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## Objection Overruled: The Binding Nature of the International Norm Prohibiting Discrimination Against Homosexual and Transgendered Individuals

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ARTICLE

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INTERNATIONAL NORM PROHIBITING  
DISCRIMINATION AGAINST HOMOSEXUAL  
AND TRANSGENDERED INDIVIDUALS**

*Sophie M. Clavier\**

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*INTRODUCTION*

On June 17, 2011, the United Nations Human Rights Council (“UNHRC”) narrowly passed the “Human Rights, Sexual Orientation and Gender Identity” Resolution (“Resolution”).<sup>1</sup> The Resolution expresses “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and [sic] gender identity.”<sup>2</sup> It aims to prohibit the criminalization of individuals based on their sexual activities, and/or sexual orientation, as well as for their sexual identity. The Resolution is binding on UNHRC members, but does not provide any penalty for lack of compliance. Moreover, it was highly contentious and passed with a very narrow margin of twenty-three to nineteen, with three abstentions.<sup>3</sup> Yet, human rights activists instantly hailed it as a success. This Article seeks to answer the following question: is this Resolution the written expression of an existing customary norm, which already prohibits all countries from criminalizing, and even discriminating against homosexuals and transgendered individuals, or reversely, is it merely an additional wishful step in the creation of such a norm, but without any binding force to date on permanent—and explicit—objectors to the said norm?

This Article hypothesizes that the first answer is the correct one. It recognizes that no international treaty to date specifically prohibits states from discriminating on the basis of sexual orientation or sexual identity, in the same manner that the International Convention on the Elimination of All Forms of Racial Discrimination<sup>4</sup> or the Convention on the Elimination of

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1. See Human Rights Council Res. 17/19, Rep. of the Human Rights Council, 17th Sess., May 31–June 17, 2011, U.N. Doc. A/HRC/17/L.9/Rev.1 (June 15, 2011).

2. *Id.* at 1.

3. States supporting the resolution: Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Guatemala, Hungary, Japan, Mauritius, Mexico, Norway, Poland, the Republic of Korea, Slovakia, Spain, Switzerland, Ukraine, Thailand, the United Kingdom, the United States, and Uruguay. States against the resolution: Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, the Republic of Moldova, the Russian Federation, Saudi Arabia, Senegal, and Uganda. Abstentions: Burkina Faso, China, and Zambia. Human Rights Council, Advance Unedited Rep. of the Human Rights Council, 17th Sess., at 107, U.N. Doc. A/HRC/17/L.30 (June 2011).

4. International Convention on the Elimination of All Forms of Racial Discrimination art.2, Jan. 4, 1969, 660 U.N.T.S. 195.

All Forms of Discrimination against Women<sup>5</sup> respectively forbid state-condoned racial or gender discrimination. It also acknowledges that the practices, as well as the beliefs, of states in terms of discrimination based on sexual identity/orientation are far from being uniform. However, this Article posits that treaty-based obligations already exist as to the prohibition of such discrimination, and that short of a specific international treaty banning such discrimination, one can imply such a ban from other clauses in widely-ratified treaties. A survey of recent international and regional judicial decisions will confirm that such implicit reading is possible and does not depart from classical positivism. However, this Article will then argue that custom as a primary source of international law goes further than the expression of the consent of unitary states to existing norms. It argues reversely that the nature of custom as a source of International Law allows it to constantly evolve as a socially-constructed order, especially in the field of human rights, and that, in the presence of a growing *opinio juris* by the international community that favors nondiscrimination, persistent objection cannot justify exception.

#### I. *TREATY-BASED PROHIBITION OF DISCRIMINATION*

This Part first establishes that international human rights treaties, by virtue of their purpose, have to be constructed as permitting a dynamic, and thus progressive, interpretation of the terms they used, moving toward expansion and not restriction of rights. This is followed second by a survey of the broad international and regional treaty-based protection against discrimination and a correlated positive obligation for states to promote equality. Third, the materials presented below demonstrate that there exists protection against discrimination often beyond what treaties list as objective status. In all the instruments mentioned, the phrase “any other status” indeed provides an open-ended guarantee of equal treatment for all, regardless of status, even if the status is not explicitly mentioned, as is often the case for religion, race, or gender. Finally, this Part emphasizes that there is no objective reason or criteria to

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5. Convention on the Elimination of All Forms of Discrimination against Women art.2, Dec. 18, 1979, 1249 U.N.T.S. 13.

discriminate against sexual identity/orientation group in the enjoyment of individual civil and economic rights, thus making homosexual and transgendered individuals part of a “protected” status. Several international and regional case law and decisions confirm all those aforementioned assertions.

