

# LGBTI ACTIVISM INFLUENCING FOREIGN LEGISLATION

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*Non-governmental organisations ('NGOs') are key actors in international human rights law, in collaborating with international organisations and in lobbying domestic governments. This paper aims to shed light on the lesbian, gay, bisexual, transgender and intersexual organisations' transnational advocacy. The first part of the paper focuses on the action of two NGOs operating in Australia and the United Kingdom, which extended their influence beyond the domestic borders, while the second part of the paper researches possible negative consequences of non-governmental advocacy.*

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## I INTRODUCTION

International human rights treaties, such as the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>1</sup> and the *European Convention on Human Rights* ('ECHR'),<sup>2</sup> are shaping the domestic legislation of their states party.<sup>3</sup> At the same time, non-governmental organisations ('NGOs') are influencing domestic legislation and international law.<sup>4</sup>

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<sup>1</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

<sup>2</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('ECHR').

<sup>3</sup> See, eg, Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935; Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) 49 *Journal of Conflict Resolution* 925; Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999); Thomas Risse, Stephen C Ropp and Kathryn Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2013). See generally Harold Hongju Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181.

<sup>4</sup> For a definition of non-governmental organisation ('NGO'), see Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press, 2005) 36–52.

Scholars have identified several types of NGO activities.<sup>5</sup> To gather and summarise different authors' opinions, I propose the following examples. NGOs can: lobby governments to ratify human rights treaties and optional protocols; propose new rights by lobbying international human rights bodies to adopt recommendations, resolutions, international human rights conventions or non-binding statements; support individual applications and communications before international human rights courts and treaty bodies; collect information on human rights violations and submit reports; follow up on decided international adjudications, resolutions and recommendations; and participate as observers in intergovernmental meetings.

More than one of these activities can be undertaken at the same time, and each activity can be associated with other non-legal actions, such as organising campaigns of protest to raise public awareness, supporting informational and educational programs, and supporting individuals and disadvantaged groups with practical aid.<sup>6</sup> In general, the primary goal of most NGOs is to influence state conduct. As a consequence, international organisations are used as levers to reach that goal.<sup>7</sup> Additionally, NGOs can be classified into several useful categories. NGOs which are 'politically activist as a matter of institutional identity' can be distinguished from those which are not. This category includes both NGOs which focus on human rights law, such as Amnesty International ('AI') and Human Rights Watch ('HRW'), and NGOs which focus on providing humanitarian aid, such as Oxfam. These politically activist NGOs can be further subdivided into identity-based NGOs, such as lesbian, gay, bisexual, transgender and intersexual ('LGBTI') organisations, and general human rights-based organisations, including AI and HRW.<sup>8</sup>

The theme of the international non-governmental advocacy is vast. As shown above, possible non-governmental actions are various and numerous, as are the types of NGOs. Therefore, to address the theme of transnational activism, I analyse one action, non-governmental support to individual applicants, and one type of organisation, LGBTI identity based organisations which focus on human rights law. Additionally, I choose to narrow the scope of my research to the United Nations Human Rights Committee ('the UN Committee') and the European Court of Human Rights ('the European Court'). The UN Committee

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<sup>5</sup> See Antonio Cassese, 'How Could Nongovernmental Organizations Use UN Bodies More Effectively?' (1979) 1(4) *Universal Human Rights* 73; Theo van Boven, 'The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy' (1989) 20 *California Western International Law Journal* 207; Andrew Clapham, 'Creating the High Commissioner for Human Rights: The Outside Story' (1994) 5 *European Journal of International Law* 556; David Weissbrodt, 'The Contribution of International Nongovernmental Organizations to the Protection of Human Rights' in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Clarendon, 1985) 403.

<sup>6</sup> On non-legal actions, see especially Ashley Currier, 'Deferral of Legal Tactics: A Global LGBT Social Movement Organization's Perspective' in Scott Barclay, Mary Bernstein and Anna-Maria Marshall (eds), *Queer Mobilizations: LGBT Activists Confront the Law* (New York University Press, 2009) 21.

<sup>7</sup> Peter J Spiro, 'NGOs and Human Rights: Channels of Power' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar, 2010) 115, 121–8.

<sup>8</sup> *Ibid* 118–19.

perspective provides a global view, while the European Court has historically enhanced a wide jurisprudence on LGBTI issues.<sup>9</sup>

The study of the influence of NGOs on human rights is twofold: both how NGOs can affect international law and whether the norms shaped by NGOs influence countries need to be considered. To analyse LGBTI organisations' influence on international human rights through advocacy addressed towards the UN Committee and the European Court, two research questions are proposed: how can LGBTI organisations create new interpretations of international norms in supporting individual applications, and are these new norms observed by states?

The scholarship on NGO theory stems from Margaret Keck and Kathryn Sikkink's study of transnational activism networks. The two authors explained that NGOs can make states comply with existing international norms through a 'boomerang pattern of influence'.<sup>10</sup> The boomerang metaphor served to explain that domestic NGOs seek allies in the international arena to pressure their governments to comply with international human rights law.<sup>11</sup> More recently, Clifford Bob proposed a comparable pattern of influence in studying how NGOs can influence states through international organisations.<sup>12</sup> He added to Keck and Sikkink's work by researching a 'logically prior' question: how non-governmental actors can create new norms of international law.<sup>13</sup> He explained that groups — for example LGBTI organisations — 'frame long-felt grievances as normative claims' and then introduce these new rights into the international agenda by convincing major human rights NGOs to support them.<sup>14</sup>

Because LGBTI organisations use international litigation to advance legal reforms in their countries,<sup>15</sup> the idea of the 'boomerang pattern' is pivotal for this paper. Indeed, in addressing the first research question, I present the advocacy of two NGOs, the Tasmanian Gay Law Reform Group ('TGLRG')<sup>16</sup> and the Northern Ireland Gay Rights Association ('NIGRA'). The first organisation supported the applicant in *Toonen v Australia* ('*Toonen*')<sup>17</sup> before the UN Committee, and the second supported the applicant in *Dudgeon v United Kingdom* ('*Dudgeon*')<sup>18</sup> before the European Court.

In addressing the second research question, the paper aims to show that these disputes have had consequences in the international arena. In doing so, this paper presents how the two NGOs based in Australia and in the United Kingdom have had the ability to positively influence domestic legislation outside the Australian

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<sup>9</sup> See especially, Paul R Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2013).

<sup>10</sup> Margaret E Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998) 12.

<sup>11</sup> *Ibid* 1–37.

<sup>12</sup> Clifford Bob (ed), *The International Struggle for New Human Rights* (University of Pennsylvania Press, 2009).

<sup>13</sup> *Ibid* 2.

<sup>14</sup> *Ibid* 4.

<sup>15</sup> See especially Loveday Hodson, *NGOs and the Struggle for Human Rights in Europe* (Hart, 2011) 134–9.

<sup>16</sup> Later renamed Tasmanian Gay & Lesbian Rights Group.

<sup>17</sup> Human Rights Committee, *Views: Communication No 488/1992*, 50<sup>th</sup> sess, UN Doc CCPR/C/50/D/488/1992 (4 April 1994) ('*Toonen v Australia*').

