments will likely be less effective.

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<sup>21</sup> See Sections III.C and IV.

## II. INTERNATIONAL LAW SOURCES FOR SEXUAL MINORITY RIGHTS

A number of international treaties and other sources of international law indirectly address the rights of sexual minorities, and UN case law has explicitly incorporated “sexual orientation” as a protected status. As of yet, no treaty has directly provided for specific protections for sexual minority rights, though one proposed treaty would do so.<sup>22</sup> These treaties are an important source of international law and are intended to be binding:

States which have ratified or acceded to a convention are party to the treaty and are bound to observe its provisions. States which have signed but not yet ratified have expressed their intention to become a party at some future date; meanwhile they are obliged to refrain from acts which would defeat the object and purpose of the treaty.<sup>23</sup>

A brief assessment of these sources, and their roles in pressing for LGBT rights, will be useful at the outset.<sup>24</sup>

### A. INTERNATIONAL TREATIES

#### 1. The International Covenant on Civil and Political Rights, and Its Enforcement

*a) The International Covenant on Civil and Political Rights and its background.* The United Nations adopted the Universal Declaration of Human Rights in 1948.<sup>25</sup> The Declaration provides for two classes of rights: (1) political rights and (2) economic and social rights. The primary distinction between these types of rights is that while political rights can be granted immediately through legislation, economic and social rights develop only over a long period of time, through the creation of institutions.<sup>26</sup> Largely because of this difference, the UN created two treaties, one dealing with each category of rights; the International Covenant on Economic, Social and Cultural Rights<sup>27</sup> addresses economic and social rights,

<sup>22</sup> See the Yogyakarta Principles, available online at <<http://www.yogyakartaprinciples.org/index.php?lang=EN>> (visited Apr 5, 2008); see also Section II.C.

<sup>23</sup> Amnesty International, *Selected International and Regional Human Rights Treaties* (Dec 31, 2006), available online at <<http://thereport.amnesty.org/document/2>> (visited Apr 5, 2008).

<sup>24</sup> For one perspective on this inquiry, see generally Maguire, 35 Cal W Intl L J at 10 (cited in note 9).

<sup>25</sup> General Assembly Res No 217A (III), UN Doc No A/810 at 71 (1948).

<sup>26</sup> David M. Trubek, *Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs*, in Theodor Medon, ed, 1 *Human Rights in International Law: Legal and Policy Issues* 205, 211–12 (Clarendon 1984).

<sup>27</sup> International Covenant on Economic, Social and Cultural Rights, General Assembly Res No 2200 A(XXI), UN Doc A/6316 (1966).



while the ICCPR addresses political rights. Though the ICCPR itself does not recognize LGBT rights explicitly, it does contain general protections that seem to include sexual minorities. Article 2 provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>28</sup>

Article 26 continues:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>29</sup>

Finally, Article 17 states: “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.”<sup>30</sup> Although this text contains protections against discrimination based on “sex,” on the vague, seemingly broad term “other status,” and on the basis of privacy, the fact that it nowhere refers specifically to LGBT rights means that the ICCPR’s text does not directly protect these rights.

b) *The UN Human Rights Committee and the watershed Toonen decision.*

Due to the international climate and the lack of specific gay rights provisions in the ICCPR, protections for LGBT individuals under the treaty were uncertain for the first two decades after its enactment.<sup>31</sup> In fact, the United Nations Human Rights Committee (“Human Rights Committee”),<sup>32</sup> the body that monitors compliance with the ICCPR, held in 1982 that a Finnish statute

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<sup>28</sup> ICCPR, art 2 (cited in note 1).

<sup>29</sup> *Id.*, art 26 (cited in note 1).

<sup>30</sup> *Id.*, art 17(1) (cited in note 1).

<sup>31</sup> Edward H. Sadtler, Note, *A Right to Same-Sex Marriage under International Law: Can It Be Vindicated in the United States?*, 40 Va J Int L 405, 418–19 (1996) (discussing the early days of the ICCPR and the *Hertzberg* decision).

<sup>32</sup> ICCPR, arts 28, 40 (cited in note 1). The UN Human Rights Committee’s duties include hearing complaints under the Optional Protocol, which allows parties to file individual communications with the Committee. Optional Protocol to the ICCPR, arts 1–2, General Assembly Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 59, UN Doc A/6316 (1966).

prohibiting “encouragement to indecent behavior between members of the same sex” did not violate the ICCPR.<sup>33</sup>

But in the landmark decision of *Toonen v Australia*,<sup>34</sup> the Human Rights Committee held that sexual orientation should be understood as a status protected from discrimination under the ICCPR’s Articles 2 and 26 (and 17).<sup>35</sup> This decision, the first of its kind by any international tribunal, created the international basis for protection of LGBT rights.

More recently, the Human Rights Committee’s decision in *Young v Australia* advanced same-sex marriage rights. The Committee held that Australia, in denying pension rights to the surviving same-sex partner of a war veteran, violated discrimination protections in Article 26 of the ICCPR.<sup>36</sup>

## 2. The UN Convention on the Elimination of All Forms of Discrimination against Women

The UN Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) is typically known as an international bill of rights for women,<sup>37</sup> but it also speaks generally of the rights of sexual freedom, which international human rights groups—but not signatories—read to include sexual minority rights.<sup>38</sup> In CEDAW’s Concluding Observations, it considers sexual

<sup>33</sup> *Hertzberg et al v Finland*, United Nations Human Rights Committee Commun No 61/1979 (R.14/61) (1982). The question in *Hertzberg* was whether a Finnish penal code provision violated ICCPR Article 19, which protects freedom of expression. The provision stated:

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

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

Id at ¶ 2.1. Five individuals contended that the Finnish government, including the state-controlled Finnish Broadcasting Company, had violated their right of freedom of expression under the ICCPR “by imposing sanctions against participants in, or censoring, radio and TV programmes dealing with homosexuality.” Id.

<sup>34</sup> *Toonen v Australia*, Commun No 488/1992, UN Doc CCPR/C/50/D/488/1992 (cited in note 9).

<sup>35</sup> For general background about *Toonen*, see James D. Willets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts*, 27 Colum Human Rights L Rev 33, 36–40 (1995); Sadtler, 40 Va J Intl L at 419–23 (cited in note 31).

<sup>36</sup> *Young v Australia*, UN GAOR Hum Rts Comm, 78th Sess, UN Doc CCPR/C/78/D/941/2000 (2000), available online at <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.78.D.941.2000.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.78.D.941.2000.En?Opendocument)> (visited Apr 5, 2008).

<sup>37</sup> Division for the Advancement of Women, United Nations Department of Public Information, *Short History of CEDAW Convention*, available online at <<http://www.un.org/womenwatch/daw/cedaw/history.htm>> (visited Apr 5, 2008).

<sup>38</sup> See generally Yakaré-Oulé Jansen, *The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 Akron L Rev 311 (2006).

orientation a valid ground for asylum (and is so far the only international treaty to do so).<sup>39</sup> Furthermore, the UN Committee on the Elimination of Discrimination against Women, charged with interpreting and monitoring compliance with CEDAW, has expressed concern about the criminalization of homosexuality in a variety of contexts.<sup>40</sup>

A substantial obstacle to using CEDAW to enforce gay rights is that its signatories have made such substantial reservations to the treaty that it has been effectively stripped of all substance.<sup>41</sup> Another problem is that some international human rights groups have, in an effort to garner enough support to get CEDAW passed in the United States,<sup>42</sup> taken the position that CEDAW does not and cannot be used to address LGBT rights.<sup>43</sup> A third problem, more amorphous though still troublesome, is that the United States' failure to sign

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<sup>39</sup> UN CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Sweden*, UN Doc A/56/38 ¶ 334 (2001).

<sup>40</sup> Id. at ¶¶ 127–28 (“The Committee is concerned that lesbianism is classified as a sexual offense in the Penal Code. The Committee recommends that lesbianism be re-conceptualized as a sexual orientation and that penalties for its practice be abolished.”).

<sup>41</sup> Jansen, 40 Akron L Rev at 326 (cited in note 38) (noting that Article 16 of CEDAW has enjoyed great popularity as a target of reservations and declarations of interpretation, despite the fact that General Recommendation 21 on Equality in Marriage and Family Relations states that no reservations can be made to this Article); Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination against Women*, 85 Am J Int'l L 281, 317 (1991) (“[CEDAW] has attracted the greatest number of substantive reservations with the potential to modify or exclude most, if not all, of the terms of the treaty.”); see generally Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination against Women*, 30 Va J Int'l L 643 (1990).

<sup>42</sup> The United States is the only nation in the Western Hemisphere, and the only industrialized democracy, that has not accepted CEDAW. Amnesty International USA, *CEDAW: Treaty for the Rights of Women*, available online at <[http://www.amnestyusa.org/Ratify\\_the\\_Treaty\\_for\\_the\\_Rights\\_of\\_Women\\_CEDAW/CEDAW\\_Treaty\\_for\\_the\\_Rights\\_of\\_Women/page.do?id=1108216&n1=3&n2=39&n3=719](http://www.amnestyusa.org/Ratify_the_Treaty_for_the_Rights_of_Women_CEDAW/CEDAW_Treaty_for_the_Rights_of_Women/page.do?id=1108216&n1=3&n2=39&n3=719)> (visited Apr 5, 2008).

