

NOTE

HOME IS WHERE THE HEART IS: SEXUAL ORIENTATION DISCRIMINATION AND THE RIGHT TO ADEQUATE HOUSING IN INTERNATIONAL LAW

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I. INTRODUCTION

In 2006, the National Gay and Lesbian Task Force reported that although only 3 to 5 percent of people in the United States are lesbian, gay, bisexual, or transsexual (LGBT), 20 to 40 percent of homeless youths are LGBT individuals.¹ In part, the report attributed this vastly disproportionate rate within homelessness to pervasive discrimination against LGBT individuals in housing practices, including refusal to accept LGBT individuals even at temporary shelters.² In fact, in recent years, watchdog groups in Canada, the United Kingdom, Brazil, South Africa, and the United States have documented similar and related problems.³ Although many state governments have attempted to address racial, ethnic, and wealth discrimination in housing, many of these governments have failed

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1. NICHOLAS RAY, *LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 1* (2006), available at <http://www.thetaskforce.org/downloads/HomelessYouth.pdf>.

2. *Id.* at 4-5.

3. See, e.g., ONTARIO HUMAN RIGHTS COMM'N, *POLICY ON DISCRIMINATION AND HARASSMENT BECAUSE OF SEXUAL ORIENTATION* 9-10, 23-26 (2006) (discussing discrimination in housing and employment against lesbian, gay, bisexual, or transsexual (LGBT) individuals, as well as hate crimes and domestic violence problems); STONEWALL CYMRU, *THE HOUSING NEEDS OF LESBIAN, GAY, AND BISEXUAL (LGB) PEOPLE IN WALES* 22-26 (2006); Press Release, Int'l Gay & Lesbian Human Rights Comm'n [IGLHRC], IGLHRC Calls for Global Mobilization to Help Pass the UN Resolution on Sexual Orientation and Human Rights (Feb. 2, 2004), available at <http://www.commondreams.org/news2004/0202-03.htm> (discussing human rights violations related to sexual orientation discrimination).

to explicitly deal with housing discrimination on the basis of sexual orientation.⁴

Fortunately, international legal standards are increasingly addressing this issue. Recently, more nations have begun to recognize both the human right to adequate housing and the need to treat sexual minorities as a protected group.⁵ Thus, international instruments mandating nondiscriminatory protection of the right to adequate housing should be construed to protect sexual minorities so as to recognize these emerging norms. In addition, to ensure consistent protection from housing discrimination, even nonparties to these instruments should recognize the existence of a customary norm of international law that includes sexual minorities among the groups protected from discrimination with regard to the right to adequate housing.

Part II of this Note will discuss the sources and nature of the right to adequate housing in international law. It will examine the conventional sources and definitions of the right and describe the right to adequate housing within international custom. Part II also will focus on the prohibition against housing discrimination. In particular, it will discuss the source and meaning of the prohibition on discrimination as well as that prohibition's justiciability. Part II will finish by exploring the emergence of a customary norm recognizing sexual minorities as a group that should be protected from discrimination in general. Part III will argue further that, given the development of this norm, sexual minorities should be among the groups that international law protects from discrimination with respect to the right to adequate housing.

II. DISCUSSION

A. *The Right to Adequate Housing in International Law*

The human right to adequate housing is well established under both conventional and customary international law. Many international instruments outline and create protections for the right to housing, including global multilateral treaties and regional international agreements. Furthermore, an increasingly strong principle of customary international law protects the right to adequate housing.

4. See *infra* Part II.

5. See *id.*

1. International Instruments Protecting the Right to Adequate Housing

Global multilateral treaties provide the most comprehensive housing rights protections, while regional international instruments create an additional layer of protection and can be enforced effectively at a more local level.⁶ Both types of instruments are products of an international regime that strongly safeguards the right to adequate housing.

a. Multilateral International Instruments

Several major multilateral instruments recognize housing rights, creating the strongest and most broad-based protections for the right to housing and more clearly defining the right itself. The Universal Declaration of Human Rights (UDHR), adopted by the U.N. General Assembly in 1948, explicitly states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . housing.”⁷ Although the UDHR is not binding law, it was the first agreement expressing a unified group of nations’ intent to protect economic, social, and cultural rights, including the right to housing.⁸

The International Covenant on Economic, Social, and Cultural Rights (ICESCR), which was adopted by the General Assembly in 1966 and currently has 149 parties, more clearly outlines the modern dimensions of the right to adequate housing.⁹ Article 11(1) of the ICESCR declares that “[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living . . . including adequate food, clothing, and housing.”¹⁰ It also asserts that these parties “will take appropriate steps to ensure the realization of this right.”¹¹ Article 11(1) is the most clear and authoritative expression of the right to housing in international law, and its near-universal acceptance in the international commu-

6. See generally Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities*, 32 COLUM. HUM. RTS. L. REV. 565, 591-96 (Summer 2001) (discussing rights protections in the African Charter on Human and People’s Rights).

7. Universal Declaration of Human Rights art. 25(1), G.A. Res. 217A, at 7176, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 102, 1948).

8. See U.N. Housing Rights Programme, *Housing Rights Legislation: Review of International and National Legal Instruments*, 1-2, 7, U.N. Doc. HS/638/01E (2002). [hereinafter *HABITAT-2002 Report*].

9. See *id.* at 77-78.

10. International Covenant on Economic, Social and Cultural Rights art. 11(1), Dec. 16, 1966, S. TREATY DOC. NO. 95-19 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR].

11. *Id.*

nity gives even greater weight to the obligations it creates. In fact, the right to housing is the only right in the ICESCR that has an entire General Comment devoted to it, indicating that the United Nations has given it an unusually significant amount of attention and thought.¹²

Several other broad-based multilateral treaties mention or expand the right to adequate housing. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention Relating to the Status of Refugees (CRSR) all guarantee some measure of protection for various groups with regard to housing accommodations.¹³ For instance, the ICERD stresses the importance of eliminating housing segregation¹⁴ and specifically prohibits racial discrimination in the fulfillment and enjoyment of the right to housing.¹⁵ Likewise, CEDAW requires nations to ensure that women may enjoy "adequate living conditions, particularly in relation to housing."¹⁶ The CRC contains a similar provision that requires nations to assist in providing adequate housing for children,¹⁷ and the CRSR mandates that nations treat refugees as favorably as other aliens with regard to housing.¹⁸

Finally, the International Covenant on Civil and Political Rights (ICCPR) contains antidiscrimination provisions that directly relate to ensuring the right to adequate housing.¹⁹ Article 2 of the ICCPR, which guarantees equality with respect to the substantive rights provided by the ICCPR itself, states the following:

12. See U.N. Comm. on Econ., Soc., and Cultural Rights, *The Right to Adequate Housing: General Comment No. 4*, U.N. Doc. E/1992/23 (Dec. 13, 1991) [hereinafter *General Comment No. 4*].

13. See International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Dec. 21, 1965, S. TREATY DOC. NO. 95-18, 660 U.N.T.S. 195 [hereinafter ICERD]; Convention on the Elimination of All Forms of Discrimination Against Women art. 14, Dec. 18, 1979, 1249 U.N.T.S. 513 [hereinafter CEDAW]; Convention on the Rights of the Child art. 27, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention Relating to the Status of Refugees art. 21, Apr. 22, 1954, 19 U.S.T. 3, 189 U.N.T.S. 150 [hereinafter CRSC].

14. See ICERD, *supra* note 13, art. 3.

15. *Id.* art. 5.

16. CEDAW, *supra* note 13, art. 14.

17. CRC, *supra* note 13, art. 27.

18. CRSC, *supra* note 13, art. 21.

19. International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 99 U.N.T.S. 171 [hereinafter ICCPR].

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁰

The U.N. Human Rights Committee (UNHRC) has indicated that lack of adequate shelter threatens the right to be free from deprivation of life,²¹ and the Committee on Economic, Social and Cultural Rights (UNCESCR) has noted that forced evictions can constitute arbitrary interference with the home.²² Because the ICCPR protects the right to be free from such deprivation and interference, Article 2 prohibits discrimination in the enforcement of those rights.²³

In addition, Article 26 of the ICCPR provides as follows:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁴

Though it does not mention housing specifically, this provision has been interpreted to prohibit discrimination with regard to housing because of its applicability to housing rights created by other instruments as well as by customary law.²⁵ The application of these nondiscrimination provisions is discussed further below.²⁶

b. Regional International Instruments

Regional international agreements reinforce the right to adequate housing. For example, the Charter of the Organization of

20. *Id.* art. 2.

