Sexual Orientation: Testing the Universality of International Human Rights Law

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Until recently, the United States consistently opposed cultural relativism while embracing universalism in international human rights law. Relativists argue that understandings of right and wrong vary along cultural lines, and thus, definitions of human rights should vary accordingly. Islamic states have argued for a Muslim conception of women’s rights; China has defended its treatment of political dissidents by invoking Confucian norms; and numerous African states have sought to justify female circumcision by upholding the practice’s cultural sanctity. Such assertions of cultural relativism have routinely elicited American criticism. At the 1993 World Conference on Human Rights, Secretary of State Warren Christopher proclaimed: “We cannot let cultural relativism become the last refuge of repression.” Since then, Christopher’s words have echoed in the United States’s diplomatic relations and treaty negotiations. Thanks in part to American lobbying, universalism now underpins major human rights instruments such as the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

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4 Female circumcision is also known as female genital mutilation.

5 Steiner and Alston, International Human Rights at 240-54 (cited in note 1).


Although the United States endorsed universalism throughout the past half-century, its position is increasingly challenged by the growing international recognition of human rights related to sexual orientation. United Nations treaty bodies and transnational tribunals have issued numerous opinions recognizing sexual orientation rights as universal human rights. Human rights scholars have also spilled much ink documenting the emergence of sexual orientation rights. In the spring of 2003, Brazil introduced a resolution entitled “Sexual Orientation and Human Rights” in the United Nations Commission on Human Rights (UNCHR). The resolution, which will reach a vote in the spring of 2005, reaffirms the fact that existing human rights instruments protect sexual minorities.

While international institutions, such as the UN Human Rights Committee, have declared the universality of sexual orientation rights, the United States has not concurred. Instead, the United States asserts culture-based arguments to justify laws that discriminate against sexual minorities. By invoking culture to justify its nonrecognition of sexual orientation rights, the United States is asserting a relativist position that conflicts with its historical endorsement of universal rights that are defined by the UN human rights regime.

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8 There exists a variety of rights associated with sexual orientation: equality rights, privacy rights, freedom of expression, freedom of association, etc. For background on the numerous rights related to sexual orientation, see generally Eric Heinze, Sexual Orientation: A Human Right 153–286 (Martinus Nijhoff 1995). I will sometimes refer to these rights collectively as “sexual orientation rights.”

9 See, for example, Young v Australia, UN GAOR Hum Rts Comm, 78th Sess, UN Doc CCPR/C/78/D/941/2000 (2000) (upholding the rights of same-sex domestic partners to receive the same government benefits as heterosexual domestic partners); Lustig-Prean & Beckett v United Kingdom, 29 Eur Ct HR 548 (2000) (voiding a ban on openly gay individuals serving in the military); Toonen v Australia, UN GAOR Hum Rts Comm, 50th Sess, Supp No 40, vol 2, at 226, UN Doc A/49/40 (1994) (holding that a statute criminalizing homosexual conduct violated the ICCPR); Dudgeon v United Kingdom, 45 Eur Ct HR 52 (1981) (holding that a ban on homosexual conduct violated the European Convention on Human Rights).


11 See Johann Hari, At Last the UN Recognises the Need for Gay Rights, Independent 17 (Apr 25, 2003).


13 Hari, At Last the UN Recognises the Need for Gay Rights, Independent at 17 (cited in note 11).

14 See Part III.
As international sexual orientation rights continue to develop, tension will grow between the United States's endorsement of universalism and its treatment of sexual orientation laws. While American exceptionalism in foreign affairs may not be new, American exceptionalism based on cultural arguments is a recent development. This Comment argues that American exceptionalism in sexual orientation law carries unique transnational legal consequences because of its cultural basis. Scholars have asserted that exceptionalism generally decreases American credibility, thus diminishing American soft power. However, with regard to sexual orientation rights, more is at stake: by asserting cultural arguments regarding sexual orientation, the United States risks legal consequences borne out in other areas of human rights, such as women's rights and freedom of political expression.

This Comment is divided into four parts. Part I provides background on the debate over universalism and cultural relativism. Part II provides background on the recognition of sexual orientation rights as a universal human right. Part III discusses the United States's treatment of sexual orientation. Part IV discusses the legal consequences of the tension between the American positions on universalism and sexual orientation laws. Specifically, this Comment considers the doctrines of international estoppel and treaty suspension to show that, by asserting cultural relativist arguments about sexual orientation, the United States will likely jeopardize the international legal principles that it fought hard to establish in other areas of human rights.

I. UNIVERSALISM VERSUS CULTURAL RELATIVISM

A. The Debate: Its History and Theoretical Underpinnings

Human rights are grounded in the notion that people, by virtue of being human, have certain fundamental and inalienable rights. Under the international human rights regime, states have an obligation to respect their citizens' human rights. Furthermore, the international

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15 See Koh, 55 Stan L. Rev at 1481 (cited in note 7). In this Comment, I adopt Koh's definition of exceptionalism, which includes all instances in which the United States promotes a double standard in international affairs. See id at 1483–87 ("[T]he most problematic face of American exceptionalism [is] when the United States ... promote[s] a double standard ... propose[ing] that a different rule should apply to itself than applies to the rest of the world."). By adopting cultural relativism itself while condemning other states for their adoption of cultural relativism, the United States promotes a double standard and is thus exercising exceptionalism.

16 See id at 1481, 1487. See also Joseph S. Nye, Jr., Propaganda Isn't the Way: Soft Power, Intl Herald Trib 6 (Jan 10, 2003) ("Soft power is the ability to get what you want by attracting and persuading others to adopt your goals"). Thus, soft power includes tools such as diplomacy, whereas hard power includes the use of force.

community has both a right and a responsibility to protest when a state neglects this obligation. 18


The international human rights regime emerged in the wake of World War II. For most of history, international law governed only the relationships between sovereign states. 19 However, the Nazi atrocities of World War II prompted world leaders to believe that international law should also address a state's mistreatment of its nationals. 20 After World War II, in 1945, the UN Charter created obligations requiring member states to respect human rights 21 and, in 1948, the General Assembly adopted the UDHR. 22 Since then, the international community has adopted numerous additional instruments to protect human rights. 23

While states readily agree that human rights should be protected by international law, the definition and scope of human rights remain contested. One dimension of this debate concerns the universal versus relative nature of rights. 24 During the post–World War II human rights movement, there was an underlying assumption that human rights are universal; 25 that is to say, founders of the human rights regime believed that a single standard should apply across the globe, transcending cultural, social, and political lines. 26 This is illustrated by the fact that the

21 UN Charter Art 1(3) (stating that the UN's purposes include "encouraging respect for human rights").
22 Universal Declaration of Human Rights, UN General Assembly Res No 217A(III), UN Doc A/810 (1948).
23 For example, the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention Against Torture; the Genocide Convention; the Convention on Elimination of Racial Discrimination; the Convention on the Rights of the Child; and the Convention on the Elimination of All Forms of Discrimination Against Women.
24 See Steiner and Alston, International Human Rights at 192 ("One of the intense debates in the human rights movement involves the 'universal' or 'relative' character, related to the 'absolute' or 'contingent' character, of the rights declared.").
25 See id at 187 (noting that instruments like the UDHR and ICCPR, which form the foundation of the human rights regime, "purport to give a genuinely universal expression to certain tenets of liberal political culture").
26 See Guyora Binder, Cultural Relativism and Cultural Imperialism in Human Rights Law, 5 Buff Hum Rts L Rev 211, 211 (1999) (noting that universalism assumes that human rights principles "transcend culture, society, and politics").
bedrock of the international human rights regime lies in an instrument called the *Universal Declaration of Human Rights*.

2. The relativist objection to human rights' Enlightenment roots.

Over the years, universalism has been challenged, primarily by non-Western states. As non-Western states faced mounting criticism for human rights violations, they began asserting culture-based defenses. Relativists reminded universalists that most non-Western states did not participate in the drafting of the UDHR because, as subjects of colonialism, they were not members of the UN. Thus, relativists argue that the human rights regime's assumption of universalism has a cultural bias, favoring Western norms derived from Enlightenment-era philosophy.

