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PROMOTING LESBIAN AND GAY RIGHTS THROUGH INTERNATIONAL HUMAN RIGHTS LAW

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A gay Argentine man has faced humiliation, degradation, and violence since he was 17. He has been imprisoned and raped repeatedly by military officers and the police, who have also extorted money by threatening to reveal his homosexuality. He has been fired and ridiculed when his employers learned of his sexual orientation. His problems culminated when the police arrested him at a gay bar. He was blindfolded, bound, stripped and tortured for eight days--raped, beaten, and subjected to electric shocks. He was finally released, completely terrorized and afraid of leaving his home. He then moved to Canada where he applied for refugee status.¹

INTRODUCTION

Most governments recognize, at least in theory, that all people have certain basic rights, such as the right to life and to be free from torture, the right to free speech and association, and the right to a fair trial. These rights are set forth in a series of international agreements,² which, taken together, constitute international human rights law.

Unfortunately, these basic rights are violated by most governments in the world. There is no international court or police force to compel governments to respect people's rights or punish those who commit abuses. As a result, human rights law is mostly an ideal, a goal or standard by which to measure conduct. Real enforcement of international rules is a long way off.

Nevertheless, international human rights law is an important tool in the struggle to protect human rights. Lawsuits and other legal complaints focus attention on human rights abuses and sometimes result in judgments which lead to compensation or improvements in human rights practices. Human rights monitors investigate, publicize and condemn human rights violations and provide support to people whose rights have been violated. Together, these activities put pressure on governments to change their behavior, increase respect for human rights and prevent some abuses.

Note: CCR welcomes comments and suggestions about this pamphlet. We plan to revise and reissue it shortly. While using the terms *lesbians*, *gay men* and *other sexual minorities*, this pamphlet applies to bisexuals, transsexuals, transvestites and others facing human rights violations because of their sexual orientation.

Lesbians and gay men often are deprived of the most basic human rights through violence, imprisonment without trial, denial of free speech or association, discrimination in employment and other areas, or the denial of the right to privacy and protection of the family. In the face of widespread abuses, lesbians, gay men and other sexual minorities around the world have started to use the persuasive power of international human rights law to fight back, filing lawsuits and human rights complaints and establishing international networks to monitor abuses.

The basic goal of this international human rights work is to establish that existing human rights provisions apply to lesbians, gay men and other sexual minorities: fundamental human rights cannot be denied on the basis of sexual orientation. Although none of the international human rights documents mention lesbian and gay rights, they contain many provisions which indicate that abuses of lesbians and gay men violate international law.

Human rights activism can operate in several distinct areas:

- (1) filing legal complaints alleging violations of human rights, with local courts or international human rights organizations;
- (2) monitoring human rights, preparing reports documenting abuses and issuing calls for international assistance in specific cases;
- (3) publicizing human rights issues and organizing campaigns to change government policies or to educate people about human rights.

These tactics can often be used together: in fact, legal actions are seldom very helpful if not accompanied by a campaign to publicize the issues.

This pamphlet addresses the use of legal action to promote lesbian and gay rights. The first section provides an overview of the human rights standards which protect against discrimination based on sexual orientation and ways in which these standards can be used to further the drive for basic human rights. The second explains how these rights can be asserted, both in local courts and through international organizations, and the potential effect of such actions.

INTERNATIONALLY PROTECTED HUMAN RIGHTS

A. What is an international human right?

1. *Government action*

International law governs the ways in which governments and officials working for the government treat people. Thus, in general, a beating by a police officer is a violation of international law, while a beating by a private person is not. However, if the private person is acting under the authority of the government, or if the government is encouraging, condoning or failing to prevent or punish such "private" actions, those supposedly private acts do violate international law.

2. *Where are international human rights listed?*

Several international agreements list international human rights. Some of the agreements, adopted through the United Nations, apply to all governments around the world. Others apply only to countries which have signed them.³ Still others, adopted through regional organizations like the Organization of American States, apply either to all of the countries which belong to that organization or to those which have signed them.

