Case Studies in the Advancement of Sexual Orientation Rights and the Role of Developing International Legal Norms: Argentina and Brazil

Christine A. Bonomo
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Abstract

This Comment discusses the influence of international legal norm development on the advancement of sexual orientation rights. Case studies of Argentina and Brazil demonstrate that progress in this area of human rights law has been "outward-looking": the countries that are most progressive in terms of sexual orientation rights are at once substantially influenced by and seeking to actively influence the development of international legal norms. To demonstrate this "outward-looking" character, this Comment analyzes nongovernmental organization activity, legislative enactments, judicial opinions, and proposed resolutions in international and regional governmental bodies in both Argentina and Brazil. It then argues that sexual orientation rights development in these two countries is a manifestation of the significant impact that international law has had upon this area of human rights law. Ultimately, this Comment suggests that international law can provide a means to progress sexual orientation rights in countries that have not yet recognized them to the same degree as Argentina and Brazil.

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I. INTRODUCTION

In the past twenty years, “concern with discrimination on the basis of sexual orientation” has gained sufficient recognition worldwide such that it is “realistic to say that this issue [has] come onto the international human rights agenda.”¹ Two countries in particular, Argentina and Brazil, have been at the forefront of this change, the former substantially influenced by, and the latter substantially influencing, the developing international legal norm recognizing sexual orientation rights. Despite academic commentary implying the contrary, these two countries not only illustrate the importance of international law in efforts to advance sexual orientation rights, but also suggest the promise that international law offers to eradicate sexual orientation discrimination globally.

In July 2010, Argentina became the first country in Latin America, and only the tenth in the world, to authorize same-sex marriage.2 Argentina’s President Cristina Fernández de Kirchner sponsored the marriage law, promoting it as a manifestation of the increasingly liberal and less discriminatory social atmosphere of the country.3 The same-sex marriage bill, however, only narrowly passed in the Senate of the Argentine National Congress (Congreso de la Nación Argentina) after several weeks of public controversy and fifteen hours of “heated debate” on the congressional floor. Indeed, the bill faced vehement opposition by both conservative legislators and the Catholic Church.4 In the hours leading up to and following the passage of the law, supporters and opponents of the bill rallied outside the Congress building, objectors carrying signs stating, “Sodomía=Argentina” (“Sodomy=Argentina”),5 and supporters holding large banners proclaiming, “El mismo amor, los mismos derechos” (“The same love, the same rights”).6 Yet the bill’s supporters ultimately prevailed, framing the achievement of marriage equality for same-sex couples as a matter of basic

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2 See Alexei Barrionuevo, Argentina Approves Gay Marriage in a First for Region, NY Times A10 (July 15, 2010), online at http://www.nytimes.com/2010/07/16/world/americas/16argentina.html (visited Apr 9, 2013); Q&A: Argentina Gay Marriage Law BBC News (July 15, 2010), online at http://www.bbc.co.uk/news/world-latam-10650267 (visited Apr 9, 2013). Notably, Argentina was not the first jurisdiction in Latin America to legalize same-sex marriage. In December of the previous year, Mexico City passed a law “allowing” same-sex couples to marry and adopt children.” See Elisabeth Malkin, Gay Marriage Puts Mexico City at Center of Debate, NY Times A10 (Feb 7, 2010), online at http://www.nytimes.com/2010/02/07/world/americas/07mexico.html?_r=0 (visited Apr 9, 2013). Not so, however, is Argentina the only country in the region to recognize same-sex marriage. Uruguay legalized same-sex marriage in April 2013, thus becoming the second country in Latin America to do so. See Uruguay: Same-Sex Marriage Is Legalized, NY Times A8 (Apr 11, 2013), online at http://www.nytimes.com/2013/04/11/world/americas/uruguay-same-sex-marriage-is-legalized.html?_r=0 (visited May 2, 2013). 3 See Barrionuevo, Argentina Approves Gay Marriage, NY Times at A10 (cited in note 2). 4 See id. 5 See id. 6 See Bob Mondello, Gay Marriage a Human Rights Issue in Argentina, (NPR July 15, 2010), transcript online at http://www.npr.org/templates/story/story.php?storyid=12854958? (visited Apr 9, 2013). Notably, current Pope Francis, who was a cardinal in Argentina at the time of the bill’s passage, campaigned vehemently against the legalization of same-sex marriage. See Uki Goñi, Defying Church, Argentina Legalizes Gay Marriage, TIME World (July 15, 2010), online at http://www.time.com/time/world/article/0,8599,2004036,00.html (visited May 2, 2013). Indeed, he referred to same-sex marriage as a “destructive pretension against the plan of God.” Simon Romero, On Gay Unions, a Pragmatist Before He was a Pope, NY Times A1 (Mar 20, 1013), online at http://www.nytimes.com/2013/03/20/world/americas/pope-francis-old-colleagues-recall-pragmatic-streak.html?pagewanted=all (visited May 2, 2013). However, “behind the scenes,” the then-cardinal may have been more of a pragmatist than his public remarks suggested: he supported civil unions for gay couples as an alternative to marriage. See id. This pragmatism could have implications for his actions as leader of the Vatican in the future: “Cardinal Bergoglio’s readiness to reach out across the ideological spectrum and acknowledge civil unions for gay people could raise expectations that he would do the same as pope.” Id.
human freedom. As one reporter noted, "[t]he marriage equality debate [in Argentina] has been seen less as a legal matter than as a human rights issue, an argument that resonates in a country that’s experienced dictatorships and human rights abuses through the years."8

In November 2012, Rio de Janeiro, Brazil, hosted its seventeenth annual gay pride parade, one of the city’s largest and most exuberant celebrations of the year.9 Brazil has been recognized as one of the more progressive countries in the world with respect to lesbian, gay, bisexual, and transgender (LGBT) issues,10 the country itself "abounding [with] symbols of sexual freedom."11 Though the National Congress of Brazil (Congreso Nacional do Brasil) has not yet legalized gay marriage, in 2011 the Brazilian Supreme Court (Supremo Tribunal Federal) voted in a unanimous decision to award same-sex couples the same rights as heterosexual couples with regard to pensions, inheritance, and adoption.12 Supporters of same-sex marriage legalization in Brazil hope that the Supreme Court’s decision will prompt the legalization of same-sex marriage nationwide,13 and significant progress toward this end has already been achieved: after a court ruling in December 2012, the Brazilian state of São Paulo, the largest state in country, now effectively allows same-sex marriage.14 Furthermore, the decision by the

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7 See Mondello, Gay Marriage a Human Rights Issue (NPR) (cited in note 6).
8 Id.
10 See, for example, Brazil: The Situation of Homosexuals; Availability of Support Groups and State Protection, (Immigration and Refugee Board of Canada 2008), online at http://www.unhcr.org/refworld/docid/492ac7c72d.html (visited Apr 9, 2013).
12 Amnesty International, Brazil Supreme Court Legalizes Same-Sex Civil Unions (Amnesty Intl May 6, 2011), online at http://www.amnesty.org/en/news-and-updates/brazil-supreme-court-legalizes-same-sex-civil-unions-2011-05-06 (visited Apr 9, 2013). Notably, Brazil is a civil law country, and thus the decisions of its courts in their interpretations of the law are not legally binding precedent. Nevertheless, decisions of the Brazilian Supreme Court have significantly influenced subsequent modifications to national legislation. See Foreign Law Guide, Brazil, (Foreign Law Guide 2000), online at http://www.foreignlawguide.com.proxy.uchicago.edu/ip/flg/Brazil%20Introduction.htm (visited Apr 9, 2013) ("The importance of the federal Supreme Court as an innovative force in Brazil’s current legal development cannot be overlooked."). Moreover, because Brazilian courts have recognized the principle of stare decisis, developing case law has played a more important role in Brazil than other civil law countries. See id.
13 See Amnesty International, Supreme Court Legalizes Same-Sex Civil Unions (cited in note 12).
14 Jean Paul Zapata, São Paulo Court Guarantees Same-Sex Marriages, (Gay Star News Dec 21, 2012), online at http://www.gaystarnews.com/article/s%C3%A3o-paulo-court-guarantees-same-sex-marriages211212 (visited Apr 9, 2013). Brazil is a federative republic containing twenty-six states
Supreme Court could have monumental effects for same-sex partnership rights, not only in Brazil, but also throughout Latin America. As Guadalupe Morengo, the Deputy Programme Director for the Americas at Amnesty International, stated, “[h]opefully the Brazilian move will influence other Latin American countries.”