21. Human Rights Comm., *Concluding Observations of the Human Rights Committee: Canada*, ¶ 12, U.N. Doc. CCPR/C/79/Add.105 (Apr. 7, 1999) (“The Committee is concerned that homelessness has led to serious health problems and even to death. The Committee recommends that the State party take positive measures required by article 6 to address this serious problem.”).

22. See U.N. Comm. on Econ., Soc., and Cultural Rights, *The Right to Adequate Housing: Forced Evictions: CESCR General Comment 7*, ¶ 9, U.N. Doc. E/1998/22, Annex IV (May 20, 1997).

23. See ICCPR, *supra* note 19, art. 2.

24. *Id.* art. 26.

25. See, e.g., *Zwaan-de Vries v. Netherlands*, Commc’n No. 182/1984, ¶¶ 12.3-12.5, U.N. Doc. Supp. No. 40 (A/42/40) (Apr. 9, 1987) (finding that the prohibition on discrimination in article 26 applies to the right of social security provided for in the ICESCR).

26. See *infra* Part II.B.1.a.

American States lists “[a]dequate housing for all sectors of the population” as one of its goals.²⁷ Like the international community after the adoption of the UDHR, the Inter-American community has continued to support the protection of economic, social, and cultural rights in more recent instruments. The most sweeping instruments include the American Convention on Human Rights and, most notably, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador).²⁸ Both instruments insist on the progressive realization of economic, social, and cultural rights; the Protocol of San Salvador legally binds its parties to recognize these goals.²⁹

The European regional system protects the right to adequate housing even more strongly. The Convention on Human Rights and Fundamental Freedoms (ECHR) protects everyone’s “right to respect for his private and family life, his home and his correspondence” and forbids “interference by a public authority with the exercise of this right.”³⁰ Furthermore, the new Protocol to the ECHR provides that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions.”³¹ In conjunction with the ECHR’s nondiscrimination provision, Article 14,³² these articles have been read to protect the right to housing in key regional cases.³³ In addition, the Revised European Social Charter contains explicit protections for housing rights and prohibits discrimination in the application of those rights.³⁴

Finally, the African Charter on Human and Peoples’ Rights (Banjul Charter) has been construed to protect the right to ade-

27. Charter of the Organization of American States [OAS] art. 34(k), Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3. The Organization of American States includes 35 member states, including the United States, Canada and Mexico.

28. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights]; Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights: Protocol of San Salvador, Nov. 17, 1988, O.A.S.T.S. No. 69 [hereinafter Protocol of San Salvador].

29. See American Convention on Human Rights, *supra* note 28, arts. 2, 4, 5, 7, 10, 11; Protocol of San Salvador, *supra* note 28, arts. 1-2.

30. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 1, 8, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights].

31. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

32. European Convention on Human Rights, *supra* note 30, art. 14.

33. See, e.g., Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 3; Akdivar v. Turkey, 1996-IV Eur. Ct. H.R. 1192; Zubani v. Italy, 1996-IV Eur. Ct. H.R. 1067.

34. European Social Charter (Revised), arts. 16, 31, May 3, 1996, 2151 U.N.T.S. 277.

quate housing because it prohibits forced evictions and ensures mental and physical health for citizens of states parties.³⁵ It also mandates nondiscrimination in the implementation of these provisions.³⁶ In recent case law, even these potentially vague provisions have been interpreted to protect the right to housing for all.³⁷

2. Customary International Law Protecting the Right to Adequate Housing

In addition to international instruments, increasingly robust customary international law protects the right to adequate housing. In general, an international custom is “such a usage as [has] obtained the force of a law.”³⁸ Evidence that a usage has “obtained the force of a law” includes an objective or “material” component—an examination of diplomatic relations between states, practices of international bodies, and practices of individual states³⁹—and a subjective component—*opinio juris sive necessitas* (or simply *opinio juris*), which is “the mutual conviction that the recurrence [of the practice] . . . is the result of a compulsory rule.”⁴⁰ As such, in determining whether a practice has become international custom, it is necessary to examine both the consensus of international and domestic practices and the extent to which the principles are seen as binding obligations.⁴¹

Accordingly, the international instruments discussed above, even where nonbinding, are evidence of a customary norm of international law recognizing the right to adequate housing. The fact that both the relevant global treaties and regional instruments have such a large number of states parties indicates a high level of international consensus on this point and an apparent acceptance of an obligation to respect the right to housing.⁴²

35. African Charter on Human and People’s Rights arts. 14, 16, Oct. 21, 1986, 1520 U.N.T.S. 217.

36. *Id.* art. 3.

37. *See, e.g.,* SERAC v. Nigeria, Afr. Comm’n on Human & People’s Rights, Comm. No. 155/96 (2001) (holding that Nigeria’s failure to clean up an environmental disaster that destroyed the petitioner’s home constituted a violation of the Banjul Charter’s guarantee of the right to health and a clean environment).

38. I.A. SHEARER, *STARKE’S INTERNATIONAL LAW* 32 (11th ed. 1994).

39. *Id.* at 32-33.

40. *Id.* at 33-34 (contrasting a sense of legal obligation with a mere motive of courtesy or comity).

41. *See id.*

42. As of July 14, 2006, 153 nations have ratified the ICESCR; 170 have ratified the ICERD; 183 have ratified the CEDAW (79 with the optional protocol); 192 have ratified the CRC; 156 have ratified the ICCPR. Office of the U.N. High Comm’r for Human Rights, *Status of Ratifications of the Principal Human Rights Treaties* (July 14, 2006), available at <http://>

In addition, the domestic law of many states demonstrates recognition of the right to adequate housing, further indicating this consensus and sense of obligation. At least fifty nations have incorporated the right to adequate housing into their Constitutions.⁴³ The large and growing number of nations incorporating this right at such a basic level supports the notion that the right to adequate housing is increasingly accepted as part of international custom.

Furthermore, more nations have begun to create statutory protections for the right to adequate housing, reflecting a belief that they are bound to respect this right. In some instances, national legislation contains general policy-oriented statements that protect the right to housing. For example, France's Law of 31 May 1990 provides, "The guarantee of a right to housing constitutes a duty of solidarity for the nation as a whole," and it ensures "access to decent and independent housing."⁴⁴ One variation on this type of law is the Philippines' Urban Development and Housing Act of 1992, which creates a national Urban Development program aiming to "[u]plift the conditions of the underprivileged and homeless citizens . . . by making available to them decent housing at afforda-

www2.ohchr.org/english/bodies/docs/status.pdf. As of October 1, 2008, there are 144 parties to the Convention Relating to the Status of Refugees. Office of the U.N. High Comm'r for Human Rights, *State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol* (Oct. 1, 2008), available at <http://www.unhcr.org/3b73b0d63.pdf>. Twenty-four American nations are parties to the American Convention on Human Rights. Organization of American States, *American Convention on Human Rights "Pact of San Jose, Costa Rica,"* <http://www.oas.org/juridico/english/signs/b-32.html> (last visited Nov. 22, 2009). Fourteen have ratified the San Salvador Protocol. Organization of American States [OAS], *Addition Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights "Protocol of San Salvador,"* available at <http://www.oas.org/juridico/English/signs/a-52.html> (last visited Nov. 22, 2009). All forty-seven members of the Council of Europe are parties to the European Convention on Human Rights (ECHR). Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedom,* available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=&CL=ENG> (last visited Nov. 22, 2009). All members of the Council are also signatories to the original 1961 European Social Charter. Council of Europe, http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp (last visited Nov. 22, 2009). As of October 2006, fifty-three nations have ratified the Banjul Charter. African Comm'n on Human & People's Rights (May 26, 2007), http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf.

43. For a complete list of the countries whose constitutions contain protections for the right to adequate housing, see CTR. ON HOUSING RIGHTS AND EVICTIONS, LEGAL RESOURCES FOR HOUSING RIGHTS: INTERNATIONAL AND NATIONAL STANDARDS 45-71 (2000).

