

International Jurisprudence and Policy Precedents Regarding Sexual Orientation

A number of inter-governmental organizations, international conferences, and non-governmental organizations working in the context of international and regional human rights protections have recognized the duty of governments to protect persons against discrimination based on sexual orientation or sexual identity.

General Charts of the International Bodies Described in this Fact Sheet

Chart A: The United Nations

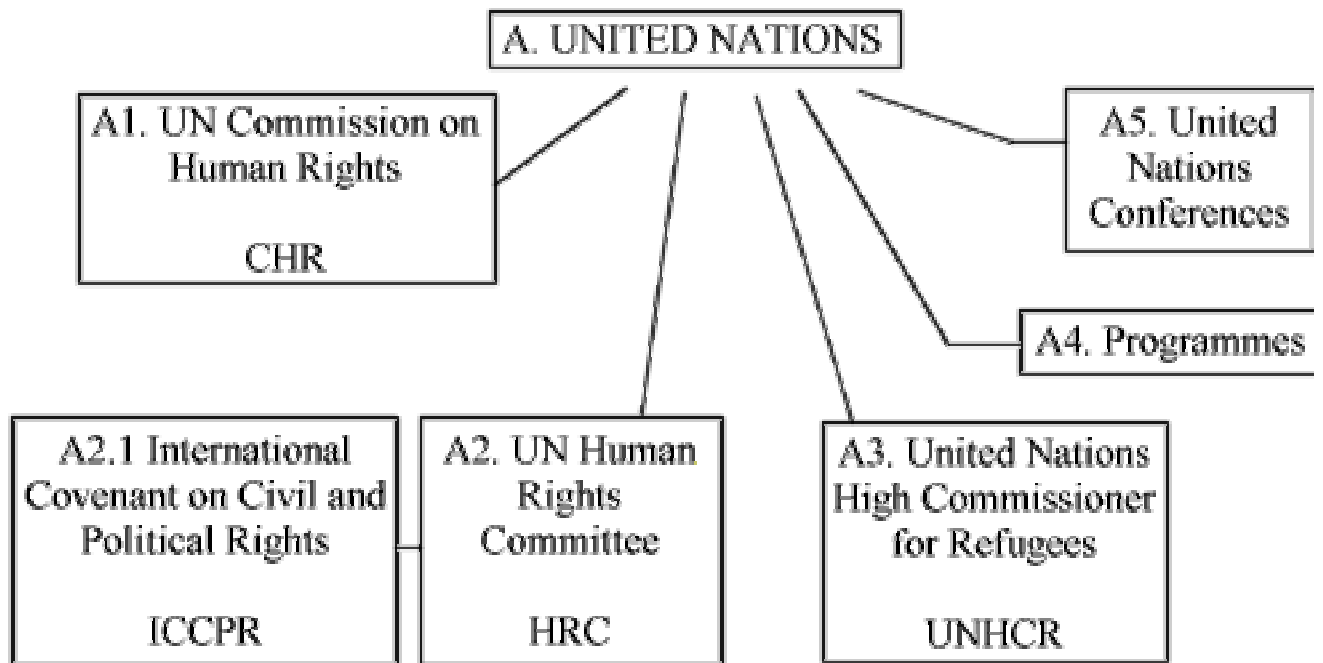
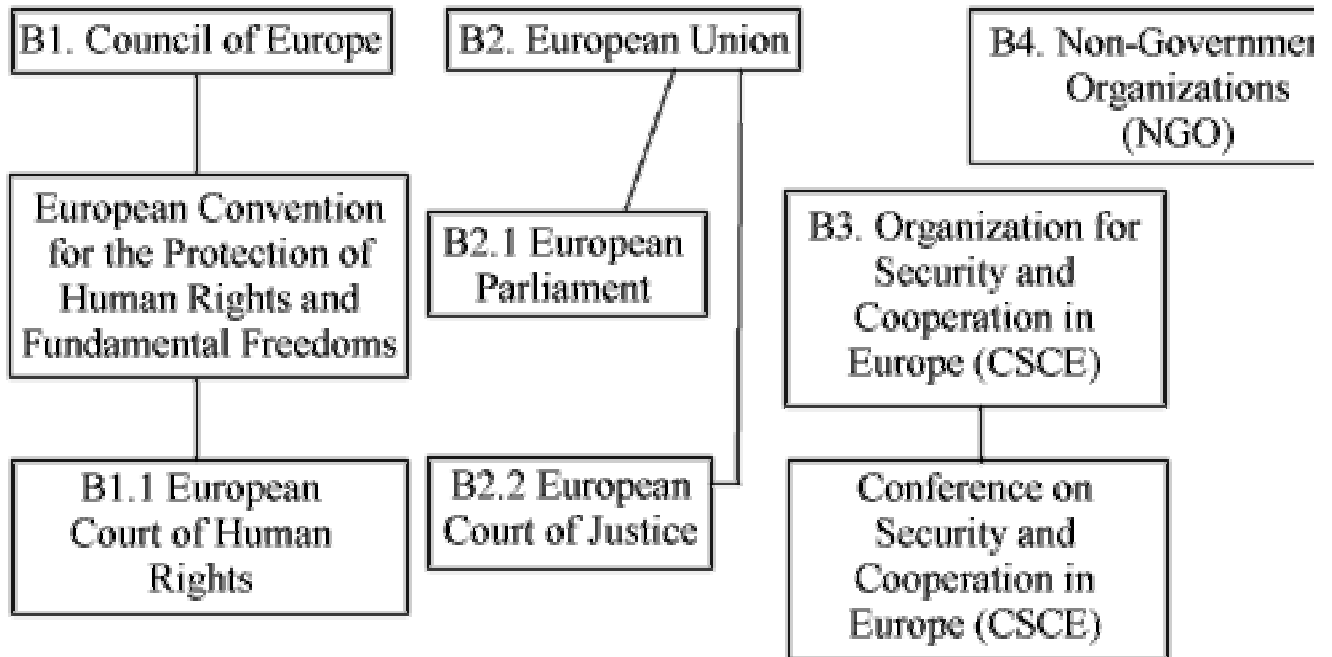


