SEXUAL ORIENTATION AND HUMAN RIGHTS: THE USE OF HUMAN RIGHTS LAW TO ADDRESS SEXUAL ORIENTATION-BASED DISCRIMINATION AND VIOLENCE IN ECUADOR

By

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This document is dedicated to my mentor, for her guidance and for sharing her wisdom throughout my academic career, and to Mandy for her support and encouragement.
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On paper, Ecuador looks like a champion of human rights—especially with respect to gay men, lesbians, bisexuals, and transgendered persons (GLBT persons or sexual minorities). It is one of only three countries in the world that explicitly includes sexual orientation in an anti-discrimination provision in its constitution, and it has adopted additional protections for GLBT persons in national and subregional legal instruments. Despite these progressive steps, however, sexual orientation-based discrimination and persecution ranging from physical violence and murder at the hands of the police to harassment and less overt forms of discrimination is widespread throughout Ecuador. Homophobia and antipathy towards homosexuality oftentimes underlie these actions. Homosexualidad (homosexuality) is seen as a rejection of the majority culture and the strong social and cultural constructions of appropriate gender and sexuality.

In some cases, sexual orientation-based discrimination, persecution, and harassment violate the human rights of sexual minorities. As human rights abuse has
been documented, national and international GLBT and human rights organizations have begun to look to human rights law as a tool to address human rights violations. An examination of international, regional, and subregional human rights treaties and documents shows that human rights law can be used to address these issues. Specifically, GLBT persons or other States could submit human rights complaints to quasi-judicial bodies in the United Nations or Inter-American human rights systems. Likewise, protections for GLBT individuals exist in Ecuadorian national law, and legal challenges of human rights violations and discrimination can be brought in national courts.

Nevertheless, consistent with the ongoing universalist/relativist debate amongst human rights advocates, it is essential to consider the extent to which human rights law should be used to protect GLBT persons in a society that has deeply embedded cultural and religious norms that are antithetical to *homosexualid*. After considering a variety of factors and employing a human rights paradigm, it is apparent that human rights law should be used to address violations of the fundamental human rights of GLBT individuals living in Ecuador. While culture must be respected, it cannot be an excuse to relegate a minority to second class citizenship and to render them defenseless against human rights abuses by the majority. As the government of Ecuador has already adopted explicit protections for sexual minorities, there would likely be minimal intrusion on Ecuadorian society and culture. Even if these national protections were aspirational at the onset, it is reasonable to expect that, at some point, GLBT persons would seek to invoke their rights. Afterall, democratic principles require equality of all people.
CHAPTER 1
INTRODUCTION

On March 12, 2004, Patricio Ordóñez Maico, a gay man and a member of Fundación Amigos por la Vida, an Ecuadorian NGO that campaigns for the rights of los homosexuales (homosexuals), was stabbed in the chest and the back by an intruder while inside the NGO’s office (AI 2004b). The intruder gained entry into the building and then attacked Maico from behind with a knife. When Maico managed to wrestle the knife away, the intruder drew a pistol and threatened to shoot Maico, saying “I am going to kill you queer son of a bitch”\(^1\) (AI 2004b). After further struggle ensued, the intruder dropped the gun and fled, leaving both weapons behind. A week before the incident, Maico, who had previously filed three complaints against the Quito Judicial police for arbitrary arrest and detention, physical and sexual abuse, and retaliatory threats for reporting abuse, presented his case at an international human rights meeting in Quito. As in most cases, Maico’s reports of the previous incidents went uninvestigated and unpunished.

Although this case is just one example of what human rights advocates say is widespread human rights abuses against sexual minorities (also referred to los hombres gay [gay men], las lesbianas [lesbians], las bisexuales [bisexuals], and los transgéneros [transgender] hereinafter GLBT people/persons or sexual minorities) in Latin America, this true account incorporates elements common to the widespread abuse and

\(^1\) Translation by Amnesty International (Amnesty International 2004). The intruder, who spoke Spanish, said “te voy a matar maricón hijo de puta” (Amnesty International 2004).
discrimination experienced by those who are, or are perceived to be, sexual minorities in Ecuador and other Latin American countries. Indeed, throughout Latin America, when a man or a woman is known to be _un homosexuale_ (a homosexual), s/he oftentimes faces a variety of human rights abuses ranging from physical abuse and torture to economic and social discrimination. The homophobia and gender discrimination that underlie such abuse has deep historical roots in Latin America, dating back to pre-colonial indigenous beliefs and to the religious beliefs that were imposed on the New World by European colonizers during the conquest and colonization periods. Such discrimination is reinforced by existing traditional cultural constructions of appropriate gender and sexuality that stigmatize the defiance thereof. Most laws explicitly outlawing same-sex sexual relations were repealed during the independence period in Latin America, however, the discrimination underlying such laws is still evident in many places throughout the region, including Ecuador.

While sexual minorities in some countries, including Argentina, Mexico, and Brazil, have recently made significant legal gains and protections, in many areas throughout Latin America discrimination and violence are common (Reding 2003). Indeed, throughout much of the region, widespread antipathy towards homosexuality has transcended history and continues to pervade government offices, the church, and society at large. In many Latin American countries, sexual minorities “face country-wide discrimination, persecution, violence, and murder” (Reding 2003: 1). However, today, as has historically been the case, such abuse largely goes undocumented and it is addressed with “acquiescence or indifference on the part of the authorities, and impunity for the
perpetrators, who are in many instances the police themselves” (AI 2004b; Reding 2003: 1; ICCHRLA 1996: 8).

As the focus in Latin America has shifted over the past two-and-a-half decades to include democracy and human rights (McCoy 1997: 58), regional and international human rights organizations have begun to document the widespread abuse against sexual minorities throughout Latin America. In other regions of the world, human rights law has proven useful in addressing similar kinds of discrimination and persecution against sexual minorities.

Since GLBT people in many parts of Latin America face varying forms of human rights abuse on account of their sexual orientation, any number of countries could serve as a focal point for analysis of this problem. However, this thesis focuses on Ecuador because: (1) it is the only Latin American country whose constitution includes an explicit prohibition of discrimination based on sexual orientation, and (2) despite this protection, political and human rights reports indicate the existence of widespread violence and discrimination against GLBT people (AI 2004b; Reding 2003: 1, 2; AI 2002b; AI 2001a). Additionally, issues pertaining to human rights and sexual orientation in Ecuador have received little academic attention.

**Significance of the Study**

Human rights law purports to protect individuals from human rights abuse at the hands of their government and other actors. A greater understanding of existing human rights abuse is instrumental in the promotion of peace and justice within a given society, country, or region. As such, the identification, research, and discussion of human rights abuse of individuals and groups within various cultures is imperative (Magnarella 1994: 7). In conducting such research, however, the culture at issue must not be forgotten and
must also be studied and considered. Only then, is it possible to determine, the viability of applying and enforcing human rights laws against those responsible for human rights violations.

Despite the existence of widespread violence and discrimination that sexual minorities in Ecuador face, there is little identifiable social science or legal scholarship on human rights and sexual orientation in Ecuador. Rather, existing information on Ecuador is limited to human rights reports and news articles documenting changes made to Ecuador’s Constitution in 1998 and the continuing violence, repression, and discrimination against sexual minorities. A synthesis of this information is helpful in beginning to understand the political and social reality of sexual minorities in Ecuador, to identify the violence and abuses that they face, and to determine how human rights law can be utilized to protect and defend them from such abuse.

**Purpose and Design of the Study**

I propose to analyze how human rights law can be used to address the widespread discrimination, persecution, and violence that sexual minorities in Ecuador face and to then assess the feasibility of using human rights law to address such abuse. To conduct my case study, I synthesized the available human rights reports and news articles on Ecuador and then analyzed that information in light of pertinent social science and legal scholarship. This information suggests that sexual minorities in Ecuador face widespread and systemic discrimination on account of sexual orientation, which is largely attributable to deeply rooted homophobia, underlying gender norms, and religious ideology.

In other regions of the world, such as Canada and the European Union, human rights law has proven useful in addressing various kinds of discrimination and persecution against sexual minorities. Even in other Latin American countries such as
Argentina, Brazil, and Mexico, progress has been made on behalf of GLBT people in the name of human rights. As a member of both the United Nations (UN) and the Organization of American States (OAS), Ecuador is subject to various human rights treaties and customary international human rights norms, and it can be held accountable for violations thereof. Moreover, by adopting explicit protections for sexual minorities in national law and including an antidiscrimination provision which explicitly prohibits discrimination based on sexual orientation in its constitution, Ecuador formally recognized the rights of sexual minorities within its borders. Accordingly, I will address the following research questions:

**Research Questions**

- How can human rights law be used to address sexual orientation-based discrimination and related human rights abuses against sexual minorities in Ecuador?

- Whether, in light of the deeply rooted cultural, religious, and moral beliefs in Ecuador regarding homosexuality, using human rights law to address these issues is a feasible option or whether it is an inappropriate imposition of Western, androcentric culture and solutions.

**Limitations**

This study is library-based and does not rely on any original data. It serves only to synthesize existing human rights data and anthropological and legal literature to determine how human rights law can be used to address discrimination against a subordinated minority group—GLBT people, and whether the use of human rights law to create change and protect sexual minorities is a feasible option. Due to language limitations of the author, the research upon which this study is based is solely that which is available in, or was translated into, English. As such, it is limited in its scope.
Definition of Terms

For purposes of this thesis, it is necessary to reduce complicated terms and concepts to finite definitions. Without doing so, it would be impossible to engage in meaningful analysis of the questions at issue. It is important to note, however, that the terms defined below are subject to various interpretations in the English language, and definitions vary according to culture and language. At the risk of oversimplifying complex terms, the following definitions are used for purposes of this paper.

- **Sex**: refers to “the biological designation of an individual as a male or female” (Wilets 1997: n.1).
- **Gender**: refers “to the socially constructed roles of ‘female,’ ‘male,’ or combination thereof” (Wilets 1997: n.1).
- **Sexuality**: “in broad terms describes a spectrum of behavior that extends from the procreative to the erotic, and encompasses ideals, desires, practices, preferences and identities” (Chant and Craske 2003: 128).
- **Sexual orientation**: “refers to a person’s sexual and emotional attraction to people of the same gender (homosexual orientation), another gender (heterosexual orientation) or both genders (bisexual orientation)” (AI 2001d: 4).
- **Homosexualidad**: is the Spanish word that describes the sexual orientation of people who are physically and emotionally attracted to people of their same gender (Fundación Ecuatoriana Equidad 2005c).³

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² Anthropologist Deborah Elliston noted that the cross-cultural application of Western notions of homosexuality in anthropological research yields limited results, because ideals, practices, norms, and understandings may vary according to culture (Elliston 2002: 289). Theorists “have noted that lesbian and gay are not context-free categories but express subjective understandings of gender, sexuality, and social location closely linked to the historical emergence of North Atlantic capitalism and to the politics of cultural pluralism during the late modernist period” (Lewin and Leap 2002: 8). Using such terms risks the invocation of “cross-cultural parallels and equivalences that are fictional and often distort the details of situated gendered construction that the research is trying to [understand]” (Lewin and Leap 2002: 8). As Rosenbloom recognized, “there are undoubtedly women [and men] in every part of the world who have intimate and sexual relationships with [persons of their same sex],” however, reducing those varied relationships to the finite Western terms “lesbian” and “gay” is grossly inadequate (Rosenbloom 1996: xxiii). In attempt to utilize definitions that most accurately reflect the cultural being studied, Spanish terms and definitions were derived from Ecuadorian resources where appropriate.

³ “Es la orientación sexual de las personas que se sienten atraídas afectiva y sexualmente por las personas de su mismo género.” (Fundación Ecuatoriana Equidad 2005c) (translation provided by Kirsten Anderson).
• **El hombre gay:** refers to men that feel sexually attracted to other men and fall in love with men. For these men, having sexual feelings towards men feels normal and natural. Sometimes these men may feel attracted to women also, but in general they say that they have stronger and more significant feelings for men (Fundación Ecuatoriana Equidad 2005d; Fundación Ecuatoriana Equidad 2005b).4 As discussed further in Chapter 2, in Latin American culture, sexual orientation is not necessarily determined by sexual activity. Rather, it is determined by adherence to or deviation from culturally constructed male gender norms.

• **Lesbiana:** refers to women who love and feel sexually attracted to other women. They can feel emotionally and spiritually connected to other women and they prefer to partner with women (Fundación Ecuatoriana Equidad 2005c; Fundación Ecuatoriana Equidad 2005d).5

• **Bisexual:** refers to people who have the capacity to love people of their same sex or the opposite sex. They are capable of being physically, sexually, and emotionally attracted to women, men, and transgendered people (Fundación Ecuatoriana Equidad 2005a).6

• **Transgénero:** is someone who belongs genetically to one sex but feels, acts, and wishes to be a member of the opposite sex (Fundación Ecuatoriana Equidad 2005e).7

• **Homophobia:** “the irrational fear of homosexuality and persons of homosexual orientation” (ICCHRLA 1996: 8).

• **International human rights law:** “refers to the body of international law aimed at protecting the human dignity of the individual. . . . it principally seeks to guarantee the rights of persons vis-á-vis their own government, but also protects them against

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4 “A los hombres que se sienten atraídos por otros hombres” (Fundación Ecuatoriana Equidad 2005d). “Los hombres que se llaman a sí mismos gay se sienten atraídos sexualmente por otros hombres y se enamoran de ellos. Sus sentimientos sexuales hacia los hombres son normales y naturales para ellos. Si bien algunos hombres gay pueden sentirse atraídos también por las mujeres, por lo general dicen que sus sentimientos por los hombres son más fuertes y más importantes para ellos” (Fundación Ecuatoriana Equidad 2005b) (translation provided by Kirsten Anderson).

5 Lesbiana refiere a las “mujeres que aman a otras mujeres,” “mujeres que se sienten atraídas sexualmente por otras mujeres,” “mujeres que podemos sentirnos vinculadas más estrechamente a las mujeres emocional y espiritualmente,” y “mujeres que preferimos a otras mujeres como pareja” (Fundación Ecuatoriana Equidad 2005c; Fundación Ecuatoriana Equidad 2005d) (translation provided by Kirsten Anderson).

6 Los bissexuales son “personas que tienen la capacidad de amar a personas de su propio sexo y de otro sexo. Esta capacidad puede incluir la atracción física, sexual y emocional o relaciones con hombres, mujeres y transgéneros” (Fundación Ecuatoriana Equidad 2005a) (translation provided by Kirsten Anderson).