<sup>18</sup> *Dudgeon v United Kingdom* (1981) 45 Eur Court HR (ser A) ('*Dudgeon*').

and British jurisdictions. As Andrew Guzman and Timothy Meyer explained, non-binding rulings issued by international courts and committees play an important role in the development of human rights law because international bodies perform adjudication that has legal consequences on states not party to the dispute.<sup>19</sup> Laurence Helfer and Erik Voeten called the consequences that international adjudications produce on states not party to a dispute the *erga omnes* effect. The two authors studied this effect through adjudications regarding LGBTI rights before the European Court,<sup>20</sup> finding that these adjudications increase the possibilities that Council of Europe ('CoE') member states adopt reforms favourable for LGBTI individuals.<sup>21</sup>

To summarise, NGOs are the object of this analysis because they are the tool for changing international human rights law,<sup>22</sup> and in order to maintain as much objective analysis as possible, it needs to be acknowledged that NGOs are neither 'good' nor 'bad'.<sup>23</sup> Therefore, in the second part of the paper, I present two aspects of the negative influence of the non-governmental advocacy: from one side, the advocacy action of conservative, pro-traditional family, right-wing organisations; from the other side, the negative influences of LGBTI organisations on the rights of the sexual minorities. In doing so, the second half of the paper briefly analyses two other case studies: *Ferguson v United Kingdom* ('*Ferguson*')<sup>24</sup> and *Vallianatos v Greece* ('*Vallianatos*').<sup>25</sup>

The paper uses the acronym LGBTI as an inclusive term to indicate sexual minorities. However, this paper presents two major limitations: the analysis is focused on same-sex sexuality and it lacks a wider view of bisexual, transgender and intersexual issues. Additionally, the two cases described in the second half of the paper focus on marriage equality and civil partnership acts: issues correlated to, but wider than, the topic discussed in the first half of the paper, the decriminalisation of homosexual conduct.

## II NGOs' INFLUENCE ON DOMESTIC LEGISLATION AND INTERNATIONAL LAW

Passing to the model of influence, this Part distinguishes two phases. In the first phase, NGOs raise delicate issues before international human rights courts and treaty bodies. In the second, how the decisions of the international bodies impact on domestic legislation. These aspects are analysed in turn.

<sup>19</sup> Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2 *Journal of Legal Analysis* 171, 210–11.

<sup>20</sup> Laurence R Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014) 68 *International Organization* 77. On the compliance of states not party, see also Sameera Dalvi, 'Homosexuality and the European Court of Human Rights: Recent Judgments against the United Kingdom and Their Impact on Other Signatories to the *European Convention on Human Rights*' (2004) 15 *University of Florida Journal of Law & Public Policy* 467.

<sup>21</sup> Helfer and Voeten, above n 20, 105.

<sup>22</sup> Spiro, above n 7, 117.

<sup>23</sup> Lindblom, above n 4, 3.

<sup>24</sup> 'Application under Article 34 of the *European Convention on Human Rights* and Rules 45 and 47 of the Rules of Court', Application in *Ferguson v United Kingdom*, European Court of Human Rights, File No 8254/11, 2 February 2011 <<http://blogs.law.columbia.edu/genderandsexualitylawblog/files/2013/01/Ferguson-v.-UK.pdf>>.

<sup>25</sup> *Vallianatos v Greece* (European Court of Human Rights, Grand Chamber, Application No 29381/09 and 32684/09, 7 November 2013).

NGO support is particularly important for the reason that not every citizen is able to involve themselves in an international dispute. Applying to international bodies could be economically onerous and international disputes can last for years. Some parts of the population are not completely aware of their rights and they may not even know of the possibility of complaining about their rights' violations. This problem may be especially present in disadvantaged minority groups or among under-educated individuals. Therefore, pressure groups, organisations and activists are important agents in the work of international courts and committees because they work as a supporting net for the applicants, providing legal advice and pro bono lawyers.<sup>26</sup>

NGOs can collaborate with the UN and the CoE, with some notable differences in their methods of operation between the two. There are nine UN human rights treaties,<sup>27</sup> each of which has established a committee of experts to monitor the application of the human rights provisions by its states party.<sup>28</sup> Eight of the nine human rights treaty bodies may consider individuals' communications or complaints,<sup>29</sup> with the exception of the Committee on Migrant Workers.<sup>30</sup> Although this paper focuses on the UN Committee, the

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<sup>26</sup> See especially Hodson, above n 15.

<sup>27</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*Convention against Torture*'); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, 2716 UNTS 3 (entered into force 23 December 2010) ('*Convention against Enforced Disappearance*'); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('*Convention on Racial Discrimination*'); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) ('*Convention on the Rights of Migrant Workers*'); *ICCPR*; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS (entered into force 3 January 1976).

<sup>28</sup> Respectively, the Committee on Elimination of Discrimination against Women; the Committee against Torture; the Committee on the Rights of Persons with Disabilities; the Committee on the Rights of the Child; the Committee on Enforced Disappearances; the Committee on the Elimination of Racial Discrimination; the Committee on Migrant Workers; the United Nations Human Rights Committee ('UNHRC'); and the Committee on Economic, Social and Cultural Rights.

<sup>29</sup> *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 10 December 1999, 2131 UNTS 83 (entered into force 22 December 2000) art 2 ('*Optional Protocol to the CEDAW*'); *Convention against Torture* art 22; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2518 UNTS 283 (entered into force 3 May 2008) art 1 ('*Optional Protocol to the CRPD*'); *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, opened for signature 28 February 2012 (entered into force 14 April 2014) art 5 ('*Optional Protocol on a Communications Procedure to the CRC*'); *Convention against Enforced Disappearance* art 31; *Convention on Racial Discrimination* art 14; *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1 ('*First Optional Protocol to the ICCPR*'); *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 24 September 2009 (entered into force 5 May 2013) art 2 ('*Optional Protocol to the ICESCR*').

<sup>30</sup> *Convention on the Rights of Migrant Workers* art 77.

Committee against Torture also dealt with three cases<sup>31</sup> regarding three gay men at risk of being tortured if deported to their home countries.<sup>32</sup> With the only exception being the Committee on the Elimination of Racial Discrimination,<sup>33</sup> all the rest of the committees can accept communications submitted by or on behalf of individuals or groups of individuals.<sup>34</sup> Therefore, NGOs have the right to address communications to these committees on their own behalf.

Differently from other international courts or committees, the UN Committee accepts communications only when submitted by individuals.<sup>35</sup> Because NGOs cannot submit communications on their own behalf, they can access the UN Committee in supporting individual plaintiffs in two ways. First, NGOs can support individual applicants with pro bono legal assistance, for example the case of *Hertzberg v Finland*,<sup>36</sup> where the five applicants were represented by the Finnish National Organization for Sexual Equality.<sup>37</sup> Secondly, plaintiffs themselves can be members of an NGO. For example, in *Toonen*,<sup>38</sup> Nicholas Toonen was part of TGLRG.<sup>39</sup>

Within the CoE, NGOs can be involved in European Court individual applications in three ways. First, NGOs can make applications before the European Court under art 34 of the *ECHR*. Secondly, a third party, who is not the

<sup>31</sup> Committee against Torture, *Communication No 31/1995*, 15<sup>th</sup> sess, UN Doc CAT/C/15/D/31/1995 (20 November 1995) ('*Mr X and Mrs Y v Netherlands*'); Committee against Torture, *Communication No 190/2001*, 30<sup>th</sup> sess, UN Doc CAT/C/30/D/190/2001 (26 May 2003) ('*KSY v Netherlands*'); Committee against Torture, *Communication No 213/2002*, 31<sup>st</sup> sess, UN Doc CAT/C/31/D/213/2002 (28 November 2003) ('*EJVM v Sweden*'). In particular, in *Mr X and Mrs Y v Netherlands*, the applicant, Mr X, was a member of an association promoting gays and bisexuals' rights in Georgia. In 1994, after Mr X had spoken in a meeting within his association, his house was raided by four men wearing military uniforms and his child was kidnapped. Mr X and his family were forced to emigrate: at [2.1]–[2.3]. However, the Committee against Torture did not admit the application, saying that Mr X did not adduce enough evidence to show that he would have been at risk of torture if he returned to Georgia: at [4.2].

<sup>32</sup> Article 3(1) of the *Convention against Torture* states that '[n]o State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

<sup>33</sup> *Convention on Racial Discrimination* art 14.

<sup>34</sup> See *Optional Protocol to the CEDAW* art 2; *Convention against Torture* art 22; *Optional Protocol to the CRPD* art 1; *Optional Protocol on a Communications Procedure to the CRC* art 5; *Convention against Enforced Disappearance* art 31; *Optional Protocol to the ICESCR* art 2.