44. Law. No. 90-449 of May 31, 1990, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], June 2, 1990, p. 6551 [hereinafter Besson Law].

ble cost.”⁴⁵ As noted by the U.N. Housing Rights Programme in its 2002 report, these general provisions not only provide sources of binding law but also help to create a housing-rights-friendly context in which more specific housing-related legislation can be interpreted.⁴⁶

In addition to these general provisions, many nations have created more targeted legislative housing protections. Several states protect security of tenure by mandating property succession laws, as in Peru,⁴⁷ or prohibiting forced evictions, as in the Philippines⁴⁸ and the United Kingdom.⁴⁹ Others, such as France⁵⁰ and the United States,⁵¹ focus on provisions of accessible housing through administrative programs. These programs seek both to provide housing to traditionally disadvantaged groups and to effectively allocate property among those who need it.⁵²

Finally, and most relevantly for this discussion, many nations have enacted laws prohibiting housing discrimination. A particularly strong example of this type of legislation is Canada’s Human Rights Code, which guarantees equal treatment with regard to housing access.⁵³ The Code also prohibits harassment by a landlord or other occupants directed toward members of groups protected from discrimination.⁵⁴ These groups—discussed in more detail below—include a more comprehensive set of statuses than explicitly mentioned in any of the international instruments, including age, citizenship status, and sexual orientation.⁵⁵ Other nations’ legislation is more modest, protecting specific groups from discrimination in access to housing or in housing provisions. Uganda’s Land Act of 1998, for instance, requires that no determination about the ownership of land discriminate against women,

45. An Act to Provide for a Comprehensive and Continuing Urban Development and Housing Program, Establish the Mechanism for its Implementation, and for Other Purposes, Rep. Act. No. 7279, § 2 (1993) (Phil.) [hereinafter *Urban Development and Housing Act of 1992*].

46. *HABITAT-2002 Report*, *supra* note 8, at 40.

47. *See, e.g.*, Leg. Decree No. 803, tits. 1-4 (1997) (Peru).

48. *See, e.g.*, Urban Development and Housing Act of 1992, *supra* note 45, §§ 28, 44.

49. *See, e.g.*, Protection from Eviction Act, 1977, c.43, § 1 (Eng.), *as amended by Housing Act 1988*, c.50, § 29 (Eng.).

50. *See, e.g.*, Besson Law, *supra* note 44.

51. *See, e.g.*, Americans with Disabilities Act, §§ 202-04, 42 U.S.C. §§ 12132-34 (1991).

52. *See, e.g.*, Besson Law, *supra* note 44.

53. Human Rights Code, R.S.O., ch. H.19, § 2 (1990) (amended 1999, 2001 and 2005) (Can.).

54. *Id.*

55. *Id.*

children, or persons with disabilities.⁵⁶ Likewise, the United States' Americans with Disabilities Act ensures equal access to housing for persons with disabilities,⁵⁷ and its Fair Housing laws protect against race-based and gender-based discrimination in access to housing.⁵⁸

B. *Justiciability of Nondiscrimination with Regard to the Right to Adequate Housing*

A common criticism of the right to adequate housing is that it is unenforceable because states are incapable of providing housing to all of their citizens.⁵⁹ One of the most consistently enforceable aspects of this right, however, is the prohibition of discrimination in access to housing. As such, nondiscrimination requirements are some of the most readily enforced provisions of both international instruments and domestic legislation protecting the right to adequate housing.

1. International Enforcement of Nondiscrimination in Access to Adequate Housing

a. Nondiscrimination Provisions in International Instruments

International instruments clearly define the prohibition on discrimination, mandating a consistent standard of equality in the application of human rights. Most relevantly, the ICESCR mandates implementation of its rights "without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."⁶⁰ As such, nations that protect the right to housing as codified in the ICESCR must do so in a nondiscriminatory fashion by implementing the ICESCR's housing measures equally and by protecting against discrimination in existing housing access.⁶¹ Other instruments contain more specific nondiscrimination provisions. For instance, the ICERD and the CEDAW mandate nondiscrimination in implementation of their protections for race and gender, respectively.⁶²

56. Land Act of 1998, § 32 (Uganda).

57. See 42 U.S.C. §§ 12132-34 (prohibiting disability discrimination by public entities at the State or local level with regards to benefits and programs).

58. Fair Housing Act, §§ 801-19, 42 U.S.C. §§ 3601-19 (1968), *amended by* Fair Housing Amendments Act of 1988, 102 Stat. 1619.

59. See *HABITAT-2002 Report*, *supra* note 8, at 63.

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

61. *Id.*

62. See ICERD, *supra* note 13, art. 3; CEDAW, *supra* note 13, art. 14.

Additionally, as mentioned above, the ICCPR strongly protects against discrimination in implementation of human rights in general, providing that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁶³ Although the specific rights guaranteed by the ICCPR are civil and political in nature, this provision indicates that all rights granted by law, including economic, social, and cultural rights, must be implemented without discrimination *where they are created*.

In fact, in general, economic, social and cultural rights are as enforceable as civil and political rights. The U.N. Housing Rights Programme states that “indivisibility, interdependence and interrelatedness form the definitive conception of human rights, be they civil, cultural, economic, political, or social in nature,”⁶⁴ and that therefore “[t]he . . . justiciability aspects of economic, social and cultural rights . . . are to be considered on an equal footing with civil and political rights.”⁶⁵ The Programme notes the international affirmation of this principle in the 1993 Vienna Declaration and Programme of Action at the World Conference on Human Rights.⁶⁶ Accordingly, the ICCPR and the nondiscrimination provisions of other instruments have all been used to enforce economic and social rights, including the right to housing.⁶⁷

Several international decisions reflect the justiciability of the right to nondiscrimination in access to adequate housing. The UNCESCR oversees compliance with the ICESCR, but it does not review individual petitions.⁶⁸ Thus, individual complaints of housing rights violations are brought under other instruments, primarily including the ICERD and the ICCPR.

b. Enforcement of Nondiscrimination under the ICERD

Because of its focus on discrimination, the ICERD has given rise to many of this area’s landmark cases, which the U.N. Committee

63. ICCPR, *supra* note 19, art. 26.

64. *HABITAT-2002 Report*, *supra* note 8, at 63.

65. *Id.*

66. *Id.*

67. *See, e.g., Zwaan-de Vries v. the Netherlands*, Commc’n No. 182/1984, ¶¶ 12.3-12.5, U.N. Doc. Supp. No. 40 (A/42/40) (Apr. 9, 1987).

68. *See* Office of the U.N. High Comm’r for Human Rights, Committee on Economic, Social, & Cultural Rights, <http://www2.ohchr.org/english/bodies/cescr/index.htm> (last visited Nov. 19, 2009) (“The Committee cannot consider individual complaints . . .”).

on the Elimination of Racial Discrimination (CERD) has adjudicated.⁶⁹ One such case is *L.K. v. Netherlands*, in which a plaintiff alleged that he was intimidated from renting in a subsidized housing area because he was not Dutch and that the government failed to properly investigate that intimidation.⁷⁰ The CERD found that both the private intimidation and the government's failure to protect him from that intimidation violated the ICERD's guarantee against discrimination in access to housing.⁷¹

More recently, the CERD went even further with its holding in *L.R. v. Slovak Republic*.⁷² Due to pressure from local interest groups, a city council had repealed a resolution creating low-cost housing for the disadvantaged minority Roma ethnic group.⁷³ The CERD found that this repeal violated the same provision of the ICERD because it was a retrogressive measure impairing the equal enjoyment of the right to housing for the Roma people in the city.⁷⁴

The CERD has even enforced nondiscrimination in housing despite procedural obstacles, most notably in *F.A. v. Norway*.⁷⁵ In that case, the petitioner complained of racially discriminatory renting practices in public housing because of prejudicial submissions by private landlords.⁷⁶ Although a late filing rendered the case inadmissible, the CERD still reprimanded the private parties involved as well as the Norwegian government.⁷⁷ Also, the CERD strongly advised the state to refrain from allowing landlords to submit suggestions about renting decisions based on racially discriminatory sentiments.⁷⁸ These rulings suggest that the ICERD is a powerful tool for enforcing nondiscrimination in the right to adequate housing.

69. See Office of the U.N. High Comm'r for Human Rights, Committee on the Elimination of Racial Discrimination, <http://www2.ohchr.org/english/bodies/cerd/index.htm> (last visited Nov. 19, 2009) ("[T]he Committee performs its monitoring functions . . . [through] the examination of individual complaints.")

70. See *L.K. v. The Netherlands*, U.N. Comm. on the Elimination of Racial Discrimination Commc'n No. 4/1991, ¶¶ 2.1-2.2, 3.2 (Mar. 16, 1993).

71. See *id.* ¶ 6.3.

72. See *L. R. v. Slovak Republic*, U.N. Comm. on the Elimination of Racial Discrimination Commc'n No. 31/2003 (Mar. 7, 2005).

73. See *id.* ¶¶ 2.1-2.4.

74. See *id.* ¶¶ 10.1-10.11; see also *Anna Koptova v. Slovakia*, Comm. on the Elimination of Racial Discrimination Commc'n No. 13/1998, ¶ 10.1 (Jan. 11, 2000).