Chart B: Regional Human Rights Bodies



A. United Nations

A1. United Nations Commission on Human Rights

U.N. Commission on Human Rights (CHR), comprised of government representatives, investigates and addresses a wide range of human rights issues, in regard to both specific countries and general themes. The Commission has addressed sexual orientation in a number of forums and mechanisms:

A1.1. Programme on HIV/AIDS

In 1996 the **CHR** included for the first time reference to homosexuals as a protected class in a resolution on the human rights of persons living with HIV/AIDS. This decision was influenced by two communications delivered by the **Joint United Nations Programme on HIV/AIDS (UNAIDS)** to the CHR's Sub-Commission on Prevention of Discrimination and Protection of Minorities. The resolution issued by the CHR addresses the forms of discrimination suffered by people living with HIV and AIDS, and it calls for U.N. agencies and member states to counter discrimination and ensure the full human rights and freedoms of people affected by HIV/AIDS. The resolution states in part that "persons suffering from disadvantaged socioeconomic or legal status" are especially "vulnerable to the risk of HIV infection... and that they suffer disproportionately from the economic and social consequences of the HIV/AIDS epidemic." The resolution twice mentions "men who are homosexual" among those who are disproportionately affected by the epidemic. The same resolution reconfirms

"that the term 'other status' in non-discrimination provisions in international human rights texts should be interpreted to cover health status, including HIV/AIDS." (E/CN.4/Sub.2/1996/L.21)

A1.2. Special Rapporteurs

The **CHR** can also appoint Special Rapporteurs to investigate particular human rights problems or abuses. In 1987 the Commission's Sub-Commission on Prevention of Discrimination and Protection of Minorities initiated such a special report on the legal and social problems of sexual minorities, including male prostitution. While this report signaled the interest of the CHR in these important issues, the report itself was poorly researched and was criticized by the Sub-Commission for being superficial and arriving at dubious conclusions. (E/CN.4/Sub.2/1988/31) More recently, the human rights of sexual minorities have been mentioned by Special Rapporteurs investigating abuses in Iran, Romania, and Colombia. In 1994 and 1995 two reports described the action of death squads who target sexual minorities for "social cleansing" in Colombia (E/CN.4/1995/50/Add.1 and E/CN.4/1995/111). Also in 1995, a report described the situation of a prisoner in Romania who was arrested and beaten for being gay (E/CN.4/1995/34). In 1996 a report listed sodomy among the crimes punishable by death in Iran, and noted that this law is enforced (E/CN.4/1996/59).