The failure of the United States to ratify CEDAW exemplifies the problems with using legally-based arguments to enforce human rights. International human rights organizations claimed that CEDAW includes sexual minority rights; the United States refused to approve the treaty because of its expansive reach; CEDAW supporters had to back off from their original interpretations of the treaty; and thus the treaty loses its force as applied to other nations. For more on the ratification controversy in the United States, see generally US Senate Republican Policy Committee, *US “Reservations” to This Treaty May Be Futile: CEDAW: Pro–United Nations, Not Pro–Women* (Sept 16, 2002), available online at <[http://rpc.senate.gov/\\_files/FOREIGN\\_je091602.pdf](http://rpc.senate.gov/_files/FOREIGN_je091602.pdf)> (visited Apr 5, 2008).

<sup>43</sup> Id.

The CEDAW Treaty makes clear that it is not aimed at all sex-based discrimination, but only at discrimination that is directed specifically against women. A same-sex marriage claim would include a charge that both men and women who want to marry individuals of their own sex are being discriminated against. There is no provision in the Treaty that would compel the U.S. Congress to pass same-sex marriage laws in order to comply.

CEDAW has been interpreted by other nations as a license to refuse to ratify CEDAW or to enforce CEDAW's provisions.<sup>44</sup>

## B. REGIONAL TREATIES

### 1. The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights ("African Charter"),<sup>45</sup> which came into force in 1986, affirms in broad terms the equality of all people before the law and the right to freedom from discrimination. Article 28 incorporates the parts of the ICCPR that address nondiscrimination, stating that "[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance." The African Charter, however, has been only somewhat effective in enforcing human rights, particularly in the LGBT rights context. The African Charter's lack of success in enforcing sexual minority rights has been attributed to several factors, including: (1) the structure of the Charter itself, (2) reluctance among its signatories to advance human rights, and (3) a lack of resources, both human and financial.

First, the African Charter contains clawback clauses<sup>46</sup> that have allowed signatories to avoid their obligations under the treaty. For example, Article 6 provides that "[n]o-one may be deprived of his freedom except for reasons already set down by law."<sup>47</sup> States have attempted to use Article 6 and other clawback clauses<sup>48</sup> in the African Charter to circumvent its human rights provisions in favor of pre-existing discriminatory domestic laws.<sup>49</sup> The African Commission on Human and Peoples' Rights ("ACHPR"), the organization

<sup>44</sup> See, for example, Sonnie Ekwowusi, *Nigeria: The Sultan, CEDAW and Our Values (2)*, Africa News (July 31, 2007) ("If the United States, which legalized abortion in 1973 in *Roe v Wade*, has refused to ratify and domesticate CEDAW, why should Nigeria, where abortion is still illegal, proceed to now ratify or domesticate CEDAW?").

<sup>45</sup> African Charter on Human and Peoples' Rights (1986), 21 ILM 58 (1982) ("African Charter") (also known as the Banjul Charter).

<sup>46</sup> A clawback clause is one that allows a party to avoid its treaty obligations under a wide variety of unspecified circumstances; these types of clauses are generally contrasted with derogation clauses, which allow for deviation from treaty obligations only under limited exigent circumstances. For further discussion, see Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never*, 3 Yale Hum Rts & Dev L J 45, 62 n 91 (2000).

<sup>47</sup> African Charter, art 6 (cited in note 45).

<sup>48</sup> Rebecca Wright, Note, *Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights*, 24 Berkeley J Intl L 463, 470 (2006) (listing the African Charter's clawback clauses). For additional examples of clawback clauses in the African Charter, see also Udombana, 3 Yale Hum Rts & Dev L J at 62–63 (cited in note 46).

<sup>49</sup> For a discussion of the problems of clawback clauses in the African Charter, see Wright, 24 Berkeley J Intl L at 470–73 (cited in note 48).

charged with enforcing the African Charter, has recently responded by unambiguously stating that “the Commission’s jurisprudence has interpreted the clawback clauses as constituting a reference to international law, meaning that only restrictions on rights that are consistent with the Charter and with State Parties’ international obligations should be enacted by the relevant national authorities.”<sup>50</sup> As yet it is unclear how nations that have read clawback clauses into the African Charter will respond to the ACHPR’s clear interpretive statement. It is fair to say, though, that until this point in the African Charter’s history, most nations have been eager to mine the text for places that will allow domestic law to trump the Charter.

Second, compliance with the African Charter has been problematic because its relaxed reporting mechanism has fostered a culture in which nations are not obligated to report on a regular basis. Article 62 of the African Charter requires that parties must submit biannual reports on legislative or other measures taken “with a view to giving effect to the rights and freedoms recognized and guaranteed by the Charter.”<sup>51</sup> Some nations submit these reports, which are then assessed and made public by the ACHPR.<sup>52</sup> But a number of member states do not; fifteen have never submitted one.<sup>53</sup> The provision has no enforcement mechanism, and nations failing to submit reports are simply told to try to submit one next time.<sup>54</sup>

A third problem with the African Charter is lack of funding and resources. The ACHPR meets twice a year for ten days and has eleven part-time members; human rights organizations point to the lean staffing and sporadic meetings as causes of the ACHPR’s weakness in enforcing human rights.<sup>55</sup> In addition, the African Charter is funded by the Organization of African Unity, which has only limited financial resources. Despite these funding problems, the African Charter’s supporters believe that the ACHPR should receive its funding solely from African groups and thus refuse to accept support from any other sources.

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<sup>50</sup> Report of the African Commission on Human and Peoples’ Rights, Executive Council, Eleventh Ordinary Session ¶ 92 (June 25–29, 2007), available online at <[http://www.achpr.org/english/activity\\_reports/activity22\\_eng.pdf](http://www.achpr.org/english/activity_reports/activity22_eng.pdf)> (visited Apr 5, 2008).

<sup>51</sup> African Charter, art 62 (cited in note 45).

<sup>52</sup> Report of the African Commission on Human and Peoples’ Rights, Executive Council, Eleventh Ordinary Session (June 25–29, 2007) (cited in note 50).

<sup>53</sup> Id at ¶ 85.

<sup>54</sup> Id at ¶ 86.

<sup>55</sup> Mercedes Sayagues, *SADC: African Charter of Human Rights, Ten Years On*, IPS (Oct 17, 1996) (“Because its parent body, the Organization of African Unity, has failed to provide adequate funding, the Commission is hampered by lack of human and financial resources. It meets twice a year for 10 days. Its 11 members work part-time to protect human rights.”) (quoting Zimbabwean lawyer and law lecturer Pearson Nherere).

As one observer has noted, “[i]f human rights are to be an African issue, it has to be funded by Africans.”<sup>56</sup> This limitation compounds the organization’s financial problems and hampers the group’s effectiveness.

## 2. The American Convention on Human Rights

The Organization of American States (“OAS”) Charter demonstrates a concern for human rights: “[T]he American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex.”<sup>57</sup> Article 17 provides that signatories “shall respect the rights of the individual and the principles of universal morality.”<sup>58</sup> At the same time, the conference established the American Declaration of the Rights and Duties of Man, which described civil, political, economic, social, and cultural rights and the duties corresponding to those rights.<sup>59</sup> Then in 1969, the OAS adopted the American Convention on Human Rights (“American Convention”).<sup>60</sup> The American Convention performed some of the work that the earlier American Declaration of the Rights and Duties of Man could not do, as that document was not crafted as a legal instrument.

### C. THE YOGYAKARTA PRINCIPLES

In 2006, a group of human rights experts drafted the Yogyakarta Principles (“Principles”), which specifically address the application of international human rights law to sexual orientation and gender identity.<sup>61</sup> The goal of the Principles is to “collate and clarify current State obligations under international law to address human rights violations based on sexual orientation and gender identity.”<sup>62</sup> This stated goal means that the Principles will need to change over

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<sup>56</sup> Id (quoting Pearson Nherere).

<sup>57</sup> Charter of the Organization of American States (1948), art 3(1), 2 UST 2394 (1951) (“OAS Charter”). Relevant amendments (“Protocols”) include the Protocol of Buenos Aires (1967), 21 UST 607; the Protocol of Cartagena de Indias, (1985), 25 ILM 529; the Protocol of Washington (1992), 33 ILM 1005 (1994); and the Protocol of Managua (1993), 33 ILM 1009 (1994).

<sup>58</sup> OAS Charter, art 17 (cited in note 57).

<sup>59</sup> For a more detailed discussion of the history of the OAS and human rights treaties, see Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards?*, 25 L & Ineq 467, 477–78 (2007); Mark Wojcik, *Using International Human Rights Law to Advance Queer Rights: A Case Study for the American Declaration of the Rights and Duties of Man*, 55 Ohio St L J 649, 649–57 (1994).

<sup>60</sup> The American Convention on Human Rights, 9 ILM 673 (1970).