Notably, Argentina and Brazil are not the only countries in Latin America to have made significant steps toward the recognition of sexual orientation rights. In 2007, Uruguay “became the first Latin American country to enact nationwide legislation permitting gay civil unions,” and, in 2013, Uruguay followed Argentina in legalizing same-sex marriage. Colombia’s Constitutional Court has “granted gay couples full rights of insurance, inheritance, immigration, and social security benefits.” The Mexican Supreme Court, moreover, has affirmed the constitutionality of gay marriage for residents of Mexico City and has legalized same-sex couple adoptions.

These developments should be viewed in the context of what has been recognized as a broader, global movement toward the advancement of sexual orientation rights around the world over the past twenty years, as noted briefly and the federal district (the seat of the government). The Brazilian judiciary is extensive, comprised of national and state court systems. State courts may independently act to recognize the existence of certain legal family relationships unless national legislation preempts. See Foreign Law Guide, Brazil (cited in note 12). Here, a state court judge in the Sao Paolo held that notaries in the city are obliged to recognize same-sex marriages and that gay couples already in civil unions may convert their unions to marriages. See Zapata, Court Guarantees Same-Sex Marriages (Gay Star News Dec 21, 2012).

In May 2013, subsequent to the final drafting of this Comment, the National Council of Justice, the council that oversees Brazil’s judiciary, ruled that notary publics cannot refuse to perform same-sex marriage ceremonies. See Simon Romero, Brazilian Court Council Removes a Barrier to Same-Sex Marriage, NY Times A4 (May 14, 2013), online at http://www.nytimes.com/2013/05/15/world/americas/brazilian-court-council-removes-a-barrier-to-same-sex-marriage.html?_r=0 (visited June 1, 2013). The National Council based its decision on the 2011 Brazilian Supreme Court ruling described above. See id. The decision “effectively legalizes gay marriage throughout Brazil” and also permits same-sex couples to convert previously granted civil unions into marriages. See id. However, the ultimate impact of the National Council’s ruling has yet to be determined because “there is some room for judicial appeals of the Brazilian decision, potentially within the high court, the Supreme Federal Tribunal, and resistance may emerge in Congress.” Id.

Amnesty International, Brazil Supreme Court Legalizes Same-Sex Civil Unions (cited in note 12).


Encarnacion, 22 J Dem at 104 (cited in note 17).

Id. But see Javier Corrales and Mario Pecheny, Introduction: The Comparative Politics of Sexuality in Latin America, in Corrales and Pecheny, eds, The Politics of Sexuality in Latin America 1, 10 (cited in note 11) (noting that, despite these developments, progress toward the recognition of rights associated with sexual orientation freedoms is decidedly uneven across the region).
above. A significant amount of legal scholarship has sought to explain this global trend, analyzing the emergence of sexual orientation rights in the context of other international human rights advancements. Some authors have even asserted that the right to be free from all forms of discrimination on the basis of sexual orientation has attained the status of an international legal norm.

In his article, State Regulation of Sexuality in Human Rights Law and Theory, “the first published, worldwide survey of international practice in interpreting and applying various international human rights norms to the issue of sexual freedom,” Aaron Xavier Fellmeth analyzes what he recognizes as an “undeniable, if gradual, trend toward recognition of freedom from state interference in sexual conduct and nondiscrimination based on sexual orientation in the corpus of international human rights law.” Fellmeth asserts, however, that “[o]ne of the most interesting aspects” of this movement is its “[a]lmost uniformly inward-looking character”:

[A]lmost every domestic tribunal that has overturned laws discriminating against sexual minorities or unconventional sexuality, and almost every state legislature that has abolished discriminatory legislation or adopted antidiscriminatory legislation, has done so without relying on international human rights law as a basis of authority. Instead, these movements have been premised upon domestic constitutional understandings of liberty, privacy, and nondiscrimination.

Fellmeth is not the only scholar to characterize the global trend surrounding sexual orientation rights in this manner. Notably, Jack Donnelly similarly suggests that the international legal component of sexual orientation rights is secondary to—merely “supplementary and supportive of”—“national struggles.”

While these scholars’ claims may accurately generalize the nature of the global development of sexual orientation rights laws, they oversimplify and overlook the international aspect of these political and legal developments in some regions of the world, and in particular, in Latin America. I will demonstrate

21 See Aaron Xavier Fellmeth, State Regulation of Sexuality in International Human Rights Law and Theory, 50 Wm & Mary L Rev 797, 811 (2008).
24 Fellmeth, 50 Wm & Mary L Rev at 797 (cited in note 21).
25 Id at 811.
26 Id at 924, 925–26.
through a discussion of Argentina and Brazil that the development of sexual orientation rights has not been “inward-looking.” In fact, it has been quite the opposite. As the cases of Argentina and Brazil make clear, the countries in the region that are most progressive in terms of sexual orientation rights are at once substantially influenced by and seeking to actively influence the development of international legal norms in this area of human rights law. In this way, international law (as expressed in developing international legal norms) has played a pivotal role in the advancement of sexual orientation rights in Latin America.

This Comment is divided into three major sections. Section II will provide the necessary background for understanding the development of sexual orientation rights in international law, defining “sexual orientation rights” for purposes of this discussion and tracing the major developments in this area over the past twenty-five years. Section III will then discuss sexual orientation rights development in Argentina and Brazil, analyzing nongovernmental organization activity, legislative enactments, judicial opinions, and resolutions proposed to international and regional governmental bodies to demonstrate its “outward-looking,” as opposed to “inward-looking,” character. This section argues that the “outward-looking” nature of sexual orientation rights development in these two countries is the manifestation of the significant impact that international law has had upon this area of human rights law. Finally, Section IV will connect sexual orientation rights development in Argentina, Brazil, and other countries in Latin America to trends in the international arena as a whole. The analysis in this Section ultimately suggests that international law can provide a means to progress sexual orientation rights in countries that have not yet recognized them to the same degree as Argentina and Brazil.

II. THE STATUS OF SEXUAL ORIENTATION RIGHTS IN INTERNATIONAL LAW

Before analyzing the international component of sexual orientation rights development in Argentina and Brazil, a discussion of the terminology employed in this Comment as well as a brief overview of sexual orientation rights in international law will provide the relevant context. In particular, clarifying the definitions of “sexual orientation” and “sexual orientation rights” is essential for understanding the underlying concepts and ideas upon which this Comment relies. Additionally, a brief overview of how “sexual orientation” and “sexual orientation rights” have been protected in the international legal arena will offer pertinent background for appreciating how developing international law has affected Argentina and Brazil.
A. Terminology

As Eric Heinze has observed, the concept of “sexual orientation” is difficult to define, especially because it could be interpreted rather broadly: “In theory, ‘sexual orientation’ could encompass any sexual attraction—of anyone toward anything.” The “scope” of “sexual orientation” as a concept, however, is much narrower in most contemporary legal, political, and popular dialogue, most frequently denoting “the gender of the people to whom one is sexually attracted.”

For purposes of this Comment, I will adopt the definition promulgated in the Yogyakarta Principles (discussed further below): “Sexual orientation is understood to refer to each person’s capacity for profound emotional, affectional, and sexual attraction to, and intimate sexual relations with, individuals of a different gender or the same gender or more than one gender.”