75. See *F.A. v. Norway*, Comm. on the Elimination of Racial Discrimination Commc'n No. 18/2000 (Mar. 21, 2001).

76. *Id.* ¶¶ 2.1-2.2.

77. *Id.* ¶¶ 7-8.

78. *Id.* ¶ 8.

c. Enforcement of Nondiscrimination under the ICCPR

The other instrument often used to enforce nondiscrimination in housing rights is the ICCPR. The UNHRC oversees adjudication of these claims.⁷⁹ Though the UNHRC tends not to focus on economic, social, and cultural rights, it has adjudicated several cases relevant to the rights' enforcement. In general, discriminatory refusal to make restitution for confiscated property and housing constitutes a large part of the UNHRC's jurisprudence protecting complainants from housing discrimination.⁸⁰

In a seminal case dealing with this subject, *Simunek v. Czech Republic*, the UNHRC found that governmental confiscation of property and refusal to make restitution based on lack of Czech citizenship constituted discrimination in violation of the ICCPR.⁸¹ Though not expressly related to the right to housing, the decision is cited often as precedent for housing-related cases under the ICCPR because discriminatory confiscation of property frequently involves forced eviction from one's home.⁸²

For instance, in *Kriz v. Czech Republic*, a complainant successfully drew on the principles of *Simunek* to argue that citizenship-based confiscation of his home violated Article 26 of the ICCPR.⁸³ Similarly, in *Blazek v. Czech Republic*, the UNHRC found that a similar confiscation violated the same provision, stating that "the State party is under an obligation to provide the [complainants] with an effective remedy" and "further encourages the State party to review its relevant legislation and administrative practices to ensure that neither the law nor its application entails discrimination."⁸⁴ Thus, by enforcing the right to be free from discriminatory property confiscation, the ICCPR is working effectively "to ensure that all per-

79. See Office of the U.N. High Comm'r for Human Rights, OHCHR - Human Rights Committee, <http://www2.ohchr.org/english/bodies/hrc/index.htm> (last visited Nov. 19, 2009) ("[A]rticle 41 of the Covenant provides for the Committee to consider inter-state complaints.")

80. See U.N. HUMAN RIGHTS COMM'N, HANDBOOK ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPALCED PERSONS: IMPLEMENTING THE 'PINHEIRO PRINCIPLES' 54-55 (2007).

81. See *Simunek v. Czech Republic*, U.N. Comm. on the Elimination of Racial Discrimination Commc'n No. 516/1992, ¶¶ 11.6-12.2 (July 19, 1995).

82. See, e.g., *Kriz v. Czech Republic*, Human Rights Comm. Commc'n No. 1054/2002 ¶ 5.1 (Nov. 3, 2005); see also *infra* note 84 and accompanying text.

83. *Id.* ¶¶ 2.1-2.3, 5.1, 7.1-7.4.

84. *Blazek v. Czech Republic*, Human Rights Comm. Commc'n No. 857/1999, ¶ 7 (Aug. 9, 2001); see also *Brok v. Czech Republic*, Human Rights Comm. Commc'n No. 774/1997, ¶ 7.4 (Jan. 15, 2002) (nearly identical holding).

sons enjoy both equality before the law and equal protection of the law”⁸⁵ with regard to housing.

2. Domestic Enforcement of Nondiscrimination in Access to Adequate Housing

To a lesser but still significant extent, domestic courts have been willing to enforce the requirement of nondiscrimination in access to housing. Canada has had a particularly strong history of adjudicating housing discrimination claims under both domestic statutes and the Canadian Charter of Rights and Freedoms (Charter).⁸⁶ In *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, for instance, the Nova Scotia Court of Appeals struck down portions of the Residential Tenancies Act, which denied security of tenure guarantees to public-housing tenants.⁸⁷ The court found that, under the Charter, the exclusion of these tenants from protection constituted unlawful discrimination on the basis of race, sex, marital status, and poverty.⁸⁸ The landmark ruling not only strengthened protections against discrimination within Canada but also effectively guaranteed security of tenure to many disadvantaged groups throughout Nova Scotia.⁸⁹ Since the decision, national and regional courts in Canada have adjudicated many such claims, providing a consistent forum and remedy for housing-discrimination problems.⁹⁰

Other nations, while not addressing housing issues as directly as Canada, have adjudicated discrimination allegations surrounding similar issues, such as deprivation of property and inheritance. For example, in *V. v. Einwohnergemeinde X*, a federal court in Switzerland adjudicated several refugees' claim that they had been denied social-welfare benefits—including those necessary for a minimum level of subsistence—based on their citizenship status.⁹¹ The court determined that this was a justiciable claim and that the petitioners had a right to continue receiving enough assistance to maintain

85. *Kriz*, *supra* note 82, ¶ 9.

86. See Canadian Charter of Rights and Freedoms, § 15, Constitution Act, 1982, pt. I, enacted as Canada Act, 1982, sched. B, ch. 11 (U.K.).

87. See *Sparks v. Dartmouth County Reg'l Hous. Auth.*, [1993] 101 D.L.R. (4th) 224, 228-30 (Can.).

88. See *id.* at 232-34.

89. See *id.*

90. See, e.g., *Flamand v. DGN Investments*, 2005 Hum. Rts. Tribunal of Ontario 10 (Apr. 8, 2005).

91. See Bundesgericht [BGer] [Federal Court] Oct. 27, 1995, 121 Entscheidungen des Schweizerischen Bundesgerichts [BGE] I 367 (Switz.).

basic living conditions.⁹² This ruling reinforces the justiciability of nondiscrimination provisions in the context of economic, social, and cultural rights. Moreover, it indicates the enforceability of nondiscrimination provisions that ensure acceptable living conditions—a notion especially relevant to adjudication of housing-discrimination claims.

Even more pertinently, in *Bhe v. Magistrate*, the Constitutional Court of South Africa struck down a traditional primogeniture law where petitioners alleged that they had been deprived of inheriting an estate due to gender discrimination.⁹³ Though not directly dealing with housing, this ruling has had a strong impact on inequality in housing because it effectively holds that women may inherit and thus own their own homes.⁹⁴ These cases reflect states' beliefs that they are bound to adjudicate discrimination claims in issues related to housing.

The United States has a different but relatively robust method of adjudicating housing-discrimination allegations through its fair-housing program: an administrative system of testing for housing discrimination and resolving individual complaints.⁹⁵ Under this system, an individual may bring a complaint of discrimination on the basis of race, color, national origin, sex, handicap, religion, or familial status before an administrative law judge.⁹⁶ If the complainant presents a *prima facie* case of housing discrimination⁹⁷ that is not effectively rebutted by a legitimate alternative explanation, the administrative law judge may award damages and provide injunctive relief.⁹⁸ This system provides a consistent and efficient way to resolve complaints of discrimination.

The United Kingdom has a similar system that involves different procedures but yields substantially similar results.⁹⁹ In fact, the

92. *See id.*

93. *See Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) at 33 (S. Afr.).

94. *See id.*

95. *See* 42 U.S.C. §§ 3610-14.

96. *See id.*

97. A *prima facie* case of discriminatory refusal to sell or rent, for example, is established by proving (1) that the aggrieved party belongs to a protected class; (2) that the aggrieved party sought and was qualified to purchase available housing; (3) that the aggrieved person was denied the housing or the housing was otherwise made unavailable to the aggrieved person; and (4) that the housing remained available thereafter. *See Cabrera v. Jakobvitz*, 24 F.3d 372, 381 (2d Cir. 1994).

98. *See, e.g., Dep't of Hous. & Urban Dev. v. Active Agency, Inc.*, Case No. 02-96-0373 (1999) (assessing a civil penalty and enjoining a renter from certain discriminatory practices).

99. *See generally* Charles E. Connerly, *Fair Housing in the US and UK*, 21 HOUSING STUD. 343 (2006).

U.K. system is perhaps even more comprehensive, protecting against "indirect" as well as intentional housing discrimination.¹⁰⁰ Creating an entire administrative system to deal with housing-discrimination claims demonstrates a state's commitment to implement the right to housing in an evenhanded manner.

C. *Sexual Minorities as a Group Protected from Discrimination in General*

Because housing discrimination is a justiciable violation of the right to housing, it is necessary to determine who is protected from this discrimination. To do so, it is important first to examine which groups generally enjoy protection internationally. The ICCPR creates a general framework for international antidiscrimination law, prohibiting discrimination based on "any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹⁰¹ Most of these groups have clear definitions,¹⁰² but the open-textured phrase "other status" leaves room for the protection of other groups where it becomes clear this protection is warranted. Looking at both international bodies' actions and state practice, it is evident that sexual minorities are becoming a group protected from discrimination under customary international law.