<sup>35</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, 2<sup>nd</sup> revised ed, 2005) 825. Article 1 of the *First Optional Protocol to the ICCPR* states that the UNHRC can 'consider communications from individuals subject to its jurisdiction who claim to be victims of a violation'.

<sup>36</sup> Human Rights Committee, *Views: Communication No 61/1979*, 15<sup>th</sup> sess, UN Doc CCPR/C/OP/1 (2 April 1982) 124 ('*Hertzberg v Finland*').

<sup>37</sup> In *Hertzberg v Finland*, the UN Committee did not find a violation of art 19(2) (freedom of expression), giving — for the first and only time of its jurisprudence — a margin of discretion for the state party: Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3<sup>rd</sup> ed, 2013) 625. On NGOs supporting individuals, see also Human Rights Committee, *Decision on Admissibility: Communication No 717/1996*, UN Doc CCPR/C/66/D/717/1996 (16 September 1999).

<sup>38</sup> *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992.

<sup>39</sup> Mark Bromley and Kristine Walker, 'The Stories of *Dudgeon* and *Toonen*: Personal Struggles to Legalize Sexual Identity' in Deena R Hurwitz, Margaret L Satterthwaite and Douglas Ford (eds), *Human Rights Advocacy Stories* (Foundation, 2009) 85.

applicant, has the right to submit written comments under art 36(2), where NGOs raise particularly important issues when they obtain the right to submit briefs.<sup>40</sup> Finally, NGOs can support applicants with legal advice. In some cases, the applicants themselves can be staff members of the NGO. This was the case in *Dudgeon*,<sup>41</sup> where Jeffrey Dudgeon was serving as a treasurer of NIGRA,<sup>42</sup> and it is also the case in *Sutherland v United Kingdom*,<sup>43</sup> where Sutherland was a gay rights activist connected with the British organisation Stonewall.<sup>44</sup>

The second phase is divided into two aspects: the influence of the international adjudication on the state party sued and the consequences in other states party. First, the UN Committee releases views on individual applications.<sup>45</sup> These are non-binding, and hence the UN Committee cannot be considered an international court but is usually referred to as a ‘quasi-judicial organ’.<sup>46</sup> Although not binding, UN Committee views are still considered to be authoritative, and Manfred Nowak noted that, in the experience of the UN Committee, most of the states party accept the decisions.<sup>47</sup> However, *Toonen* reveals that states party might be particularly resistant to complying with LGBTI decisions. After the UN Committee released its view on the case, the Tasmanian Government refused to change its *Criminal Code*. Consequently, TGLRG commenced litigation against Tasmania before the High Court of Australia, with Toonen and his long term partner Rodney Croome as plaintiffs.<sup>48</sup> On the contrary, a CoE member state is required to abide by the final judgment of the European Court under art 46 of the *ECHR* as the final judgment is communicated to the Council of Ministers of the CoE, which monitors the execution.<sup>49</sup>

Secondly, the adjudication can have consequences on other member states different from the one sued. Regardless of whether the decision is binding or not, other states might follow the decision.<sup>50</sup> Helfer and Voeten researched the *erga omnes* effect of international court decisions, explaining that states not party to the dispute may comply with the decision under three mechanisms: first, states might wish to pre-empt future litigation; secondly, states might be influenced by the fact that a policy or a law is deemed illegal; and finally, an international adjudication may influence the ‘agenda setting’ of parliaments and governments, raising the awareness of domestic decision-makers on issues otherwise neglected.<sup>51</sup> Additionally, Sameera Dalvi found that states not party to the dispute might comply with international adjudications if the political elite have a

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<sup>40</sup> Alastair Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* (Oxford University Press, 3<sup>rd</sup> ed, 2012) 45.

<sup>41</sup> *Dudgeon* (1981) 45 Eur Court HR (ser A).

<sup>42</sup> Bromley and Walker, above n 39, 85.

<sup>43</sup> *Sutherland v United Kingdom (Judgment (Striking Out))* (European Court of Human Rights, Grand Chamber, Application No 25186/94, 27 March 2001).

<sup>44</sup> Stonewall, *History of Lesbian, Gay and Bisexual Equality* <[http://www.stonewall.org.uk/at\\_home/history\\_of\\_lesbian\\_gay\\_and\\_bisexual\\_equality/default.asp](http://www.stonewall.org.uk/at_home/history_of_lesbian_gay_and_bisexual_equality/default.asp)>; Lindblom, above n 4, 328.

<sup>45</sup> *First Optional Protocol to the ICCPR* art 5(4).

<sup>46</sup> Nowak, above n 35, 669.

<sup>47</sup> *Ibid* 895.

<sup>48</sup> *Croome v Tasmania* (1997) 191 CLR 119. See also Bromley and Walker, above n 39, 108.

<sup>49</sup> *ECHR* art 46(2).

<sup>50</sup> Helfer and Voeten, above n 20, 106.

<sup>51</sup> *Ibid* 81–3.

high regard for the international court, if there are no reservations on the article involved in the dispute or if there is a social system that would facilitate the change.<sup>52</sup>

In the specific case of LGBTI issues, the adjudications created a new interpretation of an international human rights norm.<sup>53</sup> In fact, discrimination based on sexual orientation is not explicitly mentioned in the *ICCPR*, nor in the *ECHR*. When these documents were drafted, it was not considered that sexual orientation required explicit protection.<sup>54</sup> Furthermore, in contrast to other social groups such as women, children or immigrants, LGBTI individuals are not the subject of any specific UN convention.<sup>55</sup>

The next Part describes how TGLRG and NIGRA challenged the UN Committee and the European Court to elaborate and create new interpretations of the *ICCPR* and the *ECHR*. Consequently, Part IV analyses the influence of these non-governmental actions beyond the Australian and British borders.

### III *TOONEN V AUSTRALIA AND DUDGEON V UNITED KINGDOM: TWO CASE STUDIES IN COMPARISON*

In 2011 and 2010 respectively, the UN and the CoE adopted the first international documents condemning discrimination based on sexual orientation and gender identity.<sup>56</sup> Before these documents, the discourse on LGBTI rights had developed thanks to international adjudications; in particular, *Toonen*<sup>57</sup> and *Dudgeon*.<sup>58</sup> These landmark decisions are often cited by scholars,<sup>59</sup> especially because the UN Committee and the European Court initiated the practice of accepting applications from potential victims.<sup>60</sup> Less known is the work that local NGOs did behind the scenes before and during the trial.<sup>61</sup>

<sup>52</sup> Dalvi, above n 20, 480.

<sup>53</sup> See Helfer and Voeten, above n 20.

<sup>54</sup> Marc Epprecht, *Sexuality and Social Justice in Africa — Rethinking Homophobia and Forging Resistance* (Zed Books, 2013) 26–7.

<sup>55</sup> See above n 27 and accompanying text.

<sup>56</sup> Respectively: Human Rights Council, *Human Rights, Sexual Orientation and Gender Identity*, GA Res 17/19, UN GAOR, 17<sup>th</sup> sess, Agenda Item 8, UN Doc A/HRC/RES/17/19 (14 July 2011); Council of Europe, *On Measures to Combat Discrimination on Grounds of Sexual Orientation and Gender Identity*, Recommendation CM/Rec(2010)5 (31 March 2010).

<sup>57</sup> *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992.

<sup>58</sup> *Dudgeon* (1981) 45 Eur Court HR (ser A).

<sup>59</sup> See, eg, Sarah Joseph, ‘Gay Rights under the *ICCPR* — Commentary on *Toonen v Australia*’ (1994) 13 *University of Tasmania Law Review* 392; Luca Paladini, ‘Same-Sex Couples before Quasi-Jurisdictional Bodies: The Case of the UN Human Rights Committee’ in Daniele Gallo, Luca Paladini and Pietro Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014) 533, 541–3; Johnson, above n 9, 93–120; D J Harri et al, *Harris, O’Boyle and Warbrick: Law of the European Convention on Human Rights* (Oxford University Press, 2<sup>nd</sup> ed, 2009) 370–1.