<sup>61</sup> Yogyakarta Principles, available online at <<http://www.yogyakartaprinciples.org/index.php?lang=EN>> (visited Apr 5, 2008) (cited in note 22).

<sup>62</sup> Human Rights Watch, *Summary of Panel Discussion on the Yogyakarta Principles: The Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity* (Nov 7, 2007), available online at <<http://hrw.org/english/docs/2007/11/21/global17399.htm>> (visited Apr 5, 2008).

time, so its drafters intend to update the Principles as necessary to reflect changes in the international human rights landscape and resulting new obligations.<sup>63</sup>

The drafters of the Principles envision a world in which national governments work with international organizations to provide for increased protection of LGBT rights. They have provided specific recommendations to nations, as well as to “the UN human rights system, national human rights institutions, the media, NGOs and funders,” for improving the situation for LGBT communities.<sup>64</sup> The Yogyakarta Principles website states:

How can these rights be implemented? The Principles affirm the primary obligation of States to implement human rights. Each Principle is accompanied by detailed recommendations to States. The Principles also emphasise, however, that all actors have responsibilities to promote and protect human rights.<sup>65</sup>

The Principles thus reveal a trend toward utilizing nonstate actors to impose international law and norms upon unwilling, or at least resistant, nations. Noting this trend is essential to an understanding of the international human rights situation, and in particular for the discussion in Sections III and IV.

### III. THE INTERNATIONAL HUMAN RIGHTS COMMUNITY'S INVOLVEMENT IN LGBT RIGHTS LEGISLATION

Internationally, LGBT rights are not very strong, particularly in developing nations<sup>66</sup>—though the situation has, in limited cases, been improving.<sup>67</sup> The very fact that a group of human rights experts found it necessary to draft the Yogyakarta Principles itself indicates that work in this area is ongoing and essential.

Commentators have noted that while the LGBT community has made great strides in terms of human rights protections in Australia, North America, South Africa, Western Europe, and parts of Latin America, the progress in developing nations has been much less encouraging.<sup>68</sup> In many nations, sodomy

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<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> *About the Yogyakarta Principles*, available online at <<http://www.yogyakartaprinciples.org/index.php?item=21>> (visited Apr 5, 2008).

<sup>66</sup> See Amnesty International USA, *LGBT Rights around the World*, available online at <[http://www.amnestyusa.org/LGBT\\_Human\\_Rights/Country\\_Information/page.do?id=1106576&n1=3&n2=36&n3=1040](http://www.amnestyusa.org/LGBT_Human_Rights/Country_Information/page.do?id=1106576&n1=3&n2=36&n3=1040)> (visited Apr 5, 2008).

<sup>67</sup> For the South Africa example, see notes 7 and 8 and accompanying text.

<sup>68</sup> Pratima Narayan, Note, *Somewhere over the Rainbow . . . International Human Rights Protections for Sexual Minorities in the New Millennium*, 24 BU Int'l L J 313, 314 (citing Joydeep Sengupta, *How the UN Can Advance Gay Rights*, 10 Gay and Lesbian Rev 32 (2003)).

laws still exist and are regularly enforced.<sup>69</sup> A number of countries have recently introduced pieces of domestic legislation, currently pending, that directly contravene treaties to which those nations are signatories; other nations maintain laws on the books from pre-treaty days that violate their treaty obligations. A few of these nations address the international law issues arising from their actions, only to dismiss those issues summarily, and most nations do not even go this far. Nations in both categories are generally forthright in their disdain for international law on this particular topic. Ghana's official position, typical of the arguments made in favor of disregarding treaties, is that international conventions and charters that recognize LGBT rights do not override domestic laws.<sup>70</sup>

Two vital issues arise: (1) whether this position differentiates between law that already existed at the time of the treaty's enactment and laws that are promulgated after the nation signs the treaty (and if so, whether it make sense when extended to laws promulgated post-enactment); and (2) whether this position is reasonable even when limited to pre-existing law. Limiting the argument to pre-existing law seems to be the stronger argument, particularly because one reading of the African Charter lends itself to this interpretation<sup>71</sup>—but a legal argument against recently proposed legislation in Ghana necessitates invoking the second, broader version of this position. This Section will address currently pending legislation that contradicts international treaty obligations in the area of LGBT rights and will assess nations' likely reasons and any given or potential rationales for attempting to enact the legislation. It will also attempt to distinguish which argument is, or would need to be, used to justify new legislation.

## A. MAINTAINING PRE-EXISTING LAW: GHANA

### 1. Current Status of the Law and Conflicting International Obligations

Ghana's 1960 Criminal Code, Section 104(2) bans sodomy in a provision that states: "Unnatural carnal knowledge is sexual intercourse with a person in

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<sup>69</sup> James D. Wilets, *Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 Albany L Rev 989, 1028 (1997); see also Maguire, 35 Cal W Intl L J at 4 (cited in note 9) ("In many jurisdictions throughout the world, sexual minorities are considered a criminal class.").

<sup>70</sup> Ebenezer Hanson, *Ghana: No Room for Gays and Lesbians*, Public Agenda (Accra) (May 21, 2007), available online at <<http://allafrica.com/stories/200705211573.html>> (visited Apr 5, 2008).

<sup>71</sup> But see Arati Rao, Book Review, *Women's Rights as Human Rights: Local Limits and International Standards; Human Rights of Women: National and International Perspectives*, 8 Harv Hum Rts J 277, 277 ("[T]he African Charter does not explicitly call for consistency between domestic laws and international standards . . .").



an unnatural manner or with an animal.”<sup>72</sup> This law violates the terms of the African Charter, which Ghana ratified in 1989.<sup>73</sup> It also violates the ICCPR (under the interpretation advanced in *Toonen*), to which Ghana is a party.

## 2. Rationales and Reasons

Ghana’s Deputy Attorney General, Kwame Osei Prempeh, has explained that charters and international conventions that recognize gay rights do not override national laws.<sup>74</sup> Therefore, under his interpretation, Ghana’s pre-existing law banning homosexuality controls. This line of reasoning relies heavily on the fact that Ghana’s law existed before the treaties came into effect. That is, Ghana maintains its sovereignty by retaining laws that existed before the treaty. Once the treaty comes into force, however, the treaty prescribes that the national legislature will not enact new laws in conflict with treaty obligations. Presumably, if Ghana’s constitution had not previously contained any references to homosexuality, then the treaties’ assurances of human rights would include assurances of rights to the LGBT community.

Government officials also advance a cultural relativism argument. Officials claim that “Ghanaians are unique people whose culture, morality and heritage totally abhor homosexual and lesbian practices and indeed any other form of unnatural sexual acts.”<sup>75</sup> Commentators supplement this argument with concerns regarding the method of agitation; for example, one editorial comments that “[i]f a sect is in the belief that it is against their rights, they should challenge this provision in a court of law and stop the cheap ugly noise in our streets and the airwaves.”<sup>76</sup>

This concern directly relates to the way that human rights organizations have gone about advocating for LGBT rights in Ghana. As will be seen below in Section III, human rights organizations in Ghana have suddenly, in the past few years, increased pressure on the Ghanaian government for legislative action.

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<sup>72</sup> Id (quoting Ghana’s Criminal Code).

<sup>73</sup> African Union, *List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on African Charter on Human and People’s Rights* (May 26, 2007), available online at <<http://www.african-union.org/root/AU/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf>> (visited Apr 5, 2008).

<sup>74</sup> Hanson, *Ghana: No Room for Gays and Lesbians* (cited in note 70) (citing media interview with Kwame Osei-Prempeh, Deputy Attorney General, Ghana, at the 41st Ordinary Session of the African Charter).

<sup>75</sup> *Ghana Bans International Gay Conference*, BBC Monitoring Africa (Sept 1, 2006) (excerpt from report by Radio Ghana, Accra) (citing a statement signed by Ghana’s minister of interior and national orientation, Kwamena Bartels).

<sup>76</sup> Obeng Mensah Richard, Op-Ed, *Gay “Rights” Is an Affront to Public Interest*, Ghanaian Chronicle (July 12, 2007), available online at <<http://allafrica.com/stories/200707120775.html>> (visited Apr 5, 2008).

### 3. The International Response

Ghana's ban on sodomy conflicts with its own constitution, which provides for the right to freedom of association.<sup>77</sup> Until fairly recently, however, LGBT rights groups in Ghana were relatively quiet. At the fifty-year anniversary of Ghana's independence, the Gay and Lesbian Association of Ghana ("GLAG") became more vocal and began to challenge the government. GLAG's leader, Prince MacDonald, framed his dispute with the government in terms of neocolonialism, claiming that Ghana's current corruption is more corrosive than the old colonial rule.<sup>78</sup> His organization took action by threatening to boycott the December 2005 elections if no party supported repealing the sodomy law.<sup>79</sup>

More recently, rumors circulated that an international LGBT conference was to be held in Ghana.<sup>80</sup> The government, upon hearing reports of the proposed conference, pre-emptively banned it.<sup>81</sup> The government also issued a statement that the Minister of the Interior was investigating officials who purportedly gave permission for this conference and was being directed to "institute disciplinary action if they were found to have acted in contravention of the laws of Ghana."<sup>82</sup> Notably, GLAG distanced itself from the conference and reminded the public that its only goal was to improve health, not to promote gay lifestyles through a conference.<sup>83</sup>

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<sup>77</sup> Republic of Ghana Const, art 21(1)(e).