1. International Recognition of Sexual Orientation as a Protected Status

Increasingly, international bodies have begun to recognize sexual minorities as a protected group. Both global international organizations and regional bodies have contributed to this recognition.

a. Global International Bodies' Protection of Sexual Minorities

The UNHRC spoke on the issue of sexual orientation discrimination most directly in *Toonen v. Australia*.¹⁰³ In *Toonen*, an Australian citizen alleged that Tasmanian laws criminalizing homosexual conduct constituted a violation of several provisions of the ICCPR.¹⁰⁴

100. *See id.* at 357.

101. ICCPR, *supra* note 19, art. 26.

102. Even the enumerated statuses, however, are not always clearly defined. As discussed below, "sex" has been interpreted broadly to include sexual orientation as well as physical characteristics. *See Toonen v. Australia*, Human Rights Comm. Commc'n No. 488/1992, ¶ 8.7 (Apr. 4, 1994).

103. *See id.*

104. *Id.* ¶ 2.1.

The UNHRC ruled in the complainant's favor, holding that the ICCPR's prohibition of discrimination based on "sex" included sexual orientation discrimination.¹⁰⁵ The UNHRC declined to rule on whether sexual orientation fell within the "other status" category.¹⁰⁶ Its holding that "sex" encompasses sexual orientation, however, indicates that, at the very least, the UNHRC considers sexual minorities to be within the groups protected from discrimination.¹⁰⁷

In addition to this landmark case, several U.N. programs recognize sexual orientation as a protected status. For example, in its report "Time for Equality at Work," the International Labour Office recommends codifying employment-discrimination protections for sexual minorities.¹⁰⁸ The report notes that sexual orientation discrimination is an emerging form of bias that has not disappeared with time or general improvement in workplace conditions.¹⁰⁹ By specifically discussing the need to combat sexual orientation discrimination, the report contributes to international recognition of sexual minorities as a protected group.

Similarly, the U.N. High Commissioner on Refugees (UNHCR) has recognized that being a sexual minority can qualify one for refugee status.¹¹⁰ The UNHCR stated that sexual orientation qualifies as membership in a "particular social group," which is one of the bases on which an individual may seek asylum.¹¹¹ Therefore, where a member of a sexual-minority group is experiencing persecution in his or her nation, he or she may seek asylum on this basis.¹¹² This policy not only indicates the importance of protecting sexual minorities from discrimination internationally but also demonstrates that sexual orientation fits comfortably into an "other" category in international law. Sexual orientation is not specifically mentioned as a protected category, but the UNHCR readily included it within a "miscellaneous" provision, suggesting that

105. *Id.* ¶ 8.7.

106. *Id.* ¶ 7.5.

107. *See id.*

108. Press Release, Int'l Labour Office, ILO Launches First Global Report on Discrimination at Work (May 12, 2003), available at http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang=en/WCMS_071332/index.htm.

109. *Id.*

110. T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership in a Particular Social Group,'* in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTIONS 263, 269, 276 (Erika Feller et al. eds., 2003).

111. *Id.* at 268.

112. *Id.*

sexual orientation is exactly the kind of status for which these catchall clauses exist.

Along related lines, the U.N. Development Programme (UNDP) included the right to consensual adult same-sex relationships in its 1991 "Human Freedom Index."¹¹³ The index ranked nations according to a composite "freedom" score composed of various factors, including freedom of the press and the right to travel.¹¹⁴ The UNDP considered the right to freely engage in consensual same-sex relationships among these fundamental freedoms that are integral to democratic liberty.¹¹⁵ The Human Freedom Index is no longer in use, but the fact that it included this freedom in its calculations remains an indicator of the importance of protecting sexual minorities from unequal treatment in international law.

Even more issue-specific international bodies have begun to recognize the importance of protecting sexual minorities from discrimination. For instance, the Fourth World Conference on Women's Platform for Action notes the importance of allowing women to make decisions about sexuality free from discrimination.¹¹⁶ Primarily focused on promoting equality for women, at least one member of the Conference expressed that LGBT women are especially in need of protection from discrimination based on their sexuality.¹¹⁷ In addition, the International Conference on Population and Development's Plan of Action refers—if somewhat obliquely—to sexual orientation discrimination when recognizing the need to account for "diversity of family structure[s]."¹¹⁸ Both of these statements indicate that the need to treat sexual minorities equally is a pervasive part of the international legal regime, touching even issue-specific areas of law.

b. Regional Bodies' Protection of Sexual Minorities

Several regional bodies, primarily in the European system, have steadily increased their protection against sexual orientation discrimination in recent years. The European Court of Human

113. The Human Freedom Index, <http://alumni.media.mit.edu/~kris/FreedomIndex.html> (last visited Nov. 19, 2009).

114. *Id.*

115. *See id.*

116. *See* Fourth World Conference on Women, Beijing, P.R.C., Sept. 4-15, 1995, *Platform for Action*, ¶ 96, U.N. Doc. A/CONF.177/20/Rev.1 (1996).

117. *See id.* at 164-65.

118. International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Programme of Action*, ¶ 5.1, U.N. Doc. A/CONF.171/13/Rev.1 (1995).

Rights, which enforces the European Convention,¹¹⁹ has consistently ruled that signatories to the European Convention may not criminalize homosexual conduct.¹²⁰ Though this is a small step in protecting against discrimination, it contributes to the perception that international law does not permit overt legal discrimination against sexual minorities.¹²¹

The European Union has gone further in protecting sexual minorities from discrimination. In 1994, the European Parliament adopted a resolution requiring member states to repeal laws criminalizing homosexuality.¹²² It also insisted that member states eliminate sexual orientation discrimination in, *inter alia*, social security systems, adoption laws, inheritance laws, and housing.¹²³ This sweeping mandate set the tone for the direction of European regional antidiscrimination law. The European Parliament reaffirmed the directives of the 1994 resolution in 1996.¹²⁴

Then, in 1997, the Foreign Ministers of the Member States of the European Union signed the Treaty of Amsterdam, a new treaty governing the European Union.¹²⁵ A new article 6a inserted by the Treaty contains strong antidiscrimination protections, specifically including sexual orientation as an impermissible basis for discrimination.¹²⁶ Though it does not require the Council of Europe to act against this discrimination, it explicitly gives the Council permission to do so.¹²⁷ As one of the first international instruments to specifically mention sexual orientation discrimination,¹²⁸ the Treaty is a ground-breaking achievement for advocates of interna-

119. See generally European Convention on Human Rights, *supra* note 30.

120. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 24 (1981); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) at 17-18 (1988); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) at 11-12 (1993).

121. Of course, a prohibition on criminalizing conduct does not automatically equate to affirmative protection from discrimination. Such a prohibition, however, does indicate that treating such behavior as illegitimate is no longer acceptable, which can be the first step toward acknowledging that those who engage in such behavior are entitled to equal treatment.

122. Resolution on Equal Rights for Homosexuals and Lesbians in the European Community, 8, 1994 O.J. (C 61/40).

123. *Id.*

124. See generally Resolution on the Respect of Equal Rights in the European Union, 1996 O.J. (C 320).

125. Treaty of Amsterdam Amending the Treaty on European Union, Oct. 2, 1997, 37 I.L.M. 56.

126. *Id.* ¶ 7 (inserting a new article 6a).

127. *Id.*

128. See INT'L GAY & LESBIAN HUMAN RIGHTS COMM'N, INTERNATIONAL JURISPRUDENCE AND POLICY PRECEDENTS REGARDING SEXUAL ORIENTATION (1999), available at <http://www.iglhc.org/binary-data/ATTACHMENT/file/000/000/211-1.pdf>.

tional protection for sexual minorities. Though these protections are far from comprehensive, they represent an emerging tendency to protect sexual minorities from discrimination in specific geographic areas as well as across the world.

2. Domestic Recognition of Sexual Orientation as a Protected Status

In addition to international bodies, an increasing number of states appear to be embracing this customary norm in either their constitutions or, more commonly, their statutes by recognizing sexual minorities as a protected group. These states have several general kinds of laws prohibiting sexual orientation discrimination.¹²⁹

One common type of law criminalizes hate crimes or defamatory statements (or both) against sexual minorities. Canada, Denmark, Ireland, Norway, Spain, and Sweden have all enacted laws containing this kind of protection.¹³⁰ These provisions typically create or increase criminal penalties for threats and violence directed specifically against LGBT individuals or for statements intended to degrade those individuals.¹³¹ Though these are not classic antidiscrimination provisions, the laws indicate that these nations are interested in protecting the interests of sexual minorities against hostility. This interest reflects the spreading customary status of sexual minorities as a protected group.