<sup>60</sup> For *Toonen v Australia*, see Joseph and Castan, above n 37, 90–1; Nowak, above n 35, 833. For *Dudgeon v United Kingdom*, see Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press, 2010) 326; Johnson, above n 9, 97.

<sup>61</sup> For exceptions to this lack of attention, see Bromley and Walker, above n 39; Michael D Goldhaber, *A People’s History of the European Court of Human Rights* (Rutgers University Press, 2007) ch 3.

In *Toonen*, the application was the climax of a nine year campaign of advocacy supported by TGLRG, of which Toonen was a member.<sup>62</sup> Dudgeon was himself a gay rights activist.<sup>63</sup> In both cases, TGLRG and NIGRA raised the issue of discrimination on grounds of sexual orientation before the two international bodies, aiming to repeal sodomy laws in Tasmania and Northern Ireland.

TGLRG, in the person of Toonen, submitted its communication to the UN Committee on the same day that the *First Optional Protocol of the ICCPR* came into force in Australia.<sup>64</sup> The TGLRG alleged that ss 122(a), 122(c) and 123 of the Tasmanian *Criminal Code*<sup>65</sup> violated the right to privacy of Tasmanian citizens on the basis of their sexual orientation.<sup>66</sup> Although many members of the TGLRG were arrested — and during the long campaign numerous gay activists gave themselves up to the police as a form of protest, forcing police officers to investigate them<sup>67</sup> — Toonen himself was never arrested. To justify his status of victim, in the communication Toonen highlighted the distress that the law created in his life and in the lives of Tasmanian lesbians and gays.<sup>68</sup> Australia encompassed in its view the comments of the Tasmanian Government,<sup>69</sup> which admitted the interference of its anti-sodomy law in the right to privacy of the applicant. However, Tasmanian authorities justified this interference by the aim of protecting Tasmanian citizens from the spread of HIV/AIDS.<sup>70</sup> Eventually, the UN Committee concluded that the existence of the anti-sodomy law in Tasmania ‘arbitrarily interfere[d]’ with the right to private life of the applicant.<sup>71</sup> Additionally, the UN Committee created a new interpretation of arts 2(1) (prohibition of discrimination) and 26 (equality before the law), declaring that the word ‘sex’ includes ‘sexual orientation’.<sup>72</sup>

In the European case, NIGRA aimed to make the United Kingdom repeal ss 61 and 62 of the *Offences Against the Person Act 1861* (UK), and s 11 of the *Criminal Law Amendment Act 1885* (UK), which is enforced in Northern Ireland.<sup>73</sup> NIGRA focused the application on the psychological trauma that Dudgeon suffered because of the existence of the anti-sodomy law in Northern

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<sup>62</sup> Malin Nord, Interview with Nicholas Toonen (Online Interview, 2012) <<http://www.tidningekomut.se/2010/12/toonen-won-in-the-un/>>. See also Bromley and Walker, above n 39, 98–101.

<sup>63</sup> See Bromley and Walker, above n 39, 85.

<sup>64</sup> Remedy Australia, ‘Follow-up Report on Violations by Australia of *ICERD*, *ICCPR* & *CAT* in Individual Communications (1994–2014)’ (Report, 11 April 2014) 42 <[http://remedy.org.au/reports/2014\\_Follow-Up\\_Report\\_to\\_treaty\\_bodies.pdf](http://remedy.org.au/reports/2014_Follow-Up_Report_to_treaty_bodies.pdf)>. See also Sarah Pritchard, ‘Gay Rights Victory at UN (I)’ (1994) 3(2) *Human Rights Defender* 1. Note that Pritchard incorrectly gives the date of submission as 26 December 1991 rather than 25 December 1999.

<sup>65</sup> *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992, [2.1].

<sup>66</sup> *Ibid* [3.1].

<sup>67</sup> Malin Nord, Interview with Nicholas Toonen (Online Interview, 2012) <<http://www.tidningekomut.se/2010/12/toonen-won-in-the-un/>>.

<sup>68</sup> Bromley and Walker, above n 39, 105.

<sup>69</sup> Pritchard, above n 64, 13.

<sup>70</sup> *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992, [6.5].

<sup>71</sup> *Ibid* [8.6].

<sup>72</sup> *Ibid* [8.7].

<sup>73</sup> *Dudgeon* (1981) 45 Eur Court HR (ser A) [14].

Ireland.<sup>74</sup> The United Kingdom defended its position asserting that such a law has not been enforced in 'recent years'.<sup>75</sup> The European Court accepted the violation alleged by the plaintiff and declared that homosexuality is a private manifestation of personality and therefore it falls within the scope of art 8 of the *ECHR* meaning of 'private life'.<sup>76</sup>

Although both disputes can be considered successful, they present a common limitation. The UN Committee connected LGBTI rights with privacy rights instead of the principle of non-discrimination.<sup>77</sup> It has been argued that this link between LGBTI rights and privacy rights might mean tolerance instead of equality.<sup>78</sup> Similarly, the European Court did not accept the violation under art 14 (prohibition of discrimination).<sup>79</sup> It has been argued that connecting LGBTI rights with the 'right of privacy ... is not useful in achieving legal equality for homosexual persons',<sup>80</sup> and that a better response would have been connecting discrimination on grounds of sexual orientation with the notion of sexual self-determination as a fundamental freedom.<sup>81</sup> Despite these limits, eventually both Australia and the United Kingdom changed their legislation and the laws criminalising homosexual conduct between consenting adults were repealed.

Finally, some criticisms can be made of the effective role of the two NGOs in the adjudications. Sarah Joseph argued that a key factor in the success of *Toonen* was the fact that the country sued was Australia. She doubted that such a decision would have been implemented if the application was addressed against a country with an Islamic or Catholic majority.<sup>82</sup> The *Dudgeon* case was preceded by 15 applications submitted from 1955 to 1980.<sup>83</sup> These applications, even if unsuccessful, created the base on which court jurisprudence has positively evolved.<sup>84</sup> Additionally, homosexual conduct was decriminalised throughout both Australia and the United Kingdom, except for Tasmania and Northern Ireland. Paraphrasing Joke Swiebel, when the doors in New York and Strasbourg opened, it was not only because the NGOs knocked so loudly, but also because the judges let them in.<sup>85</sup> Indeed, Swiebel criticised the scholarship which places too much emphasis on the NGOs' actions and underestimates the

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<sup>74</sup> Ibid [37].

<sup>75</sup> *Dudgeon* (1981) 45 Eur Court HR (ser A) [89], cited in Bromley and Walker, above n 39, 93.

<sup>76</sup> *Dudgeon* (1981) 45 Eur Court HR (ser A) [41].

<sup>77</sup> Sarah Pritchard, 'Gay Rights Victory at UN (II)' (1994) 3(3) *Human Rights Defender* 14; Clifford Bob, *The Global Right Wing and the Clash of World Politics* (Cambridge University Press, 2012) 57.

<sup>78</sup> Pritchard, 'Gay Rights Victory at UN (II)', above n 77.

<sup>79</sup> *Dudgeon* (1981) 45 Eur Court HR (ser A), [69]–[70].

<sup>80</sup> Daniel J Kane, 'Homosexuality and the *European Convention on Human Rights*: What Rights?' (1988) 11 *Hastings International and Comparative Law Review* 447, 466.

<sup>81</sup> Ibid 448.

<sup>82</sup> Joseph, above n 59, 407.

<sup>83</sup> *WB v Germany* (European Court of Human Rights, Chamber, Application No 104/55, 17 December 1955); *KHW v Germany* [2001] II Eur Court HR 295; *X v Germany* (1973) Eur Court HR (ser A); *X v United Kingdom* (1981) 46 Eur Court HR (ser A). See also Johnson, above n 9, 19–40.