I will look specifically at the legal rights and privileges of those individuals who are minorities in terms of their sexual orientation: homosexuals (individuals who are attracted to other persons of the same sex) and bisexuals (individuals who are attracted to other persons of both sexes). Notably, many scholars have understood and analyzed the idea of sexual orientation in conjunction with “gender identity,” “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth.” However, consideration of rights related to gender identity (for example, rights related to transsexual individuals) is outside the scope of this Comment.

29 Id (emphasis in original).
31 Eric Heinze proposes the following definition: “Sexual minorities denote people whose preferences, intimate associations, lifestyles, or other forms of personal identity or expression actually or imputedly derogate from a dominant normative-heterosexual paradigm.” Heinze, Sexual Orientation at 61 (cited in note 28). Individuals who have homosexual or bisexual preferences would thus fall within this category. Jack Donnelly defines “[s]exual minorities” as those homosexual and bisexual individuals who are “despised and targeted by ‘mainstream’ society” and who are “victims of systemic denials of rights because of their sexuality.” See Donnelly, Nondiscrimination at 229 (cited in note 27).
Most broadly defined, my use of the term “sexual orientation rights” refers to the right to be free from all forms of discrimination on the basis of one’s actual or perceived sexual orientation.\textsuperscript{34} The spectrum of sexual orientation rights encompasses the legalization of same-sex intimate relationships (in other words, the decriminalization of homosexuality); the elimination of discrimination in the age of consensual sex; the prohibition of discrimination in employment and in the awarding of certain socio-economic benefits (such as housing); the open enlistment of individuals in the military regardless of their sexual orientation; the legalization of same-sex civil unions, registered partnerships, or marriages; and finally, the granting of equal custody and adoption rights regardless of the parent’s sexual orientation.\textsuperscript{35}

B. An Historical Overview of Sexual Orientation and International Human Rights Law

1. Interpretations of global and regional treaties by courts and treaty-monitoring bodies.

Several global and regional treaties protect individuals from discriminatory treatment on the basis of personal characteristics, including the International Covenant on Economic, Social, and Cultural Rights (ICESCR),\textsuperscript{36} the International Covenant on Civil and Political Rights (ICCPR),\textsuperscript{37} the European Convention on Human Rights (ECHR),\textsuperscript{38} and the American Convention on Human Rights (ACHR).\textsuperscript{39} None of these treaties, however, contain “specific references to issues related to sexual orientation.”\textsuperscript{40} Nevertheless, UN treaty-monitoring bodies and other international courts have protected sexual orientation rights in their interpretations of these treaties. In Dudgeon v United Kingdom\textsuperscript{41} and Norris v Ireland,\textsuperscript{42} for example, the European Court of Human Rights held that the provisions of the European Convention on Human Rights (ECHR)\textsuperscript{43} and the International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{44} provided for protection against discrimination based on sexual orientation.

\textsuperscript{34} See Heinze, \textit{Sexual Orientation} at 60–61 (cited in note 28).

\textsuperscript{35} See Fellmeth, 50 Wm & Mary L Rev at 817, 825, 842, 847–49, 864 (cited in note 21).


\textsuperscript{37} International Covenant on Civil and Political Rights (1966), 999 UN Treaty Ser 171 (1976) (ICCPR).


\textsuperscript{39} American Convention on Human Rights, 1144 UN Treaty Ser 123 (1979) (ACHR).


\textsuperscript{41} 45 Eur Ct HR (ser A) (1982).

\textsuperscript{42} 142 Eur Ct HR (ser A) (1988).
Rights concluded that laws criminalizing same-sex sexual activity violated Article Eight of the ECHR, a provision for the protection of an individual's privacy.43 The Court also overturned laws banning recruitment of homosexuals to the military on privacy grounds.44 In Toonen v Australia,45 the UN Human Rights Committee echoed the European Court of Human Rights in holding that the criminalization of same-sex sexual activity violated an individual's right to privacy under Article Seventeen of the ICCPR.46 The Committee also considered "that sexual orientation-related discrimination is a suspect category in terms of the enjoyment of ICCPR rights (Article 2)."47 In Young v Australia,48 moreover, the Committee determined that distinguishing between same-sex and heterosexual partners in the awarding of pension benefits violated the ICCPR.49

Sexual orientation rights have also been protected by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, administrative and judicial organs of the Organization of the American States (OAS), both of which hear petitions involving violations of the ACHR.50 In Giraldo v Colombia,51 for example, the Inter-American Commission of Human Rights held that a Colombian prison policy denying a lesbian prisoner the right to "intimate visits" from her partner because of her sexual orientation violated the privacy protections under Article Eleven of the ACHR.52 In Atala Riffo and Daughters of Chile,53 the Inter-American Court of Human Rights ruled that Chile must pay damages to a lesbian judge who was denied custody of her three daughters by the Supreme Court of Chile (La Corte Suprema de Chile) on the...
grounds of her sexual orientation. Overall, these decisions of the European Court of Human Rights, the UN Human Rights Committee, and the Inter-American Court of Human Rights demonstrate a relatively widespread recognition of sexual orientation rights by international tribunals.

2. Domestic state practices and the development of customary international law.

In addition, individual states across the world have demonstrated a willingness to protect sexual minorities from discrimination. Indeed, this "trend toward individual state recognition of a general human right to protection against discrimination based on sexual orientation" may be "potentially as influential" in the gradual development of customary international law surrounding sexual orientation rights as the opinions of the UN treaty-monitoring bodies and international courts described above. The growing number of states prohibiting discrimination on the basis of sexual orientation in their domestic laws relating to government services, housing, employment, education, and other public accommodations includes Argentina, Australia, Brazil, Canada, Costa Rica, Denmark, Finland, France, Hungary, Iceland, Ireland, Israel, Luxembourg, Mexico, Namibia, the Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, and some states and municipalities in the United States. Ecuador, Fiji, Portugal, South Africa, and Switzerland have even included a right to protection from sexual orientation discrimination in their new constitutions.

As will become more clear in the discussions of Argentina and Brazil in Sections III and IV, the relationship between domestic state practices and international legal norm development can be mutually reinforcing: progress made at the domestic level in the most progressive countries influences customary international law, which, in turn, can influence the development of domestic law in less initially progressive countries. Sexual orientation rights advancement at the domestic level is thus inherently "outward-looking," whether a particular country is being influenced by or itself influencing the development of an international legal norm.

54 Id.
55 Fellmeth, 50 Wm & Mary L Rev at 831 (cited in note 21).
56 See id at n 142.
57 See id at 831–32. South Africa's constitution, for example, contains the following provision in its Bill of Rights: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." South Africa Const, Ch 2, § 9, cl 3 (emphasis added).
3. Non-governmental organizations and other sources of “soft” international law.

The work of non-governmental organizations (NGOs) in the domestic and international sphere has also helped advance sexual orientation rights. Indeed, NGOs have played a pivotal role in the development of legal norms protecting individuals from discrimination on the basis of sexual orientation. Examples of NGOs working for the advancement of sexual orientation rights in the international arena include the International Lesbian and Gay Association (ILGA), the International Gay and Lesbian Human Rights Commission, Amnesty International, and Human Rights Watch. In issuing normative sexual rights statements grounded in the language of international human rights, these international NGOs have spearheaded the development of customary international law in this area: as Mindy Jane Roseman and Alice M. Miller note, these NGO campaigns for recognition of sexual orientation rights have been “both models and inducements” for state and international governmental bodies.