<sup>78</sup> Mashilo Mnisi, *Ghana's Gays Condemn Anniversary Celebrations, Behind the Mask* (Mar 9, 2007), available online at <<http://www.mask.org.za/article.php?cat=ghana&cid=1517>> (visited Apr 5, 2008).

<sup>79</sup> *Ghana's Gays Organise to Fight British Criminal Law*, Afrol News (Aug 19, 2004), available online at <<http://www.afrol.com/articles/13832>> (visited Apr 5, 2008). For GLAG's more recent work, see Issac Essel, *Out of the Closet!: Ghanaian Gays and Lesbians Ask for Recognition*, Accra Mail (Ghana) (Aug 24, 2006) (reporting that "top men and women in society [and] people with diverse professions including politicians" had recently become members of GLAG).

<sup>80</sup> *Ghana Bans International Gay Conference*, BBC Monitoring Africa (cited in note 75).

<sup>81</sup> Hanson, *Ghana: No Room for Gays and Lesbians* (cited in note 70) ("Government does and shall not condone any such activity which violently offends the culture, morality and heritage of the people of Ghana. Ghanaians were a unique people whose culture, morality and heritage totally abhorred homosexual, [gay] and lesbian practices and other forms of unnatural sexual acts.") (quoting the statement that banned the event).

<sup>82</sup> Id.

<sup>83</sup> *Ghana; Gays and Lesbians Conference*, Africa News (Sept 7, 2006) ("[A GLAG representative, denying affiliation with the conference] asked Ghanaians to support McDonald's cause because he is not "trying to promote anything as people are talking about, he is dealing with health issues.").

#### 4. Assessment of Strategies

In the short term, the actions taken by LGBT rights organizations in Ghana have had the opposite effect from what was intended, but this approach might prove to be successful in the long term. One commentator in a major Ghanaian newspaper stated: “Denying these deviants [a] permit [to hold an LGBT rights conference in Ghana] is certainly one bold step to stop the invasion of these deviants into Ghana. The government should make homosexuality illegal by passing appropriate laws to make gay and lesbianism illegal.”<sup>84</sup> Before the past few years, this issue did not publicly concern the people and politicians of Ghana. Now, some are calling for more legislation to take away LGBT rights.

LGBT rights organizations such as GLAG have presented health concerns as the most important reason for repealing Ghana’s sodomy law.<sup>85</sup> This line of reasoning does not seem to have done much in the way of convincing the antigay segment of Ghana’s political leaders and population, but it has been effective insofar as the organization has survived through controversies such as the conference debacle. By distancing itself from the “gay agenda” to focus solely on health issues,<sup>86</sup> GLAG is an example of a more measured, incremental approach at work.

Furthermore, no organization has attempted to respond directly to the argument advanced by Ghana’s Deputy Attorney General.<sup>87</sup> One plausible explanation for the lack of reaction is that any reply could be construed as a direct threat to Ghana’s sovereignty, and international human rights organizations might have feared making such a threat. Perhaps this is one check on the use of the legal approach.

Generally, then, Ghana is an example of a place where international and regional human rights groups might have worsened the LGBT rights situation by their initial strategy of pushing Ghana’s government to comply with its treaty obligations. Since then, groups such as GLAG have backed off from using legal arguments, choosing to focus on health issues as a way to ensure the group’s continued survival and avoid attracting more negative attention from the government.<sup>88</sup> A crucial factor in this calculation is that Ghana’s antisodomy law predates its treaty obligations, and thus its status is unclear. When domestic law predates international obligations, then, it will typically make more sense for

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<sup>84</sup> Samanhyia, *No Way for Lesbians, Gays*, Accra Mail (Ghana) (cited in note 12).

<sup>85</sup> See, for example, *Ghana; Gays and Lesbians Conference*, Africa News (cited in note 83).

<sup>86</sup> See note 83 and accompanying text.

<sup>87</sup> For the statement, see text accompanying note 74.

<sup>88</sup> See, for example, note 83.

international LGBT rights organizations to use a more cautious strategy, as seen with GLAG's choice to focus on health.

## B. MAKING THE LAW WORSE

### 1. Nigeria

*a) Legislation: The "Same Sex Marriage (Prohibition) Act."* A piece of legislation, first presented to Nigeria's Federal Executive Council in January 2006 and entitled "A Bill for an Act to Make Provisions for the Prohibition of Sexual Relationship Between Persons of the Same Sex, Celebration of Marriage by Them, and for Other Matters Connected Therewith,"<sup>89</sup> also known as the "Same Sex Marriage (Prohibition) Act," would impose a five-year prison sentence on anyone who "goes through the ceremony of marriage with a person of the same sex" and anyone who assists in a same-sex marriage ceremony.<sup>90</sup> Furthermore, in its most recently published version, the bill would punish any advocacy for LGBT rights, subjecting anyone to a five-year prison sentence who is "involved in the registration of gay clubs, societies and organizations, sustenance, procession or meetings, publicity and public show of same sex amorous relationships directly or indirectly in public and in private."<sup>91</sup>

The bill stalled in the legislature due to circumstances surrounding Nigeria's presidential elections in April 2007.<sup>92</sup> After the violent election, the political climate has remained unstable, with the result that the current status of the legislation is unclear. International human rights organizations have quieted their protests,<sup>93</sup> but it is still entirely possible that the bill will resurface. If it does, many fear that it will pass because Nigeria's current president is supported by the part of Nigeria that has most vocally pressed the government to deny rights to the LGBT community.<sup>94</sup>

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<sup>89</sup> A Bill for an Act to Make Provisions for the Prohibition of Sexual Relationship Between Persons of the Same Sex, Celebration of Marriage by Them and for Other Matters Connected Therewith (2006), HB 246, No C871–C869, available online at <<http://www.nassnig.org/bills/year%202006%20bills%20pdf/june%207%20bills/HB%20246%20BILL%202%20PROHIBIT%20SEXUAL%20REL%20BTW%20SAME%20SEX.pdf>> (visited Apr 5, 2008).

<sup>90</sup> Human Rights Watch, *Nigeria: Anti-Gay Bill Threatens Democratic Reforms: Homophobic Legislation Restricts Free Speech, Association, Assembly* (Feb 28, 2007), available online at <<http://hrw.org/english/docs/2007/02/28/nigeri15431.htm>> (visited Apr 5, 2008).

<sup>91</sup> Id.

<sup>92</sup> Id.

<sup>93</sup> Not much has been reported in the press—or by international human rights organizations—since February 2007.

<sup>94</sup> See Section III.B.1.3.

b) *Prior status of Nigeria's law.* As a legacy of the British colonial period, Nigeria has a nineteenth-century penal code that punishes “homosexual conduct” between consenting persons with fourteen years in prison.<sup>95</sup>

In addition, Nigeria's northern region has been governed since 1999 by Shari`ah law, which criminalizes sodomy under Chapter III, Part III, Sections 128–29 of the Kano State Shari`ah Penal Code Law of 2000. Twelve of Nigeria's thirty-six states punish homosexuality with stoning (though no stoning sentence has actually been carried out since Shari`ah law came into force in 1999).<sup>96</sup> Nigeria's current president, Umaru Yar`Adua, served as governor of Katsina, one of those Northern states, from 1999 to his election as President in 2007.<sup>97</sup> While Yar`Adua had, as governor, originally resisted the imposition of Shari`ah law in Katsina, the LGBT rights community feared that his need to appease his base of support in the north would lead him to support this anti-LGBT legislation.<sup>98</sup>

c) *Nigeria's conflicting international law obligations.* Nigeria acceded to the ICCPR in 1993, though it has not ratified either of its subsequent optional protocols.<sup>99</sup> Were the Same Sex Marriage (Prohibition) Act to pass, it would undoubtedly violate the ICCPR.<sup>100</sup> Nigeria also acceded to CEDAW without

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<sup>95</sup> Article 214 of Nigeria's Penal Code has been in place since the British colonial period. See Mark Gevisser, *Homosexuality in Africa: An Interpretation, An Overview of Homosexuality in Both Traditional and Modern African Societies*, in Kwame Anthony Appiah and Henry Louis Gates, eds, *Africana: The Encyclopedia of the African and African American Experience* 961, 962 (Basic Civitas 1st ed 1999) (describing how Article 214 of the Nigerian penal code is “drawn from British colonial law—even though Britain itself decriminalized sodomy in 1967”).

<sup>96</sup> *Gay Nigerians Face Sharia Death*, BBC News (Aug 10, 2007), available online at <<http://news.bbc.co.uk/2/hi/africa/6940061.stm>> (visited Apr 5, 2008); Lydia Polgreen, *Nigeria Turns from Harsber Side of Islamic Law*, NY Times A1 (Dec 1, 2007) (explaining that, while some highly-publicized stoning sentences have been given, none have actually been carried out, all having been overturned on appeal).