<sup>84</sup> Johnson, above n 9, 20.

<sup>85</sup> Joke Swiebel, 'Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy' (2009) 15 *Contemporary Politics* 19, 29.

governmental response to these actions.<sup>86</sup> My response to this criticism is that, even if I acknowledge that there have been several positive circumstances which helped in the success of the applications, the machine of justice would not have functioned without the non-governmental engine.

#### IV *TOONEN* AND *DUDGEON* INFLUENCES ON FOREIGN LEGISLATION

As Harold Koh explained, states comply with international norms through a transnational legal process of interaction and internalisation. States first obey new norms because of the interaction with other governmental and non-governmental actors.<sup>87</sup> Consequently, they in turn internalise these norms in their legislation.<sup>88</sup> NGOs are crucial actors in this transnational legal process. First, NGOs can promote the protection of human rights in what Antonio Cassese called the ‘level of imagination’, the proposition of new rights and new fields of concern.<sup>89</sup> Secondly, they are successful actors in initiating the legal process that makes states comply with international law.<sup>90</sup> Finally, NGOs facilitate states in the process of internalising the new norm created.<sup>91</sup> In the cases analysed, the TGLRG and NIGRA challenged the two international human rights bodies to obtain an elaboration of the existing norms. The new interpretations expanded the scope of the *ICCPR*’s art 17 on the right to privacy encompassing private same-sex sexual acts and arts 2(1) and 26 on the interpretation of the term ‘sex’. The new interpretation expanded also the scope of the *ECHR*’s art 8 to encompass same-sex sexual acts. This Part presents the consequences of these new interpretations in states not party to the disputes.

The *Toonen* case has been regarded as a milestone in the process of the decriminalisation of homosexual conduct under the UN aegis.<sup>92</sup> Even if this adjudication was not the first attempt to bring LGBTI issues within the UN human rights debate,<sup>93</sup> it was a groundbreaking decision that paved the way for *Resolution 17/19*<sup>94</sup> and the UN acts that followed. *Resolution 17/19* was followed by a report on LGBTI issues.<sup>95</sup> *Resolution 17/19* and the report paved the way for a panel discussion on the topic, which took place in March 2012

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<sup>86</sup> Ibid 31.

<sup>87</sup> Koh, ‘Transnational Legal Process’, above n 3, 203.

<sup>88</sup> Ibid 204.

<sup>89</sup> Cassese, above n 5, 76.

<sup>90</sup> Harold Hongju Koh, ‘The 1998 Frankel Lecture: Bringing International Law Home’ (1998) 35 *Houston Law Review* 623, 647.

<sup>91</sup> Spiro, above n 7, 122.

<sup>92</sup> Joseph, above n 59, 410.

<sup>93</sup> Beside the *Hertzberg v Finland* case mentioned above, LGBTI issues entered in the UN fora on another occasion before *Toonen v Australia*. In 1985, the Dutch minister Annelien Kappeyne van de Coppello was the first governmental delegate who talked about sexual orientation issues during a UN meeting. She petitioned for lesbian human rights during the Third UN Conference on Women in Nairobi: Swiebel, above n 85, 25.

<sup>94</sup> Human Rights Council, *Human Rights, Sexual Orientation and Gender Identity*, GA Res 17/19, UN GAOR, 17<sup>th</sup> sess, Agenda Item 8, UN Doc A/HRC/RES/17/19 (14 July 2011).

<sup>95</sup> Human Rights Council, *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity — Report of the United Nations High Commissioner for Human Rights*, 19<sup>th</sup> sess, Agenda Items 2 and 8, UN Doc A/HRC/19/41 (17 November 2011).

within the Human Rights Council.<sup>96</sup> In September 2013, the former High Commissioner for Human Rights Navi Pillay called a meeting of leaders from the United Nations to discuss LGBTI issues.<sup>97</sup> Finally, in September 2014, a second resolution — *Resolution 27/32* — was adopted.<sup>98</sup>

Looking at the state of domestic laws, as of 2012, 77 UN states still criminalise homosexual conduct.<sup>99</sup> Between 1790 and 2010, 90 countries decriminalised homosexual conduct.<sup>100</sup> Of these 90, 65 decriminalised homosexual conduct in the first 194 years between 1790 and 1994, with an average of 0.34 countries decriminalising each year. In the remaining 16 years, from 1994 to 2010, 25 countries decriminalised homosexual conduct, with an average 1.56 countries per year: Moldova (1995), Macedonia (1996), Romania (1996), Australia (1997), China (1997), Ecuador (1997), Cyprus (1998), Kazakhstan (1998), Kyrgyzstan (1998), South Africa (1998), Tajikistan (1998), Chile (1999), Azerbaijan (2000), Georgia (2000), Bosnia and Herzegovina (2001), Mongolia (2002), Armenia (2003), the United States (2003), Cape Verde (2004), Marshall Islands (2005), Nepal (2008), Nicaragua (2008), Panama (2008), India (2009)<sup>101</sup> and Fiji (2010).<sup>102</sup> Thus, same-sex sexual activities have been decriminalised four and a half times more often since the *Toonen* decision than before.

On the other hand, *Dudgeon* paved the way for the decriminalisation of homosexual conduct within the CoE member states. As Paul Johnson maintained, *Dudgeon* shaped the sociological debate on homosexuality. The Court described homosexuality as a ‘private manifestation of human personality’, and this interpretation has remained ‘axiomatic’ in the European Court’s jurisprudence.<sup>103</sup> Additionally, *Dudgeon* shaped the interpretation of homosexuality not only in cases regarding decriminalisation but also in the equalisation of the age of consent for homosexual sexual acts, *Dudgeon* being

<sup>96</sup> For a summary of the discussion, see Human Rights Council, ‘Human Rights Council Panel on Ending Violence and Discrimination against Individuals Based on Their Sexual Orientation and Gender Identity’ (Discussion Report, 7 March 2012) <<http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/SummaryHRC19Panel.pdf>>.

<sup>97</sup> Free and Equal, *Watch World Leaders Come Together — to Make LGBT History* (26 September 2013) <<https://www.unfe.org/en/actions/ministerial-meeting>>.

<sup>98</sup> Human Rights Council, *Human Rights, Sexual Orientation and Gender Identity*, GA Res 27/32, UN GAOR, 27<sup>th</sup> sess, Agenda Item 8, UN Doc A/HRC/RES/27/32 (2 October 2014).

<sup>99</sup> David A Gerstner (ed), *Routledge International Encyclopedia of Queer Culture* (Routledge, 2012) 648–76.

<sup>100</sup> Achim Hildebrandt, ‘Routes to Decriminalization: A Comparative Analysis of the Legalization of Same-Sex Sexual Acts’ (2014) 17 *Sexualities* 230, 234.

<sup>101</sup> The same-sex sexual ban in India was reintroduced in 2013: Shyamantha Asokan, ‘India’s Supreme Court Turns the Clock Back with Gay Sex Ban’, *Reuters* (online), 11 December 2013 <<http://www.reuters.com/article/2013/12/11/us-india-rights-gay-idUSBRE9BA05620131211>>.

<sup>102</sup> Hildebrandt, above n 100, 243. For a database of decriminalisation of homosexuality, see also Kees Waaldijk, ‘Legal Recognition of Homosexual Orientation in the Countries of the World: A Chronological Overview with Footnotes’ (Draft Paper presented at Global Arc of Justice: Sexual Orientation Law around the World Conference, Los Angeles, 11–14 March 2009).

<sup>103</sup> Johnson, above n 9, 50.

cited in four adjudications related to the age of consent.<sup>104</sup> Furthermore, the influence of the *Dudgeon* case goes beyond the European continent. Various authors have highlighted the influence of the *Dudgeon* case on the decriminalisation of homosexual conduct in the United States.<sup>105</sup> Indeed, *Dudgeon* was cited in *Lawrence v Texas*,<sup>106</sup> the landmark decision that in 2003 made anti-sodomy laws unconstitutional in the United States.