Finally, the issuance of the Yogyakarta Principles is perhaps the most significant recent development in the recognition of sexual orientation rights in international law. The Principles, produced by a group of international human rights experts in 2007, are the product of a recent initiative to address the uncertainty surrounding the scope of sexual orientation and gender identity rights in international law and the “terminological confusion” relating to these concepts. Though they are not binding (“hard”) international law, the Principles nevertheless “carry the authority of their expert authors” and are considered by many states and legal scholars to be a “careful articulation of the state of existing law” relating to international human rights and sexual orientation. The Principles articulate that all individuals, regardless of their sexual orientation or gender identity, have equal rights with regard to recognition before the law, including the right to privacy; freedom from violence, torture, and arbitrary detention; non-discrimination in the enjoyment of economic, social, and cultural rights, including employment, housing, social security, education, and health benefits; and freedom of expression, opinion, and

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60 See Roseman and Miller, 34 Harv J L & Gender at 338 (cited in note 58).
61 See O’Flaherty, Sexual Orientation and Gender Identity at 341 (cited in note 40).
62 Id at 342.
association, among various other rights and privileges.\textsuperscript{63} Notably, the Yogyakarta Principles have been influential throughout the world in setting new standards for the recognition of sexual orientation rights at the international, domestic, and local level, influencing regional human rights bodies, domestic policy, and municipal courts’ decisions.\textsuperscript{64} The effect of these Principles in itself provides an illustration of international law’s significant impact on this area of human rights advancement. Moreover, as this Section has demonstrated, the decisions of international tribunals and committees, the expansion of customary international law, and the influence of various forms of soft law have all advanced sexual orientation rights on a global level.

III. ARGENTINA AND BRAZIL: CASE STUDIES OF OUTWARD-LOOKING SEXUAL ORIENTATION RIGHTS DEVELOPMENT

A. Introduction: Why Look at Argentina and Brazil?

In his study of sexual orientation rights in the Netherlands and across Europe, Kees Waaldjik notes that “there is a clear pattern of steady progress according to standard sequences” in the attainment of these rights.\textsuperscript{65} In particular, in the countries where the most progress has taken place:

[L]egislative recognition of homosexuality starts (most probably after some form of association of homosexuals and information on homosexuality has become legal) with (1) decriminalization, followed or sometimes accompanied by the setting of an equal age of consent, after which (2) anti-discrimination legislation can be introduced, before the process is finished with (3) legislation recognizing same-sex partnership and parenting.\textsuperscript{66}

Thus, perhaps unsurprisingly, those countries with legislation recognizing same-sex partnership and parenting rights are the most progressive in terms of the sequence.

Applying Waaldjik’s model, both Argentina and Brazil are relatively advanced in the progress they have made toward full recognition of sexual orientation rights. Argentina does not criminalize same-sex sexual activity; has equal age of consent laws for opposite-sex and same-sex relations; has laws in certain jurisdictions prohibiting discrimination on the basis of sexual orientation;
allows same-sex marriage; and awards equal adoption rights to sexual minorities.\(^6^7\) Brazil does not criminalize same-sex sexual activity, has equal age of consent laws for opposite-sex and same-sex relations, and has laws in certain jurisdictions prohibiting discrimination on the basis of sexual orientation in the provision of public benefits.\(^6^8\) Brazilian courts have also allowed same-sex couples to participate in civil unions (and, in São Paulo, same-sex marriage), although there has been no legislation on the subject.\(^6^9\) Notably, Brazil has also “shown a high degree of institutional protection” toward sexual minorities, as evidenced by its promulgation of the “Brazil Without Homophobia” government initiative to help combat violence and discrimination toward sexual minorities (discussed further below).\(^7^0\) Because Argentina and Brazil are both relatively progressive in terms of sexual orientation rights, they provide good case studies for looking at the role of developing international law and legal norms on the advancement of those rights. Indeed, these countries exemplify the positive impact that international law has had in this area.

B. Argentina: A Country Influenced by Developing International Legal Norms

Any discussion of sexual orientation rights in Argentina would be incomplete without a survey of the activism that played a fundamental role in bringing it about. This discussion, however, will provide more than mere context: activism by NGOs dedicated to advancing sexual orientation rights has been a channel through which developing international legal norms have influenced Argentina. Several scholars have commented on the pivotal role that NGOs play in the development of international law and legal norms involving human rights. In particular, NGOs aid in the “socialization” of developing international law.


\(^6^9\) Amnesty International, See Brazil Supreme Court Legalizes Same-Sex Civil Unions (cited in note 12); Zapata, São Paulo Court Guarantees Same-Sex Marriages, (Gay Star News Dec 21, 2012) (cited in note 14). As noted above, Brazil is a civil law country, and thus the opinions of its courts do not have legally-binding effect. Nevertheless, Brazilian courts have still been influential in shaping the development and progression of Brazilian law. See text accompanying note 12. See also text accompanying note 15.

international human rights norms at the domestic level. For one, NGOs provide the “platform[s]” by which those seeking the development of a norm can “persuade” powerful states to conform to that norm through establishing relationships with the media and governmental decisionmakers. For another, domestic NGOs frequently form networks with NGOs abroad. These networks can “provide access, leverage, and information (and often money) to struggling domestic groups, . . . prise open space for new issues, and then echo these demands back into the domestic arena.” The “normative [ ] rights statements” proliferated by NGOs, moreover, can constitute a form of “soft” international law in themselves. Overall, NGOs are undoubtedly pivotal players in the creation and advancement of international human rights norms in domestic arenas.

The development of sexual orientation rights in Argentina exemplifies this phenomenon. Indeed, NGOs in Argentina have been a driving force in the advancement of these rights since the rise of gay and lesbian activism in the country in the 1970s. In 1969, gay rights activists founded the first major gay rights group in the country’s history, Grupo Nuestro Mundo (Our World Group) (also the first gay political organization in Latin America). Shortly thereafter, in 1971, Grupo Nuestro Mundo and several other smaller gay activist groups composed of mostly male left-wing university students, anarchists, and religious organizations joined to form the radical Frente de Liberación Homosexual (Homosexual Liberation Front).

In the latter half of the 1970s and the early 1980s, however, a ruthless military dictatorship ruled Argentina, regularly committing human rights violations against Argentinian citizens, and targeting marginalized groups, including sexual minorities. Formal activism nearly disappeared during this

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74 Id.

75 See Roseman and Miller, 34 Harv J L & Gender at 337 (cited in note 58).

76 See id.


78 Id.

79 See id at 87–88.
But after the collapse of the military dictatorship in 1983, “lesbian and gay life in Argentina flourished.” In 1984, a politically diverse group of gay men and lesbians founded Comunidad Homosexual de Argentina (CHA) (Argentinian Homosexual Community), which became the largest and most important gay and lesbian activist group in Argentina during the 1980s. In the 1990s, gay and lesbian activist groups again proliferated, some of the most influential of which were Las Lunas y las Otras (an untranslatable pun referring to a lesbian feminist group), Sociedad de Integración Gay-Lésbica Argentina (SIGLA) (Argentinian Society for Gay and Lesbian Integration), and Gays y Lesbianas por los Derechos Civiles (Gays DC) (Gays and Lesbians for Civil Rights). Notably, over thirty other groups have been founded since the early 1990s.

These gay and lesbian activist NGOs have worked to bring about greater awareness of sexual orientation rights in Argentina, not only by drawing attention to these rights and issuing normative statements supporting them, but also by campaigning for their legal recognition. CHA and SIGLA, for example, have publicly “decried demonization of and discrimination against gays and lesbians” in the media. These two groups have also initiated court cases involving discriminatory laws or state actions with the goals of invalidating these laws and furthering the rights of sexual minorities. Gays DC, moreover, has adopted a strategy combining casework and legislative lobbying to campaign for equal rights, especially in relation to same-sex marriage and adoption. Gays DC also played a pivotal role in the campaign for the inclusion of legal protection against sexual orientation discrimination in the Buenos Aires municipal charter.