Although human rights became an integral component of international law only after 1945, most scholars trace the concept of human rights to Enlightenment-era liberalism. Enlightenment philosophers emphasized natural rights and natural law. Because these philosophers stressed the power of human reasoning, natural rights focused on the individual and the individual's right to life, liberty, and property. According to the premise of natural law, governments do not create those rights; therefore, government's role is simply to enforce them.

Critics of natural rights eventually pushed the notion into disfavor. Philosophers like Edmund Burke, David Hume, and Jeremy Bentham argued that adopting natural law would lead to social upheaval because proclamations of natural rights could displace neces-

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27 See Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-political Conditions and Scriptural Imperatives*, 3 Harv Hum Rts J 13, 15 (1990). China also argued that it was not adequately represented in the 1940s because the Chinese seat at the UN was held by Chiang Kai-Shek's rebel regime, which China accused of pandering to its Western allies. See Ann Kent, *China, the United Nations, and Human Rights: The Limits of Compliance* 40-41 (Pennsylvania 1999) (noting that China did not take over the UN seat from Chiang Kai-Shek until 1971 and, when doing so, China resisted conceding to the human rights obligations entered into by Chiang's representatives).

28 See, for example, Sloane, 34 Vand J Transnatl L at 541-52 (cited in note 17) (“[T]he human rights tradition remains quintessentially a legacy of Western liberalism. It owes its conceptual origins to a unique Enlightenment-era synthesis of... natural law and natural rights”); Steiner and Alston, *International Human Rights* at 187 (cited in note 1) (“Observers from different regions and cultures can agree that the human rights movement, with respect to its language of rights and the civil and political rights that it declares, stems principally from the liberal tradition of Western thought.”); David Sidorsky, *Contemporary Reinterpretations of the Concept of Human Rights*, in David Sidorsky, ed, *Essays on Human Rights: Contemporary Issues and Jewish Perspectives* 88, 89 (Jewish Publication Society 1979) (“This idea [behind human rights] has its classic source in seventeenth- and eighteenth-century theories of natural rights.”).


31 Id at 169.
Although the concept of natural rights in its pure form seemed impractical and antithetical to government, the post-World War II human rights movement revived elements of natural law. Human rights are grounded in the natural rights notion that individuals, by virtue of being human, have fundamental rights. Unlike natural law, however, the human rights movement makes no ontological claim that such rights derive from a natural order. Also, the human rights movement does not assert that the sole reason for government is the enforcement of natural law.

This close relationship between the human rights movement and Western liberal thought has led relativists to advocate alternative approaches. According to relativists, the existing universalist system forces Western norms upon non-Western states that never underwent the Enlightenment. Relativists liken universalism to colonization due to its imposition of so-called Western values. For example, China argues that, unlike Enlightenment philosophy, which focuses on individual rights, Confucian tenets emphasize community and social authority: values that trump individual freedoms. In turn, China has relied on “Chinese values” to justify its suppression of political dissidents. Similarly, some African states use culture to justify female circumcision, and many Muslim states cite the Koran to question universal women’s rights as they are defined by the UN treaty system.

3. The universalist defense.

As the cultural relativist movement gained momentum, many scholars dismissed it as a pretext for oppression. The major defenses of universalism can be categorized into three broad groups. First, contemporary Western philosophers of the Aristotelian and Kantian tradition, such as John Rawls and Martha Nussbaum, have made cross-
cultural arguments for universalism. Rawls argues that society can achieve an "overlapping consensus" among the world's comprehensive moral doctrines and that this overlapping consensus conforms to political liberalism.\footnote{40} Nussbaum builds on Rawls's theory by calling attention to human capabilities as a basis for consensus. Nussbaum has used her "capabilities approach" to champion universal human rights, particularly in the area of women's rights.\footnote{41}

Second, scholars of non-Western intellectual thought have argued that human rights definitions are still compatible with their native philosophies, despite their origins in Western liberalism. For instance, Islamic scholar Abdullahi An-Na'im argues that the Koran may be interpreted either to further the agendas of oppressive regimes or to support a universalist understanding of human rights.\footnote{42} Similar to An-Na'im, Confucian scholars like Joseph Chan, Tu Weiming, and Chung-ying Cheng have used Confucian texts to support universalism; they argue that there is substantial convergence between Confucianism and political liberalism.\footnote{43}

Finally, scholars have noted that culture is neither static nor monolithic.\footnote{44} Rather, there exists divergence within every major culture and those dynamics are fluid over time.\footnote{45} Thus, states should not ask for cultural exceptions to human rights laws. Instead, cultures should evolve to accommodate human rights standards.

B. The Debate: From Theory to Practice

The academic debate over the universality of human rights has extended into the practice of international law. In the 1990s, cultural relativism culminated in two notable international declarations: the Cairo Declaration on Human Rights and the Bangkok Declaration on

\footnote{40} See generally John Rawls, The Law of Peoples (Harvard 1999); John Rawls, Political Liberalism 133–72 (Columbia 1996).
\footnote{42} An-Na'im, 3 Harv Hum Rts J at 15 (cited in note 27) ("Religious texts, like all other texts, are open to a variety of interpretations. Human rights advocates in the Muslim world should struggle to have their interpretations of the relevant texts adopted as the new Islamic scriptural imperatives for the contemporary world.").
\footnote{44} See, for example, Jack Donnelly, Universal Human Rights in Theory & Practice 86 (Cornell 2d ed 2003) ("[C]ultures are complex, variable, multivocal, and above all contested. Rather than static things, 'cultures' are fluid complexes of intersubjective meanings and practices.").
\footnote{45} Id.
Human Rights. In these declarations, Islamic and Asian states, respectively, banded together to proclaim that, although recognition of human rights is universal, the definition of such rights should be contextualized for culture.46

Cultural relativist states have targeted certain human rights in particular. First, these states have launched arguments against the universality of women's rights. This attack was evident at the negotiations for CEDAW as well as the Cairo Convention on Population Control.47 Second, civil and political rights have been targeted by cultural relativists. For example, China continues to assert that its suppression of political dissidents is justified, if not necessitated, by Confucian traditions.48 China asserts this position at international conferences and treaty negotiations whenever other states question China's human rights record.50

Despite the relativist attacks, Western nations in general, and the United States in particular, have endorsed universalism. In negotiating the UDHR, the ICCPR, CEDAW, and numerous bilateral treaties such as those regarding grants of foreign aid, the United States asserted its universalist approach. At the 1993 World Conference on Human Rights, the United States called cultural relativism "the last refuge of oppression."51 Scholarly works have documented the consistent support of universalism throughout the Clinton and Bush administrations.52


47 See, for example, Lars Adam Reho, Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women 60 (Martinus Nijhoff 1993) (noting that Morocco proposed an amendment to Article 2 to accommodate Muslim practice).


49 See Davis, Chinese Perspectives on Human Rights at 11–12 (cited in note 3) ("While continuing to crack down hard on dissidents and labour activists, as well as journalists, the government has demonstrated an increasing tendency to attempt to justify its policies ... in official human rights policy pronouncements, such as ... the Bangkok Declaration.").


52 See note 7. One should note that some scholars have highlighted the United States's uses of federalism and capitalism to raise treaty reservations, likening those reservations to cul-
To this day, states continue to debate universalism and cultural relativism. However, through the lobbying of powerful states such as the United States, universalism continues to underpin the legal structure of many human rights issues, such as women's rights and freedom of political expression.