#### *A. Treaties Interpretation and Human Rights*

This Section ascertains whether the law on interpretation of treaties allows for a possible “developmentalist” reading of a treaty, which would view the treaty as enlarging the scope of rights it contains, as opposed to an “authentic” reading, which would have the agreement of all parties.<sup>6</sup> Eduardo Jiménez de Aréchaga recalls the use of two interpretive approaches at the 1969 Vienna Conference on the Law of Treaties: one recommending that the interpretation of treaties be solely based on the “common and real” intention of all parties; the other, providing for a textual approach, whereby the intent is to “establish what the text means according to the apparent signification of its terms.”<sup>7</sup> Jiménez de Aréchaga highlights the fact that at the end, the International Law Commission recommended the latter approach, now embodied in the Vienna Convention: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>8</sup>

More importantly, in terms of interpreting human rights treaties, the “purpose” of such treaties is paramount. The Inter-American Court of Human Rights exemplifies this viewpoint when stating that:

[O]bjective criteria of interpretation that look to the texts themselves are more appropriate than subjective criteria

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6. An “authentic” interpretation receives the agreement of all parties as to the meaning of a term of a term, as opposed to a “unilateral” interpretation. See CHARLES DE VISSCHER, *PROBLÈMES D’INTERPRÉATION JUDICIAIRE EN DROIT INTERNATIONAL PUBLIC* 20–21 (1963).

7. Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, in 159 *RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 1, 42–48 (1978).

8. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

that seek to ascertain only the intent of the Parties. This is so because human rights treaties . . . “are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States;” rather “their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the state of their nationality, both against the State of their nationality and all other contracting States.”<sup>9</sup>

As a result, by the very nature of their purpose, human rights treaties should not be interpreted in favor of the freedom of states concerned. Quite the opposite, they are intended to favor individual liberties. In this light, we can now turn our attention to specific international and regional human rights agreements.

#### *B. The Principle of Nondiscrimination*

At the international level, the three main documents forming the so-called International Bill of Rights establish nondiscrimination and the correlated principle of equality as being central to the enjoyment of all fundamental rights and freedoms. The Universal Declaration of Human Rights lists these rights and freedoms, which the two Covenants, the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), then seek to protect.<sup>10</sup> Several Articles ought to be mentioned from the Universal Declaration of Human Rights in this regard:

Article 1: All human beings are born free and equal in dignity and rights . . . Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex,

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9. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3., ¶ 50 (Sept. 8, 1983).

10. See generally Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

language, religion, political or other opinion, national or social origin, property, birth or other status . . . .

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.<sup>11</sup>

These Articles provide the framework later reinforced by Article 26 of the ICCPR.<sup>12</sup> The Article states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>13</sup>

Finally, the third prong of the ICESCR includes similar nondiscrimination provisions in Article 2(2): “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>14</sup>

### C. “Other status”: An Open-Ended Proposition

The phrase “other status” is open-ended, meaning that the preceding lists are not exhaustive, and, quite to the contrary, offer the possibility of other categories. For example, in *Gueye v. France*, the Human Rights Committee (“HRC”) posited its view that the phrase “other status” in Article 26 protected retired Senegalese soldiers from discrimination based not only on nationality but also on their social, economic, and financial situations.<sup>15</sup>

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11. UDHR, *supra* note 10, arts. 1–2, 7.

12. *See* ICCPR, *supra* note 10, art. 26.

13. *Id.*

14. ICESCR, *supra* note 10, art. 2(2).

15. *See* U.N. Human Rights Comm., 35th Sess., Comm’n No. 196/1985: France (*Gueye v. France*), ¶ 9.4, CCPR/C/35/D/196/1985 (Apr. 6, 1989).

Similar broad provisions against discrimination regardless of status, listed or not, appear in all major regional instruments on human rights. In the African Charter, for example:

Article 2: Every individual shall be entitled to the enjoyment of rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status . . . .

Article 3: (1) Every individual shall be equal before the law.  
(2). Every individual shall be entitled to equal protection of the law.<sup>16</sup>

Accordingly, the African Commission in *Legal Resources Foundation v/ Zambia* ruled that: “[t]he right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens.”<sup>17</sup>

At the Inter-American level, both instruments, the American Declaration of the Rights and Duties of Man (“American Declaration”) and the American Convention on Human Rights “Pact of San Jose, Costa Rica” (“American Convention”), provide for equality and keep an open-ended interpretation of status, whether they are identified as “factors” or “social conditions.”<sup>18</sup>

Article II of the American Declaration states: “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”<sup>19</sup> Likewise, Article 1 of the American Convention (Obligation to Respect Rights)

16. African Charter on Human and Peoples’ Rights arts. 2–3, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

17. *Legal Resources Foundation v/ Zambia*, Afr. Comm’n on Human and Peoples’ Rts., Communication No. 211/98, ¶ 63 (May 7, 2001).

18. See Organization of American States, American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, OEA/Serv.L/V/II.23 (May 12, 1948) [hereinafter American Declaration]; Organization of American States, American Convention on Human Rights art. 1, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention].

19. American Declaration, *supra* note 18, art. 2.



provides that: “Parties to this Convention undertake to . . . ensure to all persons . . . the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other *social condition*.”<sup>20</sup>

Article 3 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Obligation of nondiscrimination) also states that “[t]he States Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.”<sup>21</sup>

Finally, at the European level, the cornerstone of nondiscrimination appears first in Article 14 of the European Convention on Human Rights (“ECHR”): “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>22</sup>

The Article is reinforced in Protocol 12, entered into force in 2005, which intends to broaden the field of application of Article 14 beyond the rights included in the ECHR:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

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20. American Convention, *supra* note 18, art. 1 (emphasis added).

21. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 3, *opened for signature* Nov. 17, 1988, O.A.S.T.S. No. 69 (entered into force Nov. 16, 1999).

22. Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 222.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.<sup>23</sup>

Note that the phrase “such as those” is not exclusive of other grounds. The Explanatory Report to the Protocol published by the European Council acknowledges that the list of nondiscrimination grounds in Article 1 is the same as that listed that in Article 14 of the Convention:

This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today’s societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included.<sup>24</sup>

It is, however, the European Union Charter of Fundamental Rights that goes the furthest in elucidating status, by explicitly including sexual orientation.<sup>25</sup> For example, Article 21, entitled Nondiscrimination, provides:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or *sexual orientation* shall be prohibited.<sup>26</sup>

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23. Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 2000, C.E.T.S. No. 177.

24. COUNCIL OF EUROPE, EXPLANATORY REPORT TO PROTOCOL NO. 12 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS ¶ 20 (2000), available at <http://conventions.coe.int/treaty/en/reports/html/177.htm>.

25. See Charter of Fundamental Rights of the European Union art. 21, 2000 O.J. C 364, at 13 [hereinafter Charter of Rights]. Since the entry into force of the Lisbon Treaty in 2009, the Charter holds the same legal status as other European Union treaties. See, e.g., JEAN-CLAUDE PIRIS, THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS 159 (2010).

26. Charter of Rights, *supra* note 25, art. 21 (emphasis added).

This review demonstrates that both international and regional instruments affirm the existence of freestanding rights to equality beyond the explicitly listed rights. The task at hand is now to prove whether sexual orientation and/or sexual identity by themselves can be considered a “status” when they are not explicitly mentioned. If this can be proven, the result is that sexual orientation and sexual identity are not objective and reasonable bases for discrimination.

#### D. *Sexual Orientation and Gender Identity as a Status*

Some judicial decisions have bypassed this issue (which seems to be, to date, the “easier” reasoning) by recognizing rights of homosexuals or transgendered individuals under the broader category of “sex”; or they have protected same-sex partners’ sexual acts under the cover of privacy rights. In *Toonen v. Australia*, for example, the HRC did both.<sup>27</sup> In this case, the HRC found that Tasmanian laws criminalizing sexual relations between consenting males violated Toonen’s right to privacy protected under the ICCPR. The laws “constituted an unlawful and arbitrary interference with the privacy of the applicant, contrary to Article 17(1) of the ICCPR.”<sup>28</sup> Since the violation of Article 17 was enough in itself, the HRC did not consider whether Article 26 was violated. It nonetheless remarked that “the reference to ‘sex’ in Articles 2(1) and 26 includes sexual orientation.”<sup>29</sup>

A similar reasoning applied in the European Union (“EU”), where the Court of Justice for the European Union (“Court of Justice”) has addressed discrimination against transgendered and transsexual individuals as a form of sex discrimination. In *P. v. S.*, the Court of Justice prohibited the dismissal from employment of a transsexual individual.<sup>30</sup> The Court recalled that the “the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure” and

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27. See *Toonen v. Australia*, No. 488/1992, U.N. Human Rights Comm., U.N. Doc. CCPR/C/50/D/488/1992 (Apr. 4, 1994).

28. See INTERRIGHTS, *DISCRIMINATION IN INTERNATIONAL LAW: A HANDBOOK FOR PRACTITIONERS* 140 (2011).

29. See *Toonen*, No. 488/1992 at ¶ 8.7.

30. *P. v. S.*, Case C-13/94, [1996] E.C.R. I-2143, ¶ 24.

that the EU directive protecting this right could not be limited to a person being of a particular sex.<sup>31</sup>

The European Court of Human Rights (“ECtHR”), used the right to privacy to prevent discrimination several times, for example in the case of *Dudgeon v. United Kingdom*,<sup>32</sup> and subsequently in the cases of *Norris v. Ireland*,<sup>33</sup> and *Modinos v. Cyprus*.<sup>34</sup> In all cases, the ECtHR found that domestic laws criminalizing consensual private sexual relations between adults of the same sex were contrary to the right to respect for private life laid down in Article 8 of the ECHR. Finally, in the case of *X. v. Iceland*, the ECtHR expanded the concept of privacy to social identity by affirming that privacy encompassed the “right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfillment of one’s own personality.”<sup>35</sup>

#### E. Sexual Orientation or Identity: Not a Reasonable Exception

Other judicial decisions have gone further than stopping at the boundaries of rights of privacy, recognizing at times that sexual orientation or gender identity do not offer a “reasonable” or “objective” criterion for exception to the prohibition of discrimination.<sup>36</sup> Indeed, it is notable that there is no such thing as a blanket prohibition of discrimination—not every difference in treatment can amount to discrimination.<sup>37</sup> In

31. *Id.* ¶ 19.

32. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 25 (1981).

33. *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) at 17 (1988).

34. *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) at 11 (1993).

35. *X. v. Iceland*, 5 Eur. Comm’n H.R. Dec. & Rep. 86, 87 (1976).

36. Some cases still go the other way. See, for example, *Grant v South-West Trains Ltd.*, in which the Court of Justice for the European Union held that

The refusal by an employer to allow travel concessions to the person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker’s spouse or to the person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination prohibited by Article 119 of the EC Treaty [or the Equal Pay Directive].