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80 See id at 87.
81 Brown, Lesbian and Gay Movement in Argentina at 88 (cited in note 77).
82 See id.
83 See id.
84 See id at 89.
85 See Brown, Lesbian and Gay Movement in Argentina at 93 (cited in note 77).
86 See id.
87 See id at 93–94.
88 See id. CHA was also involved in this campaign. See Comunidad Homosexual Argentina, 28 Año de la CHA, (CHA 2011), online at http://www.cha.org.ar/nosotros/27-anos-de-la-cha/ (visited Apr 9, 2013). The Buenos Aires municipal charter now contains the following article protecting sexual minorities from discrimination on the basis of sexual orientation:

> Se reconoce y garantiza el derecho a ser diferente, no admitiéndose discriminaciones que tiendan a la segregación por razones o con pretént de raza, etnia, género, orientación sexual, edad, religion, ideología... o cualquier circunstancia que implique distinción, exclusión, restricción o menoscabo.”

(“In order to recognize and guarantee the right to be different, [the city] will not permit discrimination on the basis of race, ethnicity, gender, sexual orientation, age, religion, ideology... or any circumstances that implicate difference, exclusion, restriction, or harm.

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As driving forces of sexual orientation rights advancement in Argentina, these NGOs have in turn been influenced by developing international legal norms regarding sexual orientation. Ever since their establishment in the 1980s, Argentina’s gay and lesbian activist NGOs, especially CHA, have aligned their movement with the developing human-rights discourse abroad by framing sexual orientation discrimination as a human rights issue. As Stephen Brown notes, “[t]o build bridges with other human-rights organizations, the CHA adopted the motto, ‘Freedom to express one’s sexuality is a human right,’ and an approach to lesbian and gay rights based on human-rights discourse.”

The influence of developing international legal norms on the work of Argentinian NGOs is thus clear in their deliberate appropriation of the human rights message to advance their campaign.

The international arena also influenced Argentinian NGOs by providing “key models and support” for activism in Argentina. Lesbian and gay activist publications in the country, for example, have reflected a significant awareness of the lives of sexual minorities abroad, in particular Western Europe and the United States. These Argentinean publications frequently detail not only the struggles and successes of sexual minorities in Argentina, but also the “activism, political struggles and victories, and cultural activities” of gay and lesbian NGOs and political movements abroad, especially in Western Europe and the United States. Furthermore, NGOs in Argentina have adopted international symbols and representations of gay activism and sexual orientation rights, such as the rainbow flag and pink triangle.

“Transnational linkages” were also pivotal in CHA’s campaign to win recognized legal status (persona jurídica) by the Argentinian government in the 1990s. In particular, the CHA conducted a coordinated international campaign

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89 Brown, Lesbian and Gay Movement in Argentina at 90 (cited in note 77).
91 See id.
92 Id. See also id at 119 (suggesting that awareness of gay activist protest cycles abroad, such as those following the 1969 Stonewall riots in New York, helped spur gay activism in Argentina).
93 See id at 116.
94 The CHA symbol, for example, is a pink triangle atop a rainbow flag. See Comunidad Homosexual Argentina, online at www.cha.org.ar (visited Apr 9, 2013).
95 See Brown, Democracy and Sexual Difference at 116 (cited in note 90). Legal recognition by the Argentinian government allows an organization to lobby state agencies and raise money. See Encarnación, 22J Dem at 107 (cited in note 17).
to raise the issue while former President Carlos Saúl Menem was on a diplomatic visit to the United States in November 1991. Furthermore, AIDS awareness and treatment programs have been financed in part by funding from foreign organizations such as the Norwegian Red Cross and the American Foundation for AIDS research. In these ways, what Brown refers to as “international opportunity structures” have contributed significantly to the Argentinian gay and lesbian movement and, consequently, the furtherance of sexual orientation rights in the country.

The influence of developing international legal norms on the recognition of sexual orientation rights is also apparent in judicial opinions and legislative enactments. For example, the general willingness to protect the rights of sexual minorities by lower courts in Argentina has been affected by international human rights treaties and laws. In a case heard by the district court of Mendoza before the legalization of same-sex marriage in the country, a male in a long-term partnership with another male petitioned the court to certify the couple as “cohabitants” so he could obtain health insurance benefits for his partner. In the opinion, the judge listed several international human rights treaties, including the ICCPR and the ACHR, as legal authorities supporting the proposition that the ability to establish a family is a fundamental right for all, including, presumably, sexual minorities. Moreover, in reaching the conclusion that this right to form a family should not be abridged on the grounds of sexual orientation, the judge cites the existence of “numerous international laws.”

International human rights treaties and laws affirming sexual orientation rights have also directly impacted national legislation in Argentina. In 2008, for example, the Argentine National Congress promulgated a new military law, Ley

96 See Brown, Democracy and Sexual Difference at 116 (cited in note 90). See also Encarnación, 22 J Dem at 109 (cited in note 17) (noting that Argentinian and US gay activists coordinated a campaign to “basically sham[e]” Menem into legalizing the CHA during his visit).

97 See Brown, Democracy and Sexual Difference at 116 (cited in note 90).

98 See id.


100 District Court Civ, Com y Minas N° 10 (1998 Mendoza, Argentina), El Derecho T 180 at 248.

101 See id at 255.

102 Id at 257. In the original text of the opinion, the judge asks the following rhetorical question: “Describas así las relaciones de los peticionantes ¿podrías justificarse razonablemente alguna conclusión que descalificara sus relaciones como de ostensible trato familiar, por el solo hecho de ser convivientes del mismo sexo? No ha sido esta la respuesta de numerosas legislaciones internacionales” (“Describing the relationship of the petitioners in this way, can one reasonably justify disqualifying them from the privileges of being treated as a family, for the sole reason that they are of the same sex? That has not been the response of numerous international laws.”) (emphasis added).
26.394 (repealing the 1951 military code), which in part decriminalized homosexual acts and homosexual orientation in the armed forces. When the bill was presented to Congress, its proposed form (Proyecto de Ley) included the scope, purpose, and justification for the law. The draft included references to international human rights treaties, specifically the ACHR, and stated that reform was necessary to bring the country’s military penal policies in conformity with the “standards” of international human rights law.

More recently, the Argentine National Congress has affirmed the rights of sexual minorities with its passage of Ley 26.618, which legalizes same-sex marriage. The proposed bill for this law also demonstrates that international law and developing international legal norms provided a legal foundation (fundamento) for the expansion of sexual orientation rights in the country. In particular, the draft referred extensively to international human rights treaties to establish that abridging the ability to marry on the grounds of sexual orientation would constitute discrimination in violation of fundamental rights of liberty and equality, citing in particular the ADHR, ICESR, ICCPR, and the Universal Declaration of Human Rights (UDHR). Furthermore, the draft bill referenced...
the recognition of same-sex marriage in other countries, like the Netherlands and Spain.\textsuperscript{108}

Overall, as analyses of NGO activity, judicial opinions, and legislative enactments demonstrate, the progression of sexual orientation rights in Argentina has been significantly influenced by the developing international legal human rights norms in this area. Indeed, those driving the legal change—the NGOs—have actively engaged with gay rights organizations abroad, adopting their discourse and advocacy strategies and forging transnational ties with them. Courts and those at the seat of government, moreover, have consciously looked abroad in their measures to afford greater rights to sexual minorities, influenced by international human rights treaties and the domestic practices of other countries. International law, then, has clearly been a significant factor in the advancement of sexual orientation rights in Argentina.