An even more common type of domestic law—a law more in line with quintessential antidiscrimination legislation—forbids discrimination in specific areas, including primarily access to public services and employment. Denmark, Finland, France, Ireland, Israel, Norway, Spain, and Sweden are examples of nations that have enacted this type of law.¹³² Many of these provisions resemble classic public-accommodations laws, which forbid merchants from denying goods or services to individuals based on their sexual orientations.¹³³ Employment nondiscrimination provisions typically

129. This discussion does not address every type or instance of antidiscrimination law; it seeks to provide a general explanation of some of the more common types of laws. It also does not list every nation that protects sexual minorities from discrimination, but rather it provides illustrative examples of nations that have some of these protections. For a more comprehensive discussion of specific provisions, see Int'l Gay & Lesbian Human Rights Comm'n, *Antidiscrimination Legislation: April 1999, A Worldwide Summary* (1999), available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/210-1.pdf> [hereinafter *Antidiscrimination Legislation: April 1999*].

130. *Id.*

131. *Id.*

132. *Id.*

133. *See id.*

create criminal penalties for refusing to hire or deciding to terminate an individual based on sexual orientation, with some provisions containing protections for equal treatment at work as well.¹³⁴ Both types of laws extend beyond hate crimes and defamation provisions by requiring equal treatment for sexual minorities with respect to economic, social, and cultural rights.¹³⁵ The existence of such provisions strongly supports the notion that international law increasingly ensures LGBT individuals substantive lifestyle equality.

Finally, a few nations comprehensively prohibit any discrimination against sexual minorities. Some states that have enacted these sweeping protections are Canada, the Netherlands, Ecuador, Slovenia, and South Africa.¹³⁶ These protections are usually worded either very generally,¹³⁷ simply requiring equal protection of the laws without regard to sexual orientation, or very intricately, implementing across-the-board protections in many enumerated areas, such as housing, education, and public benefits.¹³⁸

Although intricate protections more explicitly protect individuals in specific contexts, generally-worded statutes can ultimately lead to more inclusive protection. One example of how broad-based general protections prevent sexual orientation discrimination is the evolving interpretation of the Equal Protection and Due Process clauses in the U.S. Constitution.¹³⁹ These provisions do not explicitly prohibit discrimination on the basis of sexual orientation, and, historically, U.S. courts resisted construing them to protect sexual minorities.¹⁴⁰ In more recent cases, however, the U.S. Supreme Court has shifted its perspective, ruling that sexual orientation discrimination is inconsistent with the constitutional guarantees of equal protection and due process of law.¹⁴¹ In fact, the

134. See *Antidiscrimination Legislation: April 1999*, *supra* note 129.

135. See *id.*

136. *Id.*

137. See, e.g., CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [Constitution] art. 23 (Ecuador) (“All persons are considered equal and shall enjoy the same rights, freedoms and opportunities without discrimination on grounds of . . . sexual orientation . . .”).

138. Canadian Charter of Rights and Freedoms, § 15, Constitution Act, 1982, pt. I, enacted as Canada Act, 1982, sched. B, ch. 11 (U.K.) (granting broad equal protection from discrimination).

139. See U.S. CONST. amend. XIV, § 1.

140. See *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (“[W]e are quite unwilling” to announce “a fundamental right to engage in homosexual” activity.).

141. See *Romer v. Evans*, 517 U.S. 620, 631-33 (1996) (holding that a state law forbidding sexual minorities from seeking any government protection violated the Equal Protection clause); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that a state law prohibiting sodomy violated the Due Process clause).

majority opinion in *Lawrence v. Texas* explicitly invoked the international trend toward rejecting prohibitions on homosexual conduct in reaching this conclusion.¹⁴²

Evidently, even laws providing very general guarantees of equal protection are increasingly construed to protect sexual minorities from discrimination. These broad-based prohibitions on sexual orientation discrimination are probably the most compelling evidence that customary international law increasingly includes sexual minorities among the groups protected from discrimination in general.

III. ANALYSIS

As demonstrated, the right to adequate housing is well-established under both conventional and customary international law, and antidiscrimination provisions are among the more enforceable aspects of this right. Furthermore, international custom increasingly recognizes sexual minorities as a group protected from discriminatory treatment. Accordingly, the emerging customary norm considering sexual minorities a protected group should be applied to the construction of international instruments forbidding discrimination in access to housing. In addition, even nations that are not parties to the relevant international instruments should include sexual minorities among groups protected by their housing-nondiscrimination laws because they are bound by international custom.

A. *Obligations of Parties to International Instruments*

The ICESCR and the ICCPR contain the most justiciable and most universally applicable provisions protecting individuals from discrimination with regard to the right to housing.¹⁴³ Under both instruments, the inclusion of sexual minorities as a group protected from housing discrimination, in conforming with emerging

142. *Lawrence*, 539 U.S. at 576 (citing relevant decisions of the European Court of Human Rights).

143. See ICESCR, *supra* note 10, art. 11(1) (recognizing “the right of everyone to an adequate standard of living[, including] . . . housing”); ICCPR, *supra* note 19, art. 26 (recognizing that all persons “are entitled without any discrimination to equal protection of the law.”). Though other treaties prohibit housing discrimination, this is usually with regard to the subject-specific area to which the instrument relates—e.g., ICERD, which prohibits racial discrimination, or CEDAW, which focuses on gender discrimination. As discussed *infra* Part III.B.2., the inclusion of sexual minorities as a group protected from housing discrimination is relevant to these treaties, but in a more limited way.

international norms, would create important obligations for states parties.

1. Parties to the ICESCR

The ICESCR, as discussed above, provides the clearest expression of the substantive right to housing in international law, and it prohibits discrimination with respect to the enjoyment of that right.¹⁴⁴ Because sexual minorities are becoming a protected group in the international context, they should be entitled to protection from discrimination with respect to the guarantees of this right as expressed in the ICESCR.

The most authoritative expression of parties' obligations to eliminate housing discrimination under the ICESCR is the UNHRC's General Comment No. 4 (General Comment).¹⁴⁵ Emphasizing the need for nondiscrimination in access to housing, the General Comment outlines key ways in which states can combat housing discrimination,¹⁴⁶ all of which should be applied for the protection of sexual minorities.

First, the General Comment notes that even where resources are limited, nations must abstain from discriminatory practices, eliminating discriminatory legislation and policy.¹⁴⁷ Accordingly, states parties to the ICESCR should not enact laws creating barriers to housing on the basis of sexual orientation, and they should repeal laws that contain such barriers. Most obviously, this course of action would involve eliminating facially discriminatory laws, such as those that expressly disfavor LGBT individuals in the housing market. Nations should also be vigilant, however, to abolish housing-related laws that more subtly discriminate against sexual minorities. Laws prohibiting cohabitation by nonrelatives,¹⁴⁸ for instance, inherently have a strong discriminatory impact on same-sex couples, effectively prohibiting them from living together where no same-sex marriage exists. Similarly, zoning regulations that narrowly define single-family homes to include only married

144. See ICESCR, *supra* note 10, arts., 1-2.

145. See *General Comment No. 4*, *supra* note 12.

146. See *id.* ¶¶ 10-19.

147. See *id.* ¶¶ 10-11.

148. See, e.g., Dale Wetzel, *Senator Urges a Repeal of Cohabitation Law*, BISMARCK TRIB., Jan. 18, 2007 (discussing North Dakota's anti-cohabitation law and its implications). Although this and other cohabitation bans in the United States focus on cohabitation by heterosexual couples, to the extent that they can be read to prohibit unmarried partners of either sex cohabiting, they should be struck down under this provision.

couples, or heterosexual couples with biological children,¹⁴⁹ create an environment in which it is disproportionately difficult for same-sex couples to find housing. States parties to the ICESCR should eliminate these less overt forms of discriminatory state action to properly protect sexual minorities from housing discrimination in accordance with emerging norms in the international community.

In addition to eliminating discriminatory laws, the General Comment suggests that states parties should consider the housing needs of protected groups when enacting new legislation, designing policy that favors nondiscriminatory practices, and developing a long-term strategy for combating discrimination.¹⁵⁰ It indicates that even where depressed economic conditions create difficulties in providing housing, states must take into account the needs of protected groups in attempting to solve the problem.¹⁵¹ Consequently, to come in line with emerging international norms considering sexual minorities a protected group, governments should consider the need to protect LGBT individuals from discrimination when drafting and implementing housing policy.