*Grant v. South-West Trains Ltd.*, Case C-249/96, [1998] E.C.R. I-636, ¶ 50.

37. See William R. Bryant, *Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Qualification Defense for Race Discrimination*, 33 GA. L. REV. 211, 211 (1998) (“A film or stage director legally may decide to consider only male applicants when searching for someone to play the role of Tarzan, Romeo, or Martin Luther King, Jr. Similarly, a director may consider only females when casting for the role of Wonder

addition, all documents recognize that a state may limit some rights in cases when another person's rights are at stake, or if there is a conflict between rights, in limited times of national emergency.<sup>38</sup> No limitations of rights can violate peremptory norms,<sup>39</sup> but some derogations are permitted in a restrictive fashion for matters of public interests.<sup>40</sup> However, in all cases, if the state discriminates, discrimination must be duly justified. The ECtHR noted in *Abdulaziz v. United Kingdom* that: "A difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised.'"<sup>41</sup>

Indeed, this relationship of proportionality finds a relevant illustration in the aforementioned *Toonen* case, in which the HRC rejected the Tasmanian claim that the criminalization of homosexual acts was a public health measure designed to prevent the spread of HIV/AIDS and furthermore, a prohibition based on moral grounds.<sup>42</sup> The HRC found that criminalization was not a reasonable and proportionate means, nor was it a "reasonable" action in terms of the protection of morals.<sup>43</sup>

Finally, there is growing institutional and judicial recognition that not only sexual acts but also the identity of homosexuals, as such, should be protected under the term

Woman, Scarlett O'Hara, or Cleopatra. But if she were to exclude all but African Americans when casting for the role of Muhammad Ali, Uncle Remus, or Rosa Parks, she would be violating federal law.")

38. See, e.g., ICCPR, *supra* note 10, art. 4(1) (stating that parties to the International Covenant on Civil and Political Rights ("ICCPR") that are dealing with public emergencies that "threaten[] the life of the nation" may take actions derogating from their obligations under the ICCPR).

39. See *id.* arts. 4(1), 7-8 (referring to prohibitions on genocide in Article 4(1); prohibition on torture of other cruel and unusual punishment in Article 7; and prohibition on slavery in Article 8).

40. See UDHR, *supra* note 10, art. 29(2) ("In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.").

41. *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) at 35 (1985).

42. See *Toonen v. Australia*, No. 488/1992, U.N. Human Rights Comm., U.N. Doc. CCPR/C/50/D/488/1992, ¶¶ 8.5-8.6 (Apr. 4, 1994).

43. See *id.*

“status” in terms of enjoyment of all other rights enjoyed by the population at large. At the institutional level, for example, the United Nations High Commissioner for Refugees (“UNHCR”) has recognized that homosexuals are members of a “particular social group” for the purposes of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.<sup>44</sup> In its publication “Protecting Refugees,” the UNHCR states:

Homosexuals may be eligible for refugee status on the basis of persecution because of their membership of a particular social group. It is the policy of the UNHCR that persons facing attack, inhumane treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognized as refugees.<sup>45</sup>

Similarly, the Committee on Economic, Social and Cultural Rights has clarified in its General Comments, Numbers 18 of 2005 (on the right to work), 15 of 2002 (on the right to water), and 14 of 2000 (on the right to the highest attainable standard of health), that the ICESCR prohibits any discrimination on the basis of sex and sexual orientation that “has the intention or effect of nullifying or impairing the equal enjoyment or exercise of [the right at issue].”<sup>46</sup>

At the European legislative level, when dealing with work and labor issues, the EU prevents discrimination based on sexual orientation. For example, the Council Directive

44. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

45. *Protecting Refugees: Questions & Answers*, U.N. REFUGEE AGENCY (Feb. 1, 2002), <http://www.unhcr.org/ua/3b779dfe2.html>.

46. See Comm. on Economic, Social and Cultural Rights, 35th Sess., Nov. 7–25, 2005, General Comment No. 18: The Right to Work, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006); Comm. on Economic, Social and Cultural Rights, 29th Sess., Nov. 11–29, 2002, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); Comm. on Economic, Social, and Cultural Rights, 22d Sess., Apr. 25–May 12, 2000, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

2000/78/EC, in establishing a general framework for equal treatment in employment and occupation (the “Framework Directive”),<sup>47</sup> provides for the prohibition of discrimination on specified grounds (race, religion and belief, disability, age, and sexual orientation) related to employment and occupations.

For example, Article 1 (Purpose) states: “The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or *sexual orientation* as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.”<sup>48</sup> And, Article 2 (Concept of discrimination) provides:

1. For the purpose of this Directive, the ‘principle of equal treatment’ shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1.

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a *particular sexual orientation* at a particular disadvantage compared with other persons.<sup>49</sup>

In terms of jurisprudence, there are cases both at the international and regional levels affirming that homosexuality is a status that should suffer no discrimination in enjoyment of rights. At the international level, consider *Young v. Australia*, in which the HRC decided that cohabitating same-sex partners should be treated in the same manner as unmarried

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47. See Council Directive 2000/78/EC on Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. L 303/16, arts. 1–2 at 16.