CEDAW condemns the application of cultural relativism to women's rights; its provisions are resoundingly universalist. Despite opposition from Muslim states, the final version of CEDAW includes Articles 2(f) and 5(a), which require all states to modify customary and cultural practices that discriminate against women. When signing CEDAW, several Muslim states—including Bangladesh, Egypt, Iraq, and Saudi Arabia—entered reservations refusing to accept articles they deemed incompatible with Islamic Shariah, the Koran-based code of law. However, numerous states and scholars have concluded that those reservations are invalid because, according to the Vienna Convention on the Law of Treaties, reservations may not circumvent the main purpose of a treaty. Furthermore, CEDAW illustrates that the *opinio juris* component of customary international law has been established with regard to the universal protection of women's rights.
Freedom of political expression is similarly grounded in universal terms. The ICCPR does not recognize cultural exceptions. Signatories to the ICCPR, including China, are thus held to its universal obligations.59 Even states that have not signed the ICCPR can be held accountable to the ICCPR's universal terms because most of the ICCPR's provisions are now regarded as customary international law.60 Accordingly, the United States legitimately enforces the universal right to political expression through bilateral treaties, in which it offers development assistance to foreign states, conditional on compliance with the ICCPR's universalist terms.61 As a further indication of cultural relativism's inapplicability to political expression, one should note that there is a case pending in the Southern District of New York, brought under the Alien Tort Claims Act (ATCA), alleging that Chinese Premier Li Peng violated Tiananmen Square protesters' rights to peaceful assembly and association.62 It is doubtful that the court will interpret expressive rights as being relative to Chinese culture.

The current legal infrastructures of women's human rights and the right to political expression illustrate that the scale between cultural relativism and universalism currently weighs in favor of universalism. The status quo, however, is a delicate one. As Part IV of this Comment will show, the United States's posture on sexual orientation increasingly lends weight to relativism, jeopardizing, inter alia, universal women's rights and universal rights to political expression.

II. SEXUAL ORIENTATION AND HUMAN RIGHTS

Over the past decade, universal human rights related to sexual orientation emerged. At the outset, I should note that recognition of sexual orientation rights is still developing. The contours of sexual orientation rights are unclear. Indeed, there is no human rights treaty

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59 China has signed but not ratified the ICCPR.
60 See General Comment No 24, UN GAOR Human Rights Committee, 52d Session, UN Doc CCPR/C/21/Rev1/Add6 ¶ 8 (1994) (listing ICCPR provisions that qualify as customary law). See also Nicole Fritz and Martin Flaherty, Unjust Order: Malaysia's Internal Security Act, 26 Fordham Int'l L J 1345, 1371-72 (2003) ("[T]he ICCPR has met with such consistent endorsement and compliance that many of its provisions are now said to reflect customary international law.").
61 For general background on enforcement of human rights standards through conditional development assistance, see Steiner and Alston, International Human Rights at 811-61 (cited in note 1).
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with the words "sexual orientation" in its title, nor any treaty that specifically delineates sexual orientation rights. Furthermore, like women's rights, sexual orientation rights have yet to achieve the status of international customary law; numerous states, including the United States, still refuse to fully extend human rights protections to sexual minorities.

Despite these facts, however, UN treaty bodies and transnational tribunals have declared that sexual minorities are protected by existing human rights treaties such as the ICCPR. That is to say, at least according to international institutions such as the UN, sexual orientation rights fall within the scope of existing treaties and, accordingly, states are obligated to respect those rights. According to mainstream international law, when treaty and customary law are unclear, international court decisions and the writings of international jurists serve as a subsidiary source of law. Thus, statements from the UN system and opinions from human rights tribunals serve as a subsidiary source of law. Furthermore, international lawyers give great deference to UN treaty bodies' interpretation of human rights treaties. Thus, many human rights scholars believe that a body of international law has begun to amass that protects sexual orientation rights. Moreover, national practices around the world have begun to evolve, thus generating new human rights norms related to sexual orientation.

Because the emergence of international sexual orientation rights has already been extensively documented by other scholars, this Part will provide an abbreviated account of this movement by highlighting

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63 One should note that, although women's human rights have not yet attained the status of customary law, they have achieved the *opinio juris* component of international customary law. See note 58 and accompanying text.

64 See Donnelly, *Universal Human Rights* at 225–41 (cited in note 44) (noting that, internationally, discrimination against sexual minorities is still widespread and deep).

65 See Statute of the International Court of Justice, Art 38(1)(d), 59 Stat 1055, 1060, Treaty Serial No 933 (1945) (listing subsidiary sources of international law); Diane P. Wood, *Diffusion and Focus in International Law Scholarship*, 1 Chi J Intl L 141, 143 (2000) (“Public international lawyers point to Article 38 of the Statute of the International Court of Justice ('ICJ') for the definitive list of [ ] sources [of international law].”).


67 See note 10.

68 See text accompanying notes 87–91.
landmark occasions and noteworthy trends from the past decade. Specifically, this Part will look at transnational case law, statements issued by UN treaty bodies, the agendas of UN subgroups and international nongovernmental organizations (NGOs), evolving national practices, and the UNCHR’s pending resolution, “Human Rights and Sexual Orientation.”

Among numerous cases that cite international law to protect sexual orientation rights, three are particularly worth discussing: Toonen v Australia,6 Young v Australia,7 and Lustig-Prean & Beckett v United Kingdom.8 The UN Human Rights Committee decided Toonen in 1994. In that case, Nicholas Toonen, a gay rights activist, challenged Tasmania’s prohibition on homosexual activity. The Committee held that the Tasmanian legislation violated human rights pursuant to the ICCPR. Toonen is noteworthy because, through Toonen’s interpretation of the ICCPR, the UN Human Rights Committee declared that every signatory of the ICCPR has human rights obligations with regard to sexual orientation.9 Toonen stands for the fact that, although the ICCPR does not expressly mention sexual orientation, sexual orientation rights are embedded in the treaty’s language.

The Committee found in favor of Toonen on two grounds: (1) privacy rights, pursuant to Article 17;10 and (2) nondiscrimination rights, pursuant to Article 26.11 The ICCPR does not expressly prohibit sexual orientation discrimination; Article 26 prohibits discrimination “on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”12 However, the Committee found that the ICCPR covered sexual orientation because, “in [the Committee’s view] the reference to ‘sex’ . . . is to be taken as including sexual orientation.”13

Toonen is additionally noteworthy because it expressly dismissed cultural relativism. Tasmania argued against extending privacy rights to same-sex couples because of Tasmania’s local moral culture.” The

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71 29 Eur Ct HR 548 (2000).
72 If a state has signed a treaty, even if it has not ratified the treaty, it is obligated under international law not to act in a manner that would defeat the object and purpose of that treaty. See Restatement (Third) of the Foreign Relations Law of the United States § 312(3) (1987).
73 Toonen v Australia, Supp No 40, vol 2, ¶ 8.6 at 234.
74 Id ¶ 8.7 at 234.
76 Toonen, Supp No 40, vol 2, ¶ 8.6 at 234. For criticism of the Committee’s decision to have “sex” include “sexual orientation,” see Anna Funder, The Toonen Case, 5 Pub L Rev 156, 159 (1994).
77 See Sanders, Human Rights and Sexual Orientation at 20 (cited in note 10).
Committee responded: "[We] cannot accept that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern."

*Young* is another particularly noteworthy case from the UN Human Rights Committee. While *Toonen* recognized sexual orientation rights by decriminalizing same-sex activity, *Young* elevated sexual orientation from an issue of criminality to an issue of equal opportunity. In *Young*, the Human Rights Committee held that Young was entitled to a government pension because of his status as the same-sex partner of an Australian veteran.8 The Committee noted that, pursuant to Article 26 of the ICCPR, Australia had no legitimate reason for denying same-sex domestic partners government benefits that were offered to heterosexual partners.