This pamphlet discusses rights protected by the following key human rights agreements:

–**Universal Declaration of Human Rights (UDHR)**

Adopted by the United Nations in 1948, it is binding on all nations⁴

–**International Covenant on Civil and Political Rights (ICCPR)**

–**International Covenant on Economic, Social and Cultural Rights (ICESCR)**

Binding only on those countries which have signed them⁵

–**African Charter on Human and Peoples' Rights**

–**American Declaration of the Rights and Duties of Man**

–**American Convention on Human Rights**

–**European Convention for the Protection of Human Rights and Fundamental Freedoms**

Regional agreements binding on those countries in the region which have signed them (except for the American Declaration, which is binding on all countries of the Americas).⁶

There is overlap among these agreements, although they also differ in important respects.

3. *Who decides what the rights mean or to whom they apply?*

There is no international Supreme Court to explain exactly what these rights mean. Once beyond the basics, there is much disagreement. Does the death penalty violate the right to life?⁷ Is extreme physical punishment a form of torture?⁸

Outside of the area of physical rights, these differences become even greater. All human rights agreements recognize that certain rights can be regulated by the government in order to maintain order and to protect "public morality."⁹ When a government fears dissent or diversity, it can often use this language as an excuse to limit basic rights.

Disagreements about the exact meaning of certain human rights protections and about "public morality" are particularly dangerous to lesbians, gay men and other sexual minorities. Governments claim the right to criminalize certain sexual behavior in the name of "morality." They legitimize oppression of lesbians and gays and discriminate against gay and lesbian families, in the name of protecting the social order.

B. Universal Rights

The following list includes rights which are generally recognized as universal, meaning that all governments are obligated to protect them. The sources for each of these rights are listed in the endnotes.

The interpretation of each right is subject to dispute. Some governments, for example, claim the right to limit freedom of speech and association by lesbians and gay men. We must insist that these basic human rights be applied regardless of sexual orientation.

(1) The rights to life and to physical integrity¹⁰

Everyone has the right to life and to be free from physical assault. Thus any physical violence against a lesbian or gay man constitutes a violation of internationally protected human rights.

- (2) The right to be free from torture or cruel, inhuman or degrading treatment or punishment¹¹

Torture includes the imposition of severe physical or mental suffering. Cruel, inhuman or degrading treatment includes lesser forms of physical or mental abuse. *Subjecting lesbians or gay men to physical or mental abuse violates international law.*

- (3) The prohibition on arbitrary arrest, detention or conviction¹²

The government may not arrest or detain people without legal grounds. Those arrested must receive due process, including a fair and impartial hearing. The arrest of lesbians and gay men as a means of harassment and detention without a fair hearing violate human rights protections.

- (4) The right to freedom of thought, conscience, religion, opinion, speech and expression¹³

All people have the right to hold whatever beliefs they see fit and to reject views they do not share; to express their beliefs or opinions without interference, either alone or with others, in public or in private; and to distribute and receive publications expressing their views. International law thus prohibits governments from censoring or penalizing the expression of beliefs or the exchange of information about sexual orientation.¹⁴

- (5) The right to freedom of peaceful assembly and association¹⁵

Everyone has the right to gather peacefully and associate with people of one's own choosing. Thus, the government cannot ban peaceful gatherings of lesbians and gay men.

- (6) The right to be free from arbitrary interference in respect to privacy, family, home or correspondence, and from attacks on honor or reputation¹⁶

The right to privacy protects all of us from governmental interference in what we do at home, within our family, and for our private decisions about how to conduct our lives. Lesbians and gay men have the right to establish homes and families without repression.¹⁷

- (7) The right to asylum¹⁸

People who flee their home countries and face repression if they return have the right to asylum. Lesbians and gay men who will be in danger if they

return home are entitled to political asylum.

(8) The right to equality and to be free from discrimination

Everyone is equal before the law, and entitled, without discrimination, to equal protection of the law and to access to employment, housing and other goods and services. Further, all of the internationally protected rights apply to everyone, without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁹

C. Lesbians and Gays in International Law

The legal status of lesbians and gay men within the diverse nations of the world is a patchwork of tolerance and intolerance, equality and vicious repression. A handful of countries afford sexual minorities open participation in society and protection from discrimination. Others have barred the most egregious forms of oppression, but condone private discrimination and deny many of the legal benefits regulated by government, such as recognition of family status. At the other extreme, many governments promote discrimination, or, like Iran and others, even execute those accused of engaging in homosexual acts or being gay or a lesbian.