Although Helfer and Voeten recognised that positive adjudications on LGBTI issues increase the possibility of favourable policy for sexual minorities,<sup>107</sup> they maintained that it is difficult to identify the *erga omnes* effect of the *Dudgeon* decision because the majority of the CoE member states had already decriminalised homosexual conduct when the case was decided.<sup>108</sup> In 1981, there were 21 state members of the CoE, and besides the United Kingdom, only four other countries criminalised same-sex sexual acts. As shown in Figure 1, these countries are Cyprus, Ireland, Liechtenstein and Portugal.

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<sup>104</sup> *L v Austria* [2003] I Eur Court HR 29; *SL v Austria* [2003] I Eur Court HR 71; *BB v United Kingdom (Judgment)* (European Court of Human Rights, Chamber, Application No 53760/00, 10 February 2004); *HG v Austria (Judgment)* (European Court of Human Rights, Chamber, Application Nos 11084/02 and 15306/02, 2 June 2005).

<sup>105</sup> See Helfer and Voeten, above n 20, 81; Bromley and Walker, above n 39; M V Lee Badgett, *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage* (New York University Press, 2009) 11.

<sup>106</sup> 539 US 558, 573, 576 (2003).

<sup>107</sup> Helfer and Voeten, above n 20, 105.

<sup>108</sup> *Ibid* 93.

**Figure 1: Decriminalisation of Homosexual Conduct and Year of CoE Membership (Countries that Joined from 1949 to 1981)<sup>109</sup>**

Country	Year of Membership	Year of Decriminalisation
Belgium	1949	1794
Denmark	1949	1933
France	1949	1793
Greece	1949	1951
Ireland	1949	1993
Italy	1949	1890
Luxembourg	1949	1794
Netherlands	1949	1811
Norway	1949	1972
Sweden	1949	1944
Turkey	1949	1858
United Kingdom	1949	1982
Germany	1950	1969
Iceland	1950	1940
Austria	1956	1971
Cyprus	1961	1998
Switzerland	1963	1942
Malta	1965	1973
Portugal	1976	1983
Spain	1977	1979
Liechtenstein	1978	1989

After *Dudgeon*, the European Court repeated its ruling on two similar occasions: *Norris v Ireland* and *Modinos v Cyprus*.<sup>110</sup> Interestingly, both cases are related to the non-governmental sector: Norris was the chairman of the Irish Gay Rights Movement<sup>111</sup> and Modinos was the president of the Liberation Movement of Homosexuals in Cyprus.<sup>112</sup> On the contrary, the decriminalisation of homosexual conduct in Portugal and Liechtenstein did not pass through a direct ruling of the European Court. In Portugal the decriminalisation was encompassed in a larger frame of social change which occurred after the end of

<sup>109</sup> For 'Year of Membership' the data are collected from: Council of Europe, *Member States* (2015) <<http://www.coe.int/en/web/portal/country-profiles>>. For 'Year of Decriminalisation', only the latest year of decriminalisation and the year when the decriminalisation was enforced in the entire country are considered. The data are collected from: Council of Europe, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe* (2<sup>nd</sup> ed, 2011) 24. The data sources for Figure 2 are analogous.

<sup>110</sup> *Norris v Ireland* (European Court of Human Rights, Chamber, Application No 10581/83, 26 October 1988); *Modinos v Cyprus* (European Court of Human Rights, Chamber, Application No 15070/89, 22 April 1993).

<sup>111</sup> *Norris v Ireland* (European Court of Human Rights, Chamber, Application No 10581/83, 26 October 1988) [9].

<sup>112</sup> *Modinos v Cyprus* (European Court of Human Rights, Chamber, Application No 15070/89, 22 April 1993) [7].

the Salazar dictatorship,<sup>113</sup> while in Liechtenstein the anti-sodomy law was overcome with the repeal of s 129 of the 1852 *Penal Code*.<sup>114</sup>

After the *Dudgeon* case, a ‘membership conditionality’<sup>115</sup> effect occurred; many Eastern European countries decriminalised homosexual conduct in order to achieve CoE membership.<sup>116</sup> Figure 2 sheds light on the membership conditionality effect by comparing, for each CoE member state that joined the organisation after 1981, the year in which they joined and the year in which they decriminalised homosexual conduct.

**Figure 2: Decriminalisation of Homosexual Conduct and Year of CoE Membership (Countries that Joined from 1988 to 2007)**

Country	Year of Membership	Year of Decriminalisation	Difference
San Marino	1988	1865	123
Finland	1989	1971	18
Hungary	1990	1962	28
Poland	1991	1932	59
Bulgaria	1992	1968	24
Czech Republic	1993	1962	31
Estonia	1993	1992	1
Lithuania	1993	1993	0
Romania	1993	1996	-3
Slovakia	1993	1962	31
Slovenia	1993	1977	16
Albania	1995	1995	0
Latvia	1995	1992	3
Macedonia	1995	1996	-1
Moldova	1995	1995	0
Ukraine	1995	1991	4
Croatia	1996	1977	19
Russian Federation	1996	1993	3
Georgia	1999	2000	-1
Armenia	2001	2003	-2
Azerbaijan	2001	2001	0
Bosnia and Herzegovnia	2002	2001	1
Serbia	2003	1994	9
Monaco	2004	1793	211
Montenegro	2007	1977	30

<sup>113</sup> Ana Cristina Santos, *Social Movements and Sexual Citizenship in Southern Europe* (Palgrave Macmillan, 2012) 95.

<sup>114</sup> Gerstner, above n 99, 660.

<sup>115</sup> Helfer and Voeten, above n 20, 90.

<sup>116</sup> Hildebrandt, above n 100, 244.

After 1981, 26 states joined the CoE. However, Andorra is excluded from this analysis because the year of decriminalisation of homosexual conduct is not determined.<sup>117</sup> Of the remaining 25 countries, 11 have decriminalised homosexual conduct between 10 and 211 years before joining the CoE, while 14 have decriminalised homosexual conduct less than 10 years before, the same or fewer years after the CoE membership. In other words, 56 per cent of the countries that joined the CoE after 1981 decriminalised homosexual conduct shortly before or shortly after their membership.

At the beginning of this paper I proposed two research questions: how can LGBTI organisations create new interpretations of international norms towards supporting individual applications, and are these new norms observed by states? My analysis showed that TGLRG and NIGRA challenged the UN Committee and the European Court to elaborate a new interpretation of the right to privacy and of the term ‘sex’. Moreover, the study shows that countries have become more likely to decriminalise homosexual conduct after the *Toonen* decision and that a membership conditionality occurred after the *Dudgeon* decision.

Although the positive influence of these adjudications is supported by TGLRG and NIGRA in the global decriminalisation of homosexual conduct, it can be argued that if the UN Committee or the European Court had not found a violation of the rights of the applicants, the NGOs’ action could have meant a step backwards in the process of the decriminalisation of homosexual conduct. Although from a legal point of view neither the UN Committee nor the European Court are bound by their previous decisions, a statement that human rights law does not protect LGBTI individuals would have provided a legal basis to enforce discrimination on the grounds of sexual orientation. TGLRG was conscious of the possible negative consequences of its action but, eventually, the organisation decided to sue the Australian Government because after nine years of unsuccessful domestic action, an international trial seemed to be the last possible option.<sup>118</sup> On the other hand, there is no evidence in NIGRA’s position of the possibility of a negative adjudication. The next Part explains the possible negative outcomes of NGO action for the rights of the LGBTI community.