A1.3. Filing petitions

Organizations and individuals outside the United Nations can bring human rights abuses to the attention of the **CHR** by filing petitions called "Resolution 1503 communications." The Commission has received a number of such petitions regarding the human rights of gay men and lesbians.

A2. United Nations Human Rights Committee

U.N. Human Rights Committee (**HRC**), comprised of independent experts, is the body charged with monitoring the steps taken by state parties to carry out their obligations to protect human rights as guaranteed by the **International Covenant on Civil and Political Rights** (ICCPR). As part of its responsibility, the HRC can hear and issue opinions on cases filed by individuals alleging violations of their rights.

A2.1 International Covenant on Civil and Political Rights (ICCPR)

With 101 signatories, the ICCPR is one of the most important international human rights treaties. Article 17 of the ICCPR guarantees the right to privacy. Article 2(1) of the ICCPR provides that the rights and freedoms guaranteed in the ICCPR must be protected for all persons, *without discrimination*. Article 2(1)

states, in part, "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." Article 26 also prohibits discrimination based on the same language as Article 2 and takes the matter of discrimination a step further by declaring a right to equality *independent of* guarantees made in the ICCPR. Article 26 reads, in part, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law." (G.A. Res. 2200A [XXI], U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 [1966], 999 U.N.T.S. 171)

A2.1.1 The case of Tasmania

On April 4, 1994, the **HRC** ruled in the case of ***Nicholas Toonen v. Australia*** that a statute of the Australian state of Tasmania prohibiting sexual contact between consenting adult men in private was a violation of fundamental human rights.

Nicholas Toonen brought a complaint before the HRC, charging that Australia had violated its obligations under Articles 2, 17, and 26 of the ICCPR by allowing the state of Tasmania to maintain legislation prohibiting sexual contact between consenting adult males. On April 4, 1994, the HRC ruled that the Tasmanian law contradicts Article 17 (right to privacy) and Article 2 (non-discrimination) of the ICCPR. The Committee did not consider Article 26 in making its decision, but did state that the protected category of "sex" in Article 2 of the ICCPR "is to be taken as including sexual orientation." (U.N. Doc. CCPR/c/50/D/488/1992 [1994])

Since the *Toonen* decision, the **U.N. Human Rights Committee** has expressed concern, in its reports on state parties' compliance with the ICCPR, over laws that outlaw homosexual contact (see below).

A2.1.2 The case of Romania

In 1993 the **U.N. Human Rights Committee** criticized Romania for maintaining discriminatory laws, including sodomy laws that codify discrimination against sexual minorities. (CCPR/C/79/Add.30)

A2.1.3 The case of the United States

In 1995 the Committee criticized the United States for the persistence of sodomy laws in several U.S. states, noting a "[s]erious infringement of private life in some states which classify as a criminal offense sexual relations between adult consenting partners of the same sex carried out in private, and the

consequences thereof for their enjoyment of other human rights without discrimination." (U.N. GAOR, U.N. Doc. CCPR/C/79/Add 50, 6 Apr. 1995)

A2.1.4 The case of Hong Kong

In October 1996 the **U.N. Human Rights Committee** heard submissions from a representative of the Hong Kong Human Rights Monitor?an NGO based in Hong Kong?concerning the urgent need for anti-discrimination legislation in Hong Kong that would provide legal protection for many social groups, including bisexuals, gay men, and lesbians. In its report on Hong Kong's compliance with the ICCPR, it is expected that the HRC will repeat criticism it expressed in 1995 that steps should be taken to ensure equal protection and non-discrimination for sexual minorities. (CCPR/C/79/Add.57)