*Lustig-Prean*, which was decided by the European Court of Human Rights (ECHR) in 1999, is also worth noting because it dealt with a subject that has been particularly controversial in the United States: gays in the military. In *Lustig-Prean*, the ECHR held that the United Kingdom's ban on gays in the military violated the European Convention on Human Rights.8 Although the ECHR is a regional tribunal, the ECHR's decision in *Lustig-Prean* is nonetheless noteworthy because various non-European national courts around the world cite to the ECHR as persuasive authority on human rights norms.8 Professor John Attanasio has noted that "the ECHR may be becoming a sort of world court of human rights."8

The emergence of sexual orientation rights is not confined to case law. After the UN Human Rights Committee decided in *Toonen* that the ICCPR protects sexual minorities, four other UN Committees declared that they also interpret their respective treaties—the ICESCR,

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78 *Toonen*, Supp No 40, vol 2, ¶ 8.6 at 234.
80 Id.
81 29 Eur Ct HR at 548.
83 Attanasio, 28 NYU J Intl L & Pol 1 at 16 (cited in note 82). See also Slaughter, 40 Va J Intl L at 1109 (cited in note 82) ("Beyond Europe, the ECHR has become a source of authoritative pronouncements on human rights law for national courts that are not directly subject to its authority.").
CEDAW, the Convention Against Torture, and the Convention on the Rights of the Child—to protect sexual minorities. Thus, according to UN treaty bodies, all signatories to the aforementioned treaties hold human rights obligations with regard to sexual orientation.

The overarching agendas of UN subgroups and international NGOs illustrate the growing role of sexual orientation in human rights monitoring. For example, six of the UN High Commissioner for Human Rights’ Special Rapporteurs now include sexual orientation in their agendas. Major nongovernmental human rights monitors, such as Amnesty International, also include sexual orientation in their agendas. Previously, Amnesty International limited its sexual orientation work to cases of imprisonment, torture, and violence. Since 2001, however, Amnesty International’s mandate has expanded to include all forms of discrimination based on sexual orientation.

Evolving national practices, particularly in Europe, also illustrate the growing recognition of sexual orientation as a human right. European states lead the world in sexual orientation law reform. For example, in 1994, the European Parliament called upon the Commission of the European Community to recommend that member states terminate “the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework . . . [and] any restriction on the right of lesbians and homosexuals to be parents or to adopt or foster children.” The European Union has also declared that respect for sexual orientation rights is a prerequisite for states that join the European Union through its enlargement process.

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84 In a statement of interpretation regarding health care, the UN Committee on Economic, Social and Cultural Rights declared that Article 2(2) of the ICESCR proscribes discrimination on the basis of sexual orientation. CESR General Comment No 14, UN Doc E/C.12/2000/4 Art 12, ¶ 18 (Aug 11, 2000). Pursuant to CEDAW, the UN Committee on the Elimination of Discrimination Against Women has called for the decriminalization of lesbianism. See, for example, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Kyrgyzstan, UN Doc CEDAW/A/54/38 ¶¶ 127–28 (Jan 27, 1999). Pursuant to the Convention Against Torture, the UN Committee on Torture has issued declarations criticizing states for prison conditions that discriminate based on sexual orientation. See, for example, Concluding Observations of the Committee Against Torture: Egypt, UN Doc CAT/c/XXIX/Misc.4 ¶ 5(e) (Nov 20, 2002). The UN Committee on the Rights of the Child has interpreted Article 2 of the Convention on the Rights of Children as barring disparity between heterosexual and homosexual couples’ ages of consent. See, for example, Concluding Observations of the Committee on the Rights of the Child: (Isle of Man) United Kingdom of Great Britain and Northern Ireland, UN Doc CRC/C/15/Add.134 ¶ 22 (Oct 16, 2000).


86 See id at 35.


The development of national sexual orientation rights is not limited to Europe. States across the world have increasingly protected sexual minorities under either existing nondiscrimination laws or newly enacted laws expressly prohibiting sexual orientation discrimination. South Africa, Ecuador, and Fiji exemplify this trend; all three of these non-European states have modified their national constitutions to explicitly prohibit discrimination on the ground of sexual orientation.9 In another example, Canada legalized same-sex marriages in the summer of 2003.90 Legislation to legalize same-sex marriage is pending in other nations, including Asian and Latin American states such as Taiwan and Chile.91

Last spring, Brazil introduced the UNCHR resolution, "Sexual Orientation and Human Rights." The resolution did not create any new substantive rights but instead codified the recognition that "the universal nature of [human rights] is beyond question and that the enjoyment of such rights and freedoms should not be hindered in any way on the grounds of sexual orientation."92 The resolution is scheduled to reach a vote in the spring of 2005.93

III. THE AMERICAN POSITION ON SEXUAL ORIENTATION

In comparison to these international trends, the United States has been slow to extend basic human rights to sexual minorities. In fact, the UN Human Rights Committee has criticized the United States's sexual orientation laws as infringing on human rights protected by the ICCPR.94 In the United States, the premise for withholding civil and

89 See Sanders, Human Rights and Sexual Orientation at 35–36.
90 See DeNeen L. Brown, Canada’s Parliament Endorses Gay Marriage: Narrow Defeat of Motion on Traditional Matrimony Underscores National Divide, Wash Post A23 (Sept 17, 2003).
91 See Paul Wiseman, Same-Sex Marriage Spurs Few Political Ripples in Taiwan, Seattle Times A10 (Feb 27, 2004) (discussing the pending Taiwanese legislation, noting that Argentina and Brazil have extended some marriage rights to same-sex couples, and noting that similar legislation is being considered in Chile); Debby Wu, Foreigners Praise Taiwan’s Planned Human Rights Law, Taipei Times 2 (Nov 19, 2003) (discussing the pending legislation in Taiwan).
92 Sanders, Human Rights and Sexual Orientation at 30 (cited in note 10) (quoting the proposed resolution).
93 See note 12 and accompanying text.
94 See Concluding Observations of the Human Rights Committee: United States of America, UN Doc CCPR/C/79/Add.50 ¶ 287 (Oct 30, 1995) (noting as a "subject of concern" the "serious infringement of private life in some states [of the United States] which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without discrimination"). Although this report specifically addressed American sodomy laws before Lawrence v Texas, 539 US 558 (2003), its interpretation of the ICCPR can be adopted to criticize other aspects of American sexual orientation laws. Human rights scholars such as Mary Robinson and Harold Hongju Koh have cited this report to argue that the United States has violated its obligations pursuant to the ICCPR. See Brief of Amici Curiae Mary Robinson, et al, Lawrence v Texas, No 02-102, 12 n 16 (filed Jan 16, 2003) (available on Westlaw at 2003 WL 164151).
social rights from sexual minorities is usually culture-based, drawing from a particular brand of Judeo-Christian norms. This cultural relativism is evident in the United States’s treatment of sexual orientation in national practice as well as in its foreign relations.

A. Cultural Relativism in National Practice

The United States’s national laws regarding sexual orientation seem to be diverging from international trends. Over the past decade, other states have been extending civil rights—such as partnership rights and the right to serve in the military—to sexual minorities out of a sense of human rights obligations. Meanwhile, the United States has passed laws to explicitly limit those rights. The justification for these national practices is usually culture-based. Although the United States has made no express declaration endorsing cultural relativism, its national practice suffices to articulate a cultural relativist position on sexual orientation. This Part discusses evidence of the United States’s national practice.

In 1996, Congress passed the Defense of Marriage Act (DOMA), which sought to bar same-sex marriage by defining marriage as “only a legal union between one man and one woman as husband and wife.” The enactment of DOMA illustrates the United States’s cultural relativist position on sexual orientation rights. The House Report for DOMA explains that the Act was a direct response to growing support for same-sex marriages and that DOMA was necessary because “there is to this issue of marriage an overtly moral or religious aspect that cannot be divorced from the practicalities.” The report then explained that heterosexual marriage better comports with Judeo-Christian norms, citing a study that found that “the Jewish and Christian traditions have, in a clear and sustained manner, judged homosexual behavior to be morally wrong.”