C. Brazil: A Country Influenced by and Influencing Developing International Legal Norms

Luiz Mott, founder of the Brazilian gay rights activist group Grupo Gay da Bahia (Gay Group of Bahia) noted in 1995 that Brazil “enjoys the international reputation of being the New World country with the greatest freedom for homosexuals.”\textsuperscript{109} While today other Latin American countries, such as Argentina, Colombia, and Uruguay, are also recognized for affording substantial

\begin{quote}
English translation:

The state is obligated not to distinguish between individuals on the basis of sexual orientation in the exercise of rights. Doing so would constitute discrimination. We seek to remove impediments to the protection of fundamental rights, like the liberty and equality of persons, guaranteed by the National Constitution and the international treaties incorporated therein... the American Declaration of the Rights and Duties of Man (art 2), the UDHR, the ACHR (art 24), the ICESCR (art 9), the ICCPR (art 26).
\end{quote}

\textsuperscript{108} See id. The original text of this portion of the \textit{Proyecto}:

El primer país en legislar el matrimonio entre personas del mismo sexo fue Holanda en el año 2000, el ejemplo de Holanda influenció a Bélgica, que adoptó una norma similar en el año 2003. España fue sancionando leyes que reconocían los derechos de las parejas entre personas del mismo sexo a nivel regional. En el año 2005 modificó el Código Civil en materia de derecho a contraer matrimonio.

\begin{quote}
Translation:

The first country to legalize same-sex marriage was the Netherlands in 2000. The example set by the Netherlands influenced Belgium, which adopted similar legislation in 2003. At this time, Spain had also begun recognizing same-sex partnership rights at the regional level. In 2005, [Spain] modified the national Civil Code with respect to marriage.
\end{quote}

freedoms to sexual minorities, Brazil still enjoys a highly progressive reputation within the international community. This reputation is due in large part to its promotion of sexual orientation rights in the international arena. Indeed, Brazil is a country not only being influenced by international norms with regard to sexual orientation rights, but actively seeking to advance those international norms itself.

First, it should be noted that, similar to those in Argentina, sexual orientation rights activist groups and NGOs in Brazil have been influenced by the international human rights movement. Sexual minority activism in the country began in the late 1970s with the founding of Somos: Grupo de Afirmação Homossexual (We Are: Group of Homosexual Affirmation)—the name partially an homage to a publication distributed by Argentine Homosexual Liberation Front, thus signifying an awareness of sexual orientation advocacy abroad. Other groups were founded in the late 1970s, but the movement declined over the course of the next decade due to lack of financial resources, infrastructural disorganization, and the false notion that the end of military dictatorship in 1985 would restore the rights of sexual minorities without the need for concerted activism. Nevertheless, a “second wave” of activism occurred in the 1990s, epitomized by the founding of one of Brazil’s most prominent sexual orientation rights groups, Associação Brasileira de Lésbicas, Gays, Bissexuais, Travestis e Transexuais (ABGLT) (the Brazilian Gay, Lesbian, Transvestite and Transexual Association), in 1995. This “second wave” was in part the result of the international movement advocating for the recognition of sexual orientation rights. In particular, the activities of international gay rights advocates influenced a renewed movement in Brazil because the major newspaper, magazine, and television media outlets covered news relating to international gay pride

110 See, for example, Rios, Sexual Rights of Gays at 253 (cited in note 70); Wilets, 21 Duke J Comp & Intl L at 676 (cited in note 106).
111 See Brazil: The Situation of Homosexuals; Availability of Support Groups and State Protection, (Immigration and Refugee Board of Canada 2008), online at http://www.unhcr.org/refworld/docid/492ac7c72d.html (visited Apr 9, 2013).
112 See Vianna and Carrara, Sexual Politics and Sexual Rights in Brazil at 126 (cited in note 11) (“Since 2001, within the ambit of the UN World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Brazil has played an important role in efforts to include the expression sexual orientation in the idiom of human rights at the United Nations.”).
114 See id at 98.
115 See Vianna and Carrara, Sexual Politics at 125 (cited in note 11).
116 See Green, More Love at 102 (cited in note 113).
marches, debates about sexual minorities in the United States military, and AIDS issues.117

But the influence of the international arena upon sexual orientation rights activism during this time is perhaps best symbolized by the fact that, in 1995, the ILGA held its annual meeting in Rio de Janeiro—the first time that the ILGA hosted its meeting in a South American country.118 During the meeting (and partially to commemorate it), sexual orientation rights activists organized Brazil’s first gay pride parade.119 James Green writes of the general influence of the international movement upon sexual orientation rights advocacy in Brazil and the importance of the 1995 ILGA conference in particular:

The international movement has had a strong impact on Brazil, with key leaders traveling to the United States, Europe, and other countries in Latin America to participate in conferences or attend Pride demonstrations. The ILGA Conference in Rio de Janeiro brought many activists in contact with international delegates, fostering a rich interchange.120

Thus, the “rich interchange” between Brazilian activists and the international community has been important to advocacy for sexual orientation rights in the country, just as it has been in Argentina.

NGOs continue to be active and influential today, seeking advancement of the legal protections afforded to sexual minorities.121 In particular, they are representatives in the federal government’s program, Brazil without Homophobia: A Program to Combat Violence and Discrimination against LGBTs and to Promote Homosexual Citizenship (Brasil Sin Homofobia: Programa de Combate a la Violencia y la Discriminación contra GLTB y Promoción de la Ciudadanía Homosexual).122 Instituted by the Brazilian government in 2004, the initiative consists of a commission with representatives from the Discrimination Combat National Council and the Ministry of Health, as well as sexual orientation rights activists, including leaders from the ABGLT.123 The commission’s role is to make a series of recommendations designed to help state institutions dealing with education, security, law, and healthcare ensure that their policies and practices are nondiscriminatory and inhibit violence against sexual minorities.124 Notably, another aim of Brazil without Homophobia is to incentivize NGOs to

117 See id.
118 See Vianna and Carrara, Sexual Politics at 125 (cited in note 11).
119 Green, More Love at 106 (cited in note 113).
120 Id.
121 See Vianna and Carrara, Sexual Politics at 130–31 (cited in note 11).
122 See id at 129.
123 See id.
124 See id.
“support Brazilian initiatives acknowledging and protecting LGBT rights at the international level,” including the eventual establishment of a Sexual and Reproductive Rights International Convention. Furthermore, Brazil made distributing Portuguese translations of the Yogyakarta Principles a part of the program. In these ways, then, sexual orientation rights advancement in Brazil, like Argentina, has been closely tied to and impacted by advocacy efforts in the international arena.

Especially within the last decade, Brazil has not only been influenced by developments abroad, but it has also itself been at the forefront of furthering the advancement of sexual orientation rights in international law. In 2001, Brazil played a pivotal role in a campaign to include the expression “sexual orientation” in the idiom of human rights at the UN. During debates at the UN World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, for example, Brazil promoted including language on sexuality in the resolution. Perhaps most famously, however, in 2003, at the 59th Session of the UN Commission on Human Rights, Brazil proposed The Brazilian Resolution on Human Rights & Sexual Orientation (“Brazilian Resolution”). The aim of the resolution was to advance and protect the human rights of sexual minorities. In particular, the Resolution sought to reaffirm that human rights already granted to persons in declarations and treaties such as the UDHR, ICESCR, ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), applied to individuals regardless of their sexual orientation. It also contained the following six statements: (1) an expression of “deep concern at the occurrence of violations of human rights” against persons on the basis of their sexual orientation; (2) an
affirmation that human rights are the “birthright of all human beings,” and that the enjoyment of those rights “should not be hindered in any way on the grounds of sexual orientation;” (3) a call upon all countries to protect the human rights of sexual minorities; (4) a recommendation to the UN Commission on Human Rights and other treaty monitoring bodies to give “due attention” to the subject of human rights violations against sexual minorities; (5) a request that UN High Commissioner for Human Rights in particular pay “due attention” to human rights violations against sexual minorities; and (6) a decision to continue consideration of the resolution at the 60th Session of the UN Commission on Human Rights.132

Though several other countries “expressed their support for this resolution”—including Germany, Ireland, the Netherlands, Spain, and the United Kingdom—a vote was delayed in the 2003 session due to strong pressure from the Vatican and Muslim countries.133 Unfortunately, the over fifty states that opposed the measure on religious grounds reapplied pressure to prevent the Brazilian Resolution from coming to a vote during the 2004 session, and Brazil ultimately withdrew the measure because it did not have enough support.134 As Timothy Garvey suggests, Brazil’s proposal of the Resolution was likely to fail because the country should have either “(1) waited for the international courts and committees to develop a more concrete view of the subject matter, or (2) made sure that it had enough supporters to pass the Resolution.”135