7 El transgénero refiere a algo de lo “que es aquel que siendo genéticamente de un sexo, para este caso el masculine, siente, actúa y desea como perteneciente al otro” (Fundación Ecuatoriana Equidad 2005e) (translation provided by Kirsten Anderson).
other actors in the international community that might violate those rights” (Ratner and Abrams 2001: 10).

- **Universalism**: the notion in the human rights context that “claim[s] that international human rights like rights to equal protection, physical security, free speech, freedom of religion and free association are and must be the same everywhere” (Steiner and Alston 2000: 366).

- **Cultural relativism**: the notion in the human rights context which “claim[s] that (most, some) rights and rules about morality are encoded in and thus depend on cultural context, the term ‘culture’ often being used in a broad and diffuse way that reaches beyond indigenous traditions and customary practices to include political and religious ideologies and institutional structures” (Steiner and Alston 2000: 366-67).

**Structure of Thesis**

In chapter 2, this thesis provides background information that is necessary to fully understanding the issues discussed herein. Specifically, it provides a review of the pertinent social science literature on the norms and cultural constructions of gender and sexuality that exist in Latin America. An understanding of these cultural norms is imperative in identifying and fully understanding the discrimination and human rights violations that sexual minorities in Ecuador face as deviants from normative sexuality. I will also review the literature explaining the origins of the deeply rooted religious and cultural beliefs underlying homophobia and sexual orientation-based discrimination in Latin America. In so doing, I will examine the role of the Catholic Church in imposing its doctrine before, during, and after the conquest and colonization of what is now known as Latin America and its continuing influence on Latin American culture today.

Although, progressive steps on behalf of sexual minorities have been made over time, antipathy towards homosexuality is still evident throughout the region and discrimination exists in both the public and the private spheres. Oftentimes, such deep rooted cultural,
social, and religious beliefs result in, or contribute to, violations of the human rights of those who are, or are perceived to be, sexual minorities.

Then, chapter 2 presents an overview of the GLBT movement in Latin America generally. It shows that, despite the repression that sexual minorities throughout Latin American face, they have cultivated a movement dedicated to recognition and rights. Ecuador is a good example of how such a movement can join together to effect change, even in a country ripe with antipathy towards homosexuality.

Finally, it presents an overview of human rights. It begins by examining how, and to what extent, human rights law has been used to address issues related to sexual orientation. To facilitate a better understanding of the human rights system, structure, and laws, it then provides an overview of both the United Nations (UN) and the Inter-American human rights regimes. Because Ecuador is a member of both the UN and the Organization of American States (OAS), it can be held accountable for human rights violations under either system. While the human rights instruments and organs under both systems are similar, a brief overview of each system and its primary structure and instruments is essential for a clear understanding of the analysis. In conclusion, it addresses the role that human rights play in anthropology, explaining the underlying arguments in the ongoing debate between relativists and universalists as it pertains to human rights.

In chapter 3, I first present an overview of the problems that sexual minorities in Latin America commonly face; then, I provide a case study of Ecuador, highlighting documented instances of discrimination, persecution, and violence that GLBT people in Ecuador face on account of their sexual orientation. To do so, I synthesized existing data
such as newspaper articles and human rights reports, documenting actual instances of violence and discrimination against sexual minorities.

Chapter 4 analyzes how human rights law can be used to address violence, persecution, and discrimination against sexual minorities in Ecuador. Although sexual orientation is not explicitly mentioned in any human rights instrument under the UN or Inter-American human rights systems, human rights law has proven to be a viable option to protect sexual minorities in the international realm through developing case law and interpretations within the UN system. While the use of human rights law to address violations based on sexual orientation is a relatively novel approach in the Inter-American system, I will argue that human rights instruments can be used to address the oppression that sexual minorities face in Ecuador. Ecuadorian law and a subregional human rights agreement also provide protections for GLBT persons.

After establishing that human rights law can be used to address discrimination against sexual minorities in Ecuador, I will discuss the appropriateness and feasibility of using human rights law to address these issues in a country with deeply rooted religious and cultural beliefs contrary to homosexualidad (homosexuality). To do so, I will engage the ongoing debate between universalists and cultural relativists and consider arguments on both sides of the debate as they pertain to the human rights violations at issue in Ecuador. Using a human rights paradigm created by Hernández-Truyol, I will balance cultural considerations against the rights of sexual minorities, and consider the impact that the use of human rights law to protect GLBT individuals would have on the existing majority cultural and societal norms. I will also consider the effect of the Ecuadorian Government’s adoption of explicit protections for sexual minorities in its constitution, an
executive decree, and a subregional agreement. After doing so, I will determine whether (and to what extent) the application of human rights law is appropriate or if it essentially amounts to the imposition of androcentric, Western ideas and strategies on a developing nation.

Finally, chapter 5 summarizes the main findings of this study. I find that, despite cultural and religious beliefs concerning *homosexualidad* (homosexuality), the discrimination and persecution of sexual minorities violates fundamental human rights and therefore should be addressed through the use of human rights law. While human rights law can be an effective tool to address such discrimination, it is important to consider the underlying cultural context to find the most useful approaches and strategies to ensure the protection of sexual minorities. Additionally, I will suggest that future research should be done to better understand the plight of sexual minorities in Ecuador and I will raise specific questions that should be addressed in future social science research.
CHAPTER 2
BACKGROUND

Literature Review

There is no article or body of literature that addresses the precise questions raised here. Rather, there are several articles and books, in both law and the social sciences, which underlie and inform this thesis. To date, the bulk of the social science academic work done on homosexuality “has focused more on men than on women,” especially in anthropology (Babb 1998: 29). Work focusing specifically on human rights and sexual orientation has been done in the context of law, and much of it has focused either generally on the topic or specifically on legal progress or the lack thereof. In an attempt to be comprehensive, the most pertinent aspects of those works are reviewed below.

Social and Cultural Context

Cultural and religious origins of homophobia and sexual orientation-based discrimination

In Latin America, there is a long history of homophobia and sexual orientation-based discrimination and attacks directed towards GLBT persons. However, “[a]nxiety about or social restriction on same-sex desire and eroticism are, of course, nothing new or particularly limited to Latin America” (Green and Babb 2002: 5). Although, in Latin America, the social and legal restrictions that were placed on same-sex desire were largely a product of the Spanish conquest and colonization of the New World, such ideals

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8 It is worth noting that, in some ways, the history of the treatment of sexual minorities in Latin America is the same as the United States, and in some cases developments in Latin America have been more progressive than elsewhere.
originated long before that time. Prior to the arrival of European colonists, some indigenous societies, including the Aztecs and the Incas, punished same-sex sexual activity (Mejía 2000: 43; Murray 1995: 280, 281). In the case of the European colonists, as Green and Babb explained in their brief historical overview of homophobia in Latin America, such restrictions date back to proscriptions under Jewish law that were reaffirmed in the New Testament by Saint Paul, “adding the notion of sin to sexual activities between people of the same sex” (Green and Babb 2002: 5). Although there is conflicting evidence concerning the Catholic Church’s stance on same-sex activities prior to the twelfth century, it is clear that after that time, especially during the Holy Inquisition, the Church took a hard stance against same-sex sexual activity. At that time, the Church “included sodomy among the transgressions that it punished by death through public burnings” (Green and Babb 2002: 5; Boswell 1980: 281).

“As part of the conquest of the Americas, the Catholic Church imposed its ban against sodomy on indigenous cultures while monitoring the sexual behavior of Spanish and Portuguese colonizers” (Green and Babb 2002: 5). Although there is no official tally of how many people died by flames during the conquest and early colonial period, two things are certain. First, several Spanish and Portuguese conquistadores reported

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9 As Max Mejía explained the Aztecs of “pre-Hispanic Mexico, the dominant culture at the time the Spanish arrived” had harsh laws against same-sex sexual activity (Mejia 2000: 43). They “punish[ed] the practice severely with public execution for those who were caught” (2000: 43). Similarly, Stephen O. Murray relayed that, in the Andean region, the Incas also severely punished sexual activity between individuals of the same sex (Murray 1995: 280, 281). It is noteworthy, however, that same-sex sexual relations and activity was not punished in all indigenous cultures in which it existed, and in some it was even tolerated (Murray 1995: 282-288; Mejia 2000: 44-46).

10 The word “sodomy” has held different meanings at different times throughout history (Boswell 1980). “At some points in history it has referred almost exclusively to male homosexuality and at others almost exclusively to heterosexual excess” (Boswell 1980: 93 n.2). Generally, the English word “sodomy” has its origins in interpretations of the Christian Biblical story of Sodom and Gomorrah (Boswell 1980). During the time of the Holy Inquisition, “sodomy” or “sodomite” referred to male same-sex activity (Boswell 1980: 281—285).
encountering same-sex sexual practices amongst indigenous peoples throughout the region, in places including Mexico, Panama, Brazil, and the Andean nations. Second, the conquistadors reacted to those engaged in such activities with punishment, in accordance with Catholic law and doctrine (ICCHRLA 1996: 3).

“In the years immediately following Latin American independence from Spain and Portugal, most new states rewrote their criminal codes, eliminating sodomy from the list of legal prohibitions” (Green and Babb 2002: 5). Although consensual same-sex sexual activity was no longer considered a crime in most Latin American countries, deeply engrained antipathy towards homosexuality remained and was reflected in public decency codes and laws targeting those people and activities that fell outside the normative ideals of appropriate sexuality. While “the influence of Roman Catholicism was by no means uniform across the New World, there is little doubt that religious conquest played a significant role in determining what sexual behavior was, or was not, permissible” (Chant and Craske 2003: 134).

In more recent times, throughout Latin American, antipathy towards homosexuality has been evident in various ways, including the “killing of homosexuals under military regimes in Argentina, Chile and Guatemala, to less draconian, but still powerful, attempts” to eliminate homosexuality during the Cuban revolution (Chant and Craske 2003: 154). In the early twentieth century, “eugenicists, physicians, psychiatrists, and jurists in Argentina, Brazil, and other Latin American countries engaged in campaigns to ‘medicalize’ what increasingly became known as homosexuality” (Green and Babb 2002: 6). During this time, homosexuality was deemed a personal and social disease and efforts
aimed to “cure” those suffering from this affliction.\textsuperscript{11}

Despite the emergence of lesbian and gay rights movements throughout Latin America, homophobia and social ostracism persists today and the Catholic Church continues to view homosexuality as “unnatural and intrinsically bad” (Chant and Craske 2003: 133, 135). Although the notion of “homosexuality as abomination shows no sign of abating in most quarters of the Catholic Church in Latin America,” the Vatican maintains that it is against discrimination against GLBT people (Chant and Craske 2003: 136). Nonetheless, it has continued its active role in denouncing homosexuality and it has systematically interfered with advocates’ efforts to gain legal protections for GLBT persons. In Ecuador, like much of Latin America, Catholicism is the predominant religion (Embassy of Ecuador in Washington, D.C. 2004),\textsuperscript{12} and its traditional ideals are deeply embedded in Ecuadorian culture. Throughout Ecuador and much of Latin America, antipathy and traditional religious beliefs concerning homosexuality are evident.\textsuperscript{13}

**Cultural context—the machismo complex**

In Latin American culture, there are strong constructions of gender and sexuality. Consistent with the persistent gender hierarchy that is evident throughout Latin American

\textsuperscript{11} Significantly, as compared to criminalization, the medicalization of homosexuality was generally presented, and sometimes experienced, as progressive. In retrospect, however, it can be seen as being another way that sexual minorities were oppressed and treated inequitably.

\textsuperscript{12} However, many indigenous communities “still preserve their ancient beliefs of worship of the earth, the mountains, and the sun” (Embassy of Ecuador in Washington, D.C. 2004).

\textsuperscript{13} Rebutting the notion that religion “has been the cause of intolerance” of gay people, Boswell explained, “[r]eligious beliefs may cloak or incorporate intolerance, especially among adherents of revealed religions which specifically reject rationality as an ultimate criterion of judgment or tolerance as a major goal in human relations. But careful analysis can almost always differentiate between conscientious application of religious ethics and the use of religious precepts as justification for personal animosity or prejudice” (1980: 6—7).
history, males are relegated to the public sphere and females to the private sphere. Moreover, men play the role of the authoritarian boss and females are subordinate (Green and Babb 2002: 9). Although women have gained some rights and recognition in the last two decades, in many places, traditional norms continue to exist. Despite a growing spectrum of representations of sexuality in Latin America, two extremes stand out—one of “sexual repression, associated with religion, and particularly, Roman Catholicism, in which notions of guilt, sin, and restraint preponderate” and another of “exoticism and sensuality” (Chant and Craske 2003: 131). While the “respectable” woman is expected to maintain the former, it is acceptable for men to indulge in the latter.

Today, Latin American constructions of gender and sexuality reflect the markedly racialized and sexualized power relations assumed during the conquest and colonization of the New World. According to traditional Catholic ideals, the “only legitimate arena for sex was monogamous, heterosexual marriage” (Chant and Craske 2003: 134). Although the influence of Catholicism was not uniform throughout Latin America, its “proscriptions concerning sexuality have been remarkably persistent, and have played a major part in influencing hegemonic sexual discourses,” both past and present (Chant and Craske 2003: 134). In contemporary Latin America, the Catholic Church’s legacy is evident in a variety of spheres, “including dualisms between male and female sexuality” and gender norms (Chant and Craske 2003: 135). Specifically, today, while women are still expected to adhere to monogamy and to fulfill the reproductive role, men are encouraged, or expected, to engage in pre- and extra-marital affairs (Hernández-Truyol 1997: 917).
Underlying these ideals is the cultural notion of hyper-masculinity that is commonly referred to as the *machismo* complex. As explained by Joseph Carrier in the context of mestizos in Mexico, under the *machismo* ideal, “men are expected to be dominant and independent and females to be submissive and dependent” (1995: 3). The *machismo* complex “molds men as cold, intellectual, rational, profound, strong, authoritarian, independent, and brave” (Hernández-Truyol 1997: 916; Espín 1997: 89). In addition to being hyper-masculine, *Latinos* are expected to have uncontrollable sexual urges and to engage in sex for pleasure, both before marriage and after (Chant and Craske 2003: 141; Espín 1997: 89-90; Hernández-Truyol 1997: 917). Deeply embedded in the notion of *machismo* are sexism, racism, and classism, under which the dominant male is controller and conqueror of all. However, research has shown that in some countries such as Mexico and Peru, depending on one’s social class, manhood is also tied to marriage, reproduction, and being a dependable and engaged father (Fuller 1996: 52, 53, 301, 311-12). In fact, “paternity is one of the main axes of masculine identity of Peruvian Middle class men” (Fuller 1996: 312).