48. *Id.* art. 1, at 18 (emphasis added).

49. *Id.* art. 2, at 18 (emphasis added).

heterosexual partners, who were granted pension benefits.<sup>50</sup> In this particular case, the HRC indicated that “sexual orientation” is an “other status” and a ground on which discrimination cannot be based under Article 26 of the ICCPR.<sup>51</sup> There are similar decisions in regional jurisprudence, especially at the European level. Although the ECHR, like the other international covenants, does not explicitly mention sexual orientation or sexual identity, the ECtHR has the most comprehensive and progressive case law on these issues.<sup>52</sup> Indeed, the Court is increasingly treating sexual orientation as a “suspect” classification, thus requiring that states provide increasingly compelling reasons to justify it,<sup>53</sup> even within the “margin of appreciation.”<sup>54</sup> For example, in *Salgueiro Da Silva Mouta v. Portugal*, the ECtHR held that giving custody to the mother of a child rather than the father on the ground of the father’s sexual orientation was discriminatory.<sup>55</sup>

Finally, in *Karner v. Austria*, which dealt with succession of tenancy between a deceased man and his gay living partner, the ECtHR accepted Austria’s claim (under the margin of appreciation) that protection of the family in the traditional sense was a “weighty and legitimate reason” that might justify a

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50. See U.N. Human Rights Comm., 78th Sess., July 14–Aug. 8, 2003, Commc’n No. 941/2000: Australia (Young v. Australia), ¶¶ 10.2–13, U.N. Doc. CCPR/C/78/D/941/2000 (Sept. 18, 2003).

51. See ICCPR, *supra* note 10, art. 26.

52. See, e.g., *Kerkhoven v. Netherlands*, App. No. 15666/89, Eur. Comm’n H.R. (1992) (unreported); *B. v. United Kingdom*, App. No. 16106/90, 64 Eur. Comm’n H.R. Dec. & Rep. 278 (1990); *C. v. United Kingdom*, App. No. 14753/89, Eur. Comm’n H.R. (1989) (unreported); *W.J. v. United Kingdom*, App. No. 12513/86, Eur. Comm’n H.R. (1987) (unreported); *S. v. United Kingdom*, App. No. 11716/85, 47 Eur. Comm’n H.R. Dec. & Rep. 274 (1986).

53. This would be the equivalent of “strict scrutiny” in US constitutional law.

54. See Rudolf Bernhardt, *Human Rights and Judicial Review: The European Court of Human Rights*, in HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 308–09 (David M. Beatty ed., 1994) (explaining the European Court of Human Rights’ use of the “margin of appreciation” doctrine); *id.* at 319 (noting, that reduced or limited national sovereignty is now accepted in exchange for protection of human rights offered by European Convention). The margin of appreciation allows a certain level of discretion by states in the interpretation and implementation of the rights contained in the European Convention. This margin seems to be narrowing as far as discrimination against homosexuals is concerned. See *Karner v. Austria*, 2003-IX Eur. Ct. H.R. 199, 202 (2003).

55. See *Salgueiro Da Silva Mouta v. Portugal*, 2003-IX Eur. Ct. H.R. 309, 311 (1999).



difference in treatment but that not recognizing a gay partner as a living companion (a legal category in Austria) was a nonnecessary measure and a discriminatory one.<sup>56</sup> Reading the aforementioned cases, it is possible to follow Rudolf Bernhardt's conclusion that the ECtHR, while allowing for the margin of appreciation, has done so in a fairly restricted manner as to what state parties can invoke. "In a considerable number of decisions, the European Court has stressed that the [ECHR] must be interpreted and applied in accordance with present-day conditions in law and society, not with past convictions."<sup>57</sup>

In addition, there have been a number of claims before the ECtHR that a higher age of consent for male homosexual acts than for heterosexual acts constitutes discriminatory treatment contrary to Article 14 of the ECHR. Such reasoning appears in *Sutherland v. United Kingdom*; in *S.L. v. Austria*; in *L. v. Austria*; and in *B.B. v. United Kingdom*.<sup>58</sup>

Nonetheless, note that at the time of this writing, the aforementioned jurisprudential evolution seems to stop at protecting same-sex marriage. For example, in *Joslin v. New Zealand* the HRC confirmed that the right to marry under the ICCPR extended only to marriage between a man and a woman.<sup>59</sup> Similarly, in the case of *Schalk v. Austria*, the ECtHR stated that the ECHR does not oblige member states to legally recognize same-sex marriages.<sup>60</sup> Despite this holding, it is important for future, and probable, cases to note that the ECtHR does not purport to prohibit same-sex marriages.

The preceding review shows an undeniable evolving jurisprudence moving rapidly towards interpreting human rights treaties as prohibiting discrimination against sexual orientation and identity, with the current exception of same-sex marriage.

56. See *Karner*, 2003-IX Eur. Ct. H.R. at 202.

57. LOUIS HENKIN ET AL., *HUMAN RIGHTS* 313 (Robert C. Clark et al. eds., 2d ed. 1999).

58. *B.B. v. United Kingdom*, App. No. 53760/00, Eur. Ct. H.R., ¶¶ 23–25 (2004) (unreported); *L. v. Austria*, 2003-I Eur. Ct. H.R. 31, 31 (2003); *S.L. v. Austria*, 2003-I Eur. Ct. H.R. 72, 73 (2003); *Sutherland v. United Kingdom*, App. No. 25186/94, 24 Eur. Comm'n H.R. Dec. & Rep. 25, ¶¶ 3–4 (1997).