Nevertheless, the Resolution demonstrates Brazil’s commitment to advancing sexual minority rights in the international legal arena—a reflection of Luiz Mott’s vision of Brazil as a country known internationally for the freedoms it seeks to afford to sexual minorities.136 Additionally, it had lasting positive effects for the advancement of sexual orientation rights in the international arena: “the debate and the international coalition created to support it have helped to consolidate the place of the LGBT movement on the human-rights international agenda.”137 Indeed, the Brazilian Resolution had the effect of “raising the profile of human rights and sexual orientation” in international governing bodies, which in turn “helped advance those rights throughout

132 See id.
133 See Vianna and Carrara, Sexual Politics at 126 (cited in note 11). Notably, given Pope Francis’s more “pragmatic” approach to sexual orientation rights issues, the Vatican’s official stance on sexual minority rights could change in the coming years. See text accompanying note 6.
134 See Garvey, 38 Deny J Int'l L & Pol'y at 671 (cited in note 129).
135 Id at 670. For a more in-depth analysis of the reasons underlying the failure of the resolution to come to a vote, see generally id.
136 See Mott, Gay Movement at 221 (cited in note 109).
137 Vianna and Carrara, Sexual Politics at 126 (cited in note 11).
international law." The Resolution itself may have been an impetus for other governments supportive of sexual orientation rights to introduce similar documents and proposals to other UN bodies. In 2006, Norway, with the support of fifty-four other states, presented the UN Human Rights Council with a statement which urged the Human Rights Council to “pay due attention to human rights violations based on sexual orientation and gender identity.” In 2008, France and the Netherlands presented the United Nations Statement on Human Rights, Sexual Orientation and Gender Identity (“Statement”) to the UN General Assembly. The Statement, an even stronger affirmation of sexual orientation rights than the Brazilian Resolution, also encountered strong opposition from the Organization of Islamic Countries. Though the Statement lacked sufficient support for adoption by the General Assembly, it nevertheless won the support of sixty-six countries. Furthermore, since 2003, numerous intergovernmental organizations have been working vehemently to advance the rights of sexual minorities in the international arena. These developments suggest that Brazil’s concerted efforts to advance sexual orientation rights on the international stage have been successful, at least with regard to increasing global awareness of the issue and spurring other states and organizations to take international action.

Brazil has been active in advancing sexual orientation rights at the regional level as well. In 2008, Brazil proposed a resolution, Human Rights, Sexual Orientation, and Gender Identity, to the Organization of American States. The resolution was a “slightly modified” version of the Brazilian Resolution, and passed by consensus (meaning that all OAS countries agreed, including the United States). In particular, the resolution condemned human rights violations based on both sexual orientation and gender identity, “noting with

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138 Garvey, 38 Den J Intl L & Pol'y at 683 (cited in note 129).
139 See id at 683–84 (discussing proposals for the advancement of sexual orientation rights made by other countries in the wake of the Brazilian resolution).
140 See id at 683–84.
142 See Garvey, 38 Den J Intl L & Pol'y at 683 (cited in note 129).
143 Id.
144 See id at 684.
146 Garvey, 38 Den J Intl L & Pol'y at 684 (cited in note 129).
147 Human Rights Watch, OAS Adopts Resolution to Protect Sexual Rights (June 6, 2008), online at http://www.hrw.org/news/2008/06/05/oas-adopts-resolution-protect-sexual-rights (visited Apr 9, 2013).
concern acts of violence and related human rights violations” perpetrated against individuals because of their sexual orientation and gender identity, and resolving to include the topic of “[h]uman rights, sexual orientation, and gender identity” on the agenda of the Committee on Juridical and Political Affairs. The Brazil-sponsored resolution was undoubtedly significant for the advancement of sexual orientation rights in the Americas. Scott Long, the director of the Lesbian, Gay, Bisexual, and Transgender Rights Program at Human Rights Watch, called the resolution “a bold first step toward ending violence and discrimination” against sexual minorities. Furthermore, it will likely generate continued advancement of sexual orientation rights in the international arena, not only through the individual actions of OAS member states to support protective and anti-discriminatory measures for sexual minorities in international governmental bodies, but also in the passage of other resolutions or treaties, such as the proposed Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, which would expressly include sexual orientation and gender identity as categories to be protected from discrimination. In its sponsorship of this resolution, then, Brazil has once again demonstrated that it is actively influencing the advancement of sexual orientation rights on the international stage. Overall, the extent of Brazil’s participation in the international human rights forum suggests that the country views international law as an important, if not the most important, means of advancing these rights in other countries.

Examinations of Argentina and Brazil demonstrate that these countries’ approaches to sexual orientation rights, while undoubtedly still influenced by national developments, are very much “outward-looking”: Argentina exemplifying a country significantly influenced by developing international norms; and Brazil exemplifying a country not only influenced by, but itself significantly influencing, those norms. This international awareness, then, seems to have aided in progressing sexual orientation rights in these countries. Moreover, the significance of developing international legal norms on Argentina and Brazil has broader implications for the potential of international law to advance these rights in other countries.

149 Human Rights Watch, OAS Adopts Resolution (cited in note 147).
150 See id.
IV. DEVELOPING INTERNATIONAL LEGAL NORMS AND SEXUAL ORIENTATION RIGHTS: PROVIDING A PATHWAY FOR FURTHER PROGRESS

Other countries in Latin America have been influenced by developing international legal norms relating to sexual orientation rights. This trend can be viewed in "the explicit incorporation of legal references [in these countries' legislation] to international human rights law." For example, the Exposición de Motivos (Explanation Rationales) of Uruguay's 2008 Ley de Unión Concubinaria, which legalized civil unions between same-sex couples, references similar legislation in Europe. It thus takes into account the developing international legal norms toward recognition of such partnership rights. In 2009, Bolivia incorporated a prohibition on sexual orientation discrimination into its Constitution. This prohibition follows an article


A su vez, en el 2000, los Legisladores Falero, Mieres, Posada y Michelini recordaban que 'la norma propuesta está en consonancia con una buena parte de la Legislación comparada y con la tendencia mundial que consiste en reconocer jurídicamente estas situaciones y proveer los beneficios consecuentes.' Similar constatación realiza el Diputado Díaz Maynard en la exposición de motivos de su iniciativa, cuando señala que "la casi totalidad de las Legislaciones europeas y latinoamericanas contienen, desde hace muchos años, regulaciones directas del concubinato, en algunas incluso, con rango constitucional."

Translation:

In turn, in 2000, legislators Falero, Mieres, Posada and Michelini called attention to the fact that 'the proposed bill is in conformity with a large cross-section of comparative law and with the global trend of legally recognizing [same-sex unions] and providing benefits accordingly.' Legislator Díaz Maynard, in his statement of the grounds for the bill, similarly noted that "almost all European and Latin American legal systems have contained, for some time now, regulations which recognize civil union between same sex couples who have lived together for many years, some countries even formalizing it in their constitutions."

154 Bolivia Const, Art 14 (emphasis added):

El Estado prohíbe y sanciona toda forma de discriminación fundada en razón de sexo, color, edad, orientación sexual, identidad de género, origen, cultura, nacionalidad, ciudadanía, idioma, credo religioso, ideología, filiación política o filosófica, estado civil, condición económica o social, tipo de ocupación, grado de instrucción, discapacidad, embarazo, u otras que tengan por objetivo o resultado anular o menoscabar el reconocimiento, goce o ejercicio, en condiciones de igualdad, de los derechos de toda persona.

Translation (emphasis added):

In turn, in 2000, legislators Falero, Mieres, Posada and Michelini called attention to the fact that 'the proposed bill is in conformity with a large cross-section of comparative law and with the global trend of legally recognizing [same-sex unions] and providing benefits accordingly.' Legislator Díaz Maynard, in his statement of the grounds for the bill, similarly noted that "almost all European and Latin American legal systems have contained, for some time now, regulations which recognize civil union between same sex couples who have lived together for many years, some countries even formalizing it in their constitutions."
recognizing Bolivia's legal conformity with the international human rights treaties it has ratified, thereby suggesting that the human rights protections guaranteed in the Bolivian constitution, including protections afforded to sexual minorities, are influenced by international legal standards.

