

A Prohibition on Antisodomy Laws Through Regional Customary International Law

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Within the last sixty years, there has been a noticeable trend towards the decriminalization of the gay and lesbian community. A great number of nation-states have repealed their antisodomy laws, and a number of those states have affirmed their reasoning for doing so in public international agreements or statements recognizing the right to engage in adult consensual same-sex relations. Along with the abundance of recent repeals, academics, judges, and persons interested in international law have discussed the emergence of a customary international law norm prohibiting state-sponsored antisodomy laws. However, the discussion of the existence of the norm revolves around the right to privacy, as many states' antisodomy laws were repealed through nations' right to privacy laws.

While there may be a customary international law norm protecting the right to privacy, it does not necessarily follow that it includes the right to engage in same-sex sexual activity. An assessment of customary international law rules, then, is essential to establishing whether a prohibition on state-sponsored antisodomy laws is present, notwithstanding the arguments encompassing the norm under the right to privacy. Because customary international law rules are difficult to ascertain, a practical approach to locating a customary rule is needed. Comparing the proposed norm with a crystallized customary international law rule and a norm that did not fully reach crystallization provides a useful assessment for determining where the norm is currently located and predicting whether it will crystallize in the future. Additionally, a closer look at whether there is support for an emerging regional customary international law norm is necessary. The debate about the existence of a norm prohibiting state-sponsored antisodomy laws has not yet touched on this issue.

International human rights law imposes an absolute prohibition of discrimination with regard to the full enjoyment of all human rights, civil, cultural, economic, political, and social. Additionally, respect for sexual rights, sexual orientation, and gender identity is integral to the realization of equality between men and women. States must take measures to eliminate prejudices and customs based on the inferiority or superiority of one sex or stereotyped gender roles. "[N]oting further that the international community has recognized the right of persons to decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free from coercion, discrimination, and violence,"¹ an examination of the possibility of a customary international law norm regarding antisodomy laws is warranted.

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1. The Int'l Panel of Experts in Int'l Human Rights Law & on Sexual Orientation & Gender Identity, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, 9 pmbL, Nov. 6, 2006 [hereinafter *Yogyakarta Principles*], available at http://www.yogyakartaprinciples.org/principles_en.htm.

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I. INTRODUCTION

Within the last sixty years, there has been a noticeable trend towards the decriminalization of the gay and lesbian community.² A great number of nation-states have repealed their antisodomy laws, and a number of those states have affirmed their reasoning for doing so in public international agreements or statements recognizing the right to engage in adult consensual same-sex³ sexual relations.⁴ This

2. DANIEL OTTOSON, THE INT'L LESBIAN & GAY ASS'N, STATE SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS 45 (2008), http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf [hereinafter ILGA SURVEY].

3. Throughout this Article, I will refer to "same-sex" acts instead of "homosexual" acts in order to avoid any negative connotation associated with the latter.

phenomenon has also recently penetrated the domestic laws of many nations.⁵ For example, in 1981 the European Court of Human Rights (ECHR) decriminalized same-sex sexual activity in the forty-seven countries of the Council of Europe in *Dudgeon v. United Kingdom*.⁶ In 2003, the Supreme Court of the United States declared state antisodomy statutes unconstitutional in *Lawrence v. Texas*,⁷ in part, because a majority of states no longer prohibited same-sex sexual conduct by consenting adults.⁸

With the abundance of such recent repeals, academics, judges, and persons interested in international law have discussed the possible emergence of a customary international law norm⁹ prohibiting state-sponsored antisodomy laws.¹⁰ This discussion revolves around the right to privacy because many state antisodomy laws were repealed through nations' right to privacy laws.¹¹ The debate about the right to privacy as a customary international law norm is largely settled;¹² however, whether such a customary international right to privacy contains a right to decisional privacy, including a right to engage in same-sex relations, is still debatable.¹³

Persons arguing for the norm reason that because the right to privacy was included in the Universal Declaration of Human Rights (UDHR) and adopted without dissent in 1948, its later adoption in at least eighteen nations' constitutions and "virtually every major human rights initiative and convention . . . over the last three decades" qualifies it as a crystallized customary international law norm.¹⁴

While there may be a customary international law norm protecting the right to privacy, the question remains whether it includes the right to engage in same-sex sexual activity. Although privacy laws usually afford

4. See *infra* Part IV.A.

5. See *infra* Part IV.A.

6. 45 Eur. Ct. H.R. (ser. A) (1981).

7. 539 U.S. 558, 573 (2003).

8. See *id.* at 570.

9. Throughout this Article, I use the phrase "customary international law" and the terms "rule(s)" and "norm(s)" interchangeably.

10. See David A. Catania, *The Universal Declaration of Human Rights and Sodomy Laws: A Federal Common Law Right to Privacy for Homosexuals Based on Customary International Law*, 31 AM. CRIM. L. REV. 289 (1994); ILGA SURVEY, *supra* note 2; see, e.g., *Lawrence*, 539 U.S. 558.

11. See discussion *infra* Part IV.B.

12. See generally Catania, *supra* note 10 (arguing that the right to party is guaranteed by The Universal Declaration of Human Rights, G.A. Res. 217A at 71, U.N. GAOR, 3d Sess. 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), which is a source of customary international law).

13. See *id.*

14. *Id.* at 301 (internal citation omitted).

protection against discrimination without regard to any “status,” customary international law requires such a high degree of specificity that any argument that sodomy laws are implicitly prohibited by right to privacy laws is weak.¹⁵

An assessment of customary international law rules is necessary to establish whether a prohibition on state-sponsored antisodomy laws is present, notwithstanding the arguments encompassing the norm under the right to privacy.¹⁶ However, because customary international law rules are difficult to ascertain, a practical approach to locating a customary rule is necessary. Comparing the proposed norm with a crystallized customary international law rule and a norm that has not fully crystallized provides a useful assessment for determining where the norm is currently located and predicting whether it will crystallize in the future.

Additionally, it is helpful to take a closer look at whether there is support for an emerging regional customary international law norm regarding state-sponsored antisodomy laws. The debate about the existence of such a regional norm has not yet touched on this issue. However, a discussion of regional customary international law is merited because it reflects the emergence of binding norms in particularized regions. This discussion is particularly important because of four significant events that happened within the last few years: the adoption of a resolution by the Organization of American States; two statements made at the United Nations on December 18, 2008; and the creation of the Yogyakarta Principles by a group of international human rights experts.¹⁷

I will begin Part II of this Article by looking at the historical origins of the criminalization of same-sex sexual activity and why the proposed norm is necessary. Although same-sex sexual activity has been recorded throughout history in both Eastern and Western civilizations, it has not always been punishable as a crime.¹⁸ However, the later emergence of antisodomy laws led to the criminalization of a distinct class of people. Part II will discuss when the concept of sexual identity began to emerge and the effects that the criminalization of sodomy has had on the LGBT¹⁹ community.

15. See UDHR, *supra* note 12, art. 2 (prohibiting discrimination based on “other status”); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention].

16. See *id.*

17. See discussion *infra* Part IV.D.

18. See discussion *infra* Parts II.A-B.

19. LGBT stands for lesbian, gay, bisexual, and transgendered persons.

Part III of this Article will then explain customary international law generally, how norms of customary international law form, and the benefits of identifying crystallized rules. Part III will also discuss how the persistent objector exception allows states to remain unbound by a crystallized or a regional customary international law rule.

In Part IV, I will apply customary international law rules to determine whether a prohibition on state-sponsored antisodomy laws exists. Part IV will examine a 2008 Human Rights Watch global survey of antisodomy laws, as well as relevant international agreements, notable judicial opinions, and recent public statements made by state officials.

Parts V and VI of this Article compare the status of the proposed norm with a crystallized customary international law norm, and the prohibition on state-sponsored torture with the prohibition against the death penalty, a norm that never fully reached crystallization. The reason for these comparisons is to produce a virtual testing scale that can measure where the proposed norm, the prohibition on state-sponsored antisodomy laws, is located in the crystallization process.

In Part VII, I conclude that the recent repeals of state antisodomy laws and pertinent international agreements do not reflect a global crystallized customary international law norm. In Part VII, I recognize the strong opposition to the emergence of the norm in Africa and other non-Western nations, but argue that a regional customary international norm has emerged among Western States.

II. WHY THE PROPOSED NORM IS NECESSARY

A. *Same-Sex Sexual Activity in Different Regions of the World*

Same-sex sexual activity has been documented in literature and history in both Eastern and Western regions of the world for centuries.²⁰ There is evidence that both men and women participated in same-sex sexual activity in ancient Greece and Rome, although neither culture delineated sexual orientation as nations do today.²¹ There is also a large amount of documentation that same-sex sexual activity occurred in both Imperial China and pre-Meiji Japan.²²

Although same-sex sexual activity has taken place in different regions of the world for centuries, no concept of homosexuality existed

20. See generally LOUIS CROMPTON, *HOMOSEXUALITY & CIVILIZATION* (2003) (tracing evidence of homosexuality throughout history in civilizations around the world).

21. See *id.* at 3-20, 79-110 (discussing the cultural understandings of same-sex activities in ancient Greece and Rome).

22. *Id.* at 213, 411.

in the past like it does today. The Greek word *paiderastia*, meaning “boy love,” was the closest term to the modern concept of homosexuality; however, it referred to the mentor-like relationships that older men would have with younger men.²³ Even in pre-Meiji Japan, sexuality was not thought of as a static concept, but as “a natural phenomenon to be enjoyed with few inhibitions.”²⁴

The concept of sexual identity, or, more specifically, the notion of a delineation between heterosexuality and homosexuality, emerged in the late nineteenth century after psychologists, such as Karoly Maria Benkert, began classifying same-sex preferences as traits.²⁵ Around this time, legal prohibitions on sodomy began targeting sexual minorities, as those antisodomy laws “sought to prohibit non-procreative sexual activity.”²⁶

B. *Criminalization of Sexual Identities*

The concept of same-sex sexual activity as a “crime against nature” made its way into Western laws through the works of philosophers like Plato, Thomas Aquinas, and Sir William Blackstone.²⁷ For them, same-sex sexual activity was “unnatural” because it “frustrate[ed] the only ‘natural’ purpose of sex: i.e., procreation.”²⁸ At that time, sexual pleasure was thought “to be contaminating, tolerable only to the degree that it furthered reproduction (specifically, of Christians).”²⁹

Because the Western world began to view same-sex sexual activity as “unnatural,”³⁰ criminal prohibitions against such activity were enacted throughout Europe and many such crimes were given vague names like “‘buggery,’ ‘gross indecency’ or ‘crimes against nature.’”³¹ In England,

23. *Id.* at 3-4.

24. *Id.* at 413.

25. DAVID F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* 409 (1990); John Money, *Sin, Sickness, or Status?: Homosexual Gender Identity and Psychoneuroendocrinology*, 42 AM. PSYCHOLOGIST, Apr. 1987, at 384.

26. *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

27. Donald C. Knutson, *Homosexuality and the Law*, 5 J. HOMOSEXUALITY 1, 8 (1979-80).

28. *Id.*

29. HUMAN RIGHTS WATCH, *THIS ALIEN LEGACY: THE ORIGINS OF “SODOMY” LAWS IN BRITISH COLONIALISM* 13 (2008), available at <http://www.hrw.org/sites/default/files/reports/lgbt1208web.pdf> [hereinafter *THIS ALIEN LEGACY*] (defining sex by its general result is limiting since human beings obviously have the capacity to direct their sexuality to the expression of romantic love and to recreation as well as to procreation); see KNUTSON, *supra* note 27, at 8.