A2.1.5 The case of Zimbabwe

"The Committee notes with concern that homosexuals are subjected to discrimination, e.g. that aliens deemed to be homosexuals may be defined as "Prohibited Persons" for immigration purposes and are subject to deportation. The Committee recommends that such legislation be brought into conformity with the Covenant." Zimbabwe - 04/08/98. CCPR/C/79/Add.89. (Concluding Observations/ Comments), Art. 24

A2.1.6 The case of Cyprus

"The Committee notes with concern the discriminatory legal provisions which penalize homosexual acts and urges the State party to repeal them." Cyprus -. 04/08/98. CCPR/C/79/Add.88. (Concluding Observations/ Comments), Art. 11

A2.1.7 The case of Austria

"The Committee considers that existing legislation on the minimum age of consent for sexual relations in respect of male homosexuals is discriminatory on grounds of sex and sexual orientation. It requests that the law be revised to remove such discriminatory provisions." Austria - 19/11/98. CCPR/C/79/Add.103. (Concluding Observations/Comments), Art. 13

A3. United Nations High Commissioner for Refugees

Since April 1993 The United Nations High Commissioner for Refugees (**UNHCR**) has recognized in several Advisory Opinions that gays and lesbians qualify as members of a "particular social group" for the purposes of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. In its publication "Protecting Refugees," the UNHCR states: "Homosexuals may be eligible for refugee status on the basis of persecution because of their membership of a

particular social group. It is the policy of the UNHCR that persons facing attack, inhumane treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognized as refugees." (UNHCR/PI/Q&A-UK1.PM5/Feb. 1996) For more information, please request a copy of the IGLHRC Fact Sheet on immigration and asylum.

A4. United Nations Programmes

A4.1 International Labour Office (ILO)

In 1996, the ILO conducted a Special Survey on the application of the ILO's Discrimination (Employment and Occupation) Convention, 1958 (No. 111) in which it examined issues of discrimination in employment based on sexual orientation. The ILO's Committee of Experts on the Application of Conventions and Recommendations recommended that sexual orientation be included in a new protocol that would extend application of the 1958 Convention to this and other grounds. (III4B\281-11G.E95/v.3)

A4.2 U.N. Education, Scientific and Cultural Organization (UNESCO)

In 1991, the UNESCO accepted a petition to review a case of human rights violations against the editor of a lesbian periodical published in Greece. Decision 104/EX (1978) of the UNESCO Executive Board calls upon UNESCO to examine human rights violations in the areas of education, culture, science, information, and communication. UNESCO ended its investigation of the case of Irene Petropolous, who had been charged by the Greek government with publishing "indecent" material, when Ms. Petropolous was acquitted by a Greek court.

A4.3 U.N. Development Program (UNDP)

In 1991, the UNDP introduced a Human Freedom Index in its Human Development Report. This Index ranked 88 countries by 40 indicators of democracy such as press freedom, rule of law, the right to travel and the personal right to conduct homosexual relations between consenting adults. Because many developing countries objected to the inclusion of human rights in a UNDP index, the Human Freedom Index was replaced by a Political Freedom Index, and the UNDP stopped publishing the ratings of individual states.

A4.4 World Health Organization (WHO)

In May 1991, the WHO voted to delete homosexuality from its International Classification of Diseases; this change became effective in January, 1993. (Chapter V, code 302)

A5. United Nations Conferences

The Plan of Action of the **International Conference on Population and Development** (Cairo, 1994) acknowledges the necessity of recognizing the diversity of family structures that exist in the world today. (A/CONF 171/13)

At the **Fourth World Conference on Women** (Beijing, 1995) there was substantive and sustained discussion about including references to "sexual orientation" in the **Platform for Action**. The draft version of the Platform included four references, including one calling on governments to eliminate discrimination in employment, and one calling on governments to provide legal protections against discrimination. The Conference did not reach consensus on inclusion of sexual orientation language, but the final Platform for Action does include recognition that women and men must be able to decide freely on all matters relating to their sexuality free from coercion, discrimination or violence. Israel, South Africa, and the United States have indicated that they interpret language in the Platform for Action to advocate human rights protections for all women no matter their sexual orientation. (A/CONF 177/20) In addition, the **Economic Council of Europe Regional Platform for Action** for the Beijing Conference includes as one of its basic principles that the promotion, protection, and realization of the human rights of women must "reflect the full diversity of women, recognizing that many women face additional barriers because of such factors as their race, language, ethnicity, culture, religion, sexual orientation, disability, socio-economic class or status as indigenous people," and directs governments to include lesbian organizations in developing and implementing strategies for the advancement of women. (E/ECE/RW/HLM8)