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95 See text accompanying notes 87, 90–91.
96 See Michael Kirby, Law and Sexuality: The Contrasting Case of Australia, 12 Stan L & Policy Rev 103, 106–08 (2001) (noting that Australia has extended the right of military service to gays, at least partly because of international human rights considerations, and suggesting that the United States is lagging behind in reform).
97 Consider Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), 1984 ICJ 392, 415 (equating conduct with express declarations for the purpose of an estoppel claim).
99 1 USC § 7.
101 Id at 15.
102 Id at 16 n 54.
The government’s “Don’t Ask, Don’t Tell” policy, which bans openly gay, lesbian, and bisexual people from military service, is another manifestation of cultural arguments against sexual minorities. When President Clinton signed “Don’t Ask, Don’t Tell,” many observers labeled the policy as a compromise between sexual orientation rights and particular Christian values. The bill itself does not cite religious norms; however, it stresses that the policy is necessary for military “morale.” When asked why allowing sexual minorities to serve in the military would compromise morale, supporters of the ban cited cultural norms, noting that “heterosexual soldiers do not like gay soldiers.”

Evidence of relativism in American law is not confined to legislation. Jurisprudence regarding custodial rights of nonheterosexuals also serves as an example of cultural relativism. Although there is a trend in family courts not to consider sexual orientation when assessing an individual’s fitness for custodial or adoption rights, many courts still find an individual unfit solely because he or she is not heterosexual, and offer Judeo-Christian norms to explain why.

The United States’s relativist position is perhaps most clearly evident in recent presidential statements regarding marriage. For example, on February 24, 2004, President Bush discussed his proposed Federal Marriage Amendment (FMA), which would render legal recognition of same-sex marriages unconstitutional. Bush promoted the
FMA by stating, "Marriage cannot be severed from its cultural, religious and natural roots." In another official press briefing on the same day, Press Secretary Scott McClellan discussed the FMA and confirmed that President Bush consulted theologians in formulating the FMA. McClellan also supported the FMA by noting that marriage is "sacred." When a reporter asked, "Is [the FMA] purely based on [the President's] religious faith?" McClellan responded, "[I]t's based on his long-held belief." Also, in an earlier press conference on July 30, 2003, Bush implied that homosexuality is a sin. These statements from White House press conferences are particularly noteworthy because, as Part IV will discuss, such press conferences serve evidentiary purposes under international law.

B. Cultural Relativism in Foreign Relations

Because sexual orientation rights have only recently emerged in the international context, American treatment of the issue in foreign relations is limited. However, on those few occasions, the United States has opposed the extension of sexual orientation rights due to cultural differences. For example, in the spring of 2003, the United States refused to support the resolution proposed by Brazil entitled "Sexual Orientation and Human Rights." When pressed to explain, State Department spokesperson Richard Boucher stated that the United States would not support a resolution on sexual orientation that required "some sort of universal application throughout the [American legal] system."

Boucher's statement appears indicative of the United States's opposition to universalism regarding sexual orientation. Boucher's comment may have been motivated in part by federalism since he noted that sexual orientation issues are often addressed at the local level. However, Boucher conceded that antidiscrimination laws do

110 Id.
112 Id.
113 Id.
114 In addressing sexual orientation issues at the press conference, President Bush prefaced by stating that he was "mindful that we are all sinners"; commentators have interpreted his remarks as a condemnation of homosexuality. See Dick Polman, Gay-Marriage Issue Puts Bush at Odds with Himself, Philadelphia Inquirer C01 (Nov 30, 2003); Pam Lobley, We'll Recoil in Shame 20 Years from Now, Chi Trib C19 (Aug 19, 2003); Regarding Sinners: The President's Comments on Gays, Record (NJ) L06 (Aug 1, 2003). See also President Bush Discusses Top Priorities for the U.S. (press conference transcript) (July 30, 2003), online at http://www.whitehouse.gov/news/releases/2003/07/20030730-1.html (visited Aug 16, 2004).
116 Id.
exist on the federal level. Furthermore, other rights related to sexual orientation—freedoms of privacy, expression, and association—are protected on a federal level. In light of the lobbying from conservative religious groups, one can conclude that cultural relativism played a role in the State Department's rejection of the Brazilian resolution's universalist nature.

Another example of American cultural relativism lies in the American opposition to accrediting gay rights NGOs to the UN system. Americans such as Senator Jesse Helms have actively lobbied the international community against accrediting NGOs such as the International Gay and Lesbian Association. To justify his opposition, the senator criticized the moral composition of such groups.

C. Flirting with Universalism and the Relativist Response

Although this Part has primarily served to highlight religious and cultural arguments made by the United States against sexual minorities, one should note that sexual orientation rights have in fact progressed in the United States. In the 2003 case of Lawrence v Texas, for example, the Supreme Court ruled that Texas's criminalization of sodomy was unconstitutional. In his majority opinion, Justice Kennedy cited both the ECHR and an amicus brief filed by human rights advocates to argue in favor of sexual orientation rights. In another 2003 case, Goodridge v Department of Health, the Massachusetts Supreme Judicial Court held that the state's denial of marriage licenses to same-sex couples was unconstitutional. The plaintiffs' attorney characterized the decision as a win for human rights, noting that "this really is an issue about human equality and human dignity."

Yet, cultural arguments against sexual minorities persist. In the wake of Lawrence and Goodridge, cultural arguments surged in a wave of backlash. For example, in an official White House press release, President Bush joined a coalition of twenty-five Christian religious organizations to lobby against the resolution.

117 Id.
118 Religious organizations have lobbied the federal government not to endorse the Brazilian resolution. See Austin Ruse, Demand U.N. and Powell Stop Homosexual Ploy Now (May 2, 2003), online at http://www.conservativepetitions.com/petitions.php?id=190 (visited Aug 16, 2004) (urging American religious organizations to lobby against the resolution).
120 See id at 100.
organizations to proclaim that the week of October 12–18, 2003, would officially be recognized as "Marriage Protection Week."\textsuperscript{125} Marriage Protection Week sought to preserve a particular Christian notion that marriage can only be "a union between a man and a woman."\textsuperscript{126}

At present, the trajectory of the American position on sexual orientation rights is unclear. As the United States charts its course in dealing with sexual orientation, there will be consequences arising from the United States's decisions. The following Part discusses the consequences that might arise should the United States continue employing cultural arguments against the recognition of sexual orientation rights.

IV. LEGAL CONSEQUENCES OF THE AMERICAN POSITION

By asserting cultural arguments to restrict the human rights of sexual minorities, while international institutions declare sexual orientation rights to be universal, the United States is employing cultural relativism. If the United States continues to invoke culture to justify its discriminatory practices, it aligns itself with the cultural relativists that signed the Cairo and Bangkok Declarations.

By using religion to justify its sexual orientation laws, the United States is essentially saying that, while it recognizes the international human rights regime, sexual minorities' human rights should be contextualized for culture, in this case American Christianity. That argument is analogous to Islamic states' argument that women's human rights should be contextualized for Muslim culture and Asian states' argument that an individual's human rights should be contextualized for Confucian culture. Although the universalism-versus-relativism debate largely hinged on East-West differences in the past, the United States is nonetheless asserting cultural relativism when it excuses itself from human rights norms by asserting its particular brand of Judeo-Christian mores.

The United States creates a double standard by resorting to cultural relativism on sexual orientation rights. In his article, \textit{On American Exceptionalism}, Harold Hongju Koh notes that double standards are a type of exceptionalism that is not new to American foreign policy.\textsuperscript{127} What are the consequences of such American exceptionalism? Scholars have asserted that American exceptionalism compromises the United States's soft powers.\textsuperscript{128} By reducing American credibility,

\textsuperscript{125} See Jim Remsen, \textit{Week of Events in Opposition to Same-Sex Vows}, Philadelphia Inquirer A07 (Oct 12, 2003).


\textsuperscript{127} Koh, 55 Stan L Rev at 1481 (cited in note 7).

\textsuperscript{128} See id at 1487. But see Goldsmith, 1 Chi J Intl L at 338 (cited in note 66) (defending
exceptionalism compromises the United States’s soft power to conduct diplomacy. There has been a trend, however, among human rights scholars and practitioners to look beyond these soft effects to the transnational legal consequences of American exceptionalism. For example, human rights advocates have challenged the American treatment of Guantanamo Bay detainees through litigation in American courts, British courts, and the Inter-American Commission on Human Rights.