59. U.N. Human Rights Comm., 75th Sess., July 8–26, 2002, Comm'n No. 902/1999: *New Zealand (Joslin v. New Zealand)*, ¶¶ 8.2–8.3, U.N. Doc. CCPR/C/75/D/902/1999 (July 30, 2002).

60. *Schalk v. Austria*, App. No. 30141/04, Eur. Ct. H.R. ¶¶ 103–10 (2010) (unreported).

Does this mean, therefore, that this evolution is only binding on states through their specifically ratified treaty obligations, and within the scope of their reservations and understandings, or is there also already a customary norm, the binding nature of which can no longer be avoided by objecting states? Perhaps it is possible to affirm that a legal rule has now been recognized, even in a context of “much uncertainty and contradiction.”<sup>61</sup>

## II. *CUSTOM-BASED PROHIBITION OF DISCRIMINATION*

The second task of this Article is to demonstrate that states who express opposition to such nondiscrimination and who persist in refusing to transfer international law to domestic processes are not merely objecting to what *could* be a custom in the future in an attempt to prevent it, but are already in violation of a binding customary norm. In doing so, this Article posits that strict legal positivism, with an emphasis on state consent as a prerequisite to being bound by a norm regardless of its nature, has long ceased to be the dominant doctrine of conceptualization of international law, especially in the field of human rights.

### A. *Custom and Consent in International Law in General*

A reading of Article 38 of the International Court of Justice Statute identifies custom as a source of law and defines it as “evidence of a general practice accepted as law.”<sup>62</sup> While it is not explicit, there is no denying that the Statute referred at the time of its writing in 1920 (when creating the Permanent Court of International Justice) to practice of *states* and acceptance by *states*. The unitary nature of sovereign states and the fact that they were deemed to be the only subjects of international legal system was not questioned much prior to the human rights movement following World War II. The Permanent Court of International Justice encapsulated that approach in the *S.S. Lotus* case, noting that: “[t]he rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages as generally accepted as expressing

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61. *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 277 (Nov. 20).

62. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

principles of law . . . . Restrictions upon the independence of States cannot therefore be presumed.”<sup>63</sup>

The idea was that a sovereign state cannot be compelled to comply with a norm it has not agreed to by treaty and that the conduct of other states cannot in itself bind it. Strict positivism, defended by Hans Kelsen in *Pure Theory of Law* in the 1930s,<sup>64</sup> in general, and in the *S.S. Lotus* case, in particular, has been criticized for several reasons. Subsequent authors and judicial decisions have started taking into account the sociological aspect of international law—which implies taking into consideration the changing nature of international society, especially the rise of actors other than states, and the dynamic nature of its evolution. For example, Roscoe Pound views law as a form of social engineering in constant evolution.<sup>65</sup> Christian Tomuschat sees international legal order not as an expression of consent but as a sociological necessity whereby “the cohesive legal bonds tying States to one another have considerably strengthened since the coming into force of the United Nations Charter.”<sup>66</sup> Judge Rosalyn Higgins emphasizes the nature of “international law as a process rather than rules;”<sup>67</sup> and further states that “international law is a continuing process . . . that must respond to a changing political world and cannot simply rely on accumulated past decisions.”<sup>68</sup> The New Haven School has also criticized positivism as remaining “fixated on the past, trying to reap from words laid down, irrespective of the context in which they were written, the solution to a problem that arises today or tomorrow in very different circumstances.”<sup>69</sup> The decreasing dominance of a doctrine of strict state voluntarism in creating

63. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

64. See HANS KELSEN, *PURE THEORY OF LAW* 1 (Max Knight trans., Univ. of Cal. Press 2d prtg. 1970) (2d ed. 1967).

65. See ROSCOE POUND, *OUTLINES OF LECTURES ON JURISPRUDENCE* 116–19 (5th ed. 1943).

66. Christian Tomuschat, *Obligations Arising for States without or against Their Will*, 241 *RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 195, 210 (1993).

67. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 148 (1994).

68. *Id.* at 2.

69. Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity* 93 *AM. J. INT'L L.* 316, 320 (1999).

obligations is nowhere more evident than in the human rights movement.