Wales' development of a national housing strategy exemplifies how functional this type of protective measure can be. In 2001, the National Assembly of Wales decided to develop a strategy for improving housing conditions in Wales, focusing on "'sustainable development,' 'tackling social disadvantage' and 'equality of opportunity.'"¹⁵² To develop this policy, the Assembly consulted tenants' groups, local housing authorities, development projects, nongovernmental organizations, and academic resources to ensure that it considered all protected interests.¹⁵³ Particularly, the Assembly sought contributions from disadvantaged ethnic minorities and persons with disabilities.¹⁵⁴

This affirmative, inclusive approach to solving housing problems is exactly the type of measure that is ideal for protecting LGBT individuals from housing discrimination, fulfilling the General Comment's mandate to "give due priority to those social groups living in unfavourable conditions by giving them particular consideration" and ensuring that "[p]olicies and legislation [are not]

149. See LESLIE K. WEISMAN, *DISCRIMINATION BY DESIGN: A FEMINIST CRITIQUE OF THE MAN-MADE ENVIRONMENT* 132-33 (1994).

150. See *General Comment No. 4*, *supra* note 12, ¶¶ 11-12.

151. *Id.*

152. Press Release, Welsh Assembly Gov't, Better Homes for People in Wales Consultation Launched (Jan. 18, 2001).

153. *Id.*

154. *Id.*

designed to benefit already advantaged social groups at the expense of others.”¹⁵⁵ By actively soliciting the viewpoints of advocacy groups and local authorities, governments can effectively comply with their international obligation to take into account the needs of sexual minorities when developing a general housing policy for the nation.

Finally, the General Comment states that states parties to the ICESCR must monitor housing rights violations effectively, particularly by providing for domestic legal remedies for individual complaints.¹⁵⁶ It suggests that “complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination” and “allegations of any form of discrimination in the allocation and availability of access to housing” should be actionable.¹⁵⁷ Because discrimination claims are among the most justiciable of housing rights violations worldwide,¹⁵⁸ individual enforcement is perhaps the most important and effective method by which sexual minorities can combat private housing discrimination. This method is also the means by which sexual minorities may enforce the state’s obligations, as described by the General Comment, to eliminate discriminatory legislation and develop strategies to eliminate housing discrimination in long-term policy.¹⁵⁹

Ensuring that these complaints are enforceable can be accomplished in several ways. Naturally, domestic legal systems can hear private claims of discrimination, and class actions are a particularly helpful tool for this purpose.¹⁶⁰ Additionally, administrative systems such as U.S. and U.K. Fair Housing laws provide a specialized system for adjudicating complaints of discrimination, albeit in a limited context.¹⁶¹ They are more effective for fighting individual instances of discrimination than for fighting discriminatory state policy. The inclusion of sexual minorities among the groups protected by either substantive law or administrative law, however, is a key step toward ensuring nondiscrimination in housing rights as required by the ICESCR.

155. *General Comment No. 4*, *supra* note 12, ¶ 11.

156. *See id.* ¶¶ 13, 17.

157. *Id.* ¶ 17.

158. *See supra* Part II.B.

159. *See General Comment No. 4*, *supra* note 12, ¶¶ 10-19.

160. *See generally* Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998).

161. *See* Fair Housing Act §§ 810-14, 42 U.S.C. §§ 3610-14 (1968).

2. Parties to the ICCPR

The ICCPR creates another equally important set of housing-discrimination protections for sexual minorities. As discussed above, complaints under the ICCPR's nondiscrimination provisions are readily reviewed by the UNHRC,¹⁶² rendering the ICCPR a key tool for enforcing equal housing rights for LGBT individuals. In addition, like parties to the ICESCR, states parties must enforce the ICCPR's provisions domestically.¹⁶³

The ICCPR contains two nondiscrimination provisions.¹⁶⁴ The first provision, hereinafter referred to as the "internal nondiscrimination provision," guarantees equality with respect to the substantive rights mentioned in the ICCPR itself.¹⁶⁵ The second provision, mentioned above¹⁶⁶ and hereinafter referred to as the "external nondiscrimination provision, guarantees equality before the law in general, prohibiting discrimination against protected groups in any context."¹⁶⁷ Together, the ICCPR's internal nondiscrimination provision and its general equal protection provision create a framework that should ensure sexual minorities freedom from discrimination in access to housing.

a. Internal Nondiscrimination Provision

The ICCPR's internal nondiscrimination provision, Article 2, states that each party "undertakes to respect and to ensure to all individuals . . . the rights recognized in the present Covenant, without distinction of any kind."¹⁶⁸ As discussed above, the substantive rights guaranteed by other provisions of the ICCPR that have been interpreted to ensure housing rights are the right to be free from deprivation of life and the right to be free from arbitrary interference with the home.¹⁶⁹ Article 2 prohibits discrimination with regard to these rights on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹⁷⁰ Thus, whether sexual minorities are

162. *See supra* Part II.B.1.c.

163. *See* ICCPR, *supra* note 19, arts. 2, 26.

164. *Id.*

165. *See id.* art. 2.

166. *See supra* Part II.B.1.c.

167. *See* ICCPR, *supra* note 19, art. 26.

168. *Id.* art. 2.

169. *See id.* arts. 6, 17.

170. *Id.* art. 2.

protected under the term “sex”¹⁷¹ or as a protected “other status”¹⁷² within emerging international custom, they should be guaranteed equal treatment with respect to the substantive rights that have been construed to be housing related.

Consequently, individuals could use Article 2 to argue that discriminatory policies denying sexual minorities access to shelter violate the ICCPR’s guarantee of equality with regard to the right to be free from deprivation of life.¹⁷³ Recently, the UNHRC expressed concern about the effects of discrimination in access to shelter in its 2006 Concluding Observations on U.S. practice.¹⁷⁴ Discussing racial disparity in housing conditions following Hurricane Katrina, the UNHRC stated that it was “concerned about information that poor people and in particular African-Americans, were disadvantaged” during the reconstruction process, in potential violation of the right to be free from deprivation of life.¹⁷⁵

Likewise, where conditions are such that a denial of shelter results or could result in death, discrimination against LGBT individuals for “public health” or religious reasons¹⁷⁶ violates the ICCPR’s internal nondiscrimination provision. Given the recent research indicating that LGBT youths are particularly likely to experience homelessness, in part due to such discrimination,¹⁷⁷ the ICCPR’s guarantee of equal protection with respect to the right to life is especially important to enforce.

In addition, as a protected group, LGBT individuals may be able to use Article 2 to prevent discriminatory evictions that violate the right to be free from arbitrary interference with the home under Article 17.¹⁷⁸ According to the UNHRC’s interpretation of this right, “even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circum-

171. *See Toonen v. Australia*, Human Rights Comm. Commc’n No. 488/1992, ¶ 8.4 (Apr. 4, 1994).

172. ICCPR, *supra* note 19, arts. 2, 26.

173. *See id.* art. 6 (recognizing the right to life).

174. U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Art. 40 of the Covenant: Concluding Observations: United States of America*, ¶ 26, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006).

175. *Id.*

176. RAY, *supra* note 1, at 5 (discussing problems with LGBT youths experiencing discrimination while attempting to find shelter, resulting in homelessness).

177. *Id.* at 1, 5.

178. *See ICCPR, supra* note 19, art. 17.

stances.”¹⁷⁹ For instance, as Human Rights Watch recently reported, the government in Jakarta, Indonesia, carries out a significant number of evictions to protect “public order,” preventing people from living in specified areas.¹⁸⁰ Despite the legitimate bases for Jakarta’s “public order” provisions, the evictions carried out pursuant to those laws discriminate against low-income individuals, violating their right to equality before the law with respect to the provisions of Article 17 of the ICCPR.¹⁸¹

By the same reasoning, even otherwise potentially legitimate government actions may violate this provision if they effectively evict LGBT individuals because of their sexual orientation. For example, single-family zoning regulations and cohabitation laws may serve some legitimate purposes. Regulations and laws that displace current LGBT residents by evicting them from their homes, however, render those residents unequal before the law with regard to the prohibition on arbitrary interference with the home, as guaranteed by the ICCPR.¹⁸² Because sexual minorities are a protected group—thus meriting protection from discrimination in housing rights under international instruments—the ICCPR’s internal nondiscrimination provision prohibits even these types of facially neutral laws.

b. External Nondiscrimination Provision

The ICCPR’s external nondiscrimination provision¹⁸³ guarantees equality before the law for protected groups with regard to all rights.¹⁸⁴ This guarantee functions for the most part like the internal nondiscrimination provision. As mentioned above,¹⁸⁵ however, it can be used to enforce both substantive rights created by instruments other than ICCPR itself and international custom. In other words, to come in line with emerging international norms, the guarantee should protect sexual minorities from discrimination with regard to any existing right. Therefore, wherever housing

179. U.N. Human Rights Comm., *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, ¶ 4, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 8, 1988).