Human rights practitioners have increasingly used legal tools to address human rights issues instead of relying only on lobbying powers. Many of these legal tools have been characterized as innovative, sometimes too much so. For example, Belgium’s attempt to use universal jurisdiction to prosecute Israeli Prime Minister Ariel Sharon and U.S. General Tommy Franks for human rights violations has been criticized as an example of legal innovation stretched too thin. However, lawyers’ use of the ATCA to enforce human rights law is a legal innovation that has now become a common practice.

In this Part, I look at international estoppel and treaty suspension as legal tools that foreign states may innovatively, but legitimately, use to impose detrimental consequences on the United States for its double standard on cultural relativism. Although international estoppel and treaty suspension are rarely invoked, they are both doctrines that are firmly rooted in international law. In the past, these doctrines have not been invoked to deal with the United States’s human rights record because, until the sexual orientation issue emerged, the United States has never sought to justify its actions through cultural arguments.

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American exceptionalism, noting that “[A]merican hypocrisy is not the unambiguous evil that it is usually made out to be; it often serves an honorable and important role in domestic and international politics”.

129 See, for example, Rasul v Bush, 124 S Ct 2686 (2004).
130 See, for example, Abbasi v Secretary of State for Foreign and Commonwealth Affairs, 2002 EWCA Civ 1598 (2002).
133 In fact, the Supreme Court upheld the use of the ATCA to enforce human rights law. See Sosa v Alvarez-Machain, 124 S Ct 2739, 2765–66 (2004).
134 For example, to counter allegations that the United States’s treatment of Guantanamo Bay detainees violated international law, the State Department has not made cultural arguments. Instead, it has argued that the detainees are “enemy combatants” rather than “prisoners of war,” and thus they are not protected by the Geneva Conventions. See Dieter Fleck, Towards A Code of Conduct for Non-international Armed Conflicts: Current Efforts, Problems and Opportunities, 96 Am Soc'y Intl L Proceedings 25, 30 (2002). Another example involves allegations that the United States’s use of capital punishment violates international law. The United States does not make cultural arguments to justify its use of capital punishment. Instead, defenses of American capital punishment are generally a complex composite of consequentialist and retributivist ar-
Indeed, by singing the song of cultural relativism, the United States exposes itself to new legal consequences.

The remainder of this Part discusses the conceptual framework for applying estoppel and treaty suspension to the United States’s treatment of universalism. Although a single Comment cannot adequately address the comprehensive merits and weaknesses of such applications, this Comment should serve as a springboard for further discussion of the ideas proposed below.

A. International Estoppel

In the 1984 ruling in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, the International Court of Justice (ICJ) stated that “estoppel may be inferred from the conduct, declarations and the like made by a State which . . . has caused another State or States, in reliance on such conduct, detrimentally to change position or suffer some prejudice.” In 1962, in *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Judge Alfaro of the ICJ noted that international estoppel differs significantly from Anglo-American common law estoppel. Common law estoppel has evolved into numerous subcategories of estoppel—such as collateral, equitable, and promissory estoppel—all of which are governed by complex and technical rules. In contrast, international estoppel is simply defined, broadly grounded in notions of good faith and consistency. The primary foundation of this principle is the good faith that must prevail in international relations, inasmuch

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135 1984 ICJ 392.
136 Id at 415.
137 1962 ICJ 6.
138 Id at 39.
139 See Megan L. Wagner, Comment, Jurisdiction by Estoppel in the International Court of Justice, 74 Cal L Rev 1777, 1778 (1986) (“In contrast [to common law estoppel], international estoppel draws more sweeping lines.”).
as inconsistency of conduct or opinion on the part of a state to the prejudice of another is incompatible with good faith."

After surveying international case law, treatises have restated international estoppel as a three-pronged test. For example, according to Ian Brownlie's *Principles of Public International Law*, estoppel exists in international customary law where: (1) there is a statement that is "clear and unambiguous"; (2) the statement is "voluntary, unconditional, and authorized"; and (3) there is "reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement." Considering the broad scope of international estoppel, the United States may face consequences for endorsing cultural relativism. If the United States continues to apply cultural relativism to sexual orientation, it may be estopped in the future from applying universalism to other areas of human rights.

Turning to estoppel's three-part test, what would constitute a "clear and unambiguous" statement that the United States has begun to endorse relativism? The United States need not expressly state that it has adopted elements of cultural relativism. After all, the ICJ has held that "conduct" speaks as loudly as declarations. Thus, by withholding certain rights from sexual minorities while citing Christianity in lawmaking, the United States sends a statement that despite condemnation from the UN Human Rights Committee, it will not fully extend the ICCPR's antidiscrimination provision to sexual minorities because of American cultural biases. As sexual orientation continues to develop as a human right, the United States will need to address the issue more frequently in international affairs. Future statements will likely render the United States's cultural relativism even clearer.

The second prong is easy to satisfy. The ICJ has set a low bar for determining what types of government statements are voluntary, unconditional, authorized, and therefore binding. In *Nuclear Tests Case (Australia v France)*, France made general public announcements that it would discontinue atmospheric nuclear tests. The ICJ held that France was legally bound by its statements, even though there was no formal dialogue between France and the other party in the case, Australia. The ICJ held that France's statements were legally binding be-

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140 *Cambodia v Thailand*, 1962 ICJ at 42.
142 *Nicaragua v United States*, 1984 ICJ at 415 ("[E]stoppel may be inferred from the conduct, declarations and the like made by a State.") (emphasis added).
143 See note 94.
144 1974 ICJ 253.
145 Id at 267-71.
cause (1) they were made to the public, and (2) they manifested an intent to be bound. 46

In *Nuclear Tests*, the ICJ cited a presidential press conference and a televised interview as examples of public unilateral statements that manifest an intent to be bound. 47 Thus, one can infer that the Bush administration's press conferences are equally binding. As discussed in Part III.A, the Bush administration has put forth cultural defenses of the FMA in more than one press conference. Those binding press statements serve as evidence of the United States's relativist position. 48

The third prong is also relatively easy to satisfy. Consider this example: states such as China have advocated cultural relativism for quite some time. However, if the United States begins to adopt relativism, China may rely on American conduct to base its policies more confidently on cultural relativism. Thus, China may increase its crackdown on political dissidents, citing Confucian norms in which community and social authority trumps individual political expression. China could assert that, because the United States interprets the ICCPR through a Christian lens, it believed that the United States would condone China's interpretation of the ICCPR through a Confucian lens. Essentially, China could assert that it relied on American conduct to conclude that the United States would no longer hold it to a universal standard.

Thus, if the United States continues to assert cultural relativism, China may seek to prevent the United States from holding it to a universal standard. China may file a suit in the ICJ, 49 seeking an ICJ order

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146 Id.

147 Id. One should note, however, that *Nuclear Tests* has elicited much criticism for not clearly defining "intent to be bound." See Jan Klabbers, *The Concept of Treaty in International Law* 197–98 (Kluwer 1996) (noting that a determination of French intentions "necessitated the legal equivalent of a quantum leap," and that *Nuclear Tests* "proved quite controversial"). In subsequent cases, the ICJ may narrow the definition of "intent to be bound" and a statement's "authority," thus rendering estoppel's second prong more difficult to satisfy.

148 Although there is arguably no fundamental right to same-sex marriage, the UN Human Rights Committee has stated in dicta that laws against same-sex marriage can amount to a violation of the ICCPR if partnership laws do not give same-sex couples the rights granted to heterosexual married couples. See *Joslin v New Zealand*, GAOR Hum Rts Comm, UN Commun 902/1999, Doc A/57/40 (July 30, 2002) (Lallah and Scheinin concurring) (stating that, unless a state's laws allow for "recognition of same-sex partnership with consequences similar to or identical with those of marriage ... [the] denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26 [the ICCPR's antidiscrimination provision]"). (The UN Human Rights Committee has yet to hear a claim directly on point; thus, it has addressed the question only in dicta.) According to this logic, China can argue that Bush's use of religion to promote the FMA, while not guaranteeing same-sex partnership rights, amounts to an act of cultural relativism.