*Latinas*, on the other hand, are socialized to be submissive and feminine, to be mothers and wives. They are expected to be subordinate to their brothers, husbands, and fathers. *Marianismo*, the ideal role of women, as reinforced by family, church, and society is modeled after the idealization of the Virgin Mary. Under this cultural construction, women are taught to be subordinate, self-sacrificing, and chaste. They are the keepers and protectors of *Latino* culture and family and are treated as second class to men and to family (Hernández-Truyol 1997: 915-16). This idealization of the ideal woman as “mother – expressed in references to madrecita santa (holy [little] mother), *el*
sagrado deber de ser madre (the sacred duty to be a mother), and la mujer sufrida y sacrificada (the suffering and self-sacrificing mother) – makes it difficult for women not to see motherhood as their destiny” (Chant and Craske 2003: 135). Arguably, those who do not maintain the normative sexuality are shunned and relegated to the category of “whores” (Chant and Craske 2003: 142).

As Lancaster explained, however, the machismo complex “is not exclusively or even primarily a means of structuring power relations between men and women. It is a means of structuring power between and among men” (Lancaster 1992: 236). “The conquest of women,” he explained, “is a feat performed with two audiences in mind: first, other men, to whom one must constantly prove one’s masculinity and virility; and second, oneself, to whom one must also show all the signs of masculinity” (Lancaster 1992: 236-37). The machismo complex demands constant proof, assertion, and reinforcement of one’s masculinity. In fact, as Murray explained, “[t]opping other men (usually verbally or symbolically, but occasionally physically) is central to machismo, perhaps as important as maintaining the subordination of women” (1995: 55).

The machismo ideal has significant implications on the construction of homosexuality throughout Latin America. As Murray explained, throughout Latin America, homosexuality oftentimes is defined by gender, not sexual activity (1995: 49). In other words, under the machismo complex, distinctions for men (heterosexual/homosexual) are not necessarily made according to the biological sex of one’s sexual partner; instead, there exists an activo/pasivo dichotomy which distinguishes the position that one assumes during sexual relations (Fuller 1992: 57). “[M]asculine insertors (activos) ... are not considered homosexuales [and] feminine insertees (pasivos)
Another Peruvian anthropologist explained that “[a]ctivos consider insertor behavior part of a male’s prerogative. Adherence to this belief permits activos to gratify sexual needs without compromising a masculine, even heterosexual identity” (Arboleda G. 1995: 105; Mott 1995: 224).

While Fuller noted that recent research indicates that young Peruvian women are beginning to question the norms dictating or ignoring their sexuality, there is no indication of similar diversity in sexual types for men—according to men, males are either considered men or “faggots” (Fuller 1996: 52, 53). As such, although there is a degree of acceptance of male to male sexual activity especially during adolescence, in part due to the unacceptability of female premarital sex, men who engage in same-sex sexual activities must clearly be in the active sexual role and must reinforce their preference for women if they are to be considered “men” (Murray 1995: 55). Gender conformity (or the deviation therefrom) is key, because the cultural assumption is that gender roles are consistent with sexuality (Murray 1995: 63). As Fuller explained in the context of Peru, “[t]he domain of the abjected acts as the limits of the masculine; the point at which someone loses or endangers his masculine condition. This is related to the loss of the symbols of social recognition and ultimately with feminization” (Fuller 1996: 302). The most extreme example of feminization, she posits, is “occupying a passive position in [a] homosexual relationship” (Fuller 1996: 302). Lancaster similarly concluded that passive homosexuals are “feminine men, or more accurately, feminized men, not fully male men” and, therefore they are stigmatized (Lancaster 1992: 242; Carrier 1995: 17).

In addition to the stigmatization of effeminate or passive gay men, the cultural
emphasis on hyper-masculinity and the requirements to constantly prove and reinforce one’s manhood have consequences—homophobia, discrimination, rejection, and related violence. As Murray explained, it is not uncommon for the passive man in same-sex sexual relations with a “heterosexual” man to “get beaten up after sexually servicing ‘real men’ or just for the hell of it if there’s nothing better to do and one comes into the view of ‘real men,’ or (frequently, in the case of policemen), because effeminacy and/or homosexuality are affronts to public morality” (1995: 57). Carrier also described how insecurity or cultural pressures to adhere to the *machismo* ideal can lead to murder and violence (Carrier 1995: 83-84). Similarly, according to Brazilian anthropologist Luiz Mott, “discrimination and violence against lesbians and gays is a daily tragedy for millions of homosexuals in [Brazil]” (Mott 1995: 224). Additionally, homosexuals are commonly rejected by their families, their jobs, or even their school. Carrier explained that, in Mexico, people generally disapprove of homosexuality, and most of the gay men that he encountered did not want their families or heterosexual friends to know for fear of stigmatization, and in some cases rejection or violence (Carrier 1995: 13; 65).

While a lot has been written on male homosexuality, little has been written on lesbianism in Latin America. Ostensibly, there are several reasons for the lack of information. First, because the *machismo* culture is by definition male-orientated, some scholars have concluded that “lesbian relationships are generally perceived as less threatening to society” (Reding 2003: 16). Alternatively, some scholars believe that lesbian relationships tend to be less visible, and are therefore understudied. As Lancaster explained, “[i]n Nicaragua, as in many peasant societies throughout the world, there is little popular interest in categorizing or regulating female same-sex relations, and little
exists in the popular lexicon to account for it” (1992: 271). In fact, Lancaster stated that in the course of his field research, there were only scattered references to lesbians in newspaper articles and “the subject of lesbianism never came up [in conversations with his research subjects] unless [he] raised it” (1992: 271). Third, female sexuality is traditionally not recognized under the machismo complex, and lesbian sexual activity falls outside of the normative notions of sexual intercourse. Under marianismo ideals, Latinas are expected to be the dispensers (not the receivers) of care and pleasure and for women, sex continues to be linked only to reproduction and marriage (Chant and Craske 2003: 135; Hernández-Truyol 1997: 915; Espín 1997: 89). As explained by Claudia Hinojosa, “[o]ne of the cultural factors that has had the greatest impact in making lesbian women invisible is the notion that we women do not have our own sexuality” (Hinojosa 1998). She explained that people “don’t understand what happens sexually between two lesbian women” (Hinojosa 1998).

In reality, however, some research suggests that, when lesbians fail to conform to normative gender roles, they too face discrimination. Brazilian scholars reported that, although lesbians are “not as easily identified” because they “are generally more discreet and less overt in their behavior,” they face severe discrimination when they are overt, or open about their sexuality (Gonçalves de Freitas 1998: 203). In fact, once a woman’s lesbianism is known, she generally faces a dominant/submissive dichotomy and discrimination similar to that experienced by gay men (Gonçalves de Freitas 1998: 202; Mott 1995: 224-225). Two lesbian activists in Mexico explained that “[w]omen who do not fulfill the roles of mother and spouse—single mothers, prostitutes, lesbians—are seen as posing a threat to society. Women are educated from a young age to become wives
and mothers; they are under pressure to marry” (Pérez and Jiménez 1996: 114).

Consistent with these notions, it is common for men to think that the cure for lesbianism is sex with a “real man”; thus, lesbians are oftentimes threatened with and subjected to sexual violence.

**The Lesbian and Gay Rights Movement**

Despite these restrictions and historical responses to same-sex relations, sexual minorities have found ways to circumvent such restrictions, creating social spaces that have ranged from clandestine gatherings to enclaves in urban centers throughout Latin America. To be sure, because, as men, gay men enjoy greater access to sexual partners and public space, they were able to create clandestine enclaves in urban areas that sheltered them from social ostracism (Babb 2003: 311, 313). Lesbians, on the other hand, were generally limited to small social circles and covert organizing due to the social restraints placed on women (Babb 2003: 311, 313). From the creation of such spaces, lesbian and gay rights movements have emerged in many Latin American countries (Green and Babb 2002: 3). Over the last two decades, GLBT rights movements have made varied progress in countries throughout Latin America, and many have successfully “triggered national political debates about sexuality, discrimination, and the meaning of full democratic participation of all sectors in political process” (Green and Babb 2002: 3).

Collectively, GLBT organizations throughout Latin America, though small and politically modest, “have managed to shift the political discussions about the person[s] and the political” and, in some places, the “issue of discrimination against homosexuals in Latin America is” now subject to debate (Green and Babb 2002: 4). Significantly, social scientists have recently noted connections between local movements and the larger
international movement. For instance, Brown, attributed the emergence and expansion of the Argentine lesbian and gay rights movement, which is politically modest and at times disjointed yet alive and well, to both “the earlier international diffusion of lesbian and gay identity and models of activism” and the “political opportunities afforded by concrete financial support” (2002: 125-26). Similarly, Babb recently noted that, in Nicaragua, many men and women identify with the transnational lesbian and gay rights movement (2003:306). Moreover, Mott posited that, in Brazil, lesbian and gay rights defenders and activists welcome the support and assistance in defending their rights (1995: 225).

**Background on Human Rights Law**

**Sexual Orientation and Human Rights Law**

The lesbian and gay rights movement and the human rights movement merge at the employment of human rights law to address GLBT rights (Sanders 2003: 1). While none of the human rights documents make any reference to “sexual orientation” or “gender identity,” gays and lesbians have gained some recognition under the UN system through the invocation of “provisions on personal privacy and certain general provisions on equality” (Sanders 2003: 2). By the end of the twentieth century, “concern with discrimination on the basis of sexual orientation had gained sufficient recognition in national legal systems, in the various European institutions, in actions of the United Nations Human Rights Committee, in initiatives of the UN High Commissioner on Human Rights and in the work of important Non-Governmental Organizations that it had become realistic to say that the issue was now part of a broad international human rights agenda” (Sanders 2003: 2).

After conducting a comprehensive review of the pertinent legal developments throughout the international and regional human rights systems, Sanders concluded that,
while there have been both victories and defeats in attempts to invoke international law to address issues pertaining to sexual orientation, it is becoming an increasingly viable option. This, he suggests, is evident from several things, including favorable outcomes in the judicial processes, the participation by lesbians and gay men in important UN sponsored human rights meetings, and increasing, albeit limited, support by governments willing to speak out on behalf of sexual minorities (Sanders 2003: 35). Significantly, Sanders noted that international law developments generally occur only if reforms occur at the domestic level. He pointed to several State-level developments throughout the world, such as explicit constitutional prohibitions of discrimination based on sexual orientation in South Africa, Fiji, and Ecuador and the interpretation of general constitutional equality provisions to include sexual orientation in other countries (Sanders 2003: 36). In so doing, he highlighted the fact that State-level protection for sexual minorities, at least on paper, is no longer limited to Western/Northern States. While the most significant progress in lesbian and gay legal issues has occurred in the European Regional System, Sanders concluded that continued State-level developments will “permit sexual orientation issues to be openly addressed at the United Nations and in regional organizations in years to come” (2003: 36).

While in many regions of the world lesbians and gay men have gained recognition and made notable progress in human rights laws, many legal scholars have argued the need to recognize and address gender-based discrimination and biases (Dorf and Careaga 1995; Rosenbloom 1996). Legal scholars and human rights advocates have begun to call attention to the importance of the human rights issues of lesbians specifically, especially since lesbians face discrimination on account of both sex and sexual orientation.
Although much of the discrimination that lesbians and gay men face is similar, lesbians historically have been less visible than gay men. Because of this “invisibility,” some people “believe that lesbians face less severe persecution than gay men;” however, Rosenbloom argued that such “invisibility” in the law is actually an indication of deeper underlying discrimination—namely the denial of lesbians’ existence by society and governments—and merely makes discrimination more difficult to document (Rosenbloom 1996: xiii-xiv). Accordingly, the invisibility of lesbians from human rights documentation in Ecuador should not be mistaken for a lack of discrimination. Instead, it may indicate underlying discrimination that needs to be further studied and addressed.

**Overview of Human Rights Systems, Structures, and Laws**

International human rights law is a body of international law that was “born principally in the ashes of” the atrocities that occurred during World War II (Ratner and Abrams 2001: 5). The post-war Nuremberg trials were effectively a “springboard for the development of international human rights law, as much of the international community came to conclude that a government’s treatment of its citizens in peacetime was appropriate for general international regulation” (Ratner and Abrams 2001: 7). While the notion that “human beings are inherently entitled to certain fundamental rights and freedoms has roots early in human thinking” (Carter and Trimble 1999: 844), prior to that time, states had almost absolute sovereignty over that which occurred within their borders. Plainly, with only a few exceptions, human rights issues were within the jurisdiction of individual states and were not regulated by international law (Ratner and Abrams 2001: 4; Carter and Trimble 1999: 845). After World War II the status of human beings slowly evolved from being objects to subjects of international law, prompting
states to “reaffirm people’s faith in human rights and dignity of the human person” (Nowak 2003: 23).

The human rights regime that emerged from World War II is both rich and complex (Hernández-Truyol 2002: 353). International human rights law, at its core, is based around the concept that “every nation has an obligation to respect the human rights of its citizens, and that other nations [i.e., states not individuals] and the international community have a right, and responsibility, to protest if this obligation is not lived up to” (Carter and Trimble 1999: 844). To implement this concept, a body of international rules, procedures, and organizations was developed (Carter and Trimble 1999: 844). The principal organization tasked with promoting human rights and fundamental freedoms was the United Nations (UN), which was founded immediately after World War II (Carter and Trimble 1999: 845). Since the inception of the UN, several regional systems have taken up concern with human rights issues and have created regional human rights systems which make nations accountable on a regional and international level (Carter and Trimble 1999: 846). One such system, which is especially pertinent here, is the Inter-American system, which was created by the Organization of American States (OAS), a collective of 34 countries in North, Central, and South America.

In the UN, the founding document, the Charter of the United Nations (UN Charter), “established general obligations requiring UN member states to respect human rights and provided for the creation of a Human Rights Commission to protect and advance those rights” (Carter and Trimble 1999: 845). Although the UN Charter has only scattered references to human rights, it established the structure of the UN system and it “states the UN’s basic purpose of securing and maintaining peace” (Steiner and Alston 2000: 137).
It also put in place the Economic and Social Council (ECOSOC) to “set up commissions in economic and social fields and for the promotion of human rights” (U.N. Charter: Art. 68). In 1946, ECOSOC established the Commission on Human Rights (UNCHR) “which has evolved over decades to become the world’s single most important human rights organ” (Steiner and Alston 2000: 138). Thereafter, the UNCHR began drafting a bill of rights for the UN system. There are three instruments that, together, compose what is known as the International Bill of Rights: the Universal Declaration of Human Rights of 1948 (UNDR) and two principal covenants that entered into force in 1976, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Briceno 1998: 52).