<sup>97</sup> John N. Paden, *Muslim Civic Cultures and Conflict Resolution: The Challenge of Democratic Federalism* 159 (Brookings Institution 2005).

<sup>98</sup> See, for example, Jonathan Power, *Obasanjo's Legacy*, Prospect (Mar 29, 2007) (“When Obasanjo became president in 1999, many of the state governors in Nigeria's Muslim north tried to embarrass him by imposing Shari`ah law. Yar`Adua resisted this, at least in its strictest form, and is known as a conciliator.”).

<sup>99</sup> Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* 8 (June 9, 2004), available online at <<http://www.unhchr.ch/pdf/report.pdf>> (visited Apr 5, 2008).

<sup>100</sup> Letter from Rev Dyan Abena McCray, et al, to Hon Senator Ken Nnamani and Hon Senator Ibrahim Mantu, in Human Rights News, *Faith Leaders Condemn Repressive Nigerian Legislation* (Feb 27, 2007), available online at <<http://hrw.org/english/docs/2007/02/27/nigeri15425.htm>> (visited Apr 5, 2008).

reservation in 1985 and is a signatory to the optional protocol of CEDAW.<sup>101</sup> There is a strong argument that Nigeria's proposed legislation would violate the terms of CEDAW, and it would certainly elicit concern from its Committee.<sup>102</sup>

In addition, Nigeria's proposed legislation would conflict with the African Charter, which it ratified in 1983.<sup>103</sup> It would also violate the UN Declaration on Human Rights Defenders, which states that "everyone has the right, individually and in association with others, at the national and international levels: (a) to meet or assemble peacefully; (b) to form, join and participate in non-governmental organizations, associations or groups."<sup>104</sup>

d) *Rationales and reasons.* To explain why the bill is necessary, Nigerian officials have provided a rationale based on two interrelated elements: a religious and moral argument, and a protectionist argument. The moral element is evident in the statements of Peter Akinola, the Archbishop of the Anglican Church of Nigeria and one of the most vocal supporters of the proposed legislation.<sup>105</sup> He claims that the bill would "protect society's morals and values."<sup>106</sup> The protectionist element is also clear from floor debates in the House of Representatives. Abdul Ningi, then-leader of the House of Representatives, stated that the problem of homosexuality had become more pressing in light of the growing number of LGBT Nigerians.<sup>107</sup> Many political leaders in Nigeria have made similar statements, effectively claiming that the increased presence of LGBT people has necessitated this bill.

It is plausible that what really prompted the bill's proposal was increased agitation from gay rights groups, which was itself driven by Nigeria's failure to

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<sup>101</sup> Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications* 8 (cited in note 99).

<sup>102</sup> See Section II.A.2.

<sup>103</sup> African Union, List of Countries (cited in note 73).

<sup>104</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Gen Res A/RES/53/144 at art 5 (1999).

<sup>105</sup> *Communion No More*, Daily Telegraph (Mar 23, 2007), available online at <<http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2007/03/23/dl2302.xml>> (visited Apr 5, 2008) ("Archbishop Peter Akinola, Anglican Primate of Nigeria . . . has also defended new Nigerian legislation that makes 'cancerous' (his word) same-sex activity punishable by up to five years' imprisonment.").

<sup>106</sup> *Nigeria Moves to Tighten Gay Laws*, BBC News (Feb 14, 2007), available online at <<http://news.bbc.co.uk/2/hi/africa/6362505.stm>> (visited Apr 5, 2008).

<sup>107</sup> Id.

adhere to its treaty obligations.<sup>108</sup> The situation in Nigeria has never been particularly good for the LGBT community—especially in light of the sodomy law that has been part of Nigeria’s Penal Code since the nineteenth century. Once Nigeria acceded to the ICCPR and CEDAW and had ratified the African Charter, the international human rights community likely expected some changes from Nigeria. Furthermore, by not changing its laws, Nigeria disregarded its treaty obligations and delegitimized the force of the treaties. It is certainly to be expected that human rights organizations would respond. In this situation, though, the intervention of human rights groups might have increased tensions and pressure on the Nigerian government.<sup>109</sup> Because the government—and possibly the culture in general—was not prepared to take legal measures to comply with the treaty, the human rights groups forced Nigeria’s government into a corner—and eventually responded in a way that worsened the situation for the nation’s LGBT community.

e) *International response.* This is not to say that the international human rights community has not effected positive change. After the legislation was first proposed, LGBT rights groups tried a variety of tactics, and as the legislation has not passed, one could say that these tactics have been successful.

Activist groups initially used the strategy of maintaining a low profile. After the resolution was first introduced in January 2006, it lay dormant for months as Nigerian politicians focused on the nationwide elections in April of that year. Human rights and LGBT activists in Nigeria deliberately kept a fairly low profile in their protests against the legislation, as they believed that Nigerian politics would be focused on the upcoming election and they hoped that the bill would disappear without being considered by the legislature.<sup>110</sup>

This strategy was apparently working until British activist Peter Tatchell and OutRage!, his direct-action LGBT rights group, began an international appeal to human rights groups worldwide “to take urgent action to press their government’s [sic] to lobby the Nigerian government to uphold international

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<sup>108</sup> Section III.B.1 expands on this point. For a similar argument in the context of LGBT rights in Namibia, see Sonia Katyal, *Exporting Identity*, 14 Yale J L & Feminism 97, 98–99:

[Namibian] Home Affairs Minister Jerry Ekandjo told the National Assembly that the existence of homosexuality was entirely attributable to Western influences, observing “we take everything [from Western culture] lock, stock, and barrel without carefully analyzing what is good and what is harmful to us. Today it is homosexuality, tomorrow the right to walk naked, the day after it will be the right to abuse drugs. At the end the so-called rights will lead to our own extinction.”

<sup>109</sup> See text accompanying notes 110–13.

<sup>110</sup> *Nigeria’s Anti-Gay Bill Causes Protests*, Afrol News (Mar 1, 2007), available online at <<http://www.afrol.com/articles/24541>> (visited Apr 5, 2008).

human rights law and to drop this draconian legislation.”<sup>111</sup> This action caused the legislation to re-emerge.<sup>112</sup> African human rights groups disapproved, stating that Tatchell’s “neo-colonial” behavior disrupted a currently successful domestic political strategy for LGBT activists.<sup>113</sup> According to a letter sent to Tatchell: “You have proven that you have no respect for conveying the truth with regards to Africa or consulting African LGBTI leaders before carrying out campaigns that have severe consequences in our countries. You have betrayed our trust over and over again.”<sup>114</sup>

Tatchell’s intervention increased international publicity regarding the bill, spurring involvement by other human rights organizations. The subsequent international response to Nigeria’s proposed legislation has implemented most of the tactics, short of economic sanctions, in the international law arsenal: an official statement by the US State Department,<sup>115</sup> a resolution by the European Parliament calling on Nigeria to drop the legislation,<sup>116</sup> official statements by UN officials, and condemnation by international and African human rights organizations, both political and religious. Human Rights Watch has called the legislation “sweepingly homophobic,”<sup>117</sup> and in a letter to Nigerian senators, urged the legislature “to act in accordance with Nigeria’s legal obligations under international human rights law.”<sup>118</sup> Southeast England Euro-MP Caroline Lucas called it an “intolerable breach of international law and the rights and freedoms

<sup>111</sup> Peter Tatchell, *Nigeria—Vicious New Anti-Gay Law: World’s Most Sweeping, Draconian Homophobic Legislation* (Jan 19, 2006), available online at <<http://www.petertatchell.net/international/nigeriagaylaw.htm>> (visited Apr 5, 2008).

<sup>112</sup> *Nigeria’s Anti-Gay Bill Causes Protests*, Afrol News (cited in note 110).

<sup>113</sup> Id.

<sup>114</sup> *African LGBTI Human Rights Defenders Warn Public Against Participation in Campaigns concerning LGBTI Issues in Africa Led by Peter Tatchell and Outrage!*, available online at <<http://mrzine.monthlyreview.org/increase310107.html>> (visited Apr 5, 2008); see also Peter Tatchell, *Nigeria’s Anti-Gay Witch-Hunt*, *Guardian* (Aug 29, 2007), available online at <[http://commentisfree.guardian.co.uk/peter\\_tatchell/2007/08/nigerias\\_antigay\\_witchhunt.html](http://commentisfree.guardian.co.uk/peter_tatchell/2007/08/nigerias_antigay_witchhunt.html)> (visited Apr 5, 2008).

<sup>115</sup> US Department of State, Press Release, *Nigerian Legislation Threatens To Limit Rights of Sexual Minorities* (Feb 1, 2006), available online at <<http://www.state.gov/r/pa/prs/ps/2006/60241.htm>> (visited Apr 5, 2008) (criticizing the proposed bill on the grounds that it would violate Nigeria’s obligations under the ICCPR).

<sup>116</sup> European Parliament Resolution on Nigeria (March 15, 2007), P6\_TA(2007)0086, available online at <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0086&language=EN&ring=B6-2007-0105>> (visited Apr 5, 2008).