*B. Consent and Customary Norms of Human Rights: The Consent of the Community At-Large Replacing State Consent in the Formulation of Opinio Juris*

Indeed, the aftermath of World War II gave rise to an international human rights movement “out of a spreading conviction that how human beings are treated anywhere concerns everyone, everywhere.”<sup>70</sup> This movement changed the conceptualization of sovereignty, and by extension challenged strict positivism. The claim that treatment of its own citizens is strictly the domestic problem of a sovereign state was no longer acceptable. To a degree, what Louis Henkin calls the “age of rights”<sup>71</sup> is not only a departure from strict legal positivism but also a resurgence of natural law, asserting that certain rights exist regardless of positive, or man-made, laws. This is the interpretation of the Nuremberg Trials that Quincy Wright provides when he argues that superior principles of justice determined by the international community—not by individual states—formed part of the Nuremberg judgment.<sup>72</sup> Indeed, at the apex of this school of thought, *jus cogens* norms such as the prohibition of genocide, war crimes, or crimes against humanity can suffer no derogation regardless of the will of individual states and can only be changed by consensus of the international community of states.<sup>73</sup> Thus, it can be posited, as Jonathan Charney does, that acceptance is required only by the international community and not by all individual states.<sup>74</sup> As a

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70. LOUIS HENKIN, *THE AGE OF RIGHTS* 14 (1st ed. 1990), *reprinted in* LOUIS HENKIN ET AL., *HUMAN RIGHTS* 278 (Robert C. Clark et al. eds., 2d ed. 1999).

71. *See* HENKIN, *THE AGE OF RIGHTS*, *supra* note 70, at 13–20.

72. Quincy Wright, *Legal Positivism and the Nuremberg Judgment*, 42 AM. J. INT’L L. 405, 414 (1948).

73. Vienna Convention, *supra* note 8, art. 53 (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm 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.”)

74. *See* Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 536 (1993).

result, when dealing with human rights, the possibility of finding universal norms can be asserted, the acceptance of which comes from the overall international community rather than from the sum of the will of all individual states. Furthermore, it is this Article's contention that, in the field of human rights, it is increasingly impossible for any state to defy an emerging customary norm on the basis of persistent objector. Consequently, for all the divergent practices and vocal opposition by several states, they cannot escape the binding nature of the norm prohibiting discrimination against gays and transgendered people.

### C. *The Issue of Permanent Objector*

There is no denying that there is no general and uniform practice of states on the issue, and that there is a correlated explicit opposition to nondiscrimination. In terms of legislative practices, various data kept by nongovernmental organizations, such as the International Lesbian, Gay, Bisexual, Trans and Intersex Association<sup>75</sup> and World Focus,<sup>76</sup> present each country's position on issues ranging from adoption and male-male relationships to the ability to legally change genders. Undoubtedly, it shows a wide range of practices by states. World Focus has created a map that graphically illustrates how the world is split on the issues ranging from the recognition of same-sex marriage in Canada, Spain, and Scandinavian countries, to the imposition of the death penalty on homosexuals in several African and Middle Eastern countries.<sup>77</sup>

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75. See INT'L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS'N, <http://ilga.org/> (last visited Jan. 6, 2012). World Legal Survey is to this day the only database on legislations affecting Lesbians, Gays, Bisexual and Transgender people around the world. The World Legal Survey is widely consulted as a resource for those working to promote LGBT rights, whether they be activists, lawyers, academics or people working in the media. *See id.*

76. See WORLD FOCUS, <http://worldfocus.org/blog/tag/gay-rights/> (last visited Jan. 6, 2012). World Focus is one of few international news organizations that regularly reports on the issues that affect LGBT people throughout the world.

77. This map is World Focus' creation and provides a visual depiction of the various levels of recognition of the LGBT community worldwide. *See Tracking the Legality of Same-Sex Marriage around the World*, WORLD FOCUS (Dec. 29, 2009), <http://worldfocus.org/blog/2009/12/29/tracking-the-legality-of-same-sex-marriage-around-the-world/9035/>.

In terms of vocal and persistent objections, consider the explicit “no” votes in United Nations’ (“UN”) or in regional institutions’ Declarations. The finalized Yogyakarta Principles<sup>78</sup> were launched as a global charter for gay rights on March 26, 2007, at the United Nations Human Rights Council in Geneva, and indeed shaped the subsequent 2008 UN Declaration on Sexual Orientation and Gender Identity. Fifty-seven countries, as well as the Vatican, virulently opposed this Declaration, including members of the Organization of the Islamic Conference (“OIC”).<sup>79</sup> The latter issued a joint statement, criticizing the initiative as an attempt to give special prominence to gays and lesbians. The statement suggested that protecting sexual orientation could lead to “the social normalization and possibly the legalization of deplorable acts” such as pedophilia and incest.<sup>80</sup> Similar opposition faced the aforementioned Human Rights Council Decision of June 17, 2011. It was opposed by nineteen out of forty-five member nations.<sup>81</sup> Several African and Middle Eastern nations, spearheaded by Nigeria, criticized South Africa’s sponsoring of the Resolution, accusing the nation of “westernizing” and breaking from what “90 percent” of South Africans want, and decrying the UN trying to force controversial ideas with no legal basis on their countries.<sup>82</sup> The OIC concurred: “OIC states are deeply concerned by the . . . resolution that intends to discuss very controversial notions that are on sexual orientation,” with Pakistan speaking on behalf of the OIC.<sup>83</sup> Further, the OIC was “seriously concerned at the

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78. See generally Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Mar. 2007), available at [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm).

79. See Neil MacFarquhar, *In a First, Gay Rights are Pressed at the U.N.*, N.Y. TIMES, Dec. 19, 2008, at A22; see also PIOTR BAKOWSKI, FIRST UN RESOLUTION ON HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY 1 (2011), available at [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2011/110218/LDM\\_BRI\(2011\)110218\\_REV1\\_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2011/110218/LDM_BRI(2011)110218_REV1_EN.pdf).