The sweeping language of international human rights protections should guarantee lesbians and gay men full equality under the law. But even though basic international agreements state that all people are equal before the law, and bar discrimination based on any "status," no international body has interpreted the universal human rights to bar discrimination on the basis of sexual orientation.

Some progress, however, has been made in the interpretation of the right to privacy. Both the U.N. Human Rights Committee and the European Human Rights Court have ruled that laws barring sexual acts between consenting adults violate the right to privacy.²⁰ These decisions are important first steps in the drive for recognition that sexual orientation is a fundamental right. The United States, unfortunately, came to a different interpretation of its constitutional privacy right, upholding a law criminalizing private sexual conduct between consenting adult men.²¹ Even the right recognized by the European system has limits: the European Commission has upheld laws imposing a special age of consent for homosexual conduct and restrictions on military personnel.²²

To challenge this repression, we must mount a multi-faceted campaign. First, everyone has the right to certain basic, indisputable rights. *No government has the right to commit, authorize or condone violence or other abuse against anyone, to imprison anyone because of his or her sexual orientation, to torture or degrade anyone in prison.*

Second, we must push to expand the international definition of core rights to include lesbians, gay men and other sexual minorities. The right to free speech and association must include the right to join gay and lesbian organizations and to publicize their activities. The right to privacy must include the right of adults to engage in private, consensual sex, and to form families and other households based on those relationships. Although not yet widely accepted, these interpretations of the basic human rights are gaining ground.

ENFORCEMENT

The lack of effective enforcement mechanisms is the most serious weakness of international human rights law. While wonderful theories are debated and adopted at international meetings, abuses continue unabated around the world. Nevertheless, raising the argument that international law has been violated can contribute to the protection of human rights. Occasionally, legal actions obtain rulings which are obeyed by the local government. In addition, the publicity attached to a claim of human rights violations may pressure a government to change its behavior. Finally, drawing attention to human rights violations contributes to long term change. International and local struggles to attain basic human rights can have an important impact both on the people involved in those struggles and on those who learn of their efforts.

A. Domestic Courts

In some countries, international law governs over local law. In those countries, lesbians and gay men can argue that if discriminatory laws or practices violate international law, they must be amended or discontinued. For example, many constitutions specifically incorporate international agreements, stating that they govern in case of a conflict with local law. Laws which discriminate against homosexuals can be challenged as violations of international law.

The countries belonging to the European Community provide another example: those countries are bound by the decisions of the European Court, which interprets and applies the European Convention, even where it conflicts with local law.

Where international law is not binding, local courts might be persuaded to

interpret local laws consistently with international law. Thus a claim that discrimination violates a local law might be strengthened if it were accompanied by an explanation of how the discriminatory provision also violates international law.

Finally, in countries where international law is not considered binding (as is often the case in the United States), a charge that the government is violating international law is often a powerful means to draw attention to an abuse and to pressure the government to alter its behavior.

B. International organizations

1. Regional human rights organizations

Europe, Africa and the Americas have established "regional" human rights bodies which receive complaints about abuses committed in those continents. The European system is the strongest, and has actually voided national laws which criminalize private, consensual sexual acts between adults. Neither the American nor the African systems have considered claims that discrimination against lesbians and gay men violates international law. Those systems are also less effective than the European in enforcing their decisions: the African is not even empowered to take any action on complaints. Action in all of these bodies, however, can contribute to the international movement to recognize gay and lesbian rights.

a. *The European Commission on Human Rights and the European Court*

The European human rights system was established by the Council of Europe, a regional organization composed of European countries which have agreed to respect the basic human rights set forth in the European Convention of Human Rights. Individuals whose rights have been violated can file petitions with the European Commission on Human Rights, but only after they have unsuccessfully sought relief in the country where the violation occurred.²³

After an initial screening to determine whether the petition alleges a violation of the Convention, the Commission investigates the facts and attempts to negotiate a settlement. If that is unsuccessful, the case may be referred to the European Court, which has the authority to issue binding decisions.