<sup>117</sup> Human Rights Watch, *Nigeria: Anti-Gay Bill Threatens Democratic Reforms* (cited in note 90).

<sup>118</sup> Letter from Scott Long to Hon Senator Ken Nnamani, *Letter to Nigerian Senators regarding Bill to Criminalize Gay Rights* (Feb 28, 2007), available online at <[http://hrw.org/english/docs/2007/02/28/nigeri15432\\_txt.htm](http://hrw.org/english/docs/2007/02/28/nigeri15432_txt.htm)> (visited Apr 5, 2008).



of lesbians and gays in Nigeria.”<sup>119</sup> She continued, in an open letter to the Nigerian government:

This law, if approved, will constitute an unbearable discrimination as well as a violation of the rights to freedom of expression, conscience, association, and assembly. These rights are enshrined in international law as well as in the African Charter on Human and Peoples’ Rights. Furthermore, the approval of this law will undermine the fight that Nigeria is combating against the spread of HIV/AIDS.<sup>120</sup>

A New York Times editorial credited the responses of the United States and the European Union with preventing the bill from becoming law—at least so far.<sup>121</sup>

*f) Assessment of strategies.* While international and regional human rights organizations used a variety of strategies to prevent the bill from becoming law, it is worth noting that the legal argument referring to Nigeria’s treaty obligations was made only weakly and ineffectively. A few letters mention this argument, but temper its potential potency by placing it aside moral or religious rhetoric.<sup>122</sup> Two questions arise: (1) could legal arguments have made a difference if they had been framed differently, and (2) why did human rights groups fail to make legal arguments more forcefully?

The answer to the first question is that legal arguments (namely, that Nigeria’s legislation would violate the terms of the ICCPR and African Convention) might have been more successful had they been presented in isolation from moral or religious arguments. There are some strong legal arguments that might have spoken to a wider base of support, beyond just the international LGBT rights community. The legal arguments might also have had the benefit of appearing less emotional and thus might have attracted a less derisive backlash. Some of the arguments that might have been advanced follow.

The proposed legislation violates the ICCPR, articles 2, 26, 19 (freedom of assembly), and 17 (privacy).<sup>123</sup> Although Nigeria might argue that because it has not ratified the first optional protocol, which creates a mechanism allowing an

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<sup>119</sup> Colin Coward, *European Parliament Members Call Nigeria to Abandon Anti-Gay Legislation*, Changing Attitude: Nigeria News (Apr 8, 2006), available online at <<http://www.changingattitude.org.uk/news/newsitem.asp?id=225>> (visited Apr 5, 2008).

<sup>120</sup> Id.

<sup>121</sup> Editorial, *Denying Rights in Nigeria*, NY Times A22 (Mar 8, 2007).

<sup>122</sup> *Faith Leaders Condemn Repressive Nigerian Legislation* (cited in note 100), mentioning that the legislation would violate the ICCPR, African Charter, and UN Declaration on Human Rights Defenders, and then stating that

[m]ost importantly, this bill would strike at the equality, dignity and respect due all people in Nigeria. As faith leaders we are committed to building bridges of understanding across divides of difference. We believe all people of faith are called to work together for a world of justice, peace and equality.

<sup>123</sup> See Section II.A.1.

individual to petition for relief under the ICCPR's articles, the treaty has little force here, this would be inaccurate. Nations that have signed a treaty, even before ratification or accession, are "obliged to refrain from acts which would defeat the object and purpose of the treaty."<sup>124</sup> This legislation certainly qualifies, by increasing—rather than decreasing—discrimination. Nigeria might argue that sexual orientation is not a protected category under the ICCPR, but under *Toonen*, sexual orientation effectively gained protected status.

The proposed legislation also violates the terms of the African Charter. Article 1 states that parties "shall undertake to adopt legislative or other measures to give effect" to "the rights, duties, and freedoms enshrined" in the treaty.<sup>125</sup> These rights, duties, and freedoms include: the right to all freedoms in the Charter "without discrimination of any kind such as . . . sex . . . or other status," the right to liberty,<sup>126</sup> and the right to free association.<sup>127</sup> The proposed legislation would fail to adhere to the African Charter both by denying these rights and by not using legislative measures to give effect to those rights—rather, it would be using legislative measures to refuse the rights.

The answer to why human rights groups failed to make these legal arguments more forcefully is that making legal arguments in this type of situation is a double-edged sword. On one side, legal arguments might be more compelling because they would remind Nigeria of its international treaty obligations and would treat Nigeria as a political equal. Legal arguments would be more persuasive, this line of reasoning implies, because they would not require Nigeria to make moral and religious concessions. On the other side, Nigeria's politicians fear appearing too appeasing of the West in any context (whether moral, religious, or political and legal) and conceding on grounds of international treaty obligations could make politicians appear weak, as if they were willing to kowtow to the demands of western politicians.

## 2. South Korea

*a) Legislation: "Anti-Discrimination Bill."* On October 2, 2007, the South Korean Ministry of Justice announced draft legislation that would prohibit discrimination on the basis of sexual orientation, among a number of other categories.<sup>128</sup> One of the stated goals of the legislation was to expand on Korea's

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<sup>124</sup> See text accompanying note 23.

<sup>125</sup> African Charter, art 1 (cited in note 45).

<sup>126</sup> *Id.*, art 6.

<sup>127</sup> *Id.*, art 10(1).

<sup>128</sup> Human Rights Watch, *South Korea: Anti-Discrimination Bill Excludes Many: Law Should Cover Sexual Orientation and Gender Identity* (Nov 6, 2007), available online at <<http://hrw.org/english/docs/2007/11/05/skorea17234.htm>> (visited Apr 5, 2008).

pre-existing National Human Rights Commission Act to provide for more protection of LGBT rights.<sup>129</sup> The original version of the legislation contained protections for twenty groups: gender, disability, medical history, age, nationality, ethnicity, race, skin color, language, origin of birth, appearance, marriage status, pregnancy status, family type, religion, ideology or political belief, criminal or detention record, sexual orientation, educational status, and social status. But the legislation was later revised to exclude protection on the basis of sexual orientation, military status, nationality, language, appearance, family type, ideology, criminal or detention record, and educational status.<sup>130</sup> The proposed legislation, in its currently revised form, would now actually decrease protections for the LGBT community in South Korea.<sup>131</sup>

b) *Prior status of the law.* South Korea's National Human Rights Commission Act already bars discrimination on the basis of most categories, including sexual orientation, by requiring the president and other levels of government to develop plans to eliminate discrimination. Under the revised form of the legislation, the new law would actually remove protections for many groups.<sup>132</sup> South Korea has never had any antisodomy laws per se, but traditionally has been hostile to LGBT interests. For one example, South Korea has a legal standard according to which (both gay and straight) men cannot be considered rape victims, "since the crime is defined as a forcible sexual act by a 'biological' man upon a 'biological' woman."<sup>133</sup> For another example, the 1997 Youth Protection Act considers descriptions of "homosexual love" to be "harmful to youth."<sup>134</sup> In 2001, this legislation prompted the quasi-legislative Ministry of Information and Communications Media to adopt a content ratings system for censorship of the internet that listed homosexuality as an "obscenity and perversion" in its "Criteria for Indecent Internet Sites."<sup>135</sup> This decision

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<sup>129</sup> Id.

<sup>130</sup> Human Rights Commission, Letter: *Exclusion Undermines Landmark Bill* (Nov 5, 2007), available online at <<http://hrw.org/english/docs/2007/11/05/skorea17236.htm>> (visited Apr 5, 2008).

<sup>131</sup> Though a vote was scheduled for November 20, 2007, no vote has been taken; the bill is currently stalled (as of publication). International Gay and Lesbian Human Rights Commission, *South Korea: Stop Bill before It Goes to National Assembly* (Nov 13, 2007), available online at <<http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=799>> (visited Apr 5, 2008).

<sup>132</sup> *South Korea: Anti-Discrimination Bill Excludes Many* (cited in note 128).

<sup>133</sup> Arwen Swink, Note, *Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities*, 29 *Hastings Intl & Comp L Rev* 251, 253 n 13 (2006) (quoting International Gay and Lesbian Human Rights Commission, *Sexual Minorities and the Work of the United Nations Special Rapporteur on Torture* 7 (June 5, 2001)).

<sup>134</sup> Adam Creed, *Korean Gay Activists Challenge Website Ban*, Newsbytes (Jan 10, 2002).