180. HUMAN RIGHTS WATCH, *CONDEMNED COMMUNITIES: FORCED EVICTIONS IN JAKARTA* 3 (2006).

181. *See id.* at 31-33; ICCPR, *supra* note 19, arts. 2, 17.

182. *See* ICCPR, *supra* note 19, arts. 2, 17.

183. *See supra* Parts II.A, II.B.1.b.

184. *See* ICCPR, *supra* note 19, art. 26.

185. *See supra* Part II.A.

rights are created, states should forbid discrimination against sexual minorities with regard to those rights.

For example, the UNHRC's decision in *Blazek v. Czech Republic*—that seizure of property and refusal to make restitution based on citizenship status impermissibly discriminates against noncitizens in violation of the external nondiscrimination provision¹⁸⁶—should apply equally to uncompensated seizure of property based on sexual orientation. Thus, a government should not be authorized to make a rezoning change allowing only single-family homes or prohibiting cohabitation, which would effectively evict current LGBT residents, without making restitution (if such a zoning change were permissible at all, which is dubious). More to the point, a landlord should not be allowed to disproportionately raise rent for LGBT residents, effectively evicting them, because doing so would discriminatorily deprive those individuals of property and, thus, housing.

In addition, the UNHRC in *Blazek* “encourag[ed] the State party to review its relevant legislation and administrative practices to ensure that neither the law nor its application entails discrimination.”¹⁸⁷ This language demonstrates that the guarantee of equality in general includes not just freedom from individual discrimination but also from discriminatory government policy.¹⁸⁸ As such, to conform to emerging norms protecting sexual minorities from discrimination, states parties to this instrument should allow LGBT individuals to act as private enforcers, ensuring that government regulations do not create discriminatory housing conditions. Furthermore, as discussed with respect to the ICESCR, states also have the responsibility to monitor their own housing-related legislation and policies to ensure that they do not discriminate, facially or subtly, against sexual minorities.¹⁸⁹

Another example of how this enforcement might function is in the application of regional instruments. For instance, as discussed above,¹⁹⁰ the American Convention on Human Rights includes, by reference, the “provision of [a]dequate housing for all” as one of its goals.¹⁹¹ Accordingly, parties to this instrument ostensibly will

186. *Blazek v. Czech Republic*, Human Rights Comm. Commc'n No. 857/1999, ¶ 6 (Aug. 9, 2001).

187. *Id.* ¶ 7.

188. *See id.*

189. *See supra* Part III.A.

190. *Id.*

191. *See* Charter of the OAS, *supra* note 27, art. 34(k) (establishing the goal of “[a]dequate housing for all sectors of the population”); American Convention on Human

implement measures providing housing rights to their citizens by, for example, creating more housing, improving current housing, or preventing forced evictions. Under the ICCPR's external non-discrimination provision, those states that are also parties to the ICCPR should implement these measures without distinction based on sexual orientation. Regardless of the extent of the regional charter's protections—the American Convention does not explicitly prohibit sexual orientation discrimination¹⁹²—states implementing housing rights should do so without discriminating against sexual minorities to comply with the ICCPR's external non-discrimination provision (if they are parties, which most countries are).

Similarly, domestically created housing rights should be implemented without discriminating on the basis of sexual orientation so as to comply with the external nondiscrimination provision. For instance, Argentina's Constitution contains language protecting the right to housing.¹⁹³ Argentina does not, however, expressly protect sexual minorities from discriminatory treatment.¹⁹⁴ Yet, as a party to the ICCPR, Argentina has the responsibility to apply this constitutional protection for housing rights without discriminating on the basis of sexual orientation.

The external nondiscrimination provision asserts that protected groups "are equal before the law and are entitled without any discrimination to the equal protection of the law."¹⁹⁵ To comply with this requirement, states parties must not fulfill housing rights only to the extent of the instruments that create them, such as regional charters or even domestic laws; they must do so in a nondiscriminatory manner.¹⁹⁶ As such, to comply with emerging international norms, they should implement these rights without discriminating against sexual minorities, ensuring that LGBT citizens are equal before the law with respect to housing rights, regardless of how those rights are created initially. For this reason, the ICCPR's

Rights, *supra* note 28, art. 26 (requiring states aim to achieve "the full realization of the rights implicit in the economic, social, . . . and cultural standards set forth" in the OAS Charter).

192. See American Convention on Human Rights, *supra* note 28, art. 1 (prohibiting discrimination "for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition"); Protocol of San Salvador, *supra* note 28, art. 3 (providing the same obligation of nondiscrimination).

193. CONSTITUCIÓN ARGENTINA [Constitution] ch. 1, §§ 14-14bis (Arg.).

194. See *id.*

195. ICCPR, *supra* note 19, art. 26.

196. See *id.*

external nondiscrimination provision is perhaps the most powerful and universally applicable tool for ensuring equal rights in housing to sexual minorities.

B. *Obligations of Nonparties Under Customary International Law*

Even where nations are not signatories or parties to these international agreements, they should still consider the emerging international custom of sexual orientation as a protected status with regard to housing rights. Even where it is not codified, international custom creates obligations for all states in the international community by setting accepted standards that states must follow.¹⁹⁷ As such, to conform to emerging customary international standards, states that create housing rights should do so without discriminating on the basis of sexual orientation, even when they have entered into no instruments explicitly requiring nondiscrimination.

For instance, in 2005, the Australian state of Tasmania redoubled its efforts to create a housing strategy, seeking to fund affordable housing and develop a more long-term housing plan for its individual communities.¹⁹⁸ While Tasmania is focusing on low-income groups and housing quality,¹⁹⁹ it is obliged by both international custom and the ICCPR to ensure that the plan it develops fully considers the needs of other groups protected under international custom,²⁰⁰ which should include sexual minorities. Taking these needs into account would involve the responsibility, similar to that described above, to refrain from disfavoring sexual minorities and to consider the impact that new laws might have on LGBT individuals' housing circumstances. Here, because Australia is a party to the ICCPR, the difference between its conventional obligations and its customary ones is minimal.²⁰¹

The difference becomes more substantive, however, when a non-party is involved. This problem does not arise often because the large majority of nations are parties to the ICESCR or the ICCPR

197. See generally ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 898-902 (Rudolph Bernhardt ed., 1992).

198. See Sue Ham, CEO, Colony 47, Address at the Affordable Housing Crisis Tasmanian Forum: Solving the Affordable Housing Crisis – Strategies for the Future 5 (Nov. 15, 2005), available at http://www.anglicare-tas.org.au/index.php?option=com_docman&task=doc_view&gid=34&Itemid=67.

199. See *id.*

200. See, e.g., ICCPR, *supra* note 19, art. 26.

201. See generally ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 197, at 898-902.

(or both).²⁰² Yet, if a nation claims to be a persistent objector²⁰³ to the custom of protecting sexual minorities from discrimination, it might attempt to maintain that it does not have to take the needs of sexual minorities into consideration when developing housing policy and legislation. In this case, it would be necessary to examine when and how the state began to object to this custom, and explicitly how it did so.²⁰⁴ If a country could prove that it had consistently objected to the inclusion of sexual minorities as a protected group—or indeed to the right to housing itself—it could, with a great deal of effort, potentially avoid this obligation. Otherwise, even a nonparty state is bound by international custom to refrain from discriminating against sexual minorities in its efforts to implement housing rights.

IV. CONCLUSION

As adequate housing becomes an ever-growing global concern, states must take into account the needs of disadvantaged groups when considering how best to address the situation. In recent years, LGBT individuals have increasingly made their voices heard in the international community, and thus it has become clear that sexual minorities are among the groups requiring such consideration. Although states have begun to recognize this need, it is important to continue emphasizing that protection for sexual minorities must be integrated into housing policy.

This emphasis could be accomplished through increased codification of this nondiscrimination principle. More specific wording prohibiting discrimination on the basis of sexual orientation, or separate legislation protecting sexual minorities, would aid in this effort. In the meantime, however, it is critical that states take the significant first step of recognizing their obligation to protect sexual minorities from discrimination in housing rights under existing instruments and emerging customary law.

202. See authority cited *supra* Part II.A.

203. See generally ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 197, at 898-902.

204. See *id.*