30. KNUTSON, *supra* note 27, at 8.

31. Mark Bromley & Kristen Walker, *The Stories of Dudgeon and Toonen: Personal Struggles To Legalize Sexual Identities*, in *HUMAN RIGHTS ADVOCACY STORIES* 83, 86 (Deena R. Hurwitz et al. eds., 2009).

the first criminal prohibition against sodomy was enacted by the Reformation Parliament in 1533.³² However,

[t]he first recorded mentions of “sodomy” in English law date back to two medieval treatises called *Fleta* and *Britton*. They suggest how strictures on sex were connected to Christian Europe’s other consuming anxieties. *Fleta* required that “Apostate Christians, sorcerers, and the like should be drawn and burnt. Those who have connections with Jews and Jewesses or are guilty of bestiality or sodomy shall be buried alive in the ground, provided they be taken in the act and convicted by lawful and open testimony. *Britton*, meanwhile, ordered a sentence of burning upon “sorcerers, sorceresses, renegades, sodomists, and heretics publicly convicted.” Both treatises saw “sodomy” as an offense against God. They classed it, though, with other offenses against ritual and social purity, involving defilement by Jews or apostates, the racial or religious Other.

The grab-bag of crimes was telling. It matched medieval law’s treatment of “sodomy” elsewhere in Europe. The offense was not limited to sexual acts between men, but could include almost any sexual act seen as polluting.³³

With the advent of colonization, Western nations imposed their laws upon the conquered peoples of Asia and Africa.³⁴ This included injecting “European morality into [the] resistant masses,” which seemingly “did not punish ‘perverse’ sex enough.”³⁵ More than half of the countries that still retain laws criminalizing same-sex sexual activity do so, in part, because of their colonial roots.³⁶

The influence of British imperialism on sexual radicalism was powerful. States such as Zimbabwe³⁷ now condemn Western acceptance of same-sex sexual activity, although they did not legally punish same-sex relations until recently. This was noted by African LGBT activists in a 2004 petition to the United Nations, which emphasized that “[p]olitical leaders say these laws defend ‘African cultural traditions’—even though, without a single exception, these laws are foreign imports brought by the injustice of colonialism.”³⁸

32. *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

33. THIS ALIEN LEGACY, *supra* note 29, at 13.

34. *See also* Bromley & Walker, *supra* note 31, at 86. *See generally* THIS ALIEN LEGACY, *supra* note 29, at 5.

35. THIS ALIEN LEGACY, *supra* note 29, at 5.

36. *Id.* (identifying the widespread application of British antisodomy laws in Africa, Asia, and the Pacific); *see also* Appendix B.

37. *See, e.g.*, SCOTT LONG, HUMAN RIGHTS WATCH, MORE THAN A NAME: STATE-SPONSORED HOMOPHOBIA AND ITS CONSEQUENCES IN SOUTHERN AFRICA 23 (2003) (noting that President of Zimbabwe Robert Mugabe called sodomy particularly un-African).

38. Bromley & Walker, *supra* note 31, at 86.

Although criminalization of same-sex sexual activity is now virtually absent in the West,³⁹ this is a recent occurrence,⁴⁰ and other forms of discrimination and prejudice are still apparent. Today, there are seven states where same-sex sexual activity is punishable by the death penalty: Iran, Mauritania, Northern Nigeria, Saudi-Arabia, Sudan, Yemen, and the United Arab Emirates and Yemen.⁴¹ Moreover, even in the West, the LGBT community is still publicly admonished by politicians and other governmental leaders.⁴² For example, in February 2009, Utah State Senator Chris Buttars called the gay and lesbian community the “greatest threat to America,” asserting that LGBT individuals are abominations to society and lack morality.⁴³ Thus, over time the criminalization of same-sex sexual activity has turned into the criminalization of a distinct class of people.⁴⁴

C. Psychological Dimensions of Sexual Prejudice and Individual and Societal Costs

Since the notion of a delineation between heterosexuality and homosexuality emerged in the late nineteenth century, Western researchers’ views of the LGBT community have evolved.⁴⁵ The famous *Wolfenden Report*, put together in 1957 by the British Departmental Committee on Homosexual Offenses and Prostitution, concluded that homosexual behavior between consenting adults in private should not be a criminal offense.⁴⁶ The report noted that “homosexuality cannot legitimately be regarded as a disease, because in many cases it is the only symptom and is compatible with full mental health in other respects.”⁴⁷ In 1973, the American Psychiatric Association declared that people who

39. See Appendix A.

40. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986), and holding state antisodomy statutes unconstitutional).

41. ILGA SURVEY, *supra* note 2, at 46.

42. See, e.g., Rosemary Winters, *Buttars: Gays Are Greatest Threat to America*, SALT LAKE TRIB., Feb. 18, 2009.

43. *Id.*

44. See generally Bromley & Walker, *supra* note 31, at 86.

45. See generally COMM. ON HOMOSEXUAL OFFENSES & PROSTITUTION, THE WOLFENDEN REPORT 23-24 (1963) [hereinafter THE WOLFENDEN REPORT].

46. See *id.* The report continued:

The law’s function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others. . . . It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior.

Id. at 23.

47. *Id.* at 32.

engage in same-sex sexual activity should not be categorized in its *Diagnostic and Statistical Manual of Mental Disorders*, because conducting same-sex sexual activity was not evidence of a mental illness.⁴⁸

Now that the concept of sexual identity has become accepted in the scientific and academic communities, the criminalization of LGBT persons because of their sexual identity creates negative consequences for them, as well as for their societies.⁴⁹ According to some psychologists, “[p]ervasive sexual prejudice promotes antigay violence and an environment in which it is sanctioned and accepted. A cultural climate of denigration allows widespread violence against sexual minorities to go largely unpunished, conveying the message that gay, lesbian, and bisexual people do not deserve full legal protection and justice.”⁵⁰

Scholars also argue that certain negative mental health consequences stem from such sexual prejudice.⁵¹ According to them, intentional victimization causes significant levels of psychological distress and impairment in gays and lesbians.⁵² This leads to “a reduction in . . . level[s] of basic trust[,] . . . low self-esteem, depression, and feelings of helplessness.”⁵³

Nongovernmental organizations (NGOs) also have documented negative consequences of continued state criminalization of same-sex sexual conduct.⁵⁴ As reported by Human Rights Watch, gays and lesbians are routinely physically punished and even subjected to state-sponsored torture in states such as Egypt, where the government publicly vilifies the LGBT community.⁵⁵ In India, the antisodomy laws’ textual provisions are so vague that the Indian police forces can “arrest people on the presumption of sodomy, without proof of an actual act.”⁵⁶ Therefore,

48. Lynne Lamberg, *Gay Is OK with APA* (American Psychiatric Association) (Aug. 12, 1998), <http://www.soulforce.org/article/642>; see also Gregory M. Herek, *The Psychology of Sexual Prejudice*, in *PSYCHOLOGICAL PERSPECTIVES ON LESBIAN, GAY, AND BISEXUAL EXPERIENCES* 157, 157 (Linda D. Garnets & Douglas C. Kimmel eds., 2d ed. 2003).

49. Herek, *supra* note 48, at 153.

50. *Id.*

51. See, e.g., Linda D. Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, in *PSYCHOLOGICAL PERSPECTIVES ON LESBIAN, GAY, AND BISEXUAL EXPERIENCES*, *supra* note 48, at 188.

52. *Id.*

53. *Id.* at 189.

54. ILGA SURVEY, *supra* note 2, at 4-6.

55. See generally THIS ALIEN LEGACY, *supra* note 29.

56. *Id.* at 30-31 (noting the 1884 case of *Queen-Empress v. Khairati*, (1884) F. App., 204, 602, where the trial court upheld an arresting officer’s discretion, as the “defendant” was shown to have the characteristic mark of a “habitual catamite—the distortion of the orifice of the anus

because criminalizing sexual identity can have detrimental effects on individuals and societies, the need for the decriminalization of same-sex sexual activity is apparent.

III. THE SIGNIFICANCE OF CUSTOMARY INTERNATIONAL LAW

A. *Introduction to Customary International Law*

Customary international law is one recognized source of international law that may contribute to reaching global sexual equality within the next century.⁵⁷ Customary rules result from “a general and consistent practice of states followed by them from a sense of legal obligation.”⁵⁸ They bind states that assent to them, but also “are capable of binding States which have neither participated in their development . . . nor acknowledged their prescriptive force.”⁵⁹ These rules have become particularly important in the field of international human rights law within the last century, as state recognition of human rights has increased.⁶⁰

The importance of identifying crystallized customary international law rules cannot be understated. Because customary international law can carry the same weight as treaties in the international sphere, the binding legal obligations that follow are important in order to determine to which obligations States must adhere.⁶¹ It is also important to determine which States are bound to the rules because customary

into the shape of a trumpet . . . which distinctly points to unnatural intercourse within the last few months.”

57. According to the 1920 Statute of the Permanent Court of International Justice (PICJ), there are four sources of international law a court will look to when deciding cases: treaties, international custom, general principles of law; and judicial decisions and the teachings of scholars. These sources are reiterated in the current International Court of Justice’s (ICJ) statute, and according to article 38, the ICJ must apply these sources when settling the disputes which have come before it. *See* The Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060. Although the decisions made by these courts do not constitute legally binding precedents for all nations, their interpretation of customary international law is particularly instructive here. Throughout the rest of the Article, I will refer to customary international law as “custom” and “customary rules or norms.”

58. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 102(2) (1987). Similarly, the International Court of Justice noted the same two requirements in the *North Sea Continental Shelf Cases*. *See* North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 I.C.J. 3 (Feb. 20).

59. MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES 142 (1999).

60. *See* Catania, *supra* note 12, at 300.

61. Article 38 of ICJ’s statute does not delineate which sources should be accorded more weight. *See* The Statute of the International Court of Justice, June 26, 1945, art. 38, 59 stat. at 1060; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES, § 102 cmt. (j) (“[C]ustomary law and law made by international agreement have equal authority as international law.”).

international law can have an exponential reach. For example, if a significant number of States consistently follow a principle because they believe that they are legally obligated to do so, the remaining States also adhere to that norm, unless they openly and repeatedly object to the rule during its formation.⁶² If a State does not object to the norm during its formation, it will be bound by the rule through tacit acceptance.⁶³ Moreover, “a [S]tate that enters the international system after a practice has ripened into a rule of international law is bound by that rule.”⁶⁴ Therefore, the binding effect of a customary international law rule is threefold: it will bind states that consent to the rule, states that did not object to the rule as it was forming, and states that later emerge on the international plane.⁶⁵

Identifying customary international law rules is also important because of its legal consequences in the international sphere, and the fact that those consequences may also reach the domestic spheres of states. In the international realm, a crystallized norm becomes binding on all states,⁶⁶ except for those that persistently object to it.⁶⁷ The effects of customary international rules on states’ domestic laws, however, are different depending on whether and to what extent states incorporate customary international law into their domestic laws. For example, some states view international law as having a higher status than domestic law and, thus, they automatically subsume customary norms into their domestic laws.⁶⁸ For these states, it is hard to dismiss the significance of identifying crystallized customary international law rules. Once a rule has emerged, such states automatically incorporate the international norm into their domestic laws and will be bound by it.⁶⁹

On the other hand, the effects of customary international law on the domestic law of states may be quite different. Some states, like the United States, view the international and domestic spheres as particularly distinct and do not automatically include international law norms in their domestic laws.⁷⁰ States such as the United States generally incorporate

62. See discussion *infra* Part III.C.

63. See discussion *infra* Part III.C.

64. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES, § 102 cmt. (d).