<sup>135</sup> Association for Progressive Communications, *Censorship of Gay Sites Continues on South Korean Internet* (Mar 5, 2002), available online at <[http://www.apc.org/english/rights/fulltext.shtml?sh\\_itm=c81c96a8a8a48493a1f3d01d72b5095b](http://www.apc.org/english/rights/fulltext.shtml?sh_itm=c81c96a8a8a48493a1f3d01d72b5095b)> (visited Apr 5, 2008).

meant that essentially all LGBT-related websites were blocked from all public internet sources (including schools, internet cafés, and public libraries) and to all users under nineteen. LGBT groups and webmasters organized into a coalition and filed a lawsuit against the government alleging that the censoring of homosexual material violated the South Korean Constitution's protection of free speech; the court denied this claim on the grounds that freedom of speech was not applicable to homosexuality.<sup>136</sup> More recent reports, however, note that a climate of LGBT acceptance is emerging—which makes the recently proposed legislation especially surprising.<sup>137</sup>

c) *Conflicting international obligations.* The proposed legislation would violate South Korea's obligations as a party to the ICCPR, under the interpretation of the ICCPR in Toonen. In addition, Human Rights Watch has argued that the bill would violate South Korea's international legal obligations under two other treaties: the Convention on the Rights of the Child, whose compliance body has affirmed in its General Comments that the convention's prohibitions on discrimination include "sexual orientation"; and the ICESCR,<sup>138</sup> whose compliance body has "expressed concern when governments fail to include sexual orientation in their non-discrimination legislation."<sup>139</sup>

d) *Rationales and reasons.* The revisions to the proposed legislation likely occurred in response to complaints from South Korea's Congressional Missionary Coalition (Uihoe-Sungyo-Yoenhab), a group of Christian-right National Assembly members.<sup>140</sup> South Korea is very conservative, in large part

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<sup>136</sup> National Human Rights Commission of Korea, Press Release, *Web Sites on Homosexuality Are Not Harmful to Minors* (Apr 2, 2003), available online at <[http://www.humanrights.go.kr/eng/about/news/NeComitNewsView.jsp?seqid=98&page\\_num=2&search=&choice=>](http://www.humanrights.go.kr/eng/about/news/NeComitNewsView.jsp?seqid=98&page_num=2&search=&choice=>)> (visited Apr 5, 2008).

<sup>137</sup> Anthony Faiola, *South Korea Loosens Its Collar; Social Norms Change as Liberal Ideas Are Embraced*, Wash Post A20 (Dec 16, 2003) (quoting Lee Kyong Eun, a transsexual Korean actress):

"South Korea entered the new millennium as a different, more open nation," Lee said, sipping a cup of traditional citron tea at a fashionable Seoul café. "Gay rights, transgender rights and women's rights—things we would never have dealt with before—are now open for debate. We are living in a changing society. I am proof of that."

For more on Lee Kyong Eun, see note 150.

<sup>138</sup> See text accompanying note 27.

<sup>139</sup> Id.

<sup>140</sup> Human Rights Commission, Letter, *Exclusion Undermines Landmark Bill* (cited in note 130).

because of its Confucian legacy,<sup>141</sup> and as such the general population has, until very recently, been largely unaware of the existence of homosexuality.<sup>142</sup>

e) *International response.* LGBT rights groups in South Korea have been much more cautious than those in, for example, Nigeria. The reason for this caution, at least according to some sources, is that South Korea's human rights organizations have been reluctant to acknowledge LGBT rights as a category of human rights.<sup>143</sup> Other explanations might be the language barrier<sup>144</sup> (making it hard for South Korean LGBT rights groups to solicit international support) and the South Korean groups' unwillingness to travel to international conferences to describe their situation and to receive funding.<sup>145</sup>

Accordingly, responses to the proposed legislation have included primarily letter writing. Human Rights Watch, for example, responded to South Korea's proposed legislation with a letter of protest addressed to Prime Minister Duck-Soo, which attempts to remind South Korea that "protection of lesbian, gay, bisexual and transgender people is part of South Korea's duty-bound obligations under international law and standards, which prohibit discrimination on the basis of sexual orientation."<sup>146</sup> Human Rights Watch listed these obligations, including those under the ICCPR and *Toonen*, the Convention on the Rights of the Child, and the ICESCR.

Relative inaction does not mean, however, that human rights groups do not want change in South Korea. The Alliance against Homophobia and Discrimination against Sexual Minorities in South Korea responded to the

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<sup>141</sup> See generally Chai-Shin Yu, ed, *The Founding of Catholic Tradition in Korea* (Asian Humanities 2004); see also note 130.

<sup>142</sup> Chingusai: The Korean Gay Men's Coalition, *Introduction*, available online at <[http://www.chingusai.net/e\\_page/e\\_index.html](http://www.chingusai.net/e_page/e_index.html)> (visited Apr 5, 2008) ("Like many other East Asian societies, Korea is highly conservative, (hetero)sexist, and family-centered due to the enduring influence of Confucian patriarchy.").

<sup>143</sup> Huso Yi, *Life and Death in Queer Korea: Part 3: Civil Rights and Wrongs, Taking on Korean Law, Imagination, and Internet*, The Gully Online Magazine (June 6, 2003), available online at <[http://www.thegully.com/essays/asia/030606\\_korea\\_gay\\_rights.html](http://www.thegully.com/essays/asia/030606_korea_gay_rights.html)> (visited Apr 5, 2008).

<sup>144</sup> See ARC International, *Korean Sexual Minority Culture & Rights Center*, Final Report: International Dialogue on Gender, Sexuality, HIV/AIDS & Human Rights: Focus on Asia 17 (2007), available online at <<http://www.arc-international.net/koreareport.pdf>> (visited Apr 5, 2008) (listing "[m]any language barriers for communication among NGOs" as one of the challenges facing sexual minority rights groups in Asia).

<sup>145</sup> Yi, *Life and Death in Queer Korea: Part 3* (cited in note 143):

While leaders from AIDS-focused gay groups in other parts of Asia typically travel to international conferences and get some outside funding, that pattern has not developed in South Korea. For example, local queer organizations have not been represented at meetings of the International Congress on AIDS in Asia and the Pacific (ICAAP).

<sup>146</sup> Human Rights Commission, Letter, *Exclusion Undermines Landmark Bill* (cited in note 130).

proposed legislation by sending a request to the International Gay and Lesbian Human Rights Commission, asking it to “mobilize international support for the restoration of sexual orientation as a protected category in the proposed anti-discrimination legislation recently drafted by the Ministry of Justice.”<sup>147</sup> This request demonstrates the lack of resources at the disposal of South Korean LGBT rights groups, which likely contributes to the moderation in these groups’ approach.

f) *Assessment of strategies.* Human rights groups have attempted to use more subtle pressure, such as the letter from Human Rights Watch, on South Korea’s legislature than those used in some of its more aggressive campaigns (such as in Nigeria). This difference is attributable to the relative subtlety of homophobia in South Korea. While in Nigeria, an openly gay man might risk being violently attacked and is subject to criminal penalties, in South Korea he is the victim of social sanctions and internet censorship. Although South Korean human rights groups have more leeway and more time because the stakes are not physical injury or criminal penalties (and thus the situation appears less urgent),<sup>148</sup> they cannot amass the same support and thus have less funding and manpower.<sup>149</sup> Despite the low profiles of human rights groups, the culture of acceptance has begun to improve nonetheless,<sup>150</sup> suggesting that this lower-profile approach can be successful in the proper setting.

Concurrent with this more subtle strategy is a heightened use of legal arguments compared to human rights tactics in other nations. These arguments serve as a centerpiece of the letterwriting campaigns, with letters reminding the South Korean legislature of its treaty obligations. Nowhere in these letters, however, does the distinction between pre-existing law and newly created law

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<sup>147</sup> International Gay and Lesbian Human Rights Commission, *South Korea: Stop Bill before It Goes to National Assembly* (cited in note 131).

<sup>148</sup> This is not to insinuate that there are not serious consequences of homophobia in South Korea; these consequences are just sometimes more indirect. For example, workplace discrimination has been documented, as have suicides by LGBT youth (which some attribute to homophobic education). Violence is also not uncommon. See Huso Yi, *Life and Death in Queer Korea: Part 1: A Queer Exorcism: How Religion and Violence Shadow LGBT Koreans*, The Gully Online Magazine (Mar 7, 2003), available online at <[http://www.thegully.com/essays/asia/030306\\_lgbt\\_korea\\_huso\\_yi.html](http://www.thegully.com/essays/asia/030306_lgbt_korea_huso_yi.html)> (visited Apr 5, 2007).

<sup>149</sup> After the internet censorship issues described above, LGBT rights groups have apparently become more cohesive, but still lack funding and widespread support.

<sup>150</sup> For example, the entertainer Lee Kyong Eun (also known as “Ha Ri Su”), who underwent a sex change operation in 1995, is very popular; Hong Suk Chon, an openly gay actor, lost his job in 2000 when he revealed his homosexuality, but by 2003 was the star of a popular television show in which he portrayed an openly gay man. See Faiola, *South Korean Loosens Its Collar* (cited in note 137).

arise. The international human rights organizations could capitalize on this distinction to increase the force of their arguments.