As discussed above, the European system has produced the most favorable decisions to date concerning gay and lesbian human rights, holding that laws criminalizing private sexual acts between consenting adults violate the right to privacy guaranteed by the Convention. However, the European Court has also rejected petitions challenging laws imposing different ages of consent for homosexual and

heterosexual conduct.

b. *The Inter-American Human Rights Commission and
Inter-American Human Rights Court*

The Inter-American human rights system, established by the Organization of American States (O.A.S.), is based upon the rights protected by two documents: the American Declaration on the Rights and Duties of Man, which has been interpreted as binding on all members of the O.A.S., and the American Convention, binding on only those countries which have ratified it.

Individuals claiming that their rights under either document have been violated can file petitions with the Inter-American Human Rights Commission. Organizations, including non-governmental organizations (NGOs), can also file petitions asking the Commission to investigate a human rights problem in a given country. If the country accused of the violation is not a party to the Convention, the Commission can issue a report and refer the matter to the O.A.S. General Assembly. If the country is a party to the Convention, the Commission can also refer the petition to the Inter-American Human Rights Court, which has the authority to order a country to compensate victims or to take other remedial measures.

c. *The African Commission on Human and Peoples' Rights*

The African Commission, an organ of the Organization of African Unity (O.A.U.), implements the African Charter on Human and Peoples' Rights. It has the power to conduct investigations and issue reports and opinions as to the meaning of the Charter. The Commission's power to review complaints, however, is limited. Complaints must concern patterns or series of human rights violations (not individual cases). If the Commission decides that a complaint appears to fall within its mandate, it refers the complaint to the O.A.U. Assembly and can initiate an investigation only if requested to do so by the Assembly. Finally, even if an investigation is conducted, the results remain confidential unless the Assembly decides to make them public.

2. The United Nations

The United Nations has no judicial system which can issue orders to different governments. Many different bodies within the U.N. address human rights issues, each with different sets of rules. Although enforcement mechanisms are weak or non-existent, a U.N. human rights ruling or report often has a significant impact through the persuasive power of negative publicity and diplomatic pressure.

a. *Security Council/General Assembly*

The Security Council, under its powers to maintain peace, can actually authorize the use of force, as in the Persian Gulf or Bosnia. However, the diplomatic effort necessary to trigger Security Council action is beyond the reach of the international gay and lesbian movement, and is likely to be for a long time to come.

The U.N. General Assembly often approves resolutions concerning human rights issues. While not backed up by the use of force, they provide a focus for international organizing efforts, and can serve as a means of pressure against the offending government. These actions also require a concerted diplomatic campaign.

b. *U.N. Human Rights Bodies*

--U.N. Human Rights Committee: Implements the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). Has the authority to issue rulings on complaints charging violations of those agreements only if the country charged in the complaint has signed a separate special agreement called the Optional Protocol. 76 countries have signed. As discussed above, the Human Rights Committee recently held that a law criminalizing private consensual sexual activity between adults violates the Covenant's right to privacy.

--U.N. Human Rights Commission: Widely attended meetings in Geneva in February every year provide a forum to publicize international human rights issues and lobby both governments and non-governmental organizations. Actually obtaining action from the Commission on any issue requires coordination with government representatives and NGOs.

The commission also reviews petitions alleging patterns of human rights abuses in any country, called "Resolution 1503 communications." Action on these petitions, however, is completely confidential: the petitioner rarely receives anything more than an acknowledgement that the "communication" has been received and filed. Nevertheless, petitions can help raise human rights issues and focus attention on them, if accompanied by a coordinated effort to inform interested governmental and nongovernmental representatives about the issue.

--Special Rapporteurs: The Human Rights Commission occasionally appoints special investigators, called "rapporteurs," to gather information about particular problems or abuses, such as torture, or most recently, violence against women. They usually issue periodic reports in which they summarize and analyze information they have gathered. Supplying information to those rapporteurs is often an effective means to influence the international debate about human rights issues.

--Commission on the Status of Women (CSW) and the Committee on the Elimination of Discrimination Against Women (CEDAW): Receive and comment on reports from member nations about discrimination against women. The CSW also receives complaints about human rights abuses against women, but maintains complete confidentiality and rarely takes any action. Nevertheless, they provide yet another international forum in which human rights abuses against lesbians can be raised.