The Global Plan of Action of the **Habitat II Summit** (Istanbul, 1996) reinforces anti-discrimination language of the Beijing Platform and other U.N. documents by including "other status" in clauses which guarantee protection from discrimination in housing and human settlements.

B. Regional Human Rights Bodies

B1. Council of Europe

The Council of Europe encourages respect for human rights among member states through a treaty?the **European Convention for the Protection of Human Rights and Fundamental Freedoms**?and through resolutions of its Parliamentary Assembly.

1981

The **Parliamentary Assembly of the Council of Europe** condemned discrimination against homosexuals. (Recommendation 924 and Resolution 756).

This parliamentary action provided an additional legislative context for the European Court of Human Rights to consider in deciding the cases of Dudgeon, Norris, and Modinos (see below).

1993

Members of the **Parliamentary Assembly** adopted Declaration No. 277 calling for an end to discrimination against homosexuals in former Communist countries.

1998

On January 15, ILGA (International Lesbian and Gay Association) was granted NGO consultative status in the **Council of Europe**.

B1.1 European Court of Human Rights

Complaints of human rights violations under the **European Convention** are adjudicated by the **European Court of Human Rights** in Strasbourg. The European Convention establishes a right to privacy (Article 8), and the European Court of Human Rights has ruled that state signatories to the European Convention cannot criminalize same-sex sexual relations because such laws violate the personal right to privacy. The European Court articulated this decision in relation to sodomy laws in Northern Ireland (*Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149 [1981]), Ireland (*Norris v. Ireland*, 13 Eur. H.R. Rep. 186 [1991]), and Cyprus (*Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485 [1993]). Ireland and Northern Ireland repealed their sodomy laws; Cyprus has, to date, failed to comply with the Court ruling.

1992

In April the **European Court of Human Rights** found that France had violated the human rights of a transsexual when its courts refused to alter a birth certificate after the person had undergone gender reassignment surgery. The Court based its ruling on the right of a person to have respect for her or his private life (Article 8 of the Convention), and indicated that a birth certificate should record the change in a transsexual's name and sex.

1997

In February the **European Court of Human Rights** had the opportunity to extend its ruling on the European Convention's privacy guarantee in a case concerning adult consensual sadomasochistic sexual activity (SM). In the so-called "Spanner case" three British men asked the court to review the actions of the British government, which in 1990 convicted them of assault for engaging in consensual SM activities in private. In arriving at its decision in favor of the UK,

the Court did not focus on questions surrounding the fairness of the British investigation and prosecution of the men, but considered the narrower issue of whether a state could restrict consensual SM in the interests of public health (*Laskey, Jaggard and Brown v. the United Kingdom*, case no. 109/1995/615/703-705). Advocates for sexual privacy expect the issue of SM to continue to arise in human-rights contexts in the future.

1998

The **European Court of Human Rights** ruled that Britain did not discriminate against K. Sheffield and R. Horsham, two transsexuals, when it refused to alter their birth certificates to correspond with their new genders. The Court also said that the two do not have the right to marry men, as nations may confine matrimony to one man and one woman "of biological origin".

B2. European Union

Human rights issues are addressed in the European Union by--among other agencies--its legislative body, the **European Parliament**, and its highest judicial body, the **European Court of Justice**. While the Parliament has an almost-unlimited range of issues within its purview, its powers are restricted and its functions mainly advisory. The Court, like other EU agencies, primarily addresses rights questions as they take economic form--for instance, discrimination in the workplace.

*In **1997**, the European Union revised its governing **Treaty of Amsterdam** (see below) to allow, for the first time, the European Commission to act against member States which allow discrimination based on sexual orientation.