## V NEGATIVE EFFECT OF NON-GOVERNMENTAL ADVOCACY ON LGBTI RIGHTS

The objects of this study so far have been state–NGO and international organisation–NGO interactions.<sup>119</sup> To understand the possible negative consequences of non-governmental advocacy, NGO–NGO interactions need to be analysed. NGOs can interact with other NGOs in three ways. First, NGOs can be in competition to promote their different views.<sup>120</sup> Secondly, like-minded NGOs collaborate in order to pursue their goals. Finally, like-minded NGOs try

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<sup>117</sup> The Council of Europe and Kees Waaldijk confirmed that Andorra decriminalised homosexuality without specifying the year: Council of Europe, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe* (2<sup>nd</sup> ed, 2011) 24; Waaldijk, above n 102, 27.

<sup>118</sup> Malin Nord, Interview with Nicholas Toonen (Online Interview, 2012) <<http://www.tidningenkomut.se/2010/12/toonen-won-in-the-un/>>.

<sup>119</sup> See, eg, Spiro, above n 7, 121–33.

<sup>120</sup> Bob, above n 77, 2.

to advance their agenda influencing other NGOs.<sup>121</sup> The three possibilities are briefly described in turn.

First, Bob highlighted that international global issues do not have only progressive/left-wing supporter movements. They also have conservative/right-wing opponents. LGBTI organisations often fail in advancing the recognition of their rights at the UN because there are stronger organisations interested in maintaining the status quo.<sup>122</sup> Before and during the *Toonen* case, many anti-homosexuals groups were created to prevent the repealing of ss 122(a), 122(c) and 123 of the Tasmanian *Criminal Code*, including: Concerned Residents Against Moral Pollution, For A Caring Tasmania and the Homophobic Activist Liberation Organisation.<sup>123</sup> Similarly, during the *Dudgeon* case, Reverend Ian Paisley started a Save Ulster from Sodomy campaign which gathered 70 000 signatures.<sup>124</sup>

Moreover, in a more recent case, *Orlandi v Italy*,<sup>125</sup> six same-sex couples asked the European Court to compel the Italian Government to recognise their marriages contracted abroad. Advice on Individual Rights in Europe, European Commission on Sexual Orientation Law, *Fédération Internationale des ligues des Droits de l'Homme*, the European branch of the International Lesbian, Gay, Bisexual, Trans and Intersex Association ('ILGA'), *Lega Italiana dei Diritti dell'Uomo* and *Unione Forense per la Tutela dei Diritti Umani* sent written comments to support the applicants.<sup>126</sup> On the other hand, Alliance Defending Freedom sent a third party intervention in support of 'traditional' heterosexual marriage.<sup>127</sup> The case is still pending and further developments will be necessary before conclusions can be drawn regarding the non-governmental actions.

Secondly, like-minded NGOs can cooperate to achieve their common goals. One of the most outstanding examples is ILGA, which is a federation of 1100 member organisations and is present in six regions.<sup>128</sup> Finally, NGOs can try to influence other like-minded NGO agendas. This aspect has been researched by Julie Mertus, who analysed how ILGA has managed to raise the awareness of AI and HRW on sexuality rights.<sup>129</sup>

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<sup>121</sup> Spiro, above n 7, 131.

<sup>122</sup> Bob, above n 77, 70. On anti-homosexual groups in the United States, see also Tina Fetner, *How the Religious Right Shaped Lesbian and Gay Activism* (University of Minnesota Press, 2008); Michael J Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (Oxford University Press, 2013) 26–36.

<sup>123</sup> Bromley and Walker, above n 39, 102.

<sup>124</sup> Goldhaber, above n 61, 37.

<sup>125</sup> 'Statement of Facts', *Orlandi v Italy* (European Court of Human Rights, Application No 26431/12, 20 April 2012).

<sup>126</sup> 'Written Comments of FIDH, AIRE Centre, ILGA-Europe, ECSOL, UFTDU, and LIDU', Submission in *Oliari v Italy* and *Orlandi v Italy*, European Court of Human Rights, Application Nos 18766/11 and 26431/12, 27 March 2014 <[https://www.fidh.org/IMG/pdf/written\\_comments\\_2014-03-27\\_final.pdf](https://www.fidh.org/IMG/pdf/written_comments_2014-03-27_final.pdf)>.

<sup>127</sup> Alliance Defending Freedom, 'Third Party Intervention by Alliance Defending Freedom', Submission in *Orlandi v Italy*, European Court of Human Rights, Application No 26431/12, 14 February 2014 <<http://www.adfmedia.org/files/ItalyOrlandiBrief.pdf>>.

<sup>128</sup> International Lesbian, Gay, Bisexual, Trans and Intersex Association, *About Us* (2013) <[www.ilga.org/about-us/](http://www.ilga.org/about-us/)>.

<sup>129</sup> Julie Mertus, 'Applying the Gatekeeper Model of Human Rights Activism: The US-Based Movement for LGBT Rights' in Clifford Bob (ed), *The International Struggle for New Human Rights* (University of Pennsylvania Press, 2009) 52, 53–67.

Clearly conservative groups' actions can have negative consequences for the advancement of the rights of sexual minorities. For sensitive issues such as LGBTI rights, even progressive groups' advocacy can result in negative outcomes in foreign legislation. I advance the hypothesis that these negative effects might be mitigated by major communication and cooperation among LGBTI organisations. To confirm this hypothesis I present two recent examples.

After the *Toonen* case, the UN Committee has dealt with four other LGBTI applicants.<sup>130</sup> In only one of these disputes did the UN Committee not find a violation of the rights of the plaintiffs: *Joslin v New Zealand*.<sup>131</sup> However, it is not possible to find any NGO participation in that communication. Out of the many decisions of the European Court in which it is possible to find NGO participation,<sup>132</sup> two cases are considered here: *Ferguson*,<sup>133</sup> in which the court did not take further action because the United Kingdom changed its legislation, and *Vallianatos*,<sup>134</sup> which ended with a positive ruling for the applicants. These two cases have some degree of NGO participation and have, potentially or effectively, had a negative influence on the advancement of LGBTI rights.

First, OutRage!, with the support of eight other pressure groups,<sup>135</sup> started the Equal Love campaign in 2010 to contest simultaneously the *Matrimonial Causes Act 1974* (UK) and the *Civil Partnership Act 2004* (UK). The former did not allow same-sex couples to marry while the latter prevented different sex couples from accessing civil partnerships.<sup>136</sup> Eight couples were involved, four different

<sup>130</sup> Human Rights Committee, *Views: Communication No 941/2000*, 78<sup>th</sup> sess, UN Doc CCPR/C/78/D/941/2000 (18 September 2003) ('*Young v Australia*'); Human Rights Committee, *Views: Communication No 902/1999*, 50<sup>th</sup> sess, UN Doc CCPR/C/75/D/902/1999 (30 July 2002) ('*Joslin v New Zealand*'); Human Rights Committee, *Views: Communication No 1361/2005*, 89<sup>th</sup> sess, UN Doc CCPR/C/89/D/1361/2005 (14 May 2007) ('*X v Colombia*'); Human Rights Committee, *Views: Communication No 1932/2010*, 106<sup>th</sup> sess, UN Doc CCPR/C/106/D/1932/2010 (19 November 2012) ('*Fedotova v Russian Federation*').

<sup>131</sup> See Nigel Christie, 'The New Zealand Same-Sex Marriage Case: From *Aotearoa* to the United Nations' in Robert Wintermute and Mads Andenæs (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European, and International Law* (Hart, 2001) 317.

<sup>132</sup> A Stonewall activist was the applicant of *Sutherland v United Kingdom*. Liberty submitted a third party intervention in *Goodwin v United Kingdom: Goodwin v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 28957/95, 11 July 2002) [9]. International Lesbian, Gay, Bisexual, Trans and Intersex Association, in coalition with several other NGOs, submitted third party interventions in numerous cases. See, eg, *EB v France* (European Court of Human Rights, Grand Chamber, Application No 43546/02, 22 January 2008); *Fretté v France* [2002] I Eur Court HR 345; *Gas v France (Judgment (Merits and Satisfaction))* (European Court of Human Rights, Chamber, Application No 25951/07, 15 March 2012); 'Statement of Facts', *Oliari v Italy* (European Court of Human Rights, Application Nos 18766/11 and 36030/11, 21 March 2011 and 10 June 2011); 'Statement of Facts', *Orlandi v Italy* (European Court of Human Rights, Application No 26431/12, 20 April 2012); *Taddeucci v Italy* (European Court of Human Rights, Application No 51362/09, 10 January 2012).