The UNDR is a nonbinding instrument that covers both civil and political rights as well as economic and social rights, and it was designed to “exert a moral and political influence on states” (Steiner and Alston 2000: 138). The ICCPR and the ICESCR are equally binding instruments, however the ICCPR receives more resources and “civil and political rights have received the lion’s share of attention by the international human rights community” (Briceno 1998: 52). Additionally, the obligations of the ICCPR and the ICESCR are quite different. The ICCPR calls for relatively quick compliance, but the ICESCR allows for a gradual approach depending on a country’s resources. Consistent with the vision of the UN Charter, the UN has subsequently adopted additional human rights treaties that expand upon the rights articulated in the founding documents.\(^\text{14}\)

\(^\text{14}\)One such treaty is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which is a major treaty that was formed several decades after the ICCPR. CEDAW, which has 165 state parties, prohibits discrimination based on sex, and entitles women to the equal enjoyment of civil and political rights as well as social, cultural, and economic rights (Briceno 1998: 52; CEDAW).
While the UN system is a universal system in that it “is based on treaties that aim at worldwide membership,” the Inter-American System is a regional system that is “based on treaties whose membership is restricted to states” in the OAS (Steiner and Alston 2000: 136). Although the origins of the Inter-American System date back to 1889, the basic constitution of the OAS, the Charter of the Organization of American States (the OAS Charter), was not approved until 1948 at the ninth Inter-American Conference held in Bogotá, Colombia (1989: 210, 212; Steiner and Alston 2000: 868). “The OAS was established [to]…strengthen[en] regional peace and security, promot[e] and consolidate[e] representative democracy, ensur[e] the pacific settlement of disputes, achiev[e] arms reduction, and promot[e] economic, social, and cultural development” (Melish 2002: 8).

The OAS Charter, which is a legally binding instrument, sets forth the basic structure of the OAS and it embodies general human rights obligations (Melish 2002: 8). The American Declaration of the Rights and Duties of Man (American Declaration) is “considered the founding instrument of the Inter-American human rights system” (Melish 2002: 9). Like the UNDR, the American Declaration is nonbinding, and its purpose is the “international protection of the rights of man” (American Declaration: preamble). Aiming to serve as “the principal guide of an evolving American law,” it sets forth a long list of rights that member states commit themselves to respect (American Declaration: preamble). These include both civil and political rights as well as economic, social and cultural rights (American Declaration: preamble).

15 The OAS Charter also includes a strict nonintervention clause which provides that “No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever in the internal or external affairs of any other States” (OAS Charter: Art. 18).
The other framework document, the American Convention on Human Rights (American Convention), sets forth “protected rights” and it created the Inter-American Court of Human Rights to hear cases referred to it by a lower judiciary body, the Inter-American Commission (Melish 2002: 11). The American Convention is legally binding on those states that ratify it. It is considered the “most important legal instrument for vindicating rights through the Inter-American system” (Melish 2002: 10). At its core, it requires state parties to “respect the rights and freedoms recognized therein and to ensure that all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination” (American Convention: Art. 1(1)). It also sets forth protected rights, which are separated into civil and political rights and economic, social, and cultural rights (American Convention: Chapters II and III).

Throughout the history of the Inter-American System, focus has been almost exclusively on civil and political rights (Dulizky 2003: 18). Several additional protocols and treaties have been enacted to clarify and expand existing rights and protections, including the Additional Protocol to the American Convention on Human Rights in Matters of Economic, Social and Cultural Rights (Protocol of San Salvador) which “aims to fill the [economic, social, and cultural rights] gap in regional treaty law” (Melish 2002: 12).

In addition to multilateral treaties and declarations, human rights law, in both the international and the regional systems, is derived from sources including customary international law; international resolutions and recommendations; decisions and actions of UN organs and other international bodies; and national laws, regulations, court decisions and policy pronouncements (Carter and Trimble 1999: 846-849; See the Statute

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16 Twenty four countries, including Ecuador, have ratified the American Convention.
of the International Court of Justice: Art. 38). While treaties “create legally binding obligations for the nations that are parties” thereto, international declarations, resolutions, and recommendations have only persuasive (non-binding) authority (Carter and Trimble 1999: 846-47). According to underlying principles of international law, countries are bound only by those treaties and agreements to which they consent (Vienna Convention on the Law of Treaties: preamble and Arts. 11-15).

Customary international law is also an important body of international human rights law. It refers to “conduct [of states], or the conscious abstention from certain conduct [by states]” which, over time, may dictate what actions or inactions are legally permitted, prohibited, or obligatory (Steiner and Alston 2000: 69). Customary law results both from the objective actions of states and the subjective evidence of their motivation (Steiner and Alston 2000: 69, 70). Some scholars argue that the elements embodied in treaties and declarations that have been ratified or adopted by a large number of UN member States may be considered part of customary international law (Magnarella 1994: 4).

As the real subjects and beneficiaries of human rights law, individuals have some ability to assert the rights granted to them under certain human rights instruments. Under some human rights treaties, individuals or NGOs (in addition to member states) can bring claims against a state directly before an international or regional judicial body (Carter and Trimble 1999: 849). Actual enforcement of human rights laws depends largely upon the consent and compliance of the nations involved (Carter and Trimble 1999: 849). Oversight mechanisms to assist in enforcement have grown both within international organizations and in non-governmental organizations (NGOs) (Ratner and Abrams 2001:
7). For instance, in the UN, there are seven human rights treaty bodies (committees that are created by the treaty that they monitor) that are tasked with the duty to “monitor implementation of the core international human rights treaties”—the ICCPR, the ICESCR, the Torture Convention, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (UN 2005). The Inter-American Commission on Human Rights was created by treaty to monitor states’ compliance with human rights treaties in the OAS. A number of international non-governmental organizations (NGOs) like Human Rights Watch and Amnesty International investigate and prepare reports on human rights violations throughout the world and distribute them to the UN Committees and the Inter-American Commission on Human Rights (Magnarella 1994: 6).

Over the last two to three decades, the human rights regime has proven useful in addressing human rights abuses in Latin America. In the 1980s, in the wake of “[m]assive and systemic violations of human rights” throughout the “region as State policy, including disappearances, extra-judicial executions, torture, forced exile, and illegal and arbitrary arrests,” human rights efforts were focused on “preserving the right to life, physical freedom and integrity, the prohibition against torture, freedom of expression or the minimum and most basic rules of due process” (Dulitzky 2003: 18). As conditions have improved over the last twenty years, “some sectors of the human rights movement have timidly begun to direct their attention towards the guarantee of economic, social and cultural rights destined to achieve a more just, equitable, and
fraternal society” (Dulitzky 2003: 19). In March of 2004, Human Rights Watch reported that “some of the most positive human rights initiatives have now come from Latin America,” citing Mexico’s “efforts to safeguard human rights in the fight against terrorism” and Brazil’s creation and promotion of a “new resolution to tackle violence and discrimination against people on the basis of their sexual orientation” (Mungoven 2004).

In addition to being a subfield of international law, human rights also is a subfield of anthropology. According to Paul Magnarella, the role of anthropologists in human rights is to use their knowledge, experience, theoretical skills, and practical research abilities to further the causes of human rights and justice (1994: 7). Although admittedly anthropologists can do little in the way of human rights on an individual basis, by combining their efforts with lawyers, NGOs, humanists, and other social scientists, they have the ability to “accomplish a great deal” by contributing to “further development of human rights norms, international investigative procedures, fact-finding, the reporting and publicizing of human rights abuses, and the formal filing of complaints before judicial and quasi-judicial bodies” (Magnarella 1994: 7). Because anthropologists oftentimes are in the unique position to document and report human rights issues among the cultures they study, Magnarella concludes that they must not turn a blind eye to such abuse (1994: 7).

The Universalism and Cultural Relativism Debate

Anthropologists have historically struggled with the appropriateness of altering, influencing, or interfering with individual cultures. Central to anthropology is the notion of cultural relativism, under which the primary practice of anthropologists is to “describe, explain, and understand the alien culture, within the framework of one or another
theoretical perspective” (Steiner and Alston 2000: 368). From an anthropological stand point, the principle of cultural relativism “means that [anthropologists] approach each new culture with an open mind, on the presumption that it constitutes a potentially ethical and humane design for living” (Magnarella 1994: 3). This age-old debate was reinvigorated in the human rights context as some anthropologists have reconsidered their role in light of the human rights movement.

Contrary to the traditional relativistic approach, some anthropologists have argued that the traditional relativist presumption may be abandoned when thorough investigation reveals, as it sometimes does, that “segments of the society seriously abuse the human rights of others by torturing helpless people, murdering the innocent, denying due process to the accused, depriving the weak of their property, and the like” (Magnarella 1994: 3). In those cases, anthropologists must make the difficult ethical decision of whether getting involved risks altering the authentic culture and is therefore inappropriate or whether “there is a universal morality binding the fate of all people” (Magnarella 1994: 3). Adopting the view of the latter, Magnarella argues that “everyone, anthropologists included, shares an obligation to protect the weak and innocent from the unjustified and immoral treatment of the powerful” (1994: 3).

Since the inception of the human rights movement, similar arguments have emerged amongst legal scholars with regard to the application and implementation of human rights law. Those adhering to cultural relativist philosophies argue that “the world contains an impressive diversity in views about rights and wrong that is linked to the diverse underlying cultures,” (Steiner and Alston 2000: 367); and, in its strictest sense, argue that human rights is essentially a Western imperialist tool that “imposes the vision
of a few on everyone all the time” (Hernández-Truyol 2002: 357). This argument was reflected in the early reactions of postcolonial states in the South to “the Western impetus to universalize” human rights norms (2002: 356). Advocates of universalism argue that certain human rights are universal “and must be the same everywhere” (Steiner and Alston 2000: 367). The universalist philosophy is based on the notion that “all humans are entitled to human rights because all people possess human dignity” (Magnarella 2002: 16). According to Magnarella, “[i]deally, universalism combined with democracy means that people everywhere are entitled to equal dignity—each person is inviolate, each is entitled to enjoy certain rights and to be free from certain abuses” (Magnarella 2002: 18-19). This debate is ongoing in the context of human rights, as legal scholars and anthropologists consider the implementation and enforcement of various human rights laws and norms.

Recognizing the validity of the concerns underlying both arguments, Hernández-Truyol offered an alternative view that is consistent with human rights standards. She suggests that, while notions of universality should not be “used as a sword to eviscerate traditional cultural practices,” cultural practices and the power of tradition should not “be accepted as a shield to protect so-called traditional cultural practices that create, reinforce, and perpetuate the subordination, enslavement, or exclusion of individuals within their particular cultures” (2002: 357). To effect this balance of protecting the human rights of individuals while respecting diverse cultures, Hernández-Truyol proposed a human rights paradigm. At the heart of the human rights model is the principle of personhood, which embraces the ideal of the indivisibility and interdependence of the rights envisioned in the Universal Declaration, including civil and
political rights as well as social, economic, and cultural rights. She explained that these
basic principles ensure respect for the rights of individuals, and are integral in
“interpreting and translating within, between, and among cultures, by creating a context
that embraces the value of diverse peoples” and cultures (Hernández-Truyol 2002: 357).

This paradigm can be used to protect “individuals from denial of personhood
simply because they take a differently charted path” or fail to conform to the majority
views in their culture (Hernández-Truyol 2002: 366). Culture must be taken into
consideration, however, it is necessary to determine the viability of employing human
rights by considering both group and individual rights. This can be done under the
human rights paradigm by identifying and balancing the competing interests of the
human rights at issue against the “context of social, economic, political, and individual
circumstances” (2002: 366). The following questions can serve as a methodological
guideline: (1) what is the claim or right being asserted; (2) what circumstances gave rise
to the claim; (3) who is claiming the alleged breach—a cultural insider or outsider; (4)
who is violating the right at issue; (5) “what is the impact of enforcing the group norm as
compared to the impact of protecting the individual right”—“what is the level of
intrusion of the group norm on individual freedoms” and “what are the consequences of
erosion of the norm on the community” (Hernández-Truyol 2002: 366-67). To be
effective, this approach must remain flexible and objectively consider both sides of the
CHAPTER 3
STATEMENT OF THE PROBLEM

Overview of Human Rights Abuses of Sexual Minorities in Latin America

Today, sexual minorities throughout Latin America face widespread homophobia and discrimination.\(^{17}\) They are subjected to abuse, persecution, and discrimination ranging from economic and social exclusion to physical abuse, torture, and, in some cases, death. In fact, in some places throughout the region, “social cleansing” is an ideal that still exists and is acted upon (ICCHRLA 1996: 4; IGLHRC 2001: 7). For instance, in Brazil, activists estimate that between 1980 and 2000, paramilitary groups and others killed close to 2000 GLBT persons (ICCHRLA 1996: 4; IGLHRC 2001: 7). In some of those cases, they were aided and abetted by police. Furthermore, arbitrary arrests and detention, torture, and assassination of GLBT people is common (ICCHRLA 1996: 4). Such cases have been documented in many countries throughout Latin America, including Mexico, Colombia, and Argentina.

Although only one Latin American country—Nicaragua, explicitly prohibits consensual same-sex sexual activities between consenting adults,\(^{18}\) police in other countries often arrest and detain GLBT persons under vaguely worded laws that are

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\(^{17}\)As indicated herein, some Latin American countries have made significant strides with regard to rights and protections for sexual minorities. In recent years, for instance, rapid progress has been made in Brazil, Argentina, and Mexico in establishing rights of sexual minorities (Reding 2003: 19, 23, 55). While human rights abuses have continued, such legal and political strides are significant and should not be overlooked.

\(^{18}\)Nicaragua, Article 204 of Law No. 150 in the Law of Penal Code Reforms, explicitly prohibits consensual same-sex sexual activities between consenting adults. Although the law is rarely enforced, it criminalizes the most intimate aspects of same-sex relationships (IGLHRC 1996: 127).
arbitrarily enforced against sexual minorities. Once detained, GLBT persons are oftentimes subjected to various forms of abuse, including physical violence, rape, and extortion (Sarda 1998: 41; ICCHRLA 1996: 4; IGLHRC 1996: 3). In 2001, in a report to the UN Special Rapporteur on Torture, the International Gay and Lesbian Human Rights Commission reported that “torture is an extreme but widespread means for regulating sexuality, and enforcing gender norms” (IGLHRC 2001: 2). Amnesty International recently reported that, in Honduras, GLBT persons “have been subjected to grave human rights violations . . . for many years, including killings and discrimination in exercise of their civil, political, social and economic rights” (AI 2003c: 1).