Moreover, Latin America as a whole seems to be actively furthering the advancement of sexual orientation rights, as demonstrated by the recent activity of the OAS. Indeed, as noted above, the OAS unanimously adopted a resolution in 2008 condemning human rights violations against sexual minorities. In June 2012, the OAS adopted another resolution under the same name, Human Rights, Sexual Orientation and Gender Identity, which calls upon member states to pass measures against sexual orientation discrimination and other human rights violations targeting sexual minorities. Advocates of sexual orientation rights in the region have also been persistently working to frame the basic provisions of a draft Inter-American Convention on Sexual and Reproductive Rights. Once completed, this Convention will be presented to the states for adoption as a binding legal norm. While the story of sexual orientation rights in the region over the past several years is by no means entirely positive, recent

The State prohibits and sanctions all forms of discrimination based on sex, color, age, sexual orientation, gender identity, origin, culture, nationality, citizenship, language, religion, ideology, philosophical or political belief, marital status, socioeconomic status, occupation, educational achievement, disability, pregnancy, or other characteristics with the purpose of or which result in the nullification or curtailment of the equal enjoyment or exercise of the rights of all persons.

155 Bolivia Const, Art 13 ("Los derechos y deberes consagrados en esta Constitución se interpretarán de conformidad con los Tratados internacionales de derechos humanos ratificados por Bolivia.").

156 Human Rights, Sexual Orientation and Gender Identity (I) (cited in note 145).


158 See Roseman and Miller, 34 Harv J L & Gend at 339 (cited in note 58).

159 See id.

160 While advocacy for sexual orientation rights has received a positive reception in some Latin American countries, it has unfortunately been greeted with a backlash of increased anger among the general population and governing elite in other countries, especially those in the Caribbean and Central America. Homophobia is also common throughout the region. See Javier Corrales and Cameron Combs, 5 LGBT Trends to Watch For In the Americas In 2013 (Politics Daily Jan 10, 2013), online at http://www.huffingtonpost.com/javier-corrales/5-lgbt-trends-to-watch-for-in-the-americas-in-2013_b_2441863.html (visited Apr 9, 2013). Most distressingly, hate crimes committed against sexual minorities still remain a formidable problem in Latin America. See id.
events in Latin America reflect an overall trend favoring the progression of these rights.\footnote{For a discussion of the most recent trends in sexual orientation rights in the Americas as well as a prediction of what will occur in the coming year, see generally id.}

As this Comment demonstrates, developing international legal norms have played an intrinsic role in the advancement of sexual orientation rights. Analyses of Argentina and Brazil display in particular that understanding the relatively progressive approaches of these countries in their treatment of sexual minorities is not possible without appreciating the influence of the international legal arena. Indeed, these countries are at once influenced by and seeking to influence the development of international legal norms relating to sexual orientation rights. Fellmeth and other legal scholars should thus not overlook the highly globalized nature of sexual orientation rights, especially in Latin America.\footnote{See Corrales and Pecheny, Introduction at 25–26 (cited in note 20) ("LGBT movements are thus beneficiaries and exploiters of globalization forces."); Encarnación, 22 J Dem at 105 (cited in note 17) (noting the "view of Latin America's gay-rights revolution as indicative of a spillover effect of the maturity of the gay movement in the developed world; in other words, as evidence of transnationalism at work") (emphasis added).}

Understanding the importance of the international influence on sexual orientation rights advancement in Argentina, Brazil, and elsewhere in Latin America, moreover, has broader implications for advocates campaigning for the progression of these rights in other countries and regions. In particular, recognizing the significance of international legal norms on the development of sexual orientation rights provides an explanation of why some areas of the world have more progressive laws than others. Of the fourteen countries that have legalized same-sex marriage, for example, nine are in Europe.\footnote{As of May 2013, the thirteen countries other than Argentina that have legalized same-sex marriage are: The Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Denmark, Uruguay, New Zealand, and France.} The relative progressivity of Europe in relation to same-sex marriage rights may be explained in part by the affirmation of sexual orientation rights in the jurisprudence of the regional tribunal, the European Court of Human Rights.\footnote{See Section II.B.} With regard to Latin America, specifically, James D. Wilets has already noted that one explanation for the greater degree of legal advancement in certain South American countries in comparison to Caribbean nations may be explained by the difference in "attitudes towards domestic incorporation of international human rights norms"—the former being much more receptive to those norms.\footnote{See Wilets, 21 Duke J Comp & Intl L at 663 (cited in note 106).} And, looking closer to home, the fact that the US has advanced less than some Latin American countries may be in part the result of a relative lack of incorporation

\footnote{See Wilets, 21 Duke J Comp & Intl L at 663 (cited in note 106).}
of international legal norms into the country's jurisprudence and legislation. Indeed, "courts and lawyers in Latin America embrace 'transnational jurisprudence' to a greater degree than do those in the United States."166

What this discussion ultimately suggests, then, is not only that international legal norms have played a pivotal role in the advancement of sexual orientation rights, but also that the norms themselves may be the means by which advocates can advance recognition of these rights in their respective countries. Advocates of sexual orientation rights may, for example, urge their countries to follow the lead of Argentina and other countries in Latin America, encouraging their domestic courts hearing sexual minority rights' claims to consider not only national law but also developing international legal norms in their decisions; lobbying for legislatures to enact antidiscrimination provisions modeled after laws in other countries; and campaigning for the enactment of new laws and even constitutional amendments which incorporate the standards set forth in international human rights treaties. Moreover, sexual minority advocates in countries already receptive to protecting sexual orientation rights may press their governments to emulate Brazil (and, for that matter, France, Norway, and the Netherlands) by introducing resolutions or treaties in regional and international forums. In this way, recognizing the significance of international legal norms to sexual orientation rights indicates that international law is perhaps the best avenue going forward through which to protect the rights of sexual minorities everywhere.

V. CONCLUSION

Argentina and Brazil are two of the most progressive countries in the world in their legal recognition of sexual orientation rights. As this Comment has sought to demonstrate, developing international legal norms have played an important role in the advancement of sexual orientation rights in the two nations. In Argentina, the international arena has spurred NGO activism and influenced judicial and legislative approaches to protecting sexual minorities from discrimination. With regard to Brazil, not only has NGO activism been influenced by global developments, but the country itself has also taken the lead in furthering sexual orientation rights abroad, introducing antidiscrimination measures at conventions of international and regional bodies. Together,

166 Corrales and Pecheny, Introduction at 26 (cited in note 20). It is worth noting that in the landmark United States Supreme Court case, Lawrence v Texas, 539 US 558 (2003), in which the Court held that laws criminalizing same-sex sexual activity are unconstitutional, the Court cited European Court of Human Rights jurisprudence as persuasive authority. See id at 560, 573, 576. The Court's conscientiousness of transnational trends in a major decision advancing sexual orientation rights only further suggests that developing international legal norms have had a significant influence upon this area of human rights law.
Argentina and Brazil thus exemplify the ways in which countries have both been affected by and contributed to the international recognition of sexual orientation rights. These countries are, in other words, case studies in the “outward-looking” nature of sexual orientation rights advancement.

Perhaps most importantly, however, this exploration of Argentina and Brazil further suggests that international law provides an avenue to affect positive change elsewhere. Indeed, activists in countries that are less progressive than Argentina and Brazil could follow the lead of their Argentinian and Brazilian counterparts, encouraging the leaders of their governments to engage with the global sexual orientation rights movement. In this way, the “rich interchange” of legal norms between states and the international arena may be the best means by which sexual minorities can achieve equal recognition of their human rights—wherever they may reside.

\[^{167} \text{See Green, } \textit{More Love} \text{ at 106 (cited in note 113).} \]