149 Since 1985, the United States has accepted ICJ jurisdiction only on an ad hoc basis. If China brought an estoppel claim against the United States in the ICJ, the United States would have the option to decline jurisdiction. However, because of the growing role of litigation in pub-
of provisional measure, which is akin to an injunction. At present, the State Department regularly issues statements condemning China for not embracing the universality of individual rights. In reaction to such condemnation, China could argue that the United States was misinterpreting the ICCPR and seek an order against the United States. Once the United States defended its State Department reports through universalist interpretation of the ICCPR, China could attempt to estop the United States from making such an assertion. China could note that the United States employed cultural relativism as a tool for interpreting the ICCPR in its withholding of the ICCPR's protections from sexual minorities. Subsequently, China could argue that the United States must be estopped from asserting that cultural relativism is an inappropriate tool for interpreting the ICCPR. As discussed above, all three prongs of the test for estoppel may be satisfied.

Will China really be motivated to file a suit with the ICJ? One may speculate that condemnation in State Department reports will lic international law, the United States would be under considerable international pressure to accept jurisdiction, unless the State Department issued a convincing statement that China's claim was frivolous. See Richard B. Bilder, *The United States and the World Court in the Post—"Cold War" Era*, 40 Cath U L Rev 251, 260-61 (1991) (noting that the United States may incur significant political costs by not submitting to the ICJ's jurisdiction). See also Jenny S. Martinez, *Towards an International Judicial System*, 56 Stan L Rev 429, 436-44 (2003) (discussing the growing role of litigation in international public law). But see John R. Cook, *The International Court of Justice and Human Rights*, 1 Nw U J Intl Hum Rts 2, 5 (2004) (expressing skepticism regarding states consenting to ICJ jurisdiction). If the United States declined ICJ jurisdiction, the State Department would likely be under international pressure to explain why China's estoppel claim is frivolous. Thus, the United States would need to defend itself against the estoppel claim one way or another.

Even if the United States declines jurisdiction at the ICJ, states can raise an estoppel argument against the United States in the UN Human Rights Committee. The United States has, in fact, agreed to submit itself to the UN Human Rights Committee's power to review adversarial claims related to the ICCPR. 138 Cong Rec 8070 § III(3) (1992) (ratifying the ICCPR and declaring that the United States “accepts the competence of the Human Rights Committee [to review adversarial claims] . . . under Article 41 of the ICCPR”). Thus, any Member State of the ICCPR can file with the Committee a complaint against the United States for its sexual orientation laws and, once the United States raises a cultural argument, the doctrine of estoppel can be invoked.

For the purposes of this Comment, I will discuss the estoppel claim in the context of the ICJ because an ICJ judgment would carry the greater weight. An ICJ judgment would be binding between the litigant states, whereas a UN Human Rights Committee opinion would be advisory in nature, but highly persuasive. Although my discussion uses the ICJ as an example forum, my analysis also applies to the UN Human Rights Committee because the Committee reaches its decisions using the same sources of law as the ICJ, including the general principles of international law expressed in the ICJ case law.


151 Article 36 of the Statute of the ICJ grants the ICJ jurisdiction to hear disputes over the interpretation of treaties.
not trigger such a drastic response from China. However, if Chinese political dissidents continue to sue Chinese officials via ATCA claims, and if American courts interpret the ICCPR under a universalist lens during the ATCA suit, China may feel more compelled to bring a claim to the ICJ. China may resort to the ICJ to stop American federal courts from barring cultural defenses against ATCA claims. The ICJ could estop the United States from asserting universalism with regard to the ICCPR and, accordingly, order American courts to allow cultural defenses in ATCA cases against Chinese officials. An ICJ order requiring American courts to allow cultural defenses in ATCA cases would not be the first time that the ICJ directed an order at American courts. In March 2004, the ICJ ordered American courts to review fifty-one death penalty cases. Although there are no formal mechanisms for enforcing the ICJ’s orders, noncompliance with ICJ orders tarnishes a state’s international reputation.

Skeptics may argue that international estoppel should be interpreted narrowly, so that the United States should be estopped from holding other states to universalism on sexual orientation matters and sexual orientation matters only. That is to say, the United States can distinguish its position on sexual orientation from its position on other rights, such as political expression. Even though sexual orientation rights and political rights are not the same thing, they are governed by the same treaties: the ICCPR, for example. The ICJ has noted that, under the doctrine of international estoppel, a state may not “deny[] that a certain treaty is applicable” to one case while alleging that another state has “not complied with certain provisions of that [same] treaty.” Thus, if the United States uses cultural relativism to deny application of the ICCPR to sexual minorities, it can be estopped from preventing China’s use of cultural relativism to deny application of the ICCPR to political dissidents because the parallel scenarios stem from the same treaty.

Although the doctrine of international estoppel is firmly rooted in law, it rarely has been formally invoked. This may be due to the fact

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152 See note 62 and accompanying text.
153 See generally Cambodia v Thailand, 1962 IJC 6 (estopping Thailand from asserting its territorial claim and ordering Thailand to withdraw forces from the territory).
156 Cambodia v Thailand, 1962 IJC at 50 (emphasis added).
that most inconsistencies in international law are resolved through diplomacy rather than litigation. The doctrine has mostly been invoked in territorial and jurisdictional disputes.\textsuperscript{157} However, as noted above, there is an increasing trend in international law toward dealing with exceptionalism through transnational legal proceedings. Recently, international law scholars have argued that international estoppel can be legitimately applied to expropriation cases\textsuperscript{158} as well as cases on state succession.\textsuperscript{159} Along those lines, it would be reasonable also to apply international estoppel to the debate on universalism. The doctrine has never been invoked in the human rights context, but there is little reason why it should not apply to human rights. After all, the principles of good faith and consistency should not be compromised in human rights law any more than they are compromised in other sectors of international law.

B. Treaty Suspension

If the United States continues to assert cultural relativism with regards to sexual orientation, other relativist states might develop a right to suspend existing human rights treaties that were established on an underlying assumption of universalism. Treaty suspension is not an immediate risk because parties wishing to suspend treaties are held to a heavy burden of proof. Nonetheless, if the United States's advocacy of cultural relativism intensifies and other states join the United States in applying cultural relativism to sexual orientation rights, treaty suspension will become a possibility.

The international customary law doctrine, \textit{rebus sic substantis}, literally means "things standing thus." \textit{Black's Law Dictionary} defines the doctrine as the "principle that all agreements are concluded with the implied condition that they are binding only as long as there are no major changes in the circumstances."\textsuperscript{160} The Vienna Convention on the Law of Treaties' Article 62 acknowledges the doctrine, but limits it as such:

\begin{quote}
A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
\end{quote}

\textsuperscript{157} See Wagner, Comment, 74 Cal L Rev at 1777 (cited in note 139) (noting that historically estoppel had been invoked in territorial disputes, but in 1984 the ICJ twice applied estoppel to jurisdictional disputes).
\textsuperscript{160} \textit{Black's Law Dictionary} 1274 (West 7th ed 1999).
(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.\textsuperscript{161}

The International Law Committee (ILC) Commentary on Article 62 suggests that states wishing to suspend a treaty because of changed circumstances should be held to a heavy burden of proving Article 62's two prongs. The Commentary notes "the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked . . . . The circumstances of international life are always changing and it is easy to allege that the changes render [a] treaty inapplicable."\textsuperscript{162}

The ICJ has addressed treaty suspension due to changed circumstances in only three cases: The Fisheries Jurisdiction Cases (United Kingdom v Iceland\textsuperscript{163} and Federal Republic of Germany v Iceland\textsuperscript{164}) and Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/ Slovakia).\textsuperscript{165} The ICJ's reasoning was similar in all three cases and the ICJ rejected the treaty suspension claim all three times. A look at the most recent case, Gabčíkovo-Nagymaros, sheds light on the ICJ's high bar for treaty suspension claims.