65. See *id.*

66. INT’L LAW ASS’N, FINAL REPORT OF THE COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW, REPORT OF THE SIXTY-NINTH CONFERENCE, LONDON 24 (2000) [hereinafter ILA REPORT].

67. See discussion *infra* Part III.C.

68. See generally SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW (2006).

69. *Id.*

70. *The Paquete Habana*, 175 U.S. 677 (1900).

international law according to their own domestic processes, which are a product of an individual state's consent to such rules. However, there are caveats to this distinction. In *The Paquette Habana*, the Supreme Court of the United States found that international law, including custom, is a part of U.S. law.⁷¹ Therefore, whether a state views international law and domestic law as distinct from one another is not as significant as one might think. This determination only clarifies *how* custom enters domestic law; however, no matter which view is adopted, custom penetrates states' domestic spheres and the inquiry must shift to the nature and extent of that entry.

Identifying customary international law norms, or crystallized norms, is a complex task. There is no single, official source to locate past or present rules;⁷² and moreover, the formation process is not driven by *a priori* reasoning,⁷³ but instead by the actual practice of states.⁷⁴ State practice is particularly difficult to determine because actual intent is not always readily apparent, base political concerns may drive state action rather than popular consent,⁷⁵ and it is not always clear whether a particular action of a state represents the state's position on custom.⁷⁶

The second requirement of *opinio juris*, or a sense of legal obligation, is also inherently difficult to ascertain. Although *opinio juris* "may be inferred from acts or omissions," as "[e]xplicit evidence of a sense of legal obligation (*e.g.*, by official statements)," actual practice of states may contradict their treaties or official statements making the inquiry more complex.⁷⁷

To make matters more difficult, only a few judicial opinions discuss the formation of customary international law.⁷⁸ There is no requirement that a customary rule must be pronounced by a tribunal, but judicial

71. *Id.* at 700 ("[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . .").

72. MURPHY, *supra* note 68, at 78 (noting that there is no treaty similar to the Vienna Convention on the Law of Treaties regarding customary international law).

73. *A priori* reasoning relies on the logical connections between ideas, without regard to external empirical evidence.

74. MURPHY, *supra* note 68, at 13-14.

75. ILA REPORT, *supra* note 66, at 719 ("Where a rule of general customary international law exists, for any particular State to be bound by that rule it is not necessary to prove either that State's consent to it or its belief in the rule's obligatory or (as the case may be) permissive character:").

76. *See id.* at 713-19.

77. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES, § 102 cmt. (c) (1987).

78. ILA REPORT, *supra* note 66, at 717-19 (noting that one significant case the ICJ decided, the *North Sea Continental Shelf Cases*, addressed the rules of formation in custom, as discussed *infra* notes 97, 103-104).

opinions are important to the development of customary rules because, “[w]hen a court is asked to apply a customary rule, it must first determine whether such [a] rule exists and is binding on those who are parties to the case before it.”⁷⁹ Therefore, the methods used by courts to ascertain whether a rule exists or applies to a state are helpful in determining the formation process.

Further, jurists and NGOs play important roles in ascertaining customary international law rules. Because jurists’ opinions are sources of international law to which the International Court of Justice (ICJ) looks when making decisions, these opinions can be very influential.⁸⁰ Moreover, because states and international organizations also look to these sources, the normative impact of jurists’ opinions can be viewed as even more substantial.⁸¹

NGOs play a role in the discussion about the formation of customary international law. For example, the International Law Association (ILA), an international NGO with consultative status at the United Nations,⁸² formed the Committee on the Formation of Customary (General) International Law in 1984 in order to put together a comprehensive report on formation rules.⁸³ The final report of the Committee contains a broad account of the principles underlying the formation of customary international law⁸⁴ and has been widely influential in the debate about the formation of such norms. While this report is not formally binding, its guidance is particularly useful in clarifying the less-than-systematic rules promulgated by international courts and tribunals.⁸⁵

B. State Practice Requirement

In order for a customary international law rule to form, state practice regarding the rule must be consistent and virtually uniform.⁸⁶ This requirement is reasonable because a showing of consistent and

79. Melissa Robbins, *Powerful States, Customary Law and the Erosion of Human Rights Through Regional Enforcement*, 35 CAL. W. INT’L L.J. 275, 294 (2005).

80. See discussion *supra* Part III.

81. See JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 146-48 (2005).

82. Int’l Law Ass’n, About Us, http://www.ila-hq.org/en/about_us/index.cfm (last visited Dec. 20, 2008).

83. See ILA REPORT, *supra* note 66, at 712-13.

84. *Id.*

85. *Id.* at 714-15 (ascertaining the formation of customary international law with purely inductive reasoning—looking at the actual practice of states) The specific rules discussed in Part III.B take into account the Committee’s report, as well as other judicial and jurists’ opinions.

86. See *id.* at 724-26.

uniform practice reflects a state's consent to be bound by that rule.⁸⁷ Moreover, if a sufficient number of states adhere to a particular norm, it is easier to find that they do so out of a sense of legal obligation.

State practice must be quantifiable in order to determine whether it is "extensive and virtually uniform."⁸⁸ Because this requirement is a standard and not a rule,⁸⁹ there is no bright-line test to determine how much state practice is required. Therefore, "what qualifies as 'sufficiently extensive' [practice] necessarily will depend on the opinion of the court or other body conducting such a determination."⁹⁰

In order to quantify this objective element, courts look to

diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states, for example in organizations such as the Organization for Economic Cooperation and Development (OECD). Inaction may constitute state practice, as when a state acquiesces in acts of another state that affect its legal rights.⁹¹

A practice itself might include physical acts, such as arresting terrorists, or verbal acts, such as policy statements from government branches.⁹²

However, the conduct must be exhibited publicly to meet the state practice requirement.⁹³ Because this element is objective, the practice must be known and ascertainable in order to be quantifiable. For example, states may not want privileged governmental statements included in the measurement of the extent to which their public actions are in compliance with the norm, because these private communications might not accurately reflect the state's overall position. Requiring the conduct to be public demystifies any question about state action that may not have reflected a state's official policies.⁹⁴ If the conduct were made in secret, for example, through a confidential internal memorandum between government officials, it is unlikely that it was meant to be a proclamation of the state's true will.⁹⁵

87. MURPHY, *supra* note 68, at 3-4.

88. ILA REPORT, *supra* note 66, at 731.

89. *See id.*

90. Robbins, *supra* note 79, at 294.

91. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES, § 102 cmt. (b) (1987).

92. ILA REPORT, *supra* note 66, at 725, 728.

93. *See id.* at 726 (defining public as a verbal act communicated to at least one other State).

94. *See id.*

95. *See id.* at 725-26.

Notwithstanding these requirements, many questions remain as to what is required to constitute the objective element of state practice. Questions arise as to how much consistency or time is required to establish a norm, how many states are needed, and whether it matters which states follow the practice.⁹⁶

The ICJ in the *North Sea Continental Shelf* cases briefly addressed the issue of how much time is required for a customary international law rule to form:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked.⁹⁷

However, because the ICJ did not address the uniformity required for the formation of customary rules, the ILA later addressed the court's finding.⁹⁸ The ILA suggested that state practice should be sufficient in terms of "uniformity, density and representativeness" to meet the objective standard for the state practice element.⁹⁹ The organization found that internal consistency among states is necessary in order to eliminate gross variations of the norm.¹⁰⁰ If there are many inconsistencies in state domestic application of a norm, then there is no commonly accepted state practice and consequently no customary international law rule.

C. *Opinio Juris Requirement*

The second requirement for the formation of a customary international law rule is *opinio juris sive necessitatis* (*opinio juris*), a state's sense of legal obligation to follow a norm.¹⁰¹ States must adhere to a norm because they believe that they are legally compelled to do so, not

96. See Herman Meijers, *How Is International Law Made?*, 9 NETH. Y.B. INT'L L. 3, 5 (1978) (arguing that only States deemed relevant are necessary in development of the rule).

97. *North Sea Continental Shelf Cases* 43 (FRG/Den.; FRG/Neth.), 1969 I.C.J. 3 (Feb. 20).

98. See generally ILA REPORT, *supra* note 66.

99. *Id.* at 718. The ILA noted that the density requirement came from HUMPHREY WALDOCK, GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 1, 44 (1962).

100. See *id.*

101. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES, § 102 cmt. (c) (1987).

merely because they are generally following the practice.¹⁰² In this sense, a state that feels “legally free to disregard” a rule, but follows it out of “a matter of courtesy or habit,” would not meet the *opinio juris* requirement.¹⁰³ However, a state that generally practices a rule may eventually develop a sense of legal obligation to follow the rule, thus establishing *opinio juris*.¹⁰⁴

Whether a showing of *opinio juris*, or “a belief of law or necessity,”¹⁰⁵ is required to create a customary international law norm is debatable.¹⁰⁶ First, it is unclear what proof is needed to satisfy this element. Because this element is subjective, some states believe that a showing of “*consent* or *will* that something be a rule of customary law” is necessary, while others believe that states need only show a “*belief* that it is a rule.”¹⁰⁷ The former interpretation requires a state’s consent to an emerging norm and quashes any attempt at majoritarian rule by other states.¹⁰⁸ But, the latter interpretation is easier to prove since public pronouncements and actions qualify as objective evidence.¹⁰⁹ This interpretation, however, effectively nullifies the *opinio juris* requirement because the objective evidence needed to prove it is the same evidence used to prove the state practice requirement.¹¹⁰ Moreover, as the number of states adhering to such a rule increases, the more likely it is that other states will follow suit out of a sense of legal obligation.¹¹¹ The ILA agreed with this rationale:

102. *Id.*

103. *Id.*; North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 I.C.J. 3, 48 (Feb. 20):

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the . . . existence of a subjective element, [and] is implicit in the very notion of *opinio juris sive necessitates*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

104. *Id.*

105. ILA REPORT, *supra* note 66, at 743 cmt. (b).

106. *See id.* at 740-42.

107. *Id.* at 741.

108. *Id.*

109. *Id.* at 741-42.

110. *See id.* at 740-42.

111. *Id.* at 741, 744. The ILA suggests, “it is not so much a question of what a State really believes . . . but rather a matter of what it *says* it believes, or what can reasonably be implied from its conduct. In other words, it is a matter of what it *claims*.”

If it can be shown that States generally *believe* that a pattern of conduct fulfilling the [state practice] conditions . . . is permitted or (as the case may be) required by law, this is *sufficient* for it to be law; but it is not *necessary* to prove the existence of such a belief. Indeed, it is only in the case of a practice which has already achieved an appropriate level of generality that such a belief is likely to exist: those who initiate a new practice which is inconsistent with the previous law (e.g. the assertion of rights to an exclusive economic zone) cannot realistically be said to have a belief in its legality.¹¹²

D. *The Persistent Objector Exception*

Because international law is generally based on the notion of state consent, states may opt out of a customary international law norm, but only while it is evolving.¹¹³ A state will not be bound if it “persistently and openly dissents from the rule” as it is emerging.¹¹⁴ This persistent objector exception leaves state sovereignty intact because it “protects [states] from having new law imposed on them against their will by a majority.”¹¹⁵

To satisfy this exception, a state must openly express its objections to a rule “as often as circumstances require.”¹¹⁶ After expressing its objection, a state will not be bound by the rule, even when it is a prohibition regarding human rights norms.¹¹⁷ However, a persistent objector is still subject to *jus cogens*, which are preemptory norms of international law from which no derogation is permitted.¹¹⁸ Once a rule has emerged and becomes recognized as a crystallized customary international law norm, a state cannot object and it will be bound by that rule.¹¹⁹

E. *Regional Customary International Law*

There is also the possibility that regional customary international law regarding a norm could develop. Under this theory, customary rules develop “between a small number of relatively homogenous states”¹²⁰ and

112. *Id.* at 741-42.

113. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 102 cmt. (d) (1987).

114. ILA REPORT, *supra* note 66, at 738.

115. *Id.* at 739.

116. *Id.*

117. *Id.* at 738-40.

118. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 102 cmt. (k).

119. ILA REPORT, *supra* note 66, at 735-40.

120. Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 622 (2002).

create binding norms upon those states only.¹²¹ In this case, a norm that evolves binds consenting states, but does not bind states that persistently objected to the norm while it was forming.¹²²

The notion of regional customary international law, however, may become difficult to defend when human rights norms are at issue.¹²³ Some scholars argue that human rights norms are universal “because they ‘adhere to the human being by virtue of being human, and for no other reason’”;¹²⁴ thus, they reject the theory of regional human rights norms.¹²⁵ According to such universalists, human rights

are the due of every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of development. They do not depend on gender or race, class or status. To call them “rights” implies that they are claims “as of right,” not merely appeals to grace, or charity, or brotherhood, or love; they need not be earned or deserved. They are more than aspirations, or assertions of “the good,” but claims of entitlement and corresponding obligation in some political order under some applicable law. . . .¹²⁶

This argument is similar to the claim that customary norms can emerge only among those states with common concerns relevant to a norm.¹²⁷ As the ICJ noted in the *North Sea Continental Shelf Cases*, though states “whose interests are specially affected”¹²⁸ must meet the state practice and *opinio juris* requirements, the question still remains as to which states are relevant.¹²⁹ In the *North Sea Continental Shelf Cases*, the obvious answer was those states with access to, or claims to, the Continental Shelf.¹³⁰ However, where international human rights are concerned, including the right of adults to conduct consensual same-sex sexual activity, *all* states are relevant because *all* states have a citizenry.¹³¹

121. See Robbins, *supra* note 79, at 272.

122. See discussion *supra* Part III.D.

123. Robbins, *supra* note 79, at 277 (internal citations omitted).

124. *Id.* (internal citation omitted).

125. See *id.*

126. *Id.* (citing Louis Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1582, 1582 (1981)).

127. See Meijers, *supra* note 96, at 5.

128. *North Sea Continental Shelf Cases* (FRG/Den.; FRG/Neth.), 1969 I.C.J. 3, 43 (Feb. 20).

129. See ALVAREZ, *supra* note 81, at 199.

130. See *North Sea Continental Shelf Cases*, 1969 I.C.J. at 43.

131. See generally Henkin, *supra* note 126, at 1582. This argument is also relevant to the emerging norm on the prohibition of antisodomy laws. If the norm becomes crystallized as customary international law, the right to engage in adult consensual same-sex activity would be a human right, and States would have to recognize the existence of the LGBT community in their countries. In a speech at Columbia University in 2007, President Ahmadinejad stated that Iran

Adherents to the notion of regional customary international law take a particularly functional view of the matter.¹³² Regional norms may exist, but only among those states that consent to them out of a sense of legal obligation.¹³³ For some scholars, usually those who also adhere to the notion of cultural relativism,¹³⁴ reality indicates that regional norms are developing; therefore, recognizing the existence of regional customary norms preserves the notion of state consent.¹³⁵ Furthermore, scholars find that there is a possibility that “‘selling’ norms to a broader and more heterogeneous group will likely water [the norms] down and ambiguate them.”¹³⁶

IV. APPLICATION OF CUSTOMARY INTERNATIONAL LAW RULES

A. *World Survey of Domestic Laws*

In May 2008, the International Lesbian, Gay, Bisexual, Trans, and Intersex Association (ILGA), currently the only international NGO dedicated to the realization of global sexual equality,¹³⁷ completed a survey that assessed domestic laws that prohibited same-sex sexual activity.¹³⁸ These domestic laws are an appropriate place to look for customary international law norms, because they are public manifestations of a state’s will and thus fulfill the ILA’s requirement that state practice must be “public.”¹³⁹

The ILGA found that 108 states, territories, and entities do not criminalize same-sex sexual acts,¹⁴⁰ while eighty-six do.¹⁴¹ It also found that seven additional countries do not directly criminalize same-sex

did not have any homosexuals. Posting of Peter Tatchell to Gays Without Borders, <http://gayswithoutborders.wordpress.com/2008/10/01/iran-admits-it-has-gay-people-but-only-a-few-says-president-ahmadinejad/> (Oct. 1, 2008). I frame the issue not as one of whether LGBT persons exist, but as one of recognizing the right of any adult, no matter what sexual orientation, to engage in consensual same-sex sexual activity without punishment. As a side note, the President of Iran later admitted to having “a few” gay people in his country. *See id.*

132. *See* Swaine, *supra* note 120, at 622.

133. *Id.*

134. *Id.*

135. *See* Robbins, *supra* note 79, at 277-78 (internal citation omitted).

136. Swaine, *supra* note 120, at 623.

137. Int’l Lesbian, Gay, Bisexual, Trans & Intersex Ass’n, About ILGA, <http://www.ilga.org/aboutilga.asp> (last visited Jan. 11, 2009).

138. ILGA SURVEY, *supra* note 2.

139. *See* discussion *supra* Part III.A. However, it is important to note that actual state practice is also an important factor. The ILGA Survey does take this into account, as it notes that gays and lesbians have been killed in Iraq because of their sexual orientation despite the fact that there are no laws criminalizing same-sex conduct in Iraq. ILGA SURVEY, *supra* note 2, at 19.

140. *See* Appendix A.

141. *See* Appendix B.

sexual acts, but the language in their criminal laws is vague enough to be interpreted as prohibiting such conduct.¹⁴² Additionally, the ILGA found that seven of the entities that punish same-sex sexual relations do so by capital punishment.¹⁴³

The data collected in the appendices yields interesting results.¹⁴⁴ Of the 108 states and territories where same-sex sexual acts are not illegal, fifty-five have removed their antisodomy laws within the last sixty years.¹⁴⁵ Nineteen of those states and territories had already repealed their antisodomy laws, the earliest example of which was France in 1791.¹⁴⁶ The remaining thirty-four locations do not have any laws criminalizing same-sex relations.

Although it might seem rapid that the fifty-five repeals above took place over the course of the last sixty years, when this time frame is compared with the speedy change in state behavior in the *North Sea*

142. These countries include Burkina Faso, Costa Rica, the Democratic Republic of the Congo, Egypt, Indonesia, Iraq, and Niger. In Burkina Faso, article 411 of the 1996 Penal Code states, “Any act of a sexual nature that is contrary to good morals and is committed directly and deliberately on another person with or without force, compulsion or surprise, shall constitute an offense against (public) decency.” ILGA SURVEY, *supra* note 2, at 11. In Costa Rica, article 381 of the 1970 Penal Code sets a fine for “sodomy in a scandalous form.” *Id.* at 12. In the Democratic Republic of the Congo, Article 172 of the modified 2006 Penal Code criminalizes “moral offenses,” which can include same-sex sexual acts. *Id.* at 13. Egyptian laws, however, do not explicitly criminalize same-sex sexual activity, but laws prohibiting “[s]hameless public acts” and “debauchery” have been used to prosecute gay men in recent years. *Id.* at 14. Indonesia’s Penal Code also does not explicitly criminalize same-sex sexual acts, but “in 2002, the national parliament gave the Aceh province the right to adopt Islamic Sharia laws.” Since that time, individuals have been prosecuted for same-sex sexual acts in Indonesia. *Id.* at 17-18. Laws in Iraq do not criminalize same-sex sexual activity, either, but recently homosexual men and women have been killed because of their sexual orientations. *Id.* at 19. Similarly, Niger’s Penal Code does not punish same-sex sexual acts, but other laws prohibiting public nuisances, lewd acts, and indecency are vague enough to encompass prohibitions on gay and lesbian conduct. *Id.* at 28.

143. *See id.* at 46 (including Iran, Mauritania, Migeria, Saudi Arabia, Sudan, United Arab Emirates, and Yemen).

144. Please refer to the Appendix, located at the end of this Article, to view the list of states that criminalize same-sex sexual activity and the list of states that have repealed such statutes or do not have such laws.

145. The fifty-five states that have removed their antisodomy laws within the last sixty years are: Albania, Armenia, Austria, Azerbaijan, the Bahamas, Belarus, Bosnia-Herzegovina, Bulgaria, Canada, Cape Verde, Chile, Colombia, Croatia, Cuba, Cyprus, the Czech Republic, Ecuador, Estonia, Fiji, Finland, Georgia, Germany, Greece, Hungary, Ireland, Israel, Jordan, Kazakhstan, Kosovo, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Macedonia, Malta, the Marshall Islands, Moldova, Montenegro, New Zealand, Nicaragua, Norway, Portugal, Puerto Rico, Romania, Russia, Serbia, Slovakia, Slovenia, South Africa, Spain, Tajikistan, Thailand, the Ukraine, the United Kingdom, and the United States.

146. The nineteen states that reformed their antisodomy laws before 1949 are: Argentina, Belgium, Brazil, Denmark, France, Iceland, Italy, Japan, Luxembourg, Mexico, Monaco, the Netherlands, Peru, Poland, San Marino, Sweden, Switzerland, Turkey, and Uruguay.

Continental Shelf Cases,¹⁴⁷ it does not appear to be *rapid*. In those cases, the ICJ found that a customary international law rule formed, in part, because of a rapid and extensive change in state behavior in response to the outbreak of the First World War.¹⁴⁸ In fact, compared to the *North Sea Continental Shelf Cases*, states generally were considerably less swift in their repeals of antisodomy statutes, as the repeals took place over the course of sixty years.

This significance might be minimized by the fact that the fifty-five state repeals of antisodomy laws were not in response to a new situation, such as the outbreak of war in the *North Sea Continental Shelf Cases*.¹⁴⁹ The reasons for state decriminalization of same-sex sexual activity are varied.¹⁵⁰ Because same-sex sexual activity has been criminalized since the nineteenth century,¹⁵¹ a change in state behavior within the last sixty years may be considered rapid. It is arguable, therefore, that as the world is globalizing, so are human rights norms, including prohibitions on antisodomy statutes. Consequently, recent changes in human rights law reflect a change in state behavior and a collective sense of legal obligation.

Despite the argument that the relatively recent repeals constitute a rapid change in state behavior justifying the emergence of a customary norm, a 108 to eighty-six (or 5:4) ratio of states that permit sodomy versus those that explicitly prohibit it does not convey a virtually uniform and consistent state practice. Moreover, when the seven countries are included in the count that do not explicitly prohibit same-sex sexual conduct, but do punish it under other laws, the argument for a rule of customary international law becomes even more tenuous because the ratio would then become 108 to ninety-three. Therefore, a closer look at regional distinctions is appropriate in order to ascertain whether a regional customary norm prohibiting antisodomy laws exists.