<sup>133</sup> 'Application under Article 34 of the *European Convention on Human Rights* and Rules 45 and 47 of the Rules of Court', Application in *Ferguson v United Kingdom*, European Court of Human Rights, File No 8254/11, 2 February 2011.

<sup>134</sup> *Vallianatos v Greece* (European Court of Human Rights, Grand Chamber, Application Nos 29381/09 and 32684/09, 7 November 2013).

<sup>135</sup> British Humanist Association; Gay and Lesbian Humanist Association; GMB Union; Lesbian and Gay Christian Movement; National Secular Society; National Union of Students LGBT Campaign; Peter Tatchell Foundation; and UNISON.

<sup>136</sup> *Matrimonial Causes Act 1973* (UK) c 18 s 11; *Civil Partnership Act 2004* (UK) c 33 s 3(1).

sex and four same-sex couples. In November and December 2010, each couple submitted an application at their local registry office. The same-sex couples asked for a marriage license and the opposite sex couples asked for a civil partnership license. As predicted, every application was rejected.<sup>137</sup> The legal advisor of the campaign took the Equal Love legal case to the European Court — known as *Ferguson* — complaining about the violation of arts 8 and 12 combined with art 14.<sup>138</sup> The campaign continued in the following years with the organisation of protests and online petitions.<sup>139</sup> Equal Love facilitated change in England, Wales and Scotland, which allowed same-sex marriage in 2014, and eventually the European Court did not take further action in the case. However, some consideration of the legal strategy is still possible. OutRage! And its allies did not ask the European Court to recognise the right to marry a same-sex partner; they asked the European Court to declare an ‘obligation of consistency’.<sup>140</sup> This would imply that those countries that spontaneously created civil partnership institutions should make marriage and civil partnerships accessible for both same-sex and different sex couples. Considering that in many countries civil partnership can constitute either a compromise<sup>141</sup> or a step toward marriage equality,<sup>142</sup> Nicola Barker argued that a positive ruling in *Ferguson* would have meant that CoE member states would be highly discouraged from enforcing civil partnership institutions.<sup>143</sup> To summarise, although the European Court did not take further action on the *Ferguson* case, the legal strategy developed by the network of NGOs could have created an obstacle for the European LGBTI community’s attempts to achieve at least civil partnership acts in those countries that still do not have it.

Secondly, Johnson outlined similar risks in *Vallianatos*,<sup>144</sup> supported by Synthessi, a legal entity based in Athens.<sup>145</sup> The application was focused on the same-sex couples’ right to access civil partnership institutions and the European Court found a trend within the CoE member states: those states that provide citizens with alternative institutions for unmarried couples make these institutions available for same-sex couples. Consequently, the European Court

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<sup>137</sup> See Equal Love, *Monthly Archives: November 2010* (November 2010) <<http://equallove.org.uk/2010/11/>>; Equal Love, *Monthly Archives: December 2010* (December 2010) <<http://equallove.org.uk/2010/12/>>.

<sup>138</sup> ‘Application under Article 34 of the *European Convention on Human Rights* and Rules 45 and 47 of the Rules of Court’, Application in *Ferguson v United Kingdom*, European Court of Human Rights, File No 8254/11, 2 February 2011. Article 8 of the *ECHR* protects the right to respect for private and family life; art 12 the right to marry; and art 14 the prohibition of discrimination.

<sup>139</sup> See Equal Love, *Rally for Lord’s Vote on Equal Marriage* (8 July 2013) <<http://equallove.org.uk/2013/07/rally-for-lord%E2%80%99s-vote-on-equal-marriage/>>.

<sup>140</sup> ‘Application under Article 34 of the *European Convention on Human Rights* and Rules 45 and 47 of the Rules of Court’, Application in *Ferguson v United Kingdom*, European Court of Human Rights, File No 8254/11, 2 February 2011, 9 [146].

<sup>141</sup> Yuval Merin, *Equality for Same-Sex Couples: the Legal Recognition of Gay Partnerships in Europe and the United States* (University of Chicago Press, 2002) 62–3.

<sup>142</sup> William N Eskridge, ‘Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions’ (2001) 64 *Albany Law Review* 853, 880.

<sup>143</sup> Nicola Barker, ‘Civil Partnership: An Alternative to Marriage? *Ferguson and Others v United Kingdom*’ (2012) 42 *Family Law* 548, 549.

<sup>144</sup> *Vallianatos v Greece* (European Court of Human Rights, Grand Chamber, Application Nos 29381/09 and 32684/09, 7 November 2013).

<sup>145</sup> *Ibid* [1].

concluded that the Greek Government failed to give a weighty reason to deny same-sex couples civil partnerships in Greece.<sup>146</sup> After this decision, if a CoE member state wants to create legal alternatives to marriage, the new institutions should also be available for same-sex couples. In Johnson's opinion, European states which still do not have enforced civil partnerships would 'think twice' before legislating on civil partnership acts.<sup>147</sup> Thus, a victory for the two Greek associations is not a fully positive step for the improvement of LGBTI rights in Europe.

To summarise, non-governmental actions can have positive consequences at the domestic level but negative repercussions on the rights of the global LGBTI community. As stated at the beginning of this Part, counter-posed NGOs compete to promote their views and like-minded organisations cooperate or influence each other's agendas to achieve common goals. This Part shows that both conservative groups and LGBTI groups can make the advancement of LGBTI rights more difficult to achieve. In order to minimise the negative consequences of NGO action, NGO-NGO interactions need to be rethought. It is unlikely that conservative groups will change their minds on the morality of same-sex sexual behaviour, so, perhaps, the key solution is in the interaction between like-minded NGOs. LGBTI organisations should acknowledge the possible negative repercussions of their advocacy and then try to minimise the negative effects of their actions through communication and collaboration. In the above cases, OutRage! and the Athenian organisations could have consulted NGOs based in countries where same-sex couples are not allowed to register their partnership — for example in Hungary, Italy or Turkey — in order to develop a common strategy.

## VI CONCLUSION

The paper sheds light on how two organised groups, TGLRG and NIGRA, have influenced a process of decriminalisation of homosexual conduct, still ongoing within the UN states party and concluded in the European context. The activists involved took strategic risks in raising LGBTI issues before the UN Committee and the European Court, but eventually they positively affected both domestic and foreign legislation.

As stated in the introduction, this paper presents two major limitations. Bisexual, transgender and intersexual issues are overlooked, and the paper cannot provide enough space to analyse the complex topic of LGBTI couples recognition. Therefore, the aim of future research should be to apply the approach developed in this paper to study bisexual, transgender and intersexual activism and to analyse more in-depth the non-governmental advocacy on marriage equality and civil partnerships.

In conclusion, it emerges from this analysis that NGOs operating in the field of LGBTI rights are providing a major contribution to the development of sexual minorities' rights. However, NGOs should take into consideration all the possible outcomes of their actions in balancing the pros and cons of lobbying

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<sup>146</sup> Ibid [92].

<sup>147</sup> Paul Johnson, 'Vallianatos Judgment on Sexual Orientation Discrimination in Civil Partnerships' on Antoine Buyse, *ECHR Blog* (8 November 2013) <<http://echrblog.blogspot.com.au/2013/11/vallianatos-judgment-on-sexual.html>>.

their domestic governments through supporting individual applications before international human rights bodies. NGO staff members should take into consideration that, if they focus only on the domestic outcomes of their advocacy, they risk negatively affecting the rights of the international LGBTI community beyond their borders. In order to minimise possible negative legal outcomes, NGOs could increase their cooperation and communication with other like-minded NGOs based in other countries.