CONCLUSION

International human rights law, despite its limitations, has great potential in the struggle for lesbian and gay rights. Working together we can place lesbian and gay rights on the international human rights agenda, seeking not just an end to violent repression, but also full equality within the world community.

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NOTES

1. Toronto Globe & Mail, "Homosexual Granted Status as Refugee," Jan. 11, 1992, p. 1.
2. These written agreements are called treaties, covenants, declarations or human rights "instruments." In addition to written agreements, international law also includes widely accepted but unwritten rules of behavior, called "customary international law."
3. To find out if your government has signed an agreement, contact the United Nations office in your country. The U.N. also maintains two books with up-to-date records of signings, which should be available at the U.N. office: Multilateral Treaties Deposited with the Secretary-General and Statement of Treaties and International Agreements Registered or Filed and Recorded with the Secretariat.
4. The Universal Declaration, while not originally intended as a legally binding agreement, has come to be seen as a statement of minimal rules which must be followed by all nations. Such widely accepted rules are known as "customary international law" (see endnote 2). The same applies to the American Declaration of the Rights and Duties of Man.
5. Some of the rights listed in these two covenants have been recognized as part of customary international law (see endnotes 2 and 4) and thus are binding on all nations.
6. See endnotes 2 and 4.
7. A minority of countries, including the United States, claim the right to execute people convicted of certain crimes.
8. Countries such as Singapore claim the right to use physical punishment, i.e., "caning."
9. For example, UDHR, art. 29, § 2; ICCPR, art. 12, ¶ 3.
10. UDHR, arts. 1, 3; ICCPR, arts. 6, 10.
11. UDHR, art. 5; ICCPR, art. 7.
12. UDHR, arts. 9, 11; ICCPR, art. 9.
13. UDHR, arts. 18, 19; ICCPR, arts 18, 19.
14. With the exception of certain restrictions on pornography.
15. UDHR, art. 20; ICCPR, arts. 21, 22.

16. UDHR, art. 12; ICCPR, art. 17.

17. International protection of the family has been understood historically to protect the heterosexual family unit. Interpreting such rights to protect the rights of a broader range of families may require a redefinition of the terms "marriage" and "family."

18. UDHR, art. 14.

19. UDHR, art. 2; ICCPR, art. 26; ICESCR, art. 2.

20. The U.N. Human Rights Committee decided on March 31, 1994 that laws against private, consenting, adult homosexual acts breach the ICCPR. The case involved laws in the Australian province of Tasmania; the case fell within the Human Rights Committee's jurisdiction because Australia has signed the Optional Protocol to the ICCPR (see section describing the powers of the U.N. Human Rights Committee).

The European Court has twice voided laws prohibiting certain private sexual acts between consenting adults. Dudgeon v. United Kingdom, judgment of 22 October 1981, Series A no. 45; Norris v. United Kingdom, judgment of 26 October 1988, Series A no. 142.

21. Bowers v. Hardwick, 478 U.S. 186 (1986). Although the 5-4 decision has been widely criticized, it remains the law in the United States.

22. These four cases exemplify the Commission's limited recognition of the rights lesbians, gay men, and other sexual minorities should receive:

a) B. v. United Kingdom, App. No. 9237/81, 34 Eur. Comm'n. H.R. Dec. & Rep. 68 (1983), (upholding statute which prohibits homosexuals from serving in the armed forces).

b) S. v. United Kingdom, App. No. 11716/85, 47 Eur. Comm'n. H.R. Dec. & Rep. 274 (1986), (upholding statute which denies same-sex partners the ability to continue an apartment lease after one of them dies).

c) X. and Y. v. United Kingdom, App. No. 9369/81, 32 Eur. Comm'n. H.R. Dec. & Rep. 220 (1983), (upholding statute which permits the deportation of one same-sex partner where that person is a foreign national).

d) Johnson v. United Kingdom, 47 Eur. Comm'n. H.R. Dec. & Rep. 72 (1986), (upholding statute which prohibits two men from engaging in sexual activity where a third party takes part or is simply present).

23. This is known in legal terms as "exhaustion of domestic remedies." It is not an issue if no remedies are available in the country at issue or if it would be futile to attempt them.