Western states and territories make up the majority of entities that do not criminalize same-sex sexual activity.¹⁵² In fact, all of the Western countries and territories, including those in North America and Europe,

147. See notes 128-130 and accompanying text.

148. ILA REPORT, *supra* note 66, at 20 n.49.

149. See *North Sea Continental Shelf Cases*, (FRG/Den.; FRG/Neth.), 1969 I.C.J. 3 (Feb. 20).

150. See generally CROMPTON, *supra* note 21; Mark McLelland, *Is There a Japanese 'Gay Identity'?*, 2 CULTURE, HEALTH & SEXUALITY 459 (2000); Peter M. Nardi, *The Globalization of the Gay and Lesbian Socio-Political Movement: Some Observations about Europe with a Focus on Italy*, 41 SOC. PERSP. 567 (1998).

151. See discussion *supra* Parts II.A-B.

152. See Appendix B.

have either repealed their antisodomy laws or never criminalized same-sex sexual relations in the first place.¹⁵³

Comparatively, non-Western state practice is quite different. Out of the eighty-six countries that criminalize same-sex sexual conduct, thirty-five of them are in Africa.¹⁵⁴ Three more African states do not directly criminalize same-sex sexual acts, but punish the conduct under other laws.¹⁵⁵ Additionally, because the ILGA was unable to evaluate Chad's antisodomy laws,¹⁵⁶ Chad is not included in the count of countries that do not criminalize same-sex sexual activity. Therefore, only nine African countries do not criminalize same-sex sexual acts.¹⁵⁷ Consequently, out of the 108 countries that have legalized same-sex sexual relations worldwide, only eight percent are in Africa.¹⁵⁸ However, the vast majority of African nations still have laws criminalizing same-sex sexual activity.¹⁵⁹

This result illustrates that state practice in Africa generally rejects the notion that a customary international law rule prohibiting state-sponsored antisodomy statutes is forming. When assessing whether state practice is applied uniformly and consistently enough to support a claim for a customary rule prohibiting state-sponsored antisodomy laws, the case for a regional or Western customary international norm is much stronger than the case for a universal customary rule. The uniformity of the proposed norm is readily apparent in the Western nations, as none of them have antisodomy laws on their books.¹⁶⁰

The emergence of a global customary international law norm may still be possible in the future. If more states repeal their antisodomy laws, state practice in favor of the proposed norm will increase. However, in order to maintain consistency with the fifty-five states that have repealed

153. *Id.* The Western countries are: Albania, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Macedonia, Mexico, Moldova, New Zealand, Norway, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Turkey, the Ukraine, the United Kingdom, and the United States.

154. *See id.* The thirty-five African countries that criminalize same-sex sexual relations are: Algeria, Angola, Benin, Botswana, Cameroon, Comoros, Djibouti, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Mauritania, Mauritius, Morocco, Mozambique, Nigeria, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, Swaziland, Togo, Tunisia, Uganda, Zambia, and Zimbabwe.

155. These three countries are Burkina Faso, Egypt, and Niger. ILGA SURVEY, *supra* note 2, at 46.

156. *Id.*

157. *See* Appendix A.

158. *Id.*

159. *See* Appendix B.

160. *See* Appendix A.

their antisodomy laws in the past sixty years, antisodomy laws must not only be removed from the books, but same-sex sexual activity must officially remain unpunished in order to meet the objective criteria.¹⁶¹

B. *Pertinent International Agreements*

Treaties are also relevant to assessing state practice as an element of customary international law because these international agreements are objective manifestations of state positions.¹⁶² Moreover, robust treaties with a large number of signatories may bind nonsignatories, as long as those states were not persistent objectors.¹⁶³ According to Anthony D'Amato, a supporter of the notion that multilateral treaties create customary international law, "[t]he claim made here is not that treaties bind nonparties, but that generalizable provisions in treaties give rise to rules of customary law binding upon all states. *The custom is binding, not the treaty.*"¹⁶⁴

For states that assent to a treaty's terms, the objective requirement of state practice is met. Although there is "no general presumption that a treaty codifies existing customary international law,"¹⁶⁵ a state's assent to the language of an agreement sufficiently conveys its consent to the treaty's rules.¹⁶⁶ But, this does not necessarily mean that it does so out of a sense of legal obligation.¹⁶⁷ Obviously, *opinio juris* exists when an international agreement contains language that specifically furthers a customary international law rule or aims to develop international law generally.¹⁶⁸ However, for international agreements that do not contain such language, a further inquiry into the *opinio juris* of states is necessary.

Five international agreements are relevant to the emergence of a norm on the prohibition of antisodomy laws: the International Covenant on Civil and Political Rights (ICCPR),¹⁶⁹ the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention),¹⁷⁰ the International Covenant on Economic, Social and Cultural Rights

161. See *supra* notes 86-100 and accompanying text.

162. See ILA REPORT, *supra* note 66, at 753-65.

163. See Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71, 72-84 (1996).

164. ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 107 (1971) (emphasis added).

165. ILA REPORT, *supra* note 66, at 754 (emphasis omitted)

166. See *id.*

167. See *infra* Part IV.A.

168. ILA REPORT, *supra* note 66, at 754-55.

169. Dec. 19, 1966, 999 U.N.T.S. 172 [hereinafter ICCPR].

170. Nov. 4, 1950, 23 U.N.T.S. 230 [hereinafter Convention].

(ICESCR),¹⁷¹ the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁷² and the Universal Declaration of Human Rights (UDHR).¹⁷³ All of these treaties contain provisions providing a right to privacy.¹⁷⁴ However, it is unknown whether the signatories to these treaties have accepted the notion that the right to privacy encompasses the right to engage in same-sex sexual activities.¹⁷⁵ Therefore, a discussion of these treaties is merited because they each lack specific language prohibiting antisodomy laws under the right to privacy.¹⁷⁶

The ICCPR was adopted on December 19, 1966 to protect the civil and political rights of citizens in over 149 countries that have ratified it.¹⁷⁷ This covenant specifically prohibits discrimination based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”¹⁷⁸ and its provisions are interpreted by the United Nations Human Rights Committee (UNHRC).¹⁷⁹

In the 1994 case of *Toonen v. Australia*, the UNHRC found Tasmania’s antisodomy laws to be in violation of article 17 of the ICCPR, which states that “no one shall be subjected to arbitrary or unlawful interference with his privacy.”¹⁸⁰ However, interpretations made by the UNHRC do not bind ICCPR nonparties or states that have made reservations to the relevant portion of the treaty.¹⁸¹

There are currently 165 parties and eight additional signatories to the ICCPR out of 192 U.N. Member Nations.¹⁸² But, only 111 Member

171. Dec. 19, 1966, 993 U.N.T.S. 5 [hereinafter ICESCR].

172. 18 Dec. 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

173. UDHR, *supra* note 12.

174. *See supra* notes 169-173 and accompanying text.

175. *See* discussion *supra* Part I.

176. *See generally supra* notes 169-173.

177. *See* ICCPR, *supra* note 169. These rights include, but are not limited to, the right to a judicial remedy if rights are violated, the right not to be tortured, the right not to be a slave, and the right to liberty. *See id.*

178. ICCPR, *supra* note 169, art. 2, para. 1.

179. *See* First Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter First Optional Protocol].

180. *Toonen v. Australia*, U.N. HUMAN RIGHTS COMM., No. 488, at app. ¶¶ 8-10, CCPR/C/50/D/488/1992 (1994) (citing ICCPR, *supra* note 169, art. 17 at 177).

181. *See* U.N. Human Rights Comm., General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc. CCPA/C/GC/33 (Nov. 5, 2008), *available at* <http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.33.pdf>.

182. *See* ICCPR, *supra* note 169. Some ratifying States, like the United States, find the ICCPR non-self-executing, and therefore, the Committee’s holding will not be automatically

States are parties to the First Optional Protocol,¹⁸³ which established the UNHRC and gave it authority to hear individual complaints.¹⁸⁴ The parties to the First Optional Protocol are obligated to be bound by the Committee's interpretations of the treaty:

The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.¹⁸⁵

Therefore, signatory states are bound by the Committee's findings, as

[s]ome international agreements that are constitutions or charters of international organizations confer power on those organizations to impose binding obligations on their members by resolution, usually by qualified majorities. Such obligations derive their authority from the international agreement constituting the organization, and resolutions so adopted by the organization can be seen as "secondary sources" of international law for its members.¹⁸⁶

For the signatories of the First Optional Protocol, the committee's interpretation is binding, and thus, state practice of permitting same-sex sexual activity is buttressed by a sense of legal obligation.¹⁸⁷

In the 1999 case of *Mouta v. Portugal*, the European Court of Human Rights similarly interpreted the Convention to extend the prohibition on discrimination to LGBT individuals.¹⁸⁸ Although *Mouta* did not involve an antisodomy statute, the court's ruling is pertinent to the development of a customary international law norm regarding antisodomy statutes.¹⁸⁹ The court's prohibition on discrimination against

binding in its domestic law. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (holding that the ICCPR was not self-executing).

183. First Optional Protocol, *supra* note 179.

184. *See id.*

185. *Id.*

186. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 102 cmt. (g) (1987).

187. *See id.*

188. *Salgueiro da Silva Mouta v. Portugal*, 1999-IX Eur. Ct. H.R. 305 (1999).

189. The European Court of Human Rights found that Portugal's custody decision, which was "based primarily on the applicant's sexual orientation and practice of living with another man, violated Article 14 . . . of the [ECHR]." *See generally* Brief Amici Curiae of Mary Robinson, Amnesty International U.S.A., Human Rights Watch, Interrights, the Lawyers Committee for Human Rights, and Minnesota Advocates for Human Rights in Support of Petitioners at 24 n.42, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) [hereinafter Brief Amici Curiae of Mary Robinson].

the LGBT community¹⁹⁰ illustrates state *opinio juris* in repealing discriminatory laws, including antisodomy laws. This decision also had a trickle-down effect upon two other European Union agreements: the Treaty of Amsterdam¹⁹¹ and the Charter of Fundamental Rights of the European Union.¹⁹² After *Mouta*, fifteen Member States added prohibitions against discrimination based on sexual orientation to the texts of the five international agreements listed above.¹⁹³

Other human rights treaties have been interpreted in a similar fashion by U.N. internal organs.¹⁹⁴ The ICESCR promotes human rights including, but not limited to: the right to self determination, the right to work, the right to receive fair wages for work, the right to an adequate standard of living, the right to be educated, and the right to be free from discrimination in the pursuit of such rights.¹⁹⁵ The U.N. Committee on Economic, Social and Cultural Rights interpreted article 2(2) of the ICESCR, which prohibits various forms of discrimination with respect to the rights enunciated in the treaty, to include a prohibition against discrimination based on sexual orientation.¹⁹⁶ Similarly, the U.N. Committee on the Elimination of Discrimination Against Women has interpreted CEDAW, which prohibits discrimination against women in any form,¹⁹⁷ as specifically prohibiting discrimination against lesbians.¹⁹⁸ However, these interpretations only bind those states that have signed these treaties, which constitutes *opinio juris* for this emerging norm.

190. *See id.*

191. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

192. *See infra* Part IV.A.

193. *See supra* notes 169-173 and accompanying text.

194. *See infra* Part IV.A.

195. *See* ICESCR, *supra* note 171. The ICESCR promotes gender equality in the workplace by prohibiting “inferior working conditions for women when compared to men, as well as requiring an “[e]qual opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.” *Id.* art. 7, paras. 1, 3.