80. See David Crary, *United Nations: First Gay Rights Declaration Wins Much Support, United States Opposes It*, HUFFINGTON POST (Dec. 19, 2008, 12:08 AM), [http://www.huffingtonpost.com/2008/12/19/united-nations-first-gay\\_n\\_152325.html](http://www.huffingtonpost.com/2008/12/19/united-nations-first-gay_n_152325.html).

81. See *supra* note 3.

82. See *Pakistan Concerned over UN Gay Resolution*, THE NATION (June 18, 2011), <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/International/18-Jun-2011/Pakistan-concerned-over-UN-gay-resolution-passage>.

83. See *id.*

attempt to introduce to the United Nations some notions that have no legal foundation.”<sup>84</sup>

The opposition described above may be explicit and indeed amounts to a persistent objection, but a few analogies can easily demonstrate the weakness of the argument on a legal basis. As many observers have suggested: “Should South Africa during the period of Apartheid have been considered exempt from the customary rule prohibiting systematic racial discrimination because it persistently dissented from that rule during the time the rule was being developed?”<sup>85</sup> Indeed, such objection is not possible for peremptory norms such as racial discrimination. Similar reasoning thus extends to other rights even if they are not of a *jus cogens* nature. The death penalty provides a good example. For decades, the United States consistently objected to the prohibition of juvenile death penalty, either by treaty reservation<sup>86</sup> or by statements to that effect,<sup>87</sup> in essence denying the existence of a binding custom by rejecting it. Yet, the US Supreme Court concluded that juvenile death penalty was no longer compatible with evolving standard of decency,<sup>88</sup> thus recognizing the impossibility of objecting to the changing values of the international society.

Ted Stein encapsulates the viewpoint that the persistent objection can only:

[P]reserve the rights already enjoyed by the objector, where subsequent development in customary international law threatened their diminution . . . . [There is] a repudiation of the notion that there exists a residual rule of freedom in international law, a rule allowing states to engage in any

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84. See David Crary & Frank Jordans, *U.N. Gay Rights Protection Resolution Passes, Hailed as ‘Historic Moment’*, HUFFINGTON POST (June 17, 2011), [http://www.huffingtonpost.com/2011/06/17/un-gay-rights-protection-resolution-passes\\_n\\_879032.html](http://www.huffingtonpost.com/2011/06/17/un-gay-rights-protection-resolution-passes_n_879032.html).

85. LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 103 (5th ed. 2009).

86. See 138 CONG. REC. S4781, S4783 (1992) (“That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.”).

87. See *Domingues v. Nevada*, 917 P.2d 1364, 1378 (Nev. 1996) (“We conclude that the death sentence [for a juvenile] was not imposed under the influence of passion, prejudice or any arbitrary factor, nor was it excessive in this case.”).

88. See *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

activity whatsoever in the absence of a prescription emerging for positive law processes.<sup>89</sup>

Jonathan Chaney echoes this opinion that solving global problems, such as the environment or human rights violations, “must not be thwarted by the objections or actions of a few obstinate states,”<sup>90</sup> and that “the present views of states certainly contribute to an understanding of international law, but they are not the only considerations.”<sup>91</sup> Finally, as it applies to the topic at hand, there is further judicial affirmation of this viewpoint in *Lustig-Prean v. United Kingdom*, when the ECtHR considered that it could not ignore “widespread and consistently developing views or the legal changes in the domestic laws of Contracting States in favour of the admission of homosexuals into the armed forces of those States.”<sup>92</sup>

#### CONCLUSION

Reviewing treaty-based obligations as to nondiscrimination, judicial decisions that treat “other status” as a concept encompassing Lesbian, Gay, Bisexual and Transgendered (“LGBT”) individuals, and recognizing that sexual orientation or gender identity do not represent an objective and reasonable criteria to prevent individuals from the enjoyment of their civil and economic rights, should suffice to affirm that even though there are no specific treaties yet as to the prohibition of all forms of discrimination against LGBT people, there are already sufficient binding provisions to that effect. Furthermore, the dynamic nature of international law allows it to evolve with circumstances, thanks to changes in practices and perceptions, which occur faster than treaty-writing. This Article finds that there is already a large amount of states favoring nondiscrimination, and that their number is growing, as expressed in various regional and international declarations and resolutions, the last one being that of the Human Rights

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89. Ted L. Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L. L.J. 457, 477 (1985)

90. See Charney, *supra* note 74, at 551.

91. *Id.* at 540.

92. Press Release, Registry of Eur. Ct. H.R., Judgments in the Cases of *Lustig-Prean and Beckett v. The United Kingdom* and *Smith and Grady v. The United Kingdom* (Sept. 27, 1999), available at [lgbt.poradna-prava.cz/folder05/lustig.doc](http://lgbt.poradna-prava.cz/folder05/lustig.doc).



Council of June 17, 2011. Furthermore, as this line of practice grows, objections of other states no longer exclude them from being bound by the principle of nondiscrimination against LGBT individuals. Therefore, the prohibition of discrimination against LGBT individuals is now a part of international human rights law, and a norm binding on all.