In the private sphere, sexual minorities in Latin America face other forms of discrimination that prevent them from being equal participants in the workplace and at school, from obtaining adequate healthcare, and from benefits equal to heterosexual families. For example, in Argentina, Peru, Brazil, Mexico, and Nicaragua, sexual minorities have reportedly been fired for admitting their homosexuality even where they did so in an effort to obtain partner benefits (Chant and Craske 2003: 155; Sarda 1998: 41, 130). While some countries and provinces have recently enacted legislation outlawing discrimination based on sexual orientation, in most Latin American countries there are no laws prohibiting discrimination, and thus sexual minorities who are fired from their jobs because of their sexual orientation have no legal recourse (IGLHRC 1996: 130). Even in places where anti-discrimination legislation exists, however, proving discrimination solely on the basis of sexual orientation is difficult (as it is on other bases such as race, sex, and ethnicity). Furthermore, under the current definition of family, same-sex families are denied benefits and protections equal to those received by
heterosexual families. Significantly, in some provinces in countries such as Brazil and Argentina some protections and familial rights recently have been enacted.¹⁹

Although the discrimination and abuse discussed above is widespread and is no secret to authorities, in most countries throughout Latin America, little has been done to protect GLBT persons. Moreover, many sexual minorities do not report human rights violations for fear of further discrimination and retaliation. Even when abuse is reported, however, reports oftentimes go undocumented or uninvestigated. Widespread societal discrimination and impunity leave GLBT persons without protection, and, in many cases, with no where to turn. For example, in Mexico, when a twenty-five year old lesbian told her family that she was homosexual, they got extremely angry and her father beat her and then sent three men to rape her. Her reports to authorities were not taken seriously and she continues to live in fear (IGLHRC 1996: 115). In most countries, there are no explicit legal protections for sexual minorities, and where such measures do exist, they are rarely enforced. For instance, in Brazil, although progressive legal strides have been made, human rights advocates report that at least one GLBT person is killed every five days due to homophobia (Reding 2003: 25). In the absence of local and national protections, or adequate enforcement thereof, sexual minorities throughout Latin America, and elsewhere, are beginning to look to human rights law and regional and international judicial bodies for protection.

¹⁹For example, in Brazil, the government granted same-sex couples “the right to inherit each other’s pension and social security benefits,” (Rohter 2000), and in Buenos Aires, Argentina, same-sex couples can enter into civil unions (Reding 2003: 19).
Case Study: Violence and Discrimination Against Sexual Minorities in Ecuador

Ecuador is the only country in the Western Hemisphere, and one of only three in the entire world, whose constitution explicitly forbids discrimination based on sexual orientation (Reding 2003: 36). Indeed, on November 25, 1997, Ecuador repealed its anti-sodomy law, Article 516 of Ecuador’s Criminal Code (AI 1998), after its Constitutional Tribunal decided unanimously that the anti-sodomy law, which punished consensual same-sex sexual relations with imprisonment, was unconstitutional. The repeal came after Ecuadorian GLBT activists organized a national group, the Andean Triangle, which gained enough signatures to challenge the law (Gonzalez 1997b; Gonzalez 1997a; Wockner 1997). Their application for repeal of the law was accompanied by a petition that contained 6,000 signatures in support of overturning the law.

In June of the following year, then president Fabian Alarcón Creek issued an Executive Decree, the National Plan of Human Rights of Ecuador, Executive Decree No. 1527 (1998) (Plan Nacional de Derechos Humanos, Decreto Ejecutivo No. 1527), which explicitly prohibits discrimination, violence, and persecution on the basis of sexual orientation (Arts. 25 and 26; AI 2001b). Shortly thereafter, in August of 1998, Ecuador’s government reformed its Constitution, (AI 1998), at which time Article 23, Section 3, an anti-discrimination provision that explicitly includes sexual orientation, was

20The Constitutions of South Africa and Fiji also include explicit prohibitions of sexual orientation-based discrimination (Sanders 2003: 35-36). Significantly, “[a]n amendment to the constitution of Switzerland bans discrimination on the basis of ‘form of life,’ a phrase intended to include sexual life” (2003: 36).

21 Artículo 25. Garantizar el derecho de las personas a no ser discriminadas en razón de su opinión sexual, creando a través de leyes y reglamentos no discriminatorios, que faciliten las demandas sociales, económicas, culturales de esas personas. Artículo 26. Velar porque los mecanismos y agentes de seguridad del Estado no ejecuten acciones de persecución y hostigamiento a las personas por sus opciones sexuales (translation provided by Kirsten Anderson).
included. Under that provision entitled Equality Before the Law, “All persons shall be considered equal and shall enjoy the same rights, freedoms, and opportunities, without discrimination due to birth, age, ethnicity, color, social origin, language, religion, political affiliation, economic position, sexual orientation, health status, disability, or difference of any other kind” (Art. 23, § 3, Constitución Política de la República del Ecuador).22

Consistent with these inclusions of protection for GLBT persons, in July of 2002, Ecuador joined with four other Andean nations—Venezuela, Perú, Colombia, and Bolivia—to adopt a multilateral agreement called the Andean Charter for the Promotion and Protection of Human Rights (Carta Andina para la Promoción y Protección de los Derechos Humanos) which included explicit protections for sexual minorities. Specifically, it reaffirms the governments’ commitment to combat all forms of discrimination and intolerance, including that based on sexual orientation (Section II, Art. 10). The Andean Charter also contains a subsection entitled Rights of People With Different Sexual Orientation (Derechos De Las Personas Con Diversa Orientacion Sexual), in which the governments recognize that all people, regardless of their sexual orientation or sexual option, are entitled to equal human rights (Art. 52), and they commit to combat all forms of discrimination and violence against sexual minorities and to provide remedial processes for such offenses (Art. 53).

Despite the impressive legal progress explained above, little has changed

22 La iguadad ante la ley. Todas personas serán consideradas iguales y gozarán de los mismos derechos, libertades y oportunidades, sin discriminación en razón de nacimiento, edad, sexo, etnia, color, origen social, idioma, religión, filiación política, posición económica, orientación sexual; estado de salud, discapacidad, o diferencia de cualquier otra índole (translation provided by Andrew Reding) (Reding 2003: 36-37).
(Fundación Ecuatoriana Equidad 2003: 12; Galecio 2003). As a recent report indicated, “there is a serious gap between law and enforcement” when it comes to sexual minorities (Reding 2003: 37; Fundación Ecuatoriana Equidad 2003: 12). Since promulgation of the antidiscrimination provision, human rights organizations have documented continued human rights abuse including torture, police intimidation, attempted extrajudicial executions, and arbitrary arrests (AI 2002a). Additionally, in the private sphere, GLBT people face discrimination in school, at work, and at home (Galecio 2003). According to one Ecuadorian gay rights advocate who is now working on human rights and social justice issues in his native country through a U.S. based non-profit organization, the constitution is not being followed or respected and human rights violations continue (Galecio 2003). To be sure, he stated that “article 23 of the constitution has not been applied as it should be because the government has not established concrete sanctions for people who discriminate against [sexual minorities]” (Galecio 2003). In his experience, such abuse, coupled with continued antipathy towards homosexuality, has encouraged people to repress their sexuality or stay in the closet. While the lion’s share of the reports concern incidents in Quito and Guayaquil, a GLBT rights group, Quitogay, warns tourists that “[o]utside Quito and Guayaquil the two largest cities, values are still intensely conservative and there remains a general bias, even hostility, against gay people” (Quitogay 2004). Thus, it is reasonable to infer that the human rights abuses and sexual orientation-based discrimination is even greater in the cities, villages, and rural areas outside Quito and Guayaquil.

Generally, in Ecuador, “[h]omosexuality continues to be considered a sin or an illness, a crime, a social or ideological deviation or a betrayal of one’s culture” (AI
In fact, some doctors in Ecuador continue to argue that “homosexuality is a public health risk” (Gonzalez 1997b). “Whereas most human rights violations are usually denied by governments, the repression that GLBT people face [in Ecuador] is often justified in the name of culture, religion or public health” (AI 2001a: 3). In 1997, The United States Department of State (USDOS) reported that “[a]s in most Latin American countries, homosexuality is not generally practiced openly in Ecuador because of cultural antipathy and social disapprobrium” (USDOS 1997: 4). It also acknowledged that, although it found no evidence of an official police policy of mistreatment of sexual minorities, homophobic attitudes may influence police behavior and their treatment of GLBT people.

Despite the USDOS’s conclusion that no official police policy exists with regard to sexual minorities, in many cases of documented human rights abuse the Ecuadorian police were responsible for the abuse. Reportedly, sexual minorities face arbitrary arrest under a Penal Code provision that “sanctions ‘those who publicly offend against modesty by means of indecent acts or speech”’ (Reding 2003: 37). In Guayaquil alone, human rights organizations documented at least sixty arbitrary arrests of sexual minorities in early 2001 (AI 2001b). Since then, reports of such arrests have continued. While detained, several sexual minorities have been tortured, abused, and harassed by Ecuadorian police (AI 2003a). “These abuses appear to reflect institutionalized prejudice on the part of certain authorities and law enforcement officials” (AI 2002b: 3). Also, police commonly extort money from sexual minorities by threatening to publicly reveal their sexual orientation (Galecio 2003; AI 2002b: 2). The following are a few, of several, specific examples of actual abuse reported to human rights organizations:
• At midnight on June 15, 2001, six members of the National Police approached
Henry Rodríguez Lozano, president of the Fundación Ecuatoriana de Minorías
Sexuales (FEMIS), at an intersection in Guayaquil. After forcing him into a van
with “license plates indicating that the vehicle belonged to the Guayas Province
Police Administration,” the officers informed Lozano that “he was being detained
because of his repeated filings of complaints against [the] police” for sexual
orientation-based abuse (Reding 2003: 38).

• In October of 2000, at around 3 a.m., National Police and Guayquil municipal
officers burst into a GLBT disco and detained the employee who was working in
the disco’s ticket office. Once detained, police insulted him, beat him, and took
him to their police truck. Thereafter, the police returned to the disco and arrested
another el hombre gay who inquired into why the police were there. The second
man also was insulted for being un hombre gay and was physically beaten. Both
men were taken a few blocks from the disco and forced to lie face down in the
vehicle while police kicked one of them until his face bled. At police headquarters,
the man was forced to stand with his legs spread while police repeatedly hit him
with a broomstick. During the beating, police reportedly made homophobic
comments and threatened him with death if he reported the abuse. The following
day, both men were released without charges (AI 2001a: 4).

• In November of 2000, there were two separate reports made, one by a transvestite
and one by four los hombres gay who were detained by Guayaquil police and taken
to the 5 Junio Bridge, where officers attempted to extrajudicially execute them.
While the transvestite did not jump, the four los hombres gay were forced off the
bridge. Fortunately, all four could swim and they survived the fall into the water
below (AI 2001a).

Compounding such abuse of sexual minorities by police officers, police impunity is
a major problem throughout Ecuador. Such impunity, although particularly evident in
complaints by sexual minorities, is a problem that is not unique to issues concerning
GLBT people (AI 2005; AI 2004c; AI 2003b). In Ecuador, there are two kinds of police
forces: (1) National Police, which are under the authority of the Ministry of Government,
and (2) metropolitan police, which are employed by local governments in some
municipalities. Under Ecuador’s Constitution, members of the National Police Force
who are accused of offenses committed during the exercise of their professional duties
are entitled to special jurisdiction under which they are tried in a police court rather than
in ordinary civilian courts (AI 2003b). Under the police court system, judges are chosen
from existing and retired police officers (AI 2003b). According to Amnesty International, the use of police courts to try members of the police force for alleged human rights violations facilitates and, in some cases, causes impunity (AI 2005; AI 2003b). Police officers who are tried in these courts for crimes such as torture and ill-treatment usually are not punished (AI 2004a). Despite recent promises by authorities that such cases would be heard in civil court, “[p]olice courts continued to claim jurisdiction over cases involving human rights violations” (AI 2005).

Additionally, sexual minorities in Ecuador face discrimination by private individuals. For instance, in September of 2001, in Guayaquil, a "el hombre gay" reported that he was “abducted by five hooded armed men whilst walking in the street” and was forced into a van where he was beaten, forced to undress, and raped with a piece of a cane (AI 2002b: 12). Thereafter, the men threatened to kill him if he reported the incident to authorities and they indicated that he would not be the first person they killed.

Even in the face of this kind of blatant human rights abuse, however, Ecuadorean police and government officials usually do not pursue or investigate reports of such abuse. For example, in a recent incident in Quito, a "la lesbiana" couple who lived together were repeatedly physically abused, threatened with sexual and physical violence, and harassed by two men who demanded that they leave the neighborhood (AI 2002b: 7-8). Although they informed the Quito police and national authorities, nothing was done to protect the women or to investigate the identity of the perpetrators. Even after the Human Rights Ecumenical Committee wrote to the Minister of Interior informing him of the incidents and asking for a proper investigation, nothing was done. According to Amnesty International, although some government officials have “called for an end to
discrimination against the [GLBT] community, in particular to practices that lead to grave human rights abuses, the authorities continued to ignore many of the complaints they received” (AI 2003a).

GLBT human rights advocates and organizations have also faced human rights abuses (AI 2002b: 4). Ecuador’s first gay pride march was held on August 27, 1997 in Quito, and marches have subsequently taken place in Cuenca and Guayaquil. However, such events have not occurred without incident. For instance, on the evening of June 28, 2000, Guayaquil police tear-gassed approximately 300 people as they attempted to peacefully march in the city’s first Lesbian and Gay pride March, effectively preventing them from marching (Simo 2000; AI 2001b). Under scrutiny for violating the anti-discrimination provision in the Constitution, the police chief subsequently publicly “denounced local transgender sex workers as dangerous AIDS carriers” and made several arrests thereof. Many of those arrested were coerced or forced into taking a HIV test as a condition of release; then, the police chief used positive HIV results of seven of the arrestees to justify his tear-gassing of the Pride March participants. Nothing was done to contest the police chief’s actions.