In Gabčíkovo-Nagymaros, the ICJ emphasized its narrow definition of "essential" circumstances, "radical" transformation of obligations, and foreseeability. In 1977, Hungary and Slovakia\textsuperscript{166} agreed to jointly construct a hydroelectric plant on the Danube. Hungary, a former socialist state, claimed that the agreement was suspended due to changed circumstances. It argued that the states' partnership served the purpose of socialist integration; thus, socialism was a fundamental circumstance leading to the joint venture.\textsuperscript{167}

Contrary to Hungary's claim, the ICJ found that socialism was but one of several circumstances leading to the 1977 treaty. The treaty not only furthered the two states' socialist partnership; it also served more basic goals, like providing electricity and preventing floods.\textsuperscript{168}

The ICJ stated that the political and economic goals of socialism were


\textsuperscript{162} Id at 428.

\textsuperscript{163} 1973 ICJ 3.

\textsuperscript{164} 1974 ICJ 175.

\textsuperscript{165} 1997 ICJ 7.

\textsuperscript{166} At the time of the agreement, Slovakia (also known as the Slovak Republic) was part of the former Czechoslovakia.

\textsuperscript{167} Id \S 95.

\textsuperscript{168} Id \S 104.
“not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties.” The ICJ also noted that, although the project’s profitability diminished over time, that difference did not amount to a “radical” transformation of obligation, which is necessary for treaty suspension. Alternatively, Hungary claimed that changed circumstances regarding environmental laws rendered the project more burdensome. In response, the ICJ noted: “The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen.”

Despite the high bar set by the ICJ, a change in the dynamics of the universalism debate may suffice to suspend certain human rights treaties, such as CEDAW. In many ways, such a treaty suspension claim would be more clear cut than those brought forth in cases like Gabcikovo-Nagymaros. First, using CEDAW as an example, one can immediately identify universalism as an essential assumption of the treaty. After all, CEDAW stands for the “Convention on the Elimination of All Forms of Discrimination Against Women,” and the plain language of the treaty requires states to “modify social and cultural patterns of conduct” that are discriminatory. Some states, such as the Muslim states, consented to CEDAW only as a result of pressure to conform to the existing assumption of universalism within the human rights regime. This situation contrasts with the Gabcikovo-Nagymaros case, in which Hungary and Slovakia very well may have consented to their agreement for the sake of generating energy, even if socialism were not part of the circumstances in 1977.

When Muslim states tried to fashion a compromise through a treaty reservation, Westerners pointed to the fact that those reservations were invalid because they would circumvent the main purpose of CEDAW, which is to protect universal human rights for women. In light of these facts, Muslim states have a strong case that a norm of universalism was an essential circumstance leading to CEDAW.

The challenge that Muslim states would face is proving that the circumstances have changed significantly enough to trigger treaty suspension. It is unlikely that a change in the American position alone can be deemed to be a departure from the human rights regime’s assumption of universalism. However, if the United States became more outspoken and convinced other Western states to approach sexual

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169 Id (emphasis added).
170 Id.
171 Id.
172 CEDAW Arts 2(f), 5(a).
173 See An-Na’im, 3 Harv Hum Rts J at 15 (cited in note 27).
174 See text accompanying notes 54–57.
orientation from a relativist point of view, the universalism debate could very well reach a new tipping point. Accordingly, Muslim states could argue that the human rights regime's assumption of universalism has significantly "changed" and that existing treaties, like CEDAW, should be reconsidered.

Those who are skeptical of a treaty suspension claim brought by Muslim states may argue that, even if the universalist assumption changes, Muslim states' obligations pursuant to CEDAW do not radically transform. That is, the cultural compromises that Muslim states must make pursuant to CEDAW do not change just because cultural relativism now applies to sexual orientation. This argument, however, is myopic because it overlooks heavy political costs.

Although in practice Muslim states should continue to modify their customs pursuant to CEDAW regardless of the debate over sexual orientation, the political costs associated with those compromises would intensify enormously if the human rights regime no longer assumed a norm of universalism. If Muslim states cannot exercise cultural relativism, but Western states may do so, they are no longer submitting themselves to an "overlapping consensus"; rather, they are submitting themselves to a blatant assertion that American culture is superior. The notion that all states must evolve to satisfy universal norms becomes replaced by the notion that Muslim states must evolve to satisfy American norms.

Thus, although the changed circumstances of the universalism debate may not raise the direct implementation costs for Muslim states, the changed circumstances create new political costs. One should not understate these political costs by refusing to acknowledge them as "radical." After all, in light of Samuel Huntington's "Clash of Civilizations" thesis, the international community should be aware that such a blatant subordination of Muslim civilization translates into very significant costs to political integrity.

Skeptics might also argue that a change in the universalist assumption should have been foreseeable. But an assumption of universalism has undergirded the human rights regime since its establishment in the 1940s. When Muslim and Asian states issued the Cairo and Bangkok Declarations, respectively, they failed to significantly alter the human rights regime. Subsequent international conferences continued to result in human rights treaties with underlying assumptions of universalism. In light of the consistency of universalism over

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175 Huntington argues that international affairs are entering a new era, in which international conflict will be defined along cultural lines that define discrete civilizations; in this era, a high value will be assigned to the integrity of a state's culture. See Samuel P. Huntington, The Clash of Civilizations?, 72 Foreign Aff 22 (Summer 1993).
the past six decades, it is reasonable to argue that a shift in the universalism debate was not foreseeable.

To bring a claim suspending CEDAW, a Muslim state would need only to file a claim with the ICJ. One can use Saudi Arabia as an example. When Saudi Arabia filed a reservation to CEDAW citing the incompatibility between CEDAW and Shariah, other states and international law scholars objected to the reservation, concluding that the reservation is invalid and that Saudi Arabia must be held to CEDAW’s universal obligations. If the universalist-relativist balance shifts far enough, Saudi Arabia may file an ICJ suit against any state that condemns its noncompliance with CEDAW. If the balance shifts enough, Saudi Arabia can argue that it is no longer beholden to CEDAW’s universalist obligations because CEDAW has been suspended.

Although the bar for treaty suspension claims is high, CEDAW may be subjected to treaty suspension if the United States’s cultural relativism grows enough to undermine the human rights regime’s underlying assumption of universalism. Compared to the Gabcikovo-Nagymaros case, the CEDAW example more easily satisfies the requirements for treaty suspension. First, the nexus between universalism and CEDAW is tighter than the nexus between socialism and the 1977 Hungarian-Slovakian agreement. Second, the political costs in the CEDAW example are more radical than the reduction of profits in the Gabcikovo-Nagymaros case. And third, a change in the underlying universalist assumption in human rights was not foreseeable, whereas new environmental laws should have been foreseeable in the Gabcikovo-Nagymaros case.

Although treaty suspension has rarely been invoked in the past, it may become a more often utilized tool in international law. Recently, international law scholars have suggested that treaty suspension due to changed circumstances can apply to treaties including the U.S.-Soviet Anti-ballistic Missile Treaty, the Oslo Accords, and the San Francisco Peace Treaty. Human rights treaties may be next.

CONCLUSION

There exists a double standard between the United States’s advocacy of universalism in human rights law and its application of cultural
relativism to sexual orientation rights, and the United States may pay legal consequences for this double standard. Through the doctrines of estoppel and treaty suspension, the United States may be forced to abandon the universalist standard that it fought hard to establish in areas of human rights including women's rights and freedom of political expression.

Skeptics may note that the estoppel and treaty suspension claims have not yet fully ripened. However, human rights related to sexual orientation are likely to grow, drawing a sharper contrast with the United States's relativist stance on the issue. As a result, estoppel and treaty suspension claims will become increasingly compelling, so long as the United States maintains its current posture on sexual orientation.

The human rights regime is presently grounded in an assumption that human rights are universal. However, that universalism is being tested by the American position on sexual orientation.