### C. CREATING ENTIRELY NEW LAW: GUATEMALA

#### 1. Legislation: The “Integral Protection for Marriage and Family Act”

The first draft of the “Integral Protection for Marriage and Family Act” was submitted to the Guatemalan Congress in October 2005 (though it was not debated in Congress until July 2007).<sup>151</sup> The draft legislation proposes to eliminate single parents as well as same-sex couples from the official definition of “family.”<sup>152</sup> Were the legislation to be enacted, only a nuclear family made up of a father, mother, and their children would be defined as a “family.”<sup>153</sup> The draft states: “[F]amily essentially originates, exclusively, from the conjugal union between a man and a woman through marriage or through a legally declared de facto union and other social forms, such as a religious ceremony or ritual, custom or cultural practice, as the only natural design.”<sup>154</sup> Though its supporters had hoped to have it passed in October 2007, the bill is still pending because of threats of a same-sex marriage demonstration by Guatemalan LGBT rights group OASIS.<sup>155</sup>

#### 2. Prior Status of Guatemala’s Law and Current International Obligations

Guatemala does not currently have any sodomy laws, nor has it ever had any such laws. Violence toward the LGBT community is prevalent, though, with close to fifty LGBT people having been killed (and often mutilated) in the past three years.<sup>156</sup>

Guatemala is a party to the ICCPR and to the American Convention on Human Rights.<sup>157</sup>

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<sup>151</sup> *Guatemala: Activists Oppose Proposed Law on “Family” Definition*, Isis International (Oct 30, 2007), available online at <[http://www.isiswomen.org/index.php?option=com\\_content&task=view&id=820&Itemid=204](http://www.isiswomen.org/index.php?option=com_content&task=view&id=820&Itemid=204)> (visited Apr 5, 2008).

<sup>152</sup> *Id.*

<sup>153</sup> Ines Benitez, *Guatemala: Same-Sex Couples to Lose Rights under New Bill*, IPS (Oct 5, 2007).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> For further discussion on obligations under the ICCPR and the American Convention on Human Rights, see Sections II.A.1 (ICCPR) and II.B.2 (American Convention on Human Rights).

### 3. Rationales and Reasons

Speaking to the press, Guatemala's Parliamentary Deputy Carlos Eduardo Velasquez, of the small, right-wing Unity of National Change party, said that "the law defends the family and prevents the concept of marriage from being distorted. Marriage cannot be between homosexuals."<sup>158</sup> He has responded to criticism from Human Rights Watch and other LGBT rights organizations by explaining that, because "homosexuality is a preference, not a right," it is not protected under Guatemala's constitution, which only "establishes that we all have the same rights."<sup>159</sup> Velasquez also contends that Guatemala's constitution defends homosexuals "as people, but not their preferences." He responds to criticisms that the legislation is contrary to Guatemala's obligations under the ICCPR by stating that "the people of Guatemala do not want homosexual marriage."<sup>160</sup> In support of this claim, he points to the support of the Catholic and Evangelical Protestant churches in Guatemala, and the 82,000 signatures he has collected since the law was proposed in 2005.<sup>161</sup>

Both candidates in Guatemala's recent presidential election in November 2007 publicly opposed same-sex marriage rights during their campaigns. Guatemala's president-elect, Alvaro Colon, has expressed concisely his views on the subject: "God said Adam and Eve, not Adam and Steven."<sup>162</sup>

On a practical level, some sources note that legislators consider the bill as a "response to a series of gay-friendly laws passed in Latin America [and in the United States] in recent years allowing legally recognized civil unions in parts of Mexico, Colombia, Brazil, Argentina, and the United States."<sup>163</sup> It is possible that supporters of the legislation have been spurred into action by their desire to counter the pro-LGBT rights efforts of these other countries.

### 4. International Response

The international response to Guatemala's proposed legislation has included measures similar to those seen in the South Korean example. For example, Human Rights Watch sent a letter to the Guatemalan Congress, urging the Congress to vote against the bill because it would "eliminate single-parent or other non-nuclear families from the definition of 'family,'" and "could

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<sup>158</sup> Id.

<sup>159</sup> Id.

<sup>160</sup> Id.

<sup>161</sup> Id.

<sup>162</sup> Id.

<sup>163</sup> Mica Rosenberg, *Family Bill Could Hurt Guatemala Single Moms Group*, Reuters (Oct 8, 2007), available online at <<http://www.reuters.com/article/latestCrisis/idUSN08330927>> (visited Apr 5, 2008).



potentially affect the legal status of children born with the assistance of reproductive technologies.”<sup>164</sup> As in the South Korea example, letter writing is used here to publicly, clearly remind the domestic government of its international human rights obligations, while refraining from antagonizing the government or appearing too confrontational.

### 5. Assessment of Strategies

A more legal and incremental approach is apparent here. The Human Rights Watch letter complains extensively about Guatemala’s international treaty obligations in the American Convention on Human Rights, the UN Convention on the Rights of the Child, CEDAW, and the ICCPR.<sup>165</sup> Interestingly, the letter also reminds the Guatemalan legislature of its own domestic constitution and legislation, both of which contain law contrary to this proposed legislation. For example, Article 1 of the Guatemalan Constitution “states that the Guatemalan State is founded, among other goals, to protect the family,” and Article 47 states that families will be protected on “the legal basis of marriage”—and the Constitution does not define marriage in terms of a man and a woman, but *does* say that “[i]n Guatemala, all human beings are free and equal in dignity and rights.”<sup>166</sup> The proposed legislation would then, according to this line of reasoning, directly contravene Guatemala’s own constitution.

## IV. CONCLUSION

A great deal of evidence suggests that the incremental approach might ultimately be a more expedient way to improve international gay rights, particularly in the case of developing nations. In many of the cases described in the above section, *not* using the incremental approach has wrought changes to the detriment of the LGBT rights community (for example, Nigeria and Ghana). Also, in many cases, lawmakers proposed legislation limiting protections for LGBT rights only upon increased pressure from international human rights groups. It is clear—and not only in the few examples presented above<sup>167</sup>—that

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<sup>164</sup> Human Rights Watch, *Letter to the Guatemalan Congress regarding Marriage and Family Law* (Oct 1, 2007), available online at <<http://hrw.org/english/docs/2007/10/01/guatem16984.htm>> (visited Apr 5, 2008).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> For another example of this phenomenon, see Maguire, 35 Cal W Intl J at 4 n 8 (cited in note 9) (noting how a “sensational, but false” newspaper report of a gay marriage in Uganda led President Yoweri Museveni to order Uganda’s Criminal Investigations Department to arrest homosexuals) (citing Anna Borzello, *Homophobia Strikes Uganda*, *Johannesburg Mail & Guardian* (Oct 26, 1999)).

the mere existence of vocal human rights groups can be enough to push a nation's leadership to condemn the groups and their causes.

The Nigerian case is particularly fascinating because of the direct conflict between African human rights groups, which generally advocate the incremental approach, and groups that are farther removed (both geographically and culturally) from the nation they are attempting to change and that advocate a more aggressive approach. It appears that in the Nigerian case, the involvement of OutRage!, the extremist British gay rights direct-action group, compromised the efforts of African human rights groups. This scenario might be seen as a microcosm for the fundamental problem in advocating for a uniform international recognition of LGBT rights: when international pressure forces a nation to address an issue, the nation may choose to address the problem in a way undesired by the international community. Ultimately, an incremental approach to human rights would better serve the aims of improving LGBT rights worldwide.

In terms of the "legal argument" approach, the situations in which these arguments seem to be most effective are those in which legislation is proposed that, for the first time, would create a conflict with a treaty's protections of LGBT rights. Nations that already have anti-sodomy provisions in their legal codes would be less amenable to legal arguments. These countries are likely to be hostile either to the LGBT community (which is why anti-sodomy laws would already be on the books) or to the idea of international law dictating the strictures of their own legislation (nations that are ex-colonies often harbor these sentiments and retain anti-sodomy laws from the colonial period—with the exception of France's former colonies).<sup>168</sup> Thus, these nations are often more intractable and less willing to accept a reasoned argument. In those places, it seems as though the incremental approach is best—Peter Tatchell and OutRage! garner publicity, but some of this publicity comes in the form of antagonism, outrage, and anti-LGBT propaganda in the very countries they target.<sup>169</sup> In contrast, in nations where anti-LGBT legislation is proposed for the first time, there is probably a recent precipitating cause.<sup>170</sup> These nations might have less entrenched discrimination and would be more likely to be influenced by arguments stressing international treaty violations. The legal and incremental

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<sup>168</sup> Robert Aldrich, *Homosexuality in the French Colonies*, in Jeffrey Merrick and Michael Sibalis, eds, *Homosexuality in French History and Culture 202* (Haworth 2001) (noting that homosexuality was decriminalized in post-Revolution France and its colonies).

<sup>169</sup> For example, Zimbabwe and Nigeria.

<sup>170</sup> In South Korea, this precipitating cause was the growing presence of the LGBT community clashing with a conservative Christian-Confucian society; in Guatemala, the two causes were (1) legislation passed in neighboring countries and (2) concurrent moral and religious concerns.

approaches are not mutually exclusive, though, and would likely be most effective if used in tandem in those situations.

Ultimately, the tools that should be used depend on the nature of the problem. When pending legislation threatens to create a new conflict with a treaty, the international LGBT rights community could best effect positive change by using a legal or a combined legal and incremental approach. When legislation violating a treaty is already in existence, and the legislature refuses to repeal it or attempts to make it worse, the incremental approach would generally be more effective.