Similarly, the next year in June of 2001, GLBT organizations requested permission to hold a Pride March in Guayaquil and their requests were initially denied (AI 2002b: 4). Just two hours before the parade was to begin, police granted the request, giving the organization inadequate time to publicize the event. Later that year, another group made a similar request and the Mayor of Guayaquil denied it, stating that “it would obstruct traffic” (AI 2002b: 4). These police and governmental practices make organizers’ goals of awareness and visibility of the GLBT movement difficult at best.
Finally, further impeding the effectiveness of the movement, GLBT rights defenders and organizations have received multiple death threats. In early 2001, a Quito-based human rights group that advocated for GLBT rights received threats to its members and to the local GLBT community (AI 2001a: 7-8; AI 2001b). “The message called [GLBT] people mentally disturbed, queers and human rubbish” and threatened country-wide social cleansing of sexual minorities (AI 2001c). Due to widespread violence and police impunity, Amnesty International concluded that such reports might be carried out and that GLBT people in Ecuador might be in grave danger. The next month, another GLBT organization reported receiving email threats, which likened Quito and Guayaquil to Sodom and Gommorah in the Christian Bible and threatened to kill GLBT people in Ecuador (AI 2001c). By May of 2001, many of Ecuador’s GLBT rights organizations had received similar telephone or email death threats. Collectively, a number of human rights organizations in Ecuador presented authorities with a letter, informing them of the threats and requesting that action be taken. There is no evidence that any action was taken by authorities (AI 2001a: 9).
CHAPTER 4
ANALYSIS

The Use of Human Rights Law to Address Sexual Orientation-Based Discrimination and Violence Against Sexual Minorities in Ecuador

The use of human rights law to address sexual orientation related issues is a relatively new phenomenon; however, its use has proven viable in the international realm through developing case law and interpretations of existing human rights treaties. As a member of the UN and Inter-American systems, Ecuador is subject to such laws. Thus, it could be useful in addressing discrimination and abuse of GLBT people in Ecuador. Similar national human rights laws in Ecuador could provide additional protections.

International Human Rights Law in the UN System

None of the UN human rights instruments explicitly mention “sexual orientation” or “gender identity”; however, significant strides have been made in the UN system to establish equality under the law for sexual minorities. As will be shown, lesbians and gay men have gained recognition in human rights law through the invocation of provisions of human rights documents pertaining to personal privacy and equality and by some UN participants and officials who recognized GLBT persons as a minority group entitled to protections. Such legal precedents and formal recognition in the UN help support a legal basis for human rights claims by sexual minorities against Ecuador.

In the UN Human Rights system, recognition of equal rights of sexual minorities has occurred on various levels. GLBT persons gained some recognition in human rights
law through the invocation of provisions of the ICCPR concerning personal privacy and equality. In 1994, the UN Committee on Human Rights, the UN “treaty body” charged with monitoring state compliance with the ICCPR, determined that the protections against discrimination embodied in the ICCPR should be understood to include sexual orientation as a protected status (Sanders 2003: 16, 20; Toonen v. Australlia, [1994]23).

In Toonen, a gay male citizen of Tasmania, challenged a criminal law prohibiting consensual same-sex sexual activities between men, arguing that it violated his privacy and equality rights. Following similar cases in the European Court of Human Rights, the Committee held that the law violated Mr. Toonen’s right to privacy under paragraph 1 of Article 17 of the ICCPR, which states that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence” (Toonen v. Australia, para. 8.6; ICCPR Art. 17). Briefly dealing with the issue of equality, the Committee held that sexual orientation falls within the ICCPR’s reference to “sex” in its equal protection provisions in Article 2, paragraph 1 and Article 26 (Toonen v. Australia, para. 8.7; ICCPR Art. 2, 26). Both Articles contain an anti-discrimination provision that extends equal protection to all individuals “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” (ICCPR: Arts. 2 and 26). Although the parties argued that sexual orientation fell within the references to “other status” within those articles, the Committee limited its finding to its interpretation that “sex” included “sexual orientation” (Sanders 2003: 21). This interpretation has been heavily debated and has yet to be retested before the Committee (Sanders 2003: 22). Nonetheless, Toonen clearly laid an

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important foundation for the recognition of equal rights based on sexual orientation, as
the Committee’s interpretation of the ICCPR in *Toonen* will guide it in future decisions
when it considers the same or similar issues. The “other status” language also remains
open to be interpreted as including sexual orientation.

Since *Toonen*, GLBT persons have gained additional recognition by UN
participants and officials, who have exhibited an increased interest in issues concerning
sexual orientation. Indeed, in 1998, the High Commissioner for Human Rights, a
position created pursuant to recommendations in the 1993 Vienna World Conference, met
with GLBT leaders and expressed an interest in “receiving information on human rights
violations against lesbians and gay men” (Sanders 2003: 24). In 2001, the High
Commissioner for Human Rights announced that “six Special Rapporteurs of the UN
Commission on Human Rights ‘were interested in receiving information on sexual
minority issues falling within their respective mandates,’” which included extrajudicial,
summary, or arbitrary executions, violence against women, torture, the independence of
judges and lawyers, freedom of expression, and human rights defenders (Sanders 2003:
25). Several of the special reports included violations based on sexual orientation. For
instance, the Special Rapporteur on torture reported to the UN General Assembly that
“members of sexual minorities are disproportionately subject to torture and other forms
of ill-treatment, because they fail to conform to socially constructed gender
expectations” (HRW 2004a). Then, in 2003, “the Commission’s resolution on
extrajudicial, summary, or arbitrary executions (Resolution 2003/53) called upon ‘States

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24 “Being decisions on individual complaints, this case law is a very important guide to the specific
meaning in concrete circumstances of what the Covenant requires, and is thus a valuable point of reference
for courts and decision-makers in all State parties when considering the same or similar issues” (UN
2005a).
concerned to investigate promptly and thoroughly … all killings committed for any discriminatory reason, including sexual orientation’” (HRW 2004a). More recently, the “2004 report of the Special Rapporteur on the right to health notes that ‘discrimination on the grounds of sexual orientation is impermissible in international law’” (HRW 2004b). These measures are evidence of the UN’s concern for, and recognition of, the rights of GLBT persons.

UN member states also recently made efforts to get the United Nations Commission on Human Rights (UNCHR)\(^{25}\) to formally include sexual orientation as a protected class under international human right law. At the 59th Session of the UNCHR, which took place in 2003, the Brazilian government proposed a resolution on “Human Rights and Sexual Orientation” which claims that “sexual diversity is an integral part of Universal Human Rights as reflected in the Universal Declaration of Human Rights” (ILGA 2004b; AI 2003c: 1). In so doing, Brazil affirmed the impermissibility of discrimination based on sexual orientation as a fundamental principle of human rights law and expressed “deep concern at the occurrence of violations of human rights all over the world against persons on the grounds of their sexual orientation” (ILGA 2004b). Brazil’s resolution “did not attempt to create a new body of rights, but sought to reaffirm existing non-discrimination principles established under international human rights law” (AI 2004d). The resolution was publicly endorsed by human rights organizations and

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\(^{25}\) The UNCHR was established in 1946. “It currently consists of 53 member governments elected for three-year terms by ECOSOC. It meets annually for six weeks in Geneva from mid-March to late April” and for emergency sessions (Steiner and Alston 2000: 600). To “promote geographical and political balance,” a system of regional groupings has been established, including “Asia, Africa, Eastern Europe, Latin America, and Western Europe and others—the last category include[es] Canada, Australia, New Zealand, and, in practice, the United States (Steiner and Alston 2000: 600).

Consistent with previous efforts to explicitly include sexual orientation within the UN’s human rights protections, the issue proved extremely controversial (Lynch 2004: A15). As such, the UNCHR decided by a narrow vote to postpone consideration of the proposal until its next session, which began in March of 2004 (ILGA 2004b). Due to intense pressures from the Vatican and its alliance with the Islamic Conference of States (Lynch 2004: A15), however, Brazil announced during the 60th Session that it decided to keep the resolution under consultation and requested postponement of consideration of the resolution (ILGA 2004d; ILGA 2004c). The resolution has been tabled since that time, and it was not considered during the 61st Session in 2005. Nevertheless, the possibility remains that official recognition of lesbian and gay rights as human rights will soon be realized within the UN system. If official recognition is obtained, GLBT persons in Ecuador and throughout the world would enjoy greater latitude upon which to challenge sexual orientation-based discrimination, violence, and persecution.

In light of Toonen and recognition of GLBT persons’ rights within the UN, sexual minorities in Ecuador have a promising basis upon which to challenge human rights violations. Specifically, the Ecuadorian police violate the anti-discrimination provisions in the ICCPR by using laws and regulations to target GLBT persons and by arbitrarily arresting and detaining them.26 Indeed, when such laws are applied to single out GLBT persons to punish them for, or prevent them from, being a member of a particular social class, they violate the equal protection guarantees of Articles 2 and 26 of the ICCPR as

26 Ecuador is a party to the ICCPR (See the UN web site at http://www.untreaty.un.org).
interpreted by the Committee in Toonen (Toonen v. Australia, [1994], interpreting the
category “sex” in the equal protection provisions in Articles 2 and 26 of the ICCPR to
include sexual orientation).

GLBT people are also entitled to equal protection and treatment in accordance with
the UDHR. Although there is no explicit mention of sexual orientation or gender
identity, the UDHR states that all members of the human family have equal and
inalienable rights, and that all are entitled to the rights and freedoms contained within the
declaration “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”
(UDHR: Art. 2). While the UDHR does not have binding authority in international law,
some argue that it “remains the most widely recognized statement of the rights to which
every person on the planet is entitled,” (Briceno 1998: 49), and it provides the foundation
upon which all other human rights documents are based. As such, its utility as an
instructional and persuasive human rights document cannot be ignored. Moreover, some
scholars and human rights advocates argue that the Universal Declaration is customary
international law. It establishes that human rights are inalienable and universal and it
reinforces that GLBT persons are entitled to equal rights and protections under the law.

Other human rights instruments can be used to provide additional protections to
sexual minorities in Ecuador. The ICCPR contains explicit protections to which sexual
minorities, like all other Ecuadorian citizens, are entitled. Specifically, police actions,
including arbitrary arrest and detention, physical and sexual abuse, attempted
extrajudicial executions, and torture can be challenged under provisions in the ICCPR.
Those protections include the right to self-determination (Art. 1), the right to life (Art. 6),
the freedom from torture and other cruel, inhuman or degrading treatment (Art. 7), and the rights to liberty and security of person and due process of law (Art. 9). Torture—pain and suffering inflicted upon a person by an official state actor due to discrimination—is also prohibited by the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention) (Art. 1).\textsuperscript{27} Murder, torture, and prolonged arbitrary detention also violate customary international law if the Ecuadorian government or its official actors, as a matter of policy, practices, encourages, or condones such behavior (Steiner and Alston 2000: 233). Here, the evidence demonstrates that this is the case.

Moreover, impunity and refusal of the National Police to investigate the violations of human rights of sexual minorities, as well as the government’s reluctance to address such issues within the police department, also likely amounts to a violation of customary international law. The failure of police officers and government officials to pursue and investigate violations against GLBT persons at the hands of private individuals, can also be challenged as a violation of Article 2(3) of the ICCPR, which obligates governments to ensure “that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy” (ICCPR Art. 2).

Human rights organizations and defenders are also entitled to protection under international human rights laws. First, under the ICCPR, individuals are entitled to freedom of association (Art. 22). As such, police raids of GLBT bars and successful attempts by police to keep GLBT persons from participating in organized marches violates their clearly defined right to peaceful assembly. Additionally, the United

\textsuperscript{27} Ecuador is a party to the Torture Convention (See the UN web site at http://www.untreaty.un.org).
Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms calls on member states to protect defenders of human rights. Consistent with its obligation under those human rights treaties, Ecuadorian officials should take the death threats received by GLBT organizations seriously, and actively investigate such claims.

Finally, GLBT persons in Ecuador are entitled to the right to attend school and work without discrimination based on their sexual orientation. Such rights fall under economic, social, and cultural rights, which are receiving increased recognition under human rights law. Under the ICESCR, all people are guaranteed the right to work (Art. 6) and to have access to an education (Art. 13) (ICESCR; Rosenbloom 1996: xiii). Accordingly, these provisions can be used to protect GLBT persons from being arbitrarily fired from their jobs and from being harassed at work and at school. Although human rights claims can only be brought against the state, those states that fail to provide protections ensured within the treaty may be indirectly accountable by virtue of their failure to address widespread abuse that is brought to their attention. While such protections are more ambitious than pursuing protections of civil and political rights, Ecuador is a party to the ICESCR and is therefore bound by its provisions.

Within the UN human rights system, there are mechanisms in place to allow GLBT individuals or other states to file complaints (also called communications) before quasi-judicial bodies against Ecuador for the human rights violations described above. In the

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28 Ecuador is a party to the ICESCR (See the UN web site at http://www.untreaty.un.org).

29 Each of these mechanisms requires that individuals exhaust domestic remedies before bringing a claim (UN 2005b).
case of Ecuador, a complaint alleging violations of the ICCPR could be filed with the Committee on Human Rights, and a complaint alleging violations of the Torture Convention could be filed with the Committee Against Torture.\textsuperscript{31} If complaints were filed, each Committee would consider the complaint in accordance with its procedure, and it would issue an opinion accordingly (UN 2005b). These Committees also monitor human rights violations through a reporting process and it is generally useful for individuals and NGOs to inform the UN about violations (UN 2005b). The Committee on Economic, Social, and Cultural Rights monitors implementation of the ICESCR through a reporting process, but it does not currently accept individual complaints.\textsuperscript{32} Individuals and states can also file complaints with the Commission on Human Rights against Ecuador for gross and systemic human rights violations under a process known as the “1503 procedure” (UN 2005b). Under these procedures and mechanisms, GLBT persons may be able to hold Ecuador accountable to its obligations under UN treaties for individual and systemic violations against sexual minorities in Ecuador.

\textbf{Regional Human Rights Law: The Inter-American System}

Regional human rights instruments within the Inter-American system can be used in similar ways to address discrimination against GLBT persons in Ecuador. The law concerning sexual minorities is largely undeveloped in the Inter-American system;

\textsuperscript{30} Ecuador is a party to the ICCPR and the First Optional Protocol to the Covenant on Civil and Political Rights, and is therefore subject to the jurisdiction of the Committee on Human Rights (See the UN web site at http://www.ohchr.org/english/countries/ratification/5.htm).

\textsuperscript{31} Ecuador is a party to the Torture Convention and Ecuador made a declaration to the Convention, recognizing the Committee Against Torture’s competence and jurisdiction under Art. 22 (See the UN website at http://www.ohchr.org/english/countries/ratification/9.htm#reservations).