B2.1 European Parliament

1982

The **European Parliament** directed its Committee on Social Affairs and Employment to investigate sexual discrimination at the workplace. The Committee issued the "Squarcialupi Report", on the basis of which the European Parliament adopted in March 1994 a "Resolution on Sexual Discrimination at the Workplace." This resolution urges member states to "abolish any laws which make homosexual acts between consenting adults liable to punishment" and to "apply the same age of consent as for heterosexual acts." The resolution further calls on the Commission of the European Community to "renew its efforts with regard to dismissals to ensure that [...] certain individuals are not unfairly treated for reasons relating to their private life," to "submit proposals to ensure that no cases arise in the Member States of discrimination against homosexuals with regard to access to employment and working conditions," and to invite

Member States to identify "any discrimination against homosexuals with regard to employment, housing and other social problems." (OJ 1984 C 104/45).

1994

In response to a wide-ranging report on forms of discrimination based on sexual orientation within the EU--known as the "Roth Report"-- the **European Parliament** adopted a resolution calling on member states to: abolish all laws that criminalize homosexual activity; equalize age of consent laws for all sexual activity, whether homosexual or heterosexual; end unequal treatment of homosexuals in social security systems, adoption laws, inheritance laws, and housing and criminal law; take measures to reduce violence against homosexuals and prosecute those who commit such violence; initiate campaigns to combat social discrimination against homosexuals; and provide funding to homosexual social and cultural organizations. The resolution specifically calls on the United Kingdom to repeal its discriminatory law regarding the so-called "promotion" of homosexuality, and seeks a recommendation from the Commission of the European Community that gay men and lesbians be guaranteed full and equal rights of marriage (registration of their partnerships) and parenting (adopting children and serving as foster parents). (Resolution on equal rights for homosexuals and lesbians in the European Community, OJ 1994 C 61/40, Res. No A3-0028/94, 8 Feb. 1994)

1995

In May, the **European Parliament** urged that revisions to the Treaty of the European Union ban discrimination based on sexual orientation. The Parliament also extended domestic partnership benefits to its gay and lesbian employees.

1996

In September, the **European Parliament** approved another resolution meant to reaffirm its earlier call for member states to end all discrimination based on sexual orientation. (Res. No. A4-0223/96)

1997

In October the Foreign Ministers of the Member States of the EU signed the **Treaty of Amsterdam**, a new basic treaty governing the Union. The Treaty expands an antidiscrimination provision contained in previous treaties. It authorizes (but does not require) the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Treaty is one of the first major international instruments to mention sexual orientation explicitly. It will enter into

force after it has been ratified by all the Member States in accordance with their respective constitutional requirements.

1998

In September, the **European Parliament** adopted an urgent resolution on equal rights for gays and lesbians in the EU. The Parliament observed that it would refuse to "give its consent to the accession of any country that, through its legislation or policies, violates the human rights of lesbians and gay men". The countries concerned are Cyprus (which failed to adopt a genuine law reform in 1998, by replacing the total ban on male homosexual acts by a series of other discriminatory provisions), and Romania (whose parliament refused in 1998 to amend the discriminatory provisions of its Penal Code against homosexuality). The same resolution explicitly urges Austria (a member state) to repeal its unequal age of consent.

B2.2 European Court of Justice

1996

On 30 April 1996, the **European Court of Justice** in Luxembourg ruled that Cornwall College, Redruth, UK, violated the non-discrimination provisions of the European Union's Equal Treatment Directive (no. 76/207/EEC, 9 February 1976) when it dismissed a British transsexual who had undergone gender reassignment surgery. The Court ruled that the Directive, which requires EU member states to prohibit direct or indirect discrimination in employment on the grounds of sex, also covers cases of discrimination on the grounds that a person has changed sex. (P.v.S. and Cornwall County Council, Case C-13/94)

1997

Two British women, Lisa Grant and her partner Jill Percey, brought suit before the **European Court of Justice** arguing that Grant's employer should be compelled to offer benefits to her partner identical to those offered to heterosexual partners. In a preliminary finding, the Advocate General of the Court agreed that this constituted sex discrimination, because the policy refusing benefits was based on the sex of the partner concerned. Later in the year, however, the Court itself found against the couple, decided that the policy did not constitute discrimination as prohibited by Article 119 of the EC Treaty or by Council Directive 75/117/EEC of February 10th, 1975 (application of the principle of equal pay for men and women.)

The **European Court of Justice** is preparing to hear another case from the United Kingdom that could end the ban on gay members of the British armed forces. A gay British man argues that his dismissal from the British Navy is a

breach of the European Union's Equal Treatment Directive, because to dismiss a person based on the sex of his partner is a form of sex discrimination.

B3. CSCE/OSCE

During the 1992 meeting of the **Conference on Security and Cooperation in Europe** (CSCE) in Helsinki, Norway, a motion was introduced asking member states "to take steps to prohibit the promotion of hatred or contempt against homosexuals and their organizations_c ." (In a 1991 CSCE meeting in Moscow, five member states referred to lesbian and gay rights without advancing resolutions: Canada, Denmark, Norway, Finland, and Sweden.) In November 1992 a representative of the International Gay and Lesbian Association (ILGA) spoke in the final plenary session of the CSCE Expert Seminar on Tolerance in Warsaw, and in the following year another ILGA representative addressed the CSCE Implementation Meeting on Human Dimensions in Warsaw. The final report of this 1993 meeting noted that participants discussed discrimination against homosexuals and that "CSCE commitments in the area of non-discrimination cover homosexuals as well. Suggestions were made that discriminatory State policies against homosexuals, and criminalizing legislation, should be eliminated." (Quoted in ILGA Bulletin 5, 1993.) ILGA has continued to participate in CSCE meetings as a non-governmental organization, including the 1994 meeting at which the CSCE became the **Organization for Security and Cooperation in Europe** (OSCE). The Parliamentary Assembly of the OSCE passed a declaration in Ottawa in 1995 calling on member states to provide equal protection against discrimination for all people, and that includes sexual orientation among the grounds specifically protected from discrimination.

B4. Non-Governmental Organizations

The decisions and actions taken by the following organizations exemplify the sort of human rights advocacy in which many non-governmental organizations are currently involved:

- In 1991 **Amnesty International** decided to include in its definition of prisoners of conscience those individuals who have been incarcerated for their actual or presumed homosexuality.

At the 1997 Capetown International Council Meeting (ICM), Amnesty agreed to increase the visibility of its work on human-rights violations based on sexual orientation. However, a motion to add "sexual orientation" to its mission statement was abandoned by its supporters, who feared it would be defeated.

- Since 1993, the **International Human Rights Law Group** has been working to promote the application of international human rights

standards to persons facing violence or discrimination because of their sexual identity or sexual orientation.

- In 1994 **Human Rights Watch** declared that it opposes "state-sponsored and state-tolerated violence, detention and prosecution of individuals because of their sexual identity, sexual orientation or private sexual practices."
- In 1995 the **International Planned Parenthood Federation** approved its "Charter on Sexual and Reproductive Rights" which recognizes, among other rights, the rights of women to privacy, to equality and to freedom from all forms of discrimination. In this document the IPPC includes sexual orientation among the grounds it advocates should be protected from discrimination in the provision of information, health care, and reproductive health services.

The information contained in this fact sheet is drawn from Douglas Sanders, "Getting Lesbian and Gay Issues on the International Human Rights Agenda," *Human Rights Quarterly* 18 (1996) 67-106, "Promoting Lesbian and Gay Rights through International Human Rights Law," New York: Center for Constitutional Rights, James D. Wilets, "International Human Rights Law and Sexual Orientation," *Hastings International and Comparative Law Review* Vol 18, No. 1, 1-120, James D. Wilets, "Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts," *Columbia Human Rights Law Review*, Fall 1995, Vol 27, No. 1, 33-56, Laurence R. Helfer and Alice M. Miller, "Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence," *Harvard Human Rights Journal*, Spring 1996, Vol 9, 61-103, the International Lesbian and Gay Association (ILGA) accessible at <http://www.ilga.org>, communications with the Magnus Hirschfeld Center for Human Rights and other human rights organizations, and IGLHRC files.