196. *See* U.N. Committee on Economic, Social and Cultural Rights General Comment No. 14, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

197. *See* CEDAW, *supra* note 172. The CEDAW defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Id. art. 1.

198. *See* Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: Krygyzstan, U.N. Doc. CEDAW/A/54/38 (Jan. 27, 1999).

Finally, the Universal Declaration of Human Rights, which “has been widely accepted as reflective of customary international law,”¹⁹⁹ is particularly important. If the assertion that the Declaration contains crystallized rules of customary international law is correct, then an interpretation of the document’s right to privacy to include adult consensual same-sex sexual activity would establish a customary norm. However, in order for such an interpretation of the Declaration’s right to privacy to be legitimate, it still needs to satisfy the two major elements of customary international law, state practice and *opinio juris*. Acceptance of the UDHR at face value would not automatically lead to such a norm if states did not believe that the UDHR encompassed it.²⁰⁰ A general norm of the right to privacy does not meet the requisite specificity and internal consistency needed to generate a customary rule. However, if a more uniform and consistent state practice with respect to the repeal of antisodomy laws later emerges, then the UDHR will become more helpful in solidifying the rule.

The aforementioned international agreements minimally support the claim that a customary international law rule prohibiting state-sponsored antisodomy laws is evolving. The treaties protect the general right to privacy without specifically including the proposed norm.²⁰¹

199. Brief Amici Curiae of Mary Robinson, *supra* note 189, at 26. In 1948, several states came together to form the United Nations after the Second World War and signed the UDHR. See Catania, *supra* note 12, at 300-03. According to Mr. Catania:

At the time the General Assembly approved the Universal Declaration, the United States and the world community viewed [it] as a lofty statement of ‘basic principles’ and did not envision it as a binding agreement or as a treaty. However, since its adoption, at least “eighteen nations have incorporated the Universal Declaration into their own constitutions.” In addition, notwithstanding the non-binding origins of the Universal Declaration, virtually every major human rights initiative and convention adopted over the last three decades has been rooted in the principles outlined in that doctrine. These actions arguably demonstrate a degree of assent sufficient to establish a rule of customary international law.

Id. at 301-02 (internal citation omitted). Mr. Catania also argues that the UDHR contains accepted norms of customary international law because evidence is located in secondary indicators, such as “(a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals; (c) the writings of scholars; [and] (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.”

Id. at 303 (internal citation omitted).

200. Mr. Catania argues that the UDHR itself would automatically include a norm prohibiting antisodomy laws. Catania, *supra* note 12, at 303-08. However, this could not be true if the State practice and *opinio juris* elements were absent because of a lack of specificity or uniformity in the norm.

201. See *supra* notes 162-200 and accompanying text.

Moreover, the interpretations of these agreements only establish *opinio juris* for those states that are obligated to abide by those interpretations.

C. Notable Judicial Opinions

Although judicial opinions do not create binding customary international law, they can support the formation of such law if the rules therein are “adopted by states into binding national or multi-national laws.”²⁰² In this sense, state practice is buttressed by a legal obligation created by judicial decisions.

Within the last thirty years, multiple courts in both international and domestic forums have struck down antisodomy laws. After the European Court of Human Rights decided *Dudgeon v. United Kingdom* in 1981, legislative repeal of antisodomy laws was mandatory in the forty-seven Council of Europe States.²⁰³ In *Dudgeon*, the court struck down a law that criminalized same-sex sexual activity in Northern Ireland, finding that it violated the right to privacy as articulated in article 8²⁰⁴ of the Convention.²⁰⁵ The court held that the right to privacy necessarily included a right to make decisions about one’s sexual relations.²⁰⁶ This opinion came from “the world’s most influential international human rights court,”²⁰⁷ which “binds all of the European continent and protects more than 800 million residents.”²⁰⁸ Following *Dudgeon*, the European Court of Human Rights reaffirmed its rationale in two cases: *Norris v. Ireland*²⁰⁹ in 1988, and *Modinos v. Cyprus*²¹⁰ in 1993. As in *Dudgeon*, the court struck down additional antisodomy laws as violations of the right to privacy under the Convention in *Norris* and *Modinos*.²¹¹

Judicial opinions striking down antisodomy laws have also emanated from state courts in South Africa and the United States.²¹² In 1998, the Constitutional Court of South Africa unanimously invalidated South Africa’s antisodomy laws, finding that “[t]he enforcement of the

202. Robbins, *supra* note 79, at 293.

203. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981); see also ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS 93-95 (1997).

204. Article 8 of the ECHR states, “Everyone has the right to respect for his private and family life, his home and his correspondence.” Convention, *supra* note 15, art. 8.

205. See *Dudgeon*, 45 Eur. Ct. H.R. (ser. A).

206. *Id.*

207. See Brief Amici Curiae of Mary Robinson, *supra* note 189, at 10.

208. *Id.*

209. 142 Eur. Ct. H.R. (ser. A) (1988).

210. 259 Eur. Ct. H.R. (ser. A) (1993).

211. See generally *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993).

212. See *infra* notes 213-217 and accompanying text.

private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as . . . a legitimate purpose.”²¹³ The court invalidated the statute under section 14 of South Africa’s Constitution, which guarantees the right to privacy.²¹⁴

Also, in 2003, the United States Supreme Court in *Lawrence v. Texas* effectively overturned all American laws criminalizing same-sex sexual activity.²¹⁵ The Court held that a Texas antisodomy statute violated the Due Process Clause of the Fourteenth Amendment, and found that the right to make decisions about consensual adult sexual relations is protected under the right to privacy.²¹⁶ This ruling overturned the Court’s decision in *Bowers v. Hardwick*, which had upheld a Georgia antisodomy law in 1983.²¹⁷ The *Lawrence* Court noted domestic and international shifts in attitudes toward the gay and lesbian community, as evidenced by recent repeals of antisodomy laws around the country and the globe.²¹⁸ Writing for the majority, Justice Anthony Kennedy noted that “[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.”²¹⁹ Although he did not argue that other nations’ recognition of the right was a controlling factor for striking down the Texas statute, Justice Kennedy’s acknowledgment of the existence of the trend is important because judicial recognition indicates state practice.²²⁰

213. *Nat’l Coal. for Gay & Lesbian Equality & Another v. Minister of Justice & Others* 1998 (12) BCL 1517 (CC) at 1539 (S. Afr.).

214. *See id.* at 1538. The South African Court observed:

Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.

Brief Amici Curiae of Mary Robinson, *supra* note 189, at 13 n.19.

215. *Lawrence v. Texas*, 539 U.S. 558 (2003). The Court’s decision in *Lawrence* overturned its previous holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld a Georgia antisodomy law. *See Bowers*, 478 U.S. 186.

216. *Lawrence*, 539 U.S. at 558.

217. *Id.*

218. The Supreme Court specifically cited to the European Court of Human Right’s decision in *Dudgeon*, the Wolfenden Report issued by the British Parliament in 1957, and the Amicus Brief by Mary Robinson et al. *Id.*

219. *Id.* at 576.

220. *See* discussion *supra* Part IV.C.

There are still countries, however, which until recently,²²¹ have “proudly declare[d] that ‘neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking.’”²²² In 1983, the Supreme Court of India in *Kailash v. State of Haryana* upheld an antisodomy law, declaring that “England now embodies the sexual decadence against which India must be defended.”²²³ Similar reasoning has been used by other former colonies: Hong Kong,²²⁴ Singapore,²²⁵ Malaysia,²²⁶ Zimbabwe,²²⁷ Kenya,²²⁸ Zambia,²²⁹ and Nigeria.²³⁰

Because most of the cases supporting the proposed norm emanate from the Western regions of the world,²³¹ the norm is likely a regional customary international norm rather than a universal norm. The *opinio juris* requirement is present in the Council of Europe as well as in South Africa and the United States; however, neither the state practice nor the *opinio juris* requirement are met for the proposed norm in other regions of the world.

D. Public Statements Regarding the Proposed Norm-Prohibiting Antisodomy Laws

In 2008, 100 nations made public statements supporting human rights protections for the LGBT community.²³² On June 3, 2008, thirty-four States from the General Assembly of the Organization of American States (OAS) adopted a resolution expressing their concern about “acts of violence and related human rights violations perpetrated against individuals because of their sexual orientation and gender identity.”²³³

221. Please note this Article was written prior to India overturning its antisodomy law on July 1, 2009. See generally *NAZ Found. Trust v. Gov’t of NCT, Delhi & Others*, 160 Delhi Law Times 277 (Delhi H.C. 2009).

222. THIS ALIEN LEGACY, *supra* note 29, at 8 (quoting India’s 1983 Supreme Court in *Kailash v. State of Haryana*).

223. *Id.*

224. See Carole J. Peterson, *Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong*, 19 LOY. L.A. INT’L & COMP. L. REV. 337-62 (1997).

225. THIS ALIEN LEGACY, *supra* note 29, at 9-10.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. See *supra* notes 203-220 and accompanying text.

232. OAS, Resolution on Human Rights, Sexual Orientation, and Gender Identity, AG/RES-2435 (XXXVIII-O/08).

233. *Id.*

Six months later, on December 18, 2008, sixty-six U.N. Member Nations supported a General Assembly resolution confirming the extension of human rights protections to the gay and lesbian community.²³⁴ The resolution specifically included a provision “urg[ing] all nations to ‘promote and protect human rights of all persons, regardless of sexual orientation and gender identity,’ and to end all criminal penalties against people because of their sexual orientation or gender identity.”²³⁵ Every European Union nation and major Western state, except the United States, signed the resolution.²³⁶ Even the Holy See, which originally opposed the General Assembly statement,²³⁷ later reversed its stance and called for an end to criminal penalties for same-sex sexual conduct.²³⁸

In addition to these robust U.N. statements, a group of twenty-five human rights experts from various NGOs signed The Yogyakarta Principles in 2006; these principles “reflect[ed] the existing state of international human rights law in relation to issues of sexual orientation” and “affirm[ed] binding international legal standards with which all States comply.”²³⁹ It also included statements condemning the criminali-

234. Human Rights Watch, UN: General Assembly Statement Affirms Rights for All, <http://www.hrw.org/en/news/2008/12/18/un-general-assembly-statement-affirms-rights-all> (last visited Jan. 11, 2009); see also General Assembly GA/10801, <http://www.un.org/News/Press/docs/2008/ga10801.doc.htm> (last visited Jan. 13, 2008). The sixty-six signatories to the General Assembly Resolution were: Albania, Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cape Verde, Central African Republic, Chile, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Montenegro, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Poland, Portugal, Romania, San Marino, Sao Tome and Principe, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Timor-Leste, United Kingdom, Uruguay, and Venezuela. See generally United Nations, *General Assembly Adopts 52 Resolutions, 6 Decisions Recommended by Third Committee* (Dec. 18, 2008), available at <http://www.un.org/News/Press/docs/2008/ga10801.doc.htm>.

235. Human Rights Watch, *supra* note 234 (quoting statements made in the General Assembly Webcast, which is available at <http://www.un.org/webcast/ga2008.html>).

236. The fact that the United States did not sign the statement in front of the General Assembly is not detrimental to the United States’ position on the status of the proposed norm in customary international law. The United States Supreme Court, announced that antisodomy laws were unconstitutional. *Lawrence v. Texas*, 539 U.S. 558 (2003).

237. See Human Rights Watch, *supra* note 234.

238. *Id.* Archbishop Migliore, speaking on behalf of the Vatican, stated, “The Holy See continues to advocate that every sign of unjust discrimination towards homosexual persons should be avoided and urges States to do away with criminal penalties against them.” Catholic News Agency, Vatican U.N. Delegation Calls for End to Unjust Discrimination Against Homosexuals (Dec. 19, 2009), <http://www.catholicnewsagency.com/new.php?n=14672>.

239. *Yogyakarta Principles*, *supra* note 1, at 7 (emphasis added).

zation of same-sex sexual activity.²⁴⁰ Although the principles were signed by human rights experts and not state officials, a later OAS resolution that was signed in 2008 contained a provision that acknowledged the importance of The Yogyakarta Principles in international human rights law.²⁴¹

The widespread acceptance of these resolutions and principles²⁴² in such a short period of time may be significant. As the ICJ found in the *North Sea Continental Shelf Cases*, the great magnitude of state acceptance of a norm in such a short amount of time greatly impacted the crystallization of the evolving norm.²⁴³

However, although over 100 nations supported the public statements in 2008 favoring a norm prohibiting antisodomy laws, there was also a large amount of opposition to the norm in the same year.²⁴⁴ On December 18, 2008, the Organization of the Islamic Conference presented an opposition statement to the U.N. General Assembly on behalf of fifty-seven U.N. Member Nations:²⁴⁵ thirty-one from Africa,²⁴⁶ one from the Americas,²⁴⁷ twenty-three from Asia and the Middle East,²⁴⁸ and two Oceanic states.²⁴⁹ The statement included concerns about state sovereignty and, notably, the possibility that the “social normalization” of homosexuality could lead to “many deplorable acts[,] including pedophilia.”²⁵⁰

240. *Id.* at 11.

241. *See id.* Although these principles were adopted by twenty-five members from NGOs, the OAS acknowledgement of their existence in international human rights law is impressive because the rights contained in them are expansive. The rights enunciated in the principles go beyond a prohibition on antisodomy laws and claim the LGBT community should not be discriminated against in a plethora of rights. *See id.* at 5; *see also* Human Rights Watch, OAS Adopts Resolution To Protect Sexual Rights, <http://www.hrw.org/en/news/2008/06/05/oas-adopts-resolution-protect-sexual-rights> (last visited Jan. 11, 2008).

242. *See supra* notes 232-241 and accompanying text.

243. *See North Sea Continental Shelf Cases* (FRG/Den.; FRG/Neth.), 1969 I.C.J. 3 (Feb. 20).

244. *See infra* notes 245-250 and accompanying text.

245. Patrick Worsnip, U.N. Divided over Gay Rights Declaration (Dec. 18, 2008), <http://www.reuters.com/article/idUSTRE4BH7E W20081218>.

246. Algeria, Benin, Cameroon, Chad, Comoros, Cote d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Guinea, Kenya, Libya, Malawi, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, and Zimbabwe.

247. St. Lucia.

248. Afghanistan, Bangladesh, Brunei, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Lebanon, Malaysia, Maldives, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Syria, Tajikistan, Turkmenistan, the United Arab Emirates, and Yemen.

249. Fiji and the Solomon Islands.

250. Worsnip, *supra* note 245.

Therefore, the claim that there exists a customary international law rule prohibiting the criminalization of same-sex sexual activity is weakened by the strong opposition to the norm by non-Western states. However, the case for a regional customary international law norm is more robust, as the statements made by Western states constitute state practice themselves. There is also evidence that Western states believe they are legally obligated to support the decriminalization of same-sex sexual activity.²⁵¹

V. COMPARISON OF STATE-SPONSORED ANTISODOMY LAW WITH THE PROHIBITION ON STATE-SPONSORED TORTURE

A. *The Prohibition Against State-Sponsored Torture*

The prohibition on state-sponsored torture is a crystallized customary international law norm.²⁵² This norm is recognized by many nations, as is evidenced by state practice and *opinio juris*. The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), which has been ratified by 145 states,²⁵³ reflects its status as a crystallized customary international law norm.²⁵⁴ The Convention Against Torture itself does not necessarily aid in the evolution of the norm, but it expresses state affirmation of the rules contained in it.²⁵⁵

Although Amnesty International reported in 2008 that at least eighty-one states still engage in torture,²⁵⁶ as defined by the Convention Against Torture,²⁵⁷ the norm prohibiting state-sponsored torture has

251. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

252. See *infra* notes 253-262 and accompanying text.

253. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 U.N.T.S. 85 [hereinafter *Convention Against Torture*].

254. See, e.g., *United States v. Emmanuel*, No. 06-20758-CR, 2007 WL 2002452, at *6 (S.D. Fla. July 5, 2007).

255. See *id.*

256. See generally Amnesty Int'l, Report 08: At a Glance, <http://archive.amnesty.org/report2008/eng/report-08-at-a-glance.html> (last visited Jan. 20, 2009).

257. The Convention Against Torture defines an act of torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention Against Torture, *supra* note 253.

nonetheless been recognized as fully formed.²⁵⁸ In fact, some states and jurists believe this norm has reached the status of *jus cogens*, a norm from which no state may derogate under any circumstances.²⁵⁹

Nevertheless, the evidence of states' belief that the norm does exist, in whatever capacity, is still clear.²⁶⁰ The following international agreements recognize the norm: the Convention Against Torture, which began as a resolution in the U.N. General Assembly, the Geneva Conventions, the Universal Declaration of Human Rights, and other regional international agreements.²⁶¹

Judicial opinions from domestic and international fora also confirm the norm. In 1980, the United States Court of Appeals for the Second Circuit held in *Filártiga v. Peña-Irala* that a state's official use of torture was contrary to an emerging customary international law rule, and the Alien Tort Statute established jurisdiction for Paraguayan plaintiffs who sued an official of their government for a wrongful death claim.²⁶²

B. Comparison with the Proposed Norm Prohibiting Antisodomy Law

At first glance, the status of the proposed norm prohibiting antisodomy statutes may seem similar to that of the crystallized norm prohibiting state-sponsored torture. Both of these norms are evidenced by state practice, multilateral treaties, and judicial opinions.

However, a closer examination reveals that the proposed norm has not reached the universal status of the prohibition against state-sponsored torture. First, the significance of the Convention Against Torture is that 145 nations supported a norm that they already believed had attained the status of a crystallized customary international law rule.²⁶³ Moreover, the states that supported the proposed norm regarding sodomy laws did so in an OAS Resolution²⁶⁴ and a statement in front of the U.N. General

258. See *supra* notes 253-254 and accompanying text.

259. See *United States v. Emmanuel*, No. 06-20758-CR, 2007 WL 2002452, at *6. A *jus cogens* norm is a peremptory norm from which no State, under any circumstances, may derogate. MURPHY, *supra* note 72, at 81-82. The Vienna Convention on the Law of Treaties defines a *jus cogens* norm as one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* (internal quotation omitted).

260. See *infra* Part IV.A.

261. See, e.g., *Filártiga v. Peña-Irala*, 630 F.2d 876, 882-85 (2d Cir. 1980).

262. *Id.* at 890 (looking at U.S. case law and statutes, as well as other international agreements that prohibit torture).

263. See *supra* discussion Part V.A.

264. See *supra* notes 232-242 and accompanying text.

Assembly,²⁶⁵ neither of which carry the weight of a treaty. These public statements have yet to be included in a specific treaty that purports to prohibit the criminalization of same-sex sexual activity.

Second, other treaties besides the Convention Against Torture contain language explicitly prohibiting torture.²⁶⁶ States assent to this unequivocal language when they ratify these treaties.²⁶⁷ In the case of the proposed norm, however, any treaty-based support lies only implicitly in particular interpretations of the right to privacy.²⁶⁸ Because parties to these treaties did not initially assent to an expansive interpretation of the right to privacy to include the right to engage in same-sex sexual activity when they ratified the treaties, the case for a customary international law norm is much weaker for the proposed norm than it is for the prohibition against state-sponsored torture.

Finally, although Amnesty International found that eighty-one states engaged in acts of torture,²⁶⁹ this has not been fatal to the recognition of the norm prohibiting torture. When compared with the eighty-six states that continue to criminalize same-sex sexual activity, one may believe the proposed norm would also pass muster. However, the states that criminalize same-sex sexual activity do so publicly and in their own criminal laws, whereas the states that engage in torture publicly claim that state-sponsored torture is prohibited under international law.²⁷⁰

Therefore, the difference between the two norms is great and it is instructive as to the presence or absence of *opinio juris* for the proposed norm in the various regions of the world. A vast amount of *opinio juris* is needed to support a prohibition on state-sponsored torture, whereas the amount of *opinio juris* needed to satisfy the subjective element of the proposed norm is still questionable. Although many states do not have, or have repealed, their antisodomy statutes, many other states still vehemently oppose the prohibition.

The case for a regional customary international law rule prohibiting the criminalization of same-sex sexual activity is, therefore, much stronger than the case for a universal rule. While the necessary state practice and *opinio juris* are present to support a norm prohibiting state-sponsored torture around the globe, a large divide exists between the

265. *Id.*

266. *See* Convention Against Torture, *supra* note 253, art. 1.

267. *See, e.g., id.*

268. *See supra* notes 170-173 and accompanying text.

269. *See* Amnesty Int'l, *supra* note 256.

270. *See supra* notes 170-173 and accompanying text.

West and other states regarding the prohibition against the criminalization of same-sex sexual activity.

VI. COMPARISON OF STATE-SPONSORED ANTISODOMY LAW WITH THE PROHIBITION AGAINST THE DEATH PENALTY

A. *The Prohibition Against the Death Penalty*

Scholars have argued that a customary international law norm prohibiting the use of the death penalty exists.²⁷¹ There is sufficient state practice and *opinio juris* to provide evidence that the norm is in the process of evolving,²⁷² however, the extent of that evolution is uncertain.

While it is true that “a majority of the world has abolished the [death penalty],” there is insufficient consistency and uniformity in state practice to support the existence of a customary international rule prohibiting the death penalty.²⁷³ By the year 2000, 108 nations had abolished the death penalty, while eighty-three, including the United States, had not.²⁷⁴ A closer look at regional differences also shows that “[c]ompliance with customary law has also been difficult where countries are ruled by Islamic governments. Arab and Islamic nations have defended the death penalty in the name of obedience to Islamic law and the strictures of the shari’a.”²⁷⁵

Other scholars argue that a regional customary international law rule prohibiting the use of the death penalty exists in Latin America.²⁷⁶ According to scholar Monique Marie Gallien, the state practice and *opinio juris* requirements are present to support the existence of the norm in Latin America, as evidenced by state constitutions, treaties, actual practice, and public statements.²⁷⁷ Since the nineteenth century, most Latin American countries have abolished the death penalty or limited its application.²⁷⁸ Currently, the only Latin American country that still imposes the death penalty is Guatemala.²⁷⁹

271. See generally Michelle McKee, *Tinkering with the Machinery of Death: Understanding Why the United States Use of the Death Penalty Violates Customary International Law*, 6 BUFF. HUM. RTS. L. REV. 153 (2000); see also Monique Marie Gallien, “No Existira La Pena de Muerte”: Does the United States Violate Regional Customary International Law by Imposing the Death Penalty on Citizens of Puerto Rico?, 30 BROOK. J. INT’L L. 727 (2005).

272. See generally *supra* note 271 and accompanying text.

273. McKee, *supra* note 271, at 157 (citing Report of Secretary-General submitted pursuant to Commission Resolution 1997/12, U.N. Doc. E/CN.4/1998/82 (1998)).

274. *Id.* at 159.

275. *Id.* at 161.

276. See generally Gallien, *supra* note 271.

277. *Id.*

278. *Id.* at 750.

279. *Id.* at 754.

Additionally, scholars point to article 4 of The American Convention on Human Rights (also known as the “Pact of San José, Costa Rica”), which prohibits sixteen Latin American states from imposing the death penalty.²⁸⁰ Six more countries signed a later Additional Protocol to the treaty that contains a wartime exception.²⁸¹ Like the parties to the Convention Against Torture, the signatories to the treaty “were acting out of a sense of legal obligation and with the goal of codifying a practice that was already in existence among them.”²⁸² Therefore, the fact that these states are parties to the treaty provides the *opinio juris* necessary to show that a regional customary international law norm prohibiting the death penalty has evolved.

B. Comparison with the Proposed Norm

Arguments for a regional and a universal customary international law rule, respectively, are similar for both the prohibition of the death penalty and the prohibition of criminalization of same-sex sexual activity. The extent of actual state practice is strikingly similar,²⁸³ and both have regional differences. The Islamic nations have not followed the death penalty norm or the proposed antisodomy norm because both norms conflict with precepts of traditional Islamic law.²⁸⁴ Similarly, the majority of African nations and other non-Western states has not supported the norm prohibiting the criminalization of same-sex sexual activity.²⁸⁵

The case for a regional norm prohibiting antisodomy laws in the West is even stronger than the argument for a regional norm prohibiting the death penalty in Latin America. One hundred and eight states do not punish same-sex sexual activity, and virtually all of those states made public statements supporting the prohibition on antisodomy laws in 2008.²⁸⁶ Additionally, courts have struck down antisodomy statutes in forty-seven countries in the Council of Europe, South Africa, and the

280. *Id.* While article 4 of the American Convention on Human Rights does prohibit the imposition of the death penalty, it does not do so in all cases. Under section 2 of article 4, “[i]n countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.” American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123, O.A.S.T.S. 36, art. 4 (1979).

281. Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Aug. 28, 1991, 29 I.L.M. 1447, O.A.S.T.S. 73.

282. Gallien, *supra* note 271, at 754-55.

283. Compare Appendixes A and B. Both ratios contain 108 States that conform to the proposed norms.

284. *See* discussion *supra* Part VI.

285. *See* discussion *supra* Part IV.E.

286. *See* discussion *supra* Part IV.D.

United States.²⁸⁷ Therefore, it can be stated that the Western regions of the world generally support the norm prohibiting antisodomy laws. Although the evidence supporting a norm prohibiting the death penalty in Latin America is similar, Guatemala still imposes the death penalty; and, the treaty among the Latin American countries still allows a wartime exception to the imposition of the death penalty for “the most serious crimes.”²⁸⁸

VII. CONCLUDING REMARKS AND PREDICTIONS

A prohibition on state antisodomy laws or laws that affect the individual right to engage in adult consensual same-sex sexual activity has not evolved into a crystallized norm of customary international law. Current state practice, as evidenced by state domestic laws and *opinio juris* as reflected in the December 2008 U.N. General Assembly resolutions,²⁸⁹ reveals deep division over the norm; Western states are strongly in favor of the norm, while a majority of Non-Western states oppose it.

Consequently, a case may be made for a regional norm of customary international law in the West. The state practice requirement is met because all of the Western nations have repealed their antisodomy laws or never had any present, which constitutes a showing of a relatively uniform and consistent practice among the Western states.

However, the *opinio juris* requirement may be more difficult to ascertain among Western states. Some international agreements have been interpreted to encompass protections for same-sex sexual acts under the right to privacy.²⁹⁰ But it is not clear whether states understood the right to privacy to include this interpretation when they became parties to those agreements. However, judicial opinions from Western courts support the *opinio juris* of prohibiting antisodomy laws. All forty-seven countries in the Council of Europe, as well as the United States, must adhere to the proposed norm under *Dudgeon v. United Kingdom* and *Lawrence v. Texas*, respectively.

Nonetheless, crystallization of the norm has reached a significant stage of its development. The most recent U.N. General Assembly resolution that called for nondiscrimination based on sexual orientation included six African Nations as its proponents,²⁹¹ and more states likely

287. See discussion *supra* Part IV.E.

288. See discussion *supra* Part VI.

289. See *supra* note 234 and accompanying text.

290. See *supra* notes 189, 196, 198 and accompanying text.

291. See *supra* note 234 and accompanying text.

could be persuaded in the future to support sexual orientation nondiscrimination. Now is the time for states opposed to the norm to object persistently if they do not want to be bound by it in the future because the norm is presently evolving. If the number of pertinent General Assembly resolutions on the matter increases²⁹² and more states interpret international human rights treaties to include the right to engage in same-sex sexual activity within their protections against discrimination based on sexual orientation, the requirements of customary international law would be met and could propel the norm beyond its regional bounds into binding international legal authority. Furthermore, Western states, along with intergovernmental organizations and NGOs,²⁹³ may play a key role in the norm's development in the future.²⁹⁴ The proposed norm could very well continue to emerge into regions beyond the Western world. However, it is currently unlikely to do so given the strong opposition to it in Africa and other non-Western regions of the world.

292. This is a goal of the NGOs who played a role in the passing of the December 2008 resolution. *See infra* note 294 and accompanying text.

293. Organizations that lobbied for the December 18, 2008 U.N. General Assembly resolution calling for protections for the LGBT community included: Amnesty International; ARC International; the Center for Women's Global Leadership; COC Netherlands; Global Rights; Human Rights Watch; IDAHO Committee; the International Gay and Lesbian Human Rights Commission; the International Lesbian, Gay, Bisexual, Trans and Intersex Association; and the Public Services International. Int'l Lesbian, Gay, Bisexual, Trans & Intersex Ass'n, UN: General Assembly To Address Sexual Orientation (Dec. 12, 2008), http://www.ilga.org/news_results.asp?FileID=1206.

294. Nongovernmental organizations play a large role in developing customary international law rules. The recent Convention on the Rights of Persons with Disabilities was signed by a record number of United Nations Member States—eighty-one States signed the treaty on the first day it was opened—March 30, 2007. *See* Record Number of Countries Sign UN Treaty on Disabilities on Opening Day (Apr. 2, 2007), http://www.un-ngls.org/site/article.php?id_article=259. This treaty was the product of intense lobbying efforts by NGOs:

Nongovernmental organizations played a key role in establishing the Convention. The community of persons with disabilities had as its voice the International Disability Caucus, which comprised 70 organizations and had pressed for the adoption of the human rights treaty. This format allowed for the disabled community to be in the negotiating rooms, resulting in a stronger text.

Id. Like the Convention on the Rights of Persons with Disabilities, NGOs will have to increase their lobbying efforts in order to push forward a movement for a prohibition on antisodomy laws past the U.N. General Assembly. Doing this will enhance the norm's chances of surviving the crystallization process and for gaining momentum for treaty negotiations.

**ANNEX A: 108 Locations²⁹⁵ Where Same-Sex Sexual Acts
are Legal or Are Not Illegal²⁹⁶**

Albania (1995) ²⁹⁷	Finland (1971)	Neth. Antilles
Andorra	France (1791)	N. Zealand (1986)
Argentina (1887)	Gabon	Nicaragua (2008)
Armenia (2003)	Georgia (2000)	North Korea
Australia	Germany (1969)	Norway (1972)
Austria (1971)	Greece (1951)	Paraguay
Azerbaijan (2000)	Guatemala	Peru (1924)
Bahamas (1991)	Haiti	Philippines
Belarus (1994)	Honduras	Poland (1932)
Belgium (1795)	Hungary (1962)	Portugal (1983)
Bolivia	Iceland (1940)	P. Rico (2005)
Bosnia-Herzegovina (1998)	Israel (1988)	Romania (1996)
Brazil (1831)	Italy (1890)	Russia (1993)
Bulgaria (1968)	Japan (1882)	Rwanda
Burundi	Jordan (1951)	S. Marino (1865)
Cambodia	Kazakhstan (1998)	Serbia (1994)
Canada (1969)	Kosovo (1994)	Slovakia (1962)
Central African Republic	Kyrgyzstan (1998)	Slovenia (1977)
Cape Verde (2004)	Laos	S. Africa (1998)
Chile (1998)	Latvia (1992)	South Korea
China	Liechtenstein (1989)	Spain (1979)
Colombia (1981)	Lithuania (1993)	Suriname
Congo	Luxembourg (1795)	Sweden (1944)
Cote d'Ivoire	Macedonia (1996)	Switzer. (1942)
Croatia (1977)	Madagascar	Taiwan
Cuba (1979)	Mali	Tajikistan (1998)
Cyprus (1998)	Malta (1973)	Thailand (1957)
Czech Republic (1962)	Marshall Islands (2005)	Timor-Leste
Denmark (1933)	Mexico (1872)	Turkey (1858)
Dominican Republic	Micronesia	Ukraine (1991)
Ecuador (1997)	Moldova (1995)	U. King. (1967)
El Salvador	Monaco (1793)	U. States (2003)
Equatorial-Guinea	Mongolia	Uruguay (1934)
Estonia (1992)	Montenegro (1977)	Vanuatu
Fiji (2005)	Netherlands (1811)	Venezuela
		Vietnam
		West Bank (P.A.)

295. Locations include states, as well as territories such as the West Bank and Puerto Rico.

296. This list, compiled by Daniel Ottosson on behalf of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, is reprinted here with permission. See ILGA SURVEY, *supra* note 2, at 53 (permitting reprint with acknowledgement of author and ILGA).

297. The years contained in the parentheses refers to the years of repeal or reform of the State or territory's antisodomy law.

**ANNEX B: 86 Locations²⁹⁸
Where Same-Sex Sexual Acts are Illegal²⁹⁹**

Afghanistan	Malawi	Tokelau
Algeria	Malaysia	Tonga
Angola	Maldives	Trinidad & Tobago
Antigua & Barbuda	Mauritania	Tunisia
Bahrain	Mauritius	T.R. of N. Cyprus
Bangladesh	Morocco	Turkmenistan
Barbados	Mozambique	Tuvalu
Belize	Myanmar	Uganda
Benin	Namibia	U. Arab Emirates
Bhutan	Nauru	Uzbekistan
Botswana	Nepal	Western Samoa
Brunei	Nigeria	Yemen
Cameroon	Niue	Zambia
Comoros	Oman	Zimbabwe
Cook Islands	Pakistan	
Djibouti	Palau	
Dominica	Panama	
Eritrea	Papua New Guinea	
Ethiopia	Qatar	
Gambia	St. Kitts & Nevis	
Gaza	St. Lucia	
Ghana	St. Vincent & the Gren.	
Grenada	São Tomé and Príncipe	
Guinea	Saudi-Arabia	
Guinea-Bissau	Senegal	
Guyana	Seychelles	
India ³⁰⁰	Sierra Leone	
Iran	Singapore	
Jamaica	Solomon Islands	
Kenya	Somalia	
Kiribati	Sri Lanka	
Kuwait	Sudan	
Lebanon	Swaziland	
Lesotho	Syria	
Liberia	Tanzania	
Libya	Togo	

298. Locations include states, as well as territories such as the Gaza Strip, the Cook Islands, and Niue. ILGA also surveyed the laws of the United Arab Emirates, which should be referred to as an “entity” in the list above.

299. See *supra* note 296 and accompanying text.

300. See discussion *supra* note 221.