\textsuperscript{32} The Committee on Economic, Social, and Cultural Rights is currently considering a draft Optional Protocol that would give it the power to accept individual complaints (See the UN website at http://www.ohchr.org/english/bodies/CESCR/index.htm). Thus, GLBT individuals may eventually be able to submit human rights complaints for violations of the ICESCR.
however, the provisions in its primary documents are very similar to those in the UN human rights documents, and they can be used in the same ways within the Inter-American system (Steiner and Alston 2000: 869). Although the UN human rights instruments are not binding within the Inter-American system, cases from the Committee can be used as persuasive authority where provisions of the UN and the Inter-American human rights treaties are the same.33

Like the UN human rights documents, there are no explicit references to sexual orientation in any of the human rights instruments in the Inter-American system. However, the American Declaration, which is similar to the UDHR in terms of rights, (Steiner and Alston 2000: 869), states that “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed, or any other factor” (American Declaration Art. 2). The American Convention on Human Rights also guarantees equal treatment of all persons before the law (Art. 24), and it states that state parties must ensure every human being within its jurisdiction “the free and full exercise of [the rights and freedoms recognized therein], without any 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” (Art. 1). In accordance with the UN Committee on Human Rights’ interpretation in Toonen, the language “sex” arguably includes sexual orientation. One could also argue that the language “any other factor” in Article 2 of the American

33 According to Art. 27 of the Rules of Procedure for the Inter-American Commission on Human Rights, “The Commission shall consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments, with respect to the Member States of the OAS, only when the petitions fulfill the requirements set forth in those instruments, in the Statute, and in these Rules of Procedure” (IACHR Rules of Procedure 2002: Art. 27).
Declaration or “any other social condition” in Article 1 of the American Convention includes sexual orientation. GLBT persons could challenge unequal treatment or discrimination by state actors within Ecuador on either ground.

Other provisions of the American Convention can be used to protect the civil and political rights of sexual minorities in Ecuador. Indeed, the American Convention ensures civil and political rights (Ch. 2) including freedom from torture or other cruel, inhuman, or degrading punishment or treatment (Art. 5); personal liberty and security, including freedom from arbitrary arrest and imprisonment (Art. 7); the right to due process (Art. 8); and the right to dignity (Art. 11). These provisions can be used to address the widespread violence against sexual minorities as well as discrimination and torture that they face at the hands of police and other state actors. Arbitrary arrests, physical and sexual abuse, and harassment by police officers are also unlawful under the above listed human rights provisions. Additionally, international customary law prohibitions of torture, murder, and prolonged arbitrary detention can be invoked to protect GLBT people (Steiner and Alston 2000: 233).

Furthermore, GLBT organizations are entitled to freedom of thought and expression (Art. 13), the right to assemble peacefully (Art. 15), and the right to free association (Art. 16) under the American Convention. Police interference with marches and other GLBT events is clearly a violation of those guarantees.

Human rights defenders should be afforded protection in accordance with the OAS General Assembly’s adoption of a resolution stating its intention to implement the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental
Freedoms (AI 2001d). “The resolution called on member states to provide ‘human Rights Defenders with the necessary guarantees and facilities to continue freely carrying out their work of promoting and protecting human rights’” and to adopt necessary measures to ensure their safety (AI 2001d). Accordingly, Ecuador, as a member of the OAS, should abide by the resolution and provide necessary protection to human rights defenders working on GLBT issues.

GLBT people may also have additional human rights protections of their economic, social, and cultural rights. The American Declaration, the American Convention, and the Protocol of San Salvador\(^\text{34}\) provide protections of such rights (American Declaration; American Convention Ch. 3, Art. 26; Protocol of San Salvador; Steiner and Alston 2000: 870). The Protocol of San Salvador provides for the right to work (Art. 6) in just, equitable and satisfactory conditions (Art. 7), and the right to education (Art. 13). Similarly, the American Declaration states that all people are entitled to the right to work (Art. 14) and the right to education (Art. 12). The American Convention also provides a brief, general recognition of such rights (American Convention Ch. 3, Art. 26). These provisions can be used to address the discrimination that GLBT persons face in the private sector, if it can be proven that the Ecuadorian government is complicit or has intentionally failed to protect and uphold such rights. Because this argument is more attenuated and depends on the state’s knowledge of the actions of nonstate actors and its ability to adopt or enact measures to provide such protections (American Convention Art. 1), it is less likely to be successful.

\(^{34}\) Ecuador is a party to the Protocol of San Salvador (See the OAS website at http://www.oas.org/juridico/english/Sigs/a-52.html).
Under the Inter-American structure, claims can be brought either by individual parties or by states before the Inter-American Human Rights Commission, which is an adjudicatory body tasked with promoting and protecting human rights within the OAS (American Convention Arts. 44 through 51).\(^{35}\) Once the adjudicatory proceedings are complete, the Commission issues a report (OAS 2005). If human rights violations are found, the Commission provides recommendations and would give Ecuador a period of time to correct the violations. The Commission can also independently investigate the existence of the human rights violations that GLBT persons face in Ecuador. If it found human rights violations, it could issue an advisory opinion instructing the Ecuadorian government to comply with human rights law (American Convention Art. 41; Stein and Alston 2000: 873). Under either procedure, if the government of Ecuador did not comply, the Commission could issue a second report or it could send the case to the Inter-American Court of Human Rights for review (OAS 2005).

Although a few cases concerning sexual orientation have been brought before the Inter-American Commission on Human Rights, it has yet to reach a decision on any of them. In each of the cases, the parties were able to reach amicable settlements with the government at issue before the Commission reached a decision. Nevertheless, parties have been able to use human rights law and the petition process to achieve favorable outcomes in their cases, (Sanders 2003: 31)—evidence that human rights law is already being used to protect GLBT citizens and an indication that some Latin American

\(^{35}\) Before submitting a complaint, individuals must exhaust their domestic remedies, unless the individual showed that “the victim tried to exhaust domestic remedies but failed because: 1) those remedies do not provide for adequate due process; 2) effective access to those remedies was denied, or; 3) there has been undue delay in the decision on those remedies.” (OAS 2005).
governments recognize their obligation under human rights law to respect the rights of sexual minorities.

**Human Rights Protections in an Andean Regional Agreement and in Ecuadorian National Law**

Human rights protections for Ecuadorian citizens also exist under Andean regional and national human rights law. Unlike international and Inter-American human rights instruments, these three instruments—Ecuador’s National Plan of Human Rights Executive Decree No. 1527 (1998), its Constitution (1998), and the Andean Charter (2002) (a multi-lateral agreement it entered into with four other countries in the Andean Region)—explicitly recognize sexual minorities as a protected class and afford protections based on sexual orientation. Thus, GLBT persons in Ecuador can bring human rights claims in local courts and tribunals.

The Human Rights Plan explicitly prohibits discrimination, violence, and persecution on the basis of sexual orientation (Human Rights Plan: Arts. 25 and 26). The Constitution contains an equal protection provision that prohibits discrimination based on sexual orientation (Constitution: Art. 23(3)). In the Andean Charter, Ecuador reaffirmed its decision to combat all forms of discrimination and intolerance, including that based on sexual orientation (Andean Charter: Section II, Art. 10).

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36 Artículo 25. Garantizar el derecho de las personas a no ser discriminadas en razón de su opción sexual, creando a través de leyes y re flam entos no discriminatorios, que faciliten las demandas sociales, económicas, culturales de esas personas. Artículo 26. Velar porque los mecanismos y agentes de seguridad del Estado no ejecuten acciones de persecución y hostigamiento a las personas por sus opciones sexuales (translation provided by Kirsten Anderson).

37 La igualdad ante la ley. Todas personas serán consideradas iguales y gozarán de los mismos derechos, libertades y oportunidades, sin discriminación en razón de nacimiento, edad, sexo, etnia, color, origen social, idioma; religión, filiación política, posición económica, orientación sexual; estado de salud, discapacidad, o diferencia de cualquier otra índole (translation provided by Kirsten Anderson).

38 Artículo 10. Reafirman su decisión de combatir toda forma de racismo, discriminación, xenofobia y cualquier forma de intolerancia o de exclusión en contra de individuos o colectividades por razones de raza,
recognized that all people, regardless of their sexual orientation, are entitled to equal human rights (Andean Charter: Art. 52), and it agreed to combat all forms of discrimination and violence against sexual minorities and to provide remedial processes for such offenses (Andean Charter: Art. 53). Under these provisions, GLBT persons can challenge violence, harassment, and intimidation by Ecuadorian police, as well as the impunity that most reports of such human rights violations receive, in domestic courts. Complaints against the government of Ecuador can also be brought in domestic courts under the Andean Charter for its failure to combat widespread discrimination or to create a remedial process for such offenses.

In addition to the protections described above, these local human rights instruments also incorporated international and regional human rights law into national law. Specifically, the Human Rights Plan recognizes the universality, indivisibility, and interdependence of all human rights and the government of Ecuador committed to adopting, upholding, and enforcing international, regional, and subregional human rights law (Human Rights Plan: Preamble, para. 5; Art. 35). The government also agreed to observe and comply with the decisions of the different international bodies for the protection of human rights (Human Rights Plan: Art. 35(3)).

Furthermore, the government incorporated international and regional law into its color, sexo, edad, idioma, religion, opinión política, nacionalidad, orientación sexual, condición migratoria y por cualquier otra condición; y, deciden promover legislaciones nacionales que penalicen la discriminación racial (translation provided by Kirsten Anderson).

39 Artículo 52. Reconocen que las personas, cualesquiera sean su orientación u opción sexuales, tienen iguales derechos humanos que todas las demás. Artículo 53. Combatirán toda forma de discriminación a individuos por motivos de su orientación u opción sexuales, con arreglo a las legislaciones nacionales y, para ello, prestarán especial atención a la prevención y sancion de la violencia y discriminación contra las personas con diversa orientación y opción sexual, y la garatína de recursos legales para una efectiva reparación u opción daños y perjuicios derivados de tales delitos (translation provide by Kirsten Anderson).
constitution, which guarantees to all inhabitants without discrimination, the free and effective exercise and enjoyment of the human rights established therein and in the declarations, pacts, treaties, and international instruments that are enforced (Constitution: Art. 17). It also states that all rights enumerated therein will be directly applicable before any judge, court, or authority, and it directs the government to adopt, through plans and programs, means for the effective enjoyment of these rights (Constitution: Art. 18).

The Andean Charter affirmed that all human rights and fundamental liberties are universal, indivisible, interdependent, and interrelated (Andean Charter: Art. 3), and it incorporated and committed to applying international, regional, and Andean sub-regional human rights instruments (Andean Charter: Preamble). Ecuador and the other Andean signatories also pledged to defend the principles in the UDHR and the American Declaration (Andean Charter: Preamble para. 6). The parties agreed to adopt all of the legal and administrative means necessary to prevent and investigate the acts that could constitute violations of human rights and to assure the efficacy of the constitutional and judicial recourses to judge and sanction those responsible for violations (Andean Charter: Art. 2). In light of Ecuador’s adoption of these human rights instruments, GLBT persons could bring claims in national tribunals and courts, challenging the government’s failure to adhere to national law as well as its international, regional, and subregional human rights obligations.

**Should Human Rights Law Be Used to Address Sexual Orientation-Based Discrimination in Ecuador? The Universalist/Cultural Relativist Debate**

While, as suggested above, human rights instruments *can* be used to address discrimination against GLBT persons in Ecuador, it is necessary to determine whether such instruments *should* be used in light of the strongly held religious and cultural beliefs
concerning *homosexualidad* (homosexuality) that underlie Latin American society. In other words, in light of widespread homophobia and antipathy towards *homosexualidad* in Ecuador, is the use of human rights law appropriate or does it amount to cultural and moral imperialism?

These questions get at the heart of the cultural relativist and universalist debate among human rights advocates. Universalists argue that certain human rights such as “the rights to equal protection, physical security, free speech, freedom of religion, and free association” are universal and thus “must be the same everywhere” (Steiner and Alston 2000: 366-67). Following in the tradition of John Locke and the UDHR, they “maintain that universal human rights are based on the inherent dignity of human kind” (Magnarella 2002: 16). In this context, GLBT individuals facing discrimination, persecution, and violence at the hands of Ecuadorian officials argue that they are entitled to basic fundamental human rights such as equal protection and due process, regardless of their sexual orientation (Fundación Ecuatoriana Equidad 2002).

Cultural relativists, on the other hand, argue that “the world contains an impressive diversity in views about right and wrong that is linked to the diverse underlying cultures”40 (Steiner and Alston 2000: 367). In its strictest sense, relativists argue that human rights law is essentially a Western imperialist tool that “imposes the vision of a few on everyone” (Hernández-Truyol 2002: 357). In considering the issues discussed herein, many Ecuadorians raise traditional cultural and religious norms which reject *homosexualidad*, and argue that, by extending human rights protections to GLBT

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40 The term “culture” oftentimes is interpreted by relativists to include “political and religious ideologies and institutional structures” (Steiner and Alston 2000: 367).
individuals, Western political will and culture is being imposed on Ecuador.\footnote{Western European and Canadian countries afford the greatest protections and rights to GLBT persons. The United States also provides sexual minorities protections (and in some states rights), however such provisions recently have come under fire by conservative political and religious groups.}

Recognizing the validity of the concerns underlying both universalist and relativist arguments, Hernández-Truyol offers an alternative view, suggesting a methodology under which cultural practices and traditions are respected, but are not allowed to “create, reinforce, and perpetuate the subordination, enslavement, or exclusion of individuals within their particular cultures” (Hernández-Truyol 2002: 357). Where, as here, a minority group (GLBT individuals) is dissenting within the majority culture (traditional Ecuadorian cultural), the “human rights paradigm” effectively balances competing perspectives to determine the extent to which human rights should be applied and enforced (Hernández-Truyol 2002: 366). Noting that this approach must remain flexible and objective, the following considerations serve as a methodological guideline for this analysis: (1) the claim or right being asserted; (2) the circumstances that gave rise to the claim; (3) the person or group that is claiming the alleged breach—a cultural insider or outsider; (4) the person, group, or entity that is violating the right(s) at issue; (5) the “impact of enforcing the group norm as compared to the impact of protecting the individual right”—(e.g. “the level of intrusion of the group norm on individual freedoms” and “the consequences of erosion of the norm on the community” (Hernández-Truyol 2002: 366-67). Each of these considerations is addressed below.

Here, the competing rights or interests at stake are the human rights of GLBT Ecuadorians to be free from discrimination, violence, and persecution on the one hand and the traditional religious and cultural norms in Ecuador concerning appropriate
sexuality and gender on the other. Specifically, GLBT individuals within Ecuador argue that, as members of the human race, they are entitled to the protection of their most basic human rights. Notwithstanding the cultural and religious beliefs in Ecuador concerning homosexualidad, GLBT people are members of Ecuadorian society and should be treated with respect and afforded freedoms equal to all other citizens (Fundación Ecuatoriana Equidad 2002). They should be allowed to live openly without fear of discrimination, violence, or arbitrary treatment by police. Moreover, if they are subjected to violence or discrimination in the private sector, their complaints to police and government officials should be properly investigated and pursued by authorities (Fundación Ecuatoriana Equidad 2002).

Proponents of traditional cultural and religious institutions within Ecuador, however, argue that homosexualidad is a Western concept that is antithetical to their cultural and religious beliefs and that the “gay rights agenda” should not be forced onto them by extending formal recognition and rights to GLBT individuals. To be sure, within Ecuador, “[h]omosexuality continues to be considered a sin or an illness, a crime, or a social or ideological deviation or a betrayal of one’s culture” (AI 2001a: 3; Fundación Ecuatoriana Equidad 2002; Gonzalez 1997b). Indeed, Ecuadorian society is heavily influenced by the Catholic Church, which recently publicly opposed efforts in the UN that “called on all states to protect and promote the human rights of all people, regardless of their sexual orientation” (Capdevila 2003; Lynch 2004: A15). Supporters of the Church argued that explicit protections of and for GLBT individuals would force them to validate a lifestyle that they view as morally wrong, and it would open the Church and those who adhere to its traditional teachings to claims for human rights violations if they
continue to advocate and practice their longstanding religious beliefs (Catholic Family and Human Rights Institute 2003). Additionally, many Ecuadorians view *homosexualidad* as contrary to the traditional cultural constructions of gender and sexuality inherent in *machismo* culture (Fundación Ecuatoriana Equidad 2002). For these reasons, many Ecuadorians classify GLBT individuals as a second class population and not as citizens (Fundación Ecuatoriana Equidad 2002). Some people also view recognition and protection of GLBT individuals as “homosexual activism” or furtherance of a particular (Western) social agenda that is contrary to their culture.

As explained in depth in chapter 3, widespread violence and discrimination against and persecution of GLBT people in Ecuador has led human rights advocates both inside and outside Ecuador to consider human rights law as a source of protection for sexual minorities against such abuse (Fundación Ecuatoriana Equidad 2002; AI 2002b; AI 2001a). In Ecuador, GLBT individuals are a subordinated group, and they routinely face discrimination and ill-treatment. In many cases, government officials are responsible for such transgressions; and, even where private individuals are responsible for human rights violations, complaints to police are oftentimes ignored and rarely investigated.

A small GLBT movement already exists in Ecuador, and many in that movement are looking to human rights law (in the international, regional, and national contexts) and international GLBT rights organizations for assistance (Fundación Ecuatoriana Equidad 2002). International human rights organizations and GLBT rights groups have begun to take notice of the discrimination and violence that sexual minorities in Ecuador face, and have even reported human rights violations to local and national authorities (Fundación Ecuatoriana Equidad 2002; AI 2002b; AI 2001a). In a few cases, courts in Ecuador have
considered complaints of physical maltreatment and sexual violations of GLBT individuals while in custody of the police (Fundación Ecuatoriana Equidad 2002). However, for the most part, little has been done to address these issues and no formal human rights complaints against Ecuador have been filed in international or regional human rights systems. Invariably, intervention by international organizations will be viewed by some as imperialistic and unwarranted. In this case, however, human rights law could be invoked by GLBT individuals themselves, with or without the assistance of outside organizations.

Such actions are warranted, because the harms to GLBT are great. In the worst cases involving torture and physical abuse, the life and physical integrity of sexual minorities are at stake. These types of atrocities at the hands of government officials, albeit on a much larger scale, were the impetus for creating human rights law and a process by which individuals could bring claims against their government for human rights abuses. At the very least, such discrimination and violence keep GLBT individuals in the closet, forcing them to forgo happiness, dignity, and full personhood for fear of social and economic repercussions (Fundación Ecuatoriana Equidad 2002).

From an objective standpoint, application of human rights to GLBT individuals would likely have an impact on both sexual minorities in Ecuador and on Ecuadorian culture. However, the level of intrusion on the majority culture and societal norms would be minimal. Although, as with the challenge to any cultural or societal norm, “there w[ould] come a time when one additional person following or refusing to follow the norm w[ould] have an impact on the norm itself” (Hernández-Truyol 2002: 367), the overall integrity of Ecuadorian culture does not depend on the continuation of
discrimination and persecution of GLBT individuals. To be sure, the use of human rights law by GLBT individuals in Ecuador would not threaten or erode the Catholic Church, and a formal recommendation by an international or regional human rights body or a local court would not displace or destroy machismo culture. Instead, the majority culture would continue to exist (with modifications as to the treatment of GLBT individuals within Ecuadorian society), and neither religion nor gender norms would significantly change. While religious beliefs and cultural constructions of gender and sexuality may underlie much of sexual orientation-based discrimination and violence, discrimination and violence are not inherent to the survival of these beliefs and cultural constructions.

Furthermore, as a backdrop to this documented discrimination and abuse, over the last seven years, the Ecuadorian government has adopted the core international and regional human rights documents into its national law, and it has provided explicit protections to GLBT individuals in its constitution and Human Rights Plan and in the Andean Charter. In so doing, it already formally recognized sexual minorities as a protected group of citizens, and it formally extended rights and protections to GLBT people (Fundación Ecuatoriana Equidad 2002). One Ecuadorian GLBT advocacy organization interpreted the governments’ adoption of these various protections as a “new focus on the recognition of human rights, that is based in recognizing the well being of individuals and/or the recognition of citizenship,” which aims to create fair and just societies characterized by “equality, acceptance, governability, and inclusiveness,” and that satisfy the individual and collective needs of all sectors and social groups in Ecuador.
(Fundación Ecuatoriana Equidad 2002). Arguably, there is minimal intrusion on Ecuadorian society and culture as the Ecuadorian government itself has, at least on paper, adopted the rights and recognitions that GLBT people seek to invoke.

Even if these constitutional recognitions and rights were aspirational at the onset, the changes themselves stemmed from “the existence of problems that [were] serious and pervasive, and for which solutions” are “linked to bringing about reforms in difficult areas such as … culture and globalization” (Garcia-Villegas 2003: 147-48). In this case, in 1997, Ecuadorian GLBT rights organizations joined forces with the strong existing indigenous movement and gained enough support to get the existing sodomy law, Article 516 of the Penal Code, which applied penalties of four to twelve years imprisonment to adult men engaged in consensual same-sex sexual relations, reviewed and repealed (Fundación Ecuatoriana Equidad 2002; Gonzalez 1997b; Gonzalez 1997a; Wockner 1997). Thereafter, they were apparently able to obtain enough political support to secure explicit protections in the Human Rights Plan and the constitution. At that time, the Ecuadorian government also recognized the indivisibility and universality of human rights, and incorporated the core human rights documents into its constitution and national law.

At the very least, these events were an important step for GLBT individuals in the recognition of their most basic and fundamental human rights and they created public recognition and visibility for GLBT individuals and organizations (Fundación Ecuatoriana Equidad 2002). It is reasonable to expect that, at some point, GLBT

42 Este nuevo enfoque del reconocimiento de los derechos humanos, que se fundamenta en reconocer el bienestar de los individuos y/o el reconocimiento de la ciudadanía, … equilibrio, aceptas, gobernables, e incluyentes (translation provided by Kirsten Anderson).
individuals would seek to hold the government accountable for the rights and recognitions that the legislators and constitutional framers adopted, by demanding investigation of human rights violations and the application of justice that the national Human Rights Plan and Andean Charter guarantee. Such efforts are attainable in Ecuadorian society, and bringing the legislators who adopted these legal protections to task would likely strengthen the constitution and democracy itself (Garcia-Villegas 2003: 147-48).

As the above analysis reveals, human rights law should be used to address sexual orientation-based discrimination, violence and persecution in Ecuador. The rights that GLBT individuals seek to invoke are fundamental human rights to equal protection, due process, and physical protection—rights to which all individuals are entitled regardless of their sexual orientation. The recognition of GLBT rights “is a democratic signal—as is the fight against discrimination, exclusion and violence and for inclusion and equality” (Roth 2003: 4).
CHAPTER 5
CONCLUSION

Summary of Findings

On paper, Ecuador looks to be a champion of equality and human rights, especially as they pertain to GLBT individuals; however, reality reveals a much different picture. As the case study in chapter 3 showed, those who are, or are perceived to be homosexualidad face widespread discrimination, violence, persecution, and harassment by police and other individuals within society. Complaints of such abuse are oftentimes met with indifference, creating an environment where human rights violations of GLBT people generally go unreported or unpunished. Over the last few years, international and national human rights organizations and GLBT advocacy groups have begun to record such abuses and to look toward human rights law as an avenue of addressing such human rights violations.

As explained herein, human rights law can be used to address the violations that GLBT individuals in Ecuador face. Indeed, human rights protections for sexual minorities exist under the UN Human Rights system, the Inter-American Human Rights system, and national law. Under the ICCPR, sexual minorities are clearly entitled to equal protection, which gives GLBT Ecuadorians the ability to challenge the discrimination, harassment, and unequal treatment that they are subjected to by police officers and other government officials. GLBT persons can also use additional provisions of the ICCPR to challenge the widespread violence, impunity, and arbitrary treatment that
they suffer at the hands of police officers. Additional protections for sexual minorities exist in the Torture Convention, the ICESCR, and customary international law. As explained herein, GLBT citizens have similar recourse in the Inter-American Human Rights system under the American Declaration, the American Convention, and the Protocol of San Salvador. Most important, GLBT individuals in Ecuador have explicit protections and rights under Ecuadorian national law and the Andean Charter. Accordingly, to the extent that sexual minorities have fair and impartial judicial recourse, challenges can also be brought within the Ecuadorian judicial system.

Although, as this thesis showed, human rights law can be used to challenge sexual orientation-based discrimination, violence, and persecution, the more difficult question was whether it should be used. Widespread homophobia and antipathy towards homosexualidad underlie discrimination and abuse of sexual minorities in Ecuador. Specifically, homosexualidad is seen by the majority in Ecuador as a rejection or abandonment of their culture and/or traditional religious beliefs. Like most other Latin American countries, strong cultural constructions of appropriate gender and sexuality exist. In this machismo culture, defiance of appropriate gender and sexuality is oftentimes met with violence and resistance. Moreover, traditional Catholic teachings deem homosexualidad as a sin and an unacceptable way of life. As such, some would argue that the use of human rights law to protect GLBT persons is inappropriate and amounts to cultural and moral imperialism.

Notwithstanding these cultural and religious constructions, GLBT individuals are human beings who are suffering real and egregious violations of their fundamental human rights. The majority culture should not be used to facilitate or further oppression
or to disentitle sexual minorities of basic human rights simply because they fail to conform.

Accordingly, this thesis engaged the ongoing debate between universalists and cultural relativists, and used Hernández-Truyol’s human rights paradigm to determine the extent to which human rights law should be used to protect GLBT individuals in Ecuador. As the analysis revealed, human rights law should be used to its fullest extent to protect GLBT persons from discrimination, violence, and persecution that they suffer at the hands of police officers and other government officials. Despite cultural and religious norms, all individuals are entitled to fundamental human rights such as equal protection, due process, and physical integrity, regardless of their sexual orientation. Here, human rights abuses are widespread and harmful and must be addressed.

GLBT individuals do not seek to create new rights, but rather they simply seek to invoke existing law. The use of human rights law to address these violations will not have an adverse impact on Ecuadorian culture and religion. Rather, it will simply prohibit discrimination and violence against sexual minorities. After all, the extension of human rights law to sexual minorities is not a foreign concept that is being imposed on Ecuador by outsiders. Indeed, the government of Ecuador vis-à-vis legislators and the drafters of the constitution recognized GLBT people as a protected class and adopted explicit human rights protections for them. Even if the Ecuadorian government’s adoption of those provisions was aspirational, the government’s inclusion of them represents its acknowledgement of the voice of a minority group within Ecuador which faces serious and pervasive abuses that need to be addressed.
Future Research

This thesis has only scratched the surface on a very complex topic. Because there are no previous social science studies in English concerning GLBT individuals and human rights in Ecuador, this thesis broke new ground. Accordingly, additional research is necessary to build on and challenge the information and conclusions herein. Field research would be extremely beneficial, as issues pertaining to culture and human rights are ever changing.

There are many issues concerning GLBT individuals in Ecuador that could be studied in future research. Field research on the cultural constructions of sex and sexuality focusing specifically on Ecuador would be helpful. More field research should also be done to further investigate the circumstances that led to the Ecuadorian government’s adoption of such apparently strong human rights legislation for GLBT persons.

Furthermore, because most reports of sexual orientation-based discrimination and violence concern *los hombres gay* and *los transgéneros*, further research on the situation of *las lesbianas* is needed, because *las lesbianas* also face discrimination based on sex and sexual orientation. Do they face increased discrimination or do they actually experience less overt discrimination than other sexual minorities?

More research on the issues raised in this thesis is needed. For example, it would be particularly beneficial to research enforceability issues. How likely is it that the Ecuadorian government would comply with opinions and recommendations by international and regional human rights judicial bodies? If human rights adjudicatory bodies render decisions in favor of GLBT individuals, what can be done to ensure that the government of Ecuador would comply?
In Ecuador, where human rights and democracy are central to the constitution, the time is long overdue to address human rights concerns facing GLBT persons. Although many amongst the majority regard such abuses as a consequence of nonconformity to religious ideals and cultural constructions of gender and sexuality, the othering of individuals who fall within the minority is contrary to the human rights regime. While culture must be respected, it cannot be an excuse to relegate a minority to second class citizenship and render them defenseless against human rights abuses by the majority. Democratic principles require equality of all people.
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Human Rights Instruments


BIOGRAPHICAL SKETCH

I am a native of Missouri, and I received my Bachelor of Arts degree from Missouri State University, where I graduated magna cum laude. I received my law degree from the University of Florida Levin College of Law with high honors in May of 2002. While in law school, I was a research assistant to human rights professor Berta Hernández-Truyol, with whom I coauthored two articles that used human rights law to address domestic issues. During the Summer of 2001, I studied in San Jose, Costa Rica, where I worked on a human rights project with an attorney from Bogotá, Colombia. I also received a certificate in International Legal Studies.

Upon graduation from law school, I clerked for the Honorable Charles R. Wilson in the United States Court of Appeals for the Eleventh Circuit. I am licensed to practice law in the State of Florida, and I am currently an Equal Justice Works Fellow at Southern Legal Counsel, where I work on civil rights and constitutional law issues.

I am particularly interested in human rights legal issues—both domestic and abroad. The focus of my graduate studies was human rights in Latin America. Where possible, I concentrated specifically on human rights issues concerning women and sexual orientation. Upon graduation I will receive a Graduate Certificate in Women’s Studies and Gender Research. To further my academic abilities, I also studied Spanish in Ecuador during